1980

In Re the Matter of Nelda Boyer : Reply Brief of Appellant

Utah Supreme Court

SUSIE RICE; Respondent ROBERT B. HANSON, SHARON PEACOCK; Amicus CuriaePAUL GOTAY; Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

IN RE THE MATTER :

OF : CASE NUMBER 16853

NELDA BOYER :

REPLY BRIEF OF APPELLANT

Appeal from a final order of the Honorable Judge Calvin Gould of the Second Judicial District Court of Weber County, State of Utah, declaring Nelda Boyer an incapacitated person and in need of a guardian.

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INTRODUCTION

In its Amicus Curiae Brief, the State concedes that involuntary guardianship limits the ward's fundamental civil rights, Amicus Curiae Brief of State of Utah at 5, but argues that both the substantive and procedural provisions found in the Utah Uniform Probate Code fully comport with constitutional mandates. Appellant vigorously disagrees.

Under the Utah Uniform Probate Code, Utah Code Ann. §§75-1-101 et seq., an "incapacitated person means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person," §75-1-201 (18), allowing the court to appoint a guardian "if it is satisfied that the person...is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision...." §75-5-304 (emphasis added). Unless specifically modified by the court, the guardian: has custody of the ward and establishes

the ward's place of residence, §75-5-312(1)(a); has the right to define the ward's training and educational needs, id. at (1)(b); determines the ward's need for medical and other professional care, id. at (1)(c); and in general "has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child...." Id. at (1). According to the Utah Constitution, Art. IV §6: "No mentally incompetent person...unless restored to civil rights, shall be permitted to vote at any election, or be eligible to hold office in this State." While no Utah case has construed the effect of the appointment of a guardian with respect to this constitutional provision, see, e.g., Home Town Finance Corp. v. Frank, 13 Utah 2d 26, 368 P.2d 72, 75-76 (1962), it is clear that the appointment of a guardian results in a massive curtailment of liberties for the ward.

The controlling principle against which the guardianship provisions of the Utah Uniform Probate Code must be measured was well stated by this Court in In the Matter of the Guardianship of Valentine, 4 Utah 2d 355, 294 P.2d 696, 702 (1956):

> The right of every individual to handle his own affairs even at the expense of dissipating his fortune is a right jealously guarded and one which will not be taken away except in extreme cases.

Like Valentine, Appellant alleges that on the facts the appointment of a guardian for her was clearly erroneous. Unlike Valentine, however, she also challenges the constitutional validity of the cited statutes, which

fail to comport with the mandates of both procedural and substantive due process as well as equal protection.

As a case of first impression in this Court, Appellant asks that the Court consider her allegations of factual error and constitutional insufficiency as hinging upon one another. While Appellant requests a reversal of the order appointing a guardian for her on every ground this Court deems appropriate, the Court will recognize that the factual errors in this case are based in large part upon statutes that operate to unnecessarily deprive individuals of their fundamental rights. The number of future appeals by others can be substantially diminished through the legislative enactment of guardianship laws which safeguard these rights. This Court has before it the opportunity to define the contours of constitutionality for subsequent enactments of the Utah Legislature relating to involuntary guardianship.

ARGUMENT

POINT I.

THE STATUTORY REQUIREMENTS FOR THE APPOINTMENT OF A GUARDIAN ARE UNCONSTITUTIONALLY VAGUE.

Under Utah Code Ann. §75-1-201(18), an incapacitated person must be unable to make "responsible decisions concerning his person." (emphasis added) The statute does not require that the alleged incapacitated person be unable to make any decisions, but only that such decisions as are made evidence a lack of responsibility.

This Court has specifically discarded "an unwillingness to or lack of interest in functioning, be the latter two ever so reprehensible as personal characteristics," In Re Heath, 102 Utah 1, 126 P.2d 1058, 1061 (1942), as sufficient grounds for the appointment of a guardian. Yet the objective "responsible decision" standard would permit the appointment of a guardian for a functional person who makes decisions that pose no danger to anyone, including self, but are simply labelled "irresponsible" by others.

> An objective standard is inappropriate for determining whether an individual is incapable of managing his person. Assessing an individual's personal management by comparing his behavior to normative standards carries the danger that courts will assert unnecessary control over the individual whose behavior is merely different from that of the majority. This danger is not a conjectural one. Recently, parents in several states have used conservatorship laws to legally abduct an adult son or daughter who has chosen to live with an unorthodox religious sect. "Deprogramming" procedures then divorce these individuals from their religious beliefs. Used in this manner, conservatorship may function as a weapon against those who reject conformity rather than as a service for those who need protection.
>
> Furthermore, because the objective standard compares the alleged incompetent's personal management to ostensibly desirable personal management of a reasonable man, the standard tempts the trier of fact to prescribe what is "best" for an alleged incompetent even though that individual is capable of making decisions for himself. In affirming a conservatorship order, one state supreme court, for example, relied in part on expert testimony declaring that the best interests of the alleged incompetent would be served by appointing a conservator, although the same expert testified that the alleged incompetent was able to decide what he did or did not desire. [In Re Schmidt's Guardianship, 221 Or. 535, 352 P.2d 152 (1960)]

Note, Conservatorship of the Person, 1977 U. ILL. L. FORUM 1113, 1121-22. While Appellant agrees with the State that guardianship is intended to confer benefits rather than extinguish rights, Amicus Brief, supra at 13,

> [e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient.... The greatest dangers of liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. U.S., 277 U.S. 438, 479 (1938) (Brandeis, J., dissenting).

The "responsible decision" standard is not only "inappropriate," Conservatorship of the Person, supra, but constitutionally impermissible because it is vague. The difficulty with a vague standard is that "men of common intelligence must necessarily guess at its meaning and differ as to its application [which] violates the first essential of due process of law." State v. Packard, 122 Utah 369, 250 P.2d 561, 563 (1952). A statutory standard must "be susceptible of uniform interpretation and application by those charged with responsibility of applying and enforcing it." Id., 250 P.2d at 564.

"The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." Baggett v. Bullitt, 377 U.S. 360, 372 (1964). Appellant specifically lost the rights to establish a residence of her choosing and to set her own educational goals, Utah Code Ann. §75-5-312, both

rights jealously guarded as "essential to the orderly pursuit of happiness...." Board of Regents v. Roth, 408 U.S. 564, 572 (1972), and cases cited therein.

The appointment of a guardian labels a person "irresponsible," if not wholly incompetent to manage one's affairs. A guardian is appointed for an indefinite period and during that period has the authority to establish the ward's need for medical or psychiatric treatment. In the context of civil commitment, the State has been constitutionally required to determine that persons are not only mentally ill and "unable to engage in a rational decision-making process," but also dangerous, before imposing involuntary treatment. Utah Code Ann. §64-7-36(10); Colyar v. Third Judicial Dist. Court, 469 F. Supp. 424 (D.Utah 1979). While commitment can also be for an indefinite period of time, a civilly committed patient can be released from involuntary treatment by mental health facility staff, §§64-7-42 and 43, whereas an order of guardianship cannot be modified or vacated except by the court. §75-5-307.

In light of this analogy, it is apparent that the appointment of a guardian is as onerous as civil commitment, yet a guardian is appointed merely because the ward is unable to make or communicate "responsible decisions concerning his person," and because the court is convinced a guardian is desirable as one means of providing "continuing care and supervision." Prior to 1979, Utah's civil commitment laws contained this same defect. The Utah federal court's Chief Judge wrote:

> [T]he statute refers to "a responsible decision." This standard is sufficiently vague and overbroad to allow for a great deal of abuse. The use of the word "responsible" focuses the committing authority's attention on the content of the decision rather than on the ability of the individual to engage in a rational decision-making process. The word "responsible," being given no further content, lends itself to a completely subjective and, therefore, potentially arbitrary and nonuniform, evaluation of what is decided rather than an objective evaluation of the method by which the decision is reached.

Colyar, supra at 433 (original emphasis). The court noted that under this standard a particular state court judge was free to determine whether or not a decision was "responsible."

The use of a vague standard to find a person incapacitated and in need of guardianship may once have been constitutionally permissible, but "times and conditions may change so that it might be adjudged to be unconstitutional...." Stone v. Dept. of Registration, 567 P.2d 1115, 1117 (Utah 1977). Unless a statute affords freedom from arbitrary action, it cannot satisfy the requirements of substantive due process. Mineer v. Bd. of Review of Industrial Comm., 572 P.2d 1364, 1366 (Utah 1977).

POINT II.

THE STATUTORY REQUIREMENTS FOR THE APPOINTMENT OF A GUARDIAN ARE UNCONSTITUTIONALLY OVERBROAD.

This Court has long recognized that personal liberty is highly prized:

> The right to be free from restraint of one's person is one of the most fundamental and cherished of freedoms. It is the policy of the law to afford it the highest degree of protection possible consistent with the rights of others.

Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458, 459 (1962). Where "the rights of others" are as minimal as they are here, "the highest degree of protection" is all the more applicable.

Legislation is unconstitutionally overbroad when it is susceptible to prohibiting conduct protected by the First Amendment to the United States Constitution, Grayned v. City of Rockford, 408 U.S. 104 (1972), applicable to the states through the Fourteenth Amendment. State v. Barlow, 107 Utah 292, 153 P.2d 647, 652 (1944), appeal dismissed, 324 U.S. 829 (1945). Even if the "responsible decision" standard were clear and precise, a valid use of the State's parens patriae authority may not sweep unnecessarily broadly to appoint guardians for functional persons. Cf. Zwickler v. Koota, 389 U.S. 241 (1967). Where fundamental and cherished freedoms are at stake, the State must employ the least drastic means available, most especially where the paramount concern is for the person of the ward. Shelton v. Tucker, 364 U.S. 479 (1960).

The State argues that Utah's guardianship laws are not overbroad because of the flexibility allowed a court in determining the powers of a guardian. Amicus Brief, supra at 10. Appellant agrees that flexibility is appropriate, but, even so, she maintains that these statutes fail to comport with the principles cited above, for two reasons. First, whatever flexibility is afforded a court is dependent upon a finding that the proposed ward is unable to make or communicate responsible decisions, a threshold too uncertain and flimsy to afford adequate protection. The provision for

finding the appointment "desirable" adds nothing. While Appellant agrees that incapacity may stem from myriad causes which cannot all be statutorily defined, §75-1-201(18), by listing specific reasons for incapacity yet allowing for "other cause," provides a court no additional guidance as to the level of impairment necessary for appointment of a guardian. For insofar as Utah's guardianship scheme fails to limit deprivations of autonomy according to the proposed ward's proven needs, the scheme violates the least restrictive alternative principle and must be struck down. See infra at Point III.

Second, the existence and/or sufficiency of particular dispositions available to the court is not at issue in this case. The legislature may provide for flexibility in sentencing criminal defendants, for example, yet the elements of the offense charged are set according to rigorous standards. The same is true in cases of civil commitment and deprivation of parental rights. The informality of such proceedings as these does not permit the abridgement of basic constitutional provisions of due process. State in the Interest of S-J-, 576 P.2d 1280 (Utah 1978).

In examining the constitutionality of the guardianship laws, this Court recognizes it is "not primarily concerned with the wisdom, desirability or expediency of the law, but with the question as to whether it violates constitutional guarantees." Allen v. Trueman, 100 Utah 36, 110 P.2d 355, 363 (1941). The fact that the proposed ward may be incapacitated and in need of "continuing care and supervision," Utah Code Ann. §75-5-304, is insufficient reason to force the person to accept a guardian.

> It might be argued that the individual interest is less fundamental or less important when one is dealing with a person of diminished capacity because the person lacks the ability to make meaningful choices. If the individual interest is less fundamental, then, the argument goes, the state's interest may be less compelling. But this argument sweeps too broadly. Whether an interest is fundamental depends not on the depth of individual appreciation of the interest at stake, but on whether or not the right is protected by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30-34, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); "Developments [in the Law, Civil Commitment of the Mentally Ill," 87 HARV. L. REV. 1190,] supra at 1211 n. 6.
> .... An individual's diminished capacity should not and does not affect the protection owed him when the state attempts to deprive him of his liberty.

Colyar, supra at 430.

Not only does the ward lose the right to make residential, occupational, educational, and other basic decisions; further, the guardian's control may violate the ward's free exercise of religious beliefs. In Holmes v. Silver Cross Hospital, 340 F. Supp. 125, 130 (N.D.Ill. 1972), the court held:

> The state-appointed conservator's ordering of medical treatment in violation of his religious beliefs, no matter how well-intentioned the conservator may be, violates the First Amendment's freedom of exercise clause in the absence of some substantial state interest.

If the definition of incapacitated person for whom a guardian may be appointed is overbroad, some narrowly-defined class of persons for whom guardians can constitutionally be appointed must exist. Compare the Utah definitions with those used in the Model Guardianship and Conservatorship Act

prepared by the American Bar Association's Commission on the Mentally Disabled, reprinted at 3 MENTAL DIS. L. REP. 264, 266-67 (1979):

> Section 3. Definitions
> As used in this act:
> ....
> (2) "Disabled persons" means adults whose ability to receive and evaluate information effectively and/or to communicate decisions is impaired to such an extent that they lack the capacity to manage their financial resources and/or to meet essential requirements for their physical health or safety even with court-ordered assistance or the appointment of a limited personal guardian or limited conservator.
> ....
> (4) "Meet essential requirements for physical health or safety" means those actions necessary to provide the health care, food, shelter, clothing, personal hygiene and other care without which serious physical injury or illness is more likely than not to occur.

(Because the case at bar contests only Utah's laws for guardianship of the person, the separate sections defining lack of capacity to "manage financial resources"--provisions for conservatorship of the estate--are omitted.)

Utah's definition of incapacity contains none of the requirements of the Model Act that the proposed ward pose a danger to self. Utah Code Ann. §75-5-304 does require that the court find the appointment of a guardian "necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person," but a lack of care and supervision need not rise to the level of personal dangerousness. Nor does the present statute require that the appointment of a guardian be the only means of providing care and supervision.

The concept that a person must pose a danger to self before a compelling State interest in intervention arises has received a fair amount of judicial attention.

> If an individual is able to provide basic care for himself and is not otherwise a danger to himself or others, the legitimacy of the state's interest is called into serious question. The parens patriae power is premised on the state's interest in caring for those who cannot care for themselves. If an individual can care for himself, alone or with the help of family or friends, the rationale behind the parens patriae power fails.

Colyar, supra at 431; see also O'Connor v. Donaldson, 422 U.S. 563 (1976); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977). And In Re Boyd, 403 A.2d 744 (D.C.Ct. App. 1979), held that the guardian of even an adjudicated incompetent person could not freely make decisions affecting the ward absent a life-or-death situation.

In sum, the present Utah statutes broadly apply to allow the appointment of a guardian for persons, like Appellant, who pose no danger to anyone, including themselves, but who make decisions that others consider inappropriate. In this respect the District Court's decision fully complied with an unconstitutional statutory scheme: the facts adduced at the hearing permitted guardianship over a person capable of managing her own affairs. Her decisions might be irresponsible to some, yet individual choice is determined not by "the vote of the majority," but by "the singular situation viewed from the unique perspective of the person called on to make the decision." Saikewicz, supra, 370 N.E.2d at 428.

POINT III.

THE STATUTES FAIL TO REQUIRE APPLICATION OF THE CONSTITUTIONAL PRINCIPLE OF LEAST RESTRICTIVE ALTERNATIVE.

In the context of civil commitment, a Utah court must find a person: (1) mentally ill, (2) dangerous to self or others, (3) unable to engage in a rational decision-making process regarding hospitalization, (4) can receive adequate and appropriate treatment in a mental health facility, and (5) cannot be effectively helped by a less restrictive alternative, before ordering the person hospitalized. Utah Code Ann. §64-7-36(10). Once the order of hospitalization is entered, however, mental health facility staff have complete flexibility to formulate treatment plans that meet the patient's needs.

In guardianship proceedings, all dispositions flow from findings of irresponsible decisionmaking and the desirability of guardianship. Moreover, under §75-5-312, the guardian's authority is automatically plenary, "except as modified by the court." However, the statutes nowhere require that different findings be made for alternative dispositions. Even if a person is completely unable to engage in a rational decision-making process, that person is not civilly committable on those grounds alone; yet that same person can suffer the deprivations of guardianship for failure to engage in <u>responsible</u> decisionmaking--and nothing else. The proposed ward's individual level of need for guardianship in specific areas need not be scrutinized under the present Utah law.

Appellant does not suggest that the criteria for appointment of a guardian should be identical to those for civil commitment. Appellant does maintain that the scope of the guardian's authority must be both compelled and limited strictly by the necessity for depriving the ward of autonomy in those areas.

The American Bar Association, which originally approved the Uniform Probate Code in 1969, has issued a statement of the Code's shortcomings. The ABA now believes that the Code lacks a number of essential elements:

> (1) Assessment of actual mental and adaptive limitations of the person needing assistance or protection.
> (2) Court finding of lack of capacity to do specific kinds of tasks or to make specific kinds of decisions.
> (3) Court order of limited guardianship which specifies those legal disabilities to be imposed and grants only those powers the guardian will need in order to act where a legal disability has been specified.

ABA Commission on the Mentally Disabled, Limited Guardianships for the Mentally Disabled, 12 CLEARINGHOUSE REV. 231, 232 (1978).

Guardianship laws must require application of the least restrictive alternative for at least two reasons.

> First is the broad range of factual contexts to which the principle has been applied. The doctrine itself, as generally enunciated by the Supreme Court, seems broad enough to encompass any situation in which fundamental personal liberties are infringed upon by government regulations promulgated in pursuit of legitimate state objectives. Second, the concept has already been applied in cases involving the analogous situation of the involuntary institutionalization and habilitation of the mentally disabled.

Comment, Interdiction Reform: The Need for a Limited Interdiction Article in the Louisiana Civil Code, 54 TULANE L. REV. 164, 184 (1979). The article concludes that the extension of the least restrictive alternative principle to guardianship proceedings is constitutionally required.

POINT IV.

A HIGH EVIDENTIARY STANDARD DOES NOT CURE SUBSTANTIVE DEFECTS.

Appellant agrees with the State that the "satisfaction" standard of proof is equated with the standard of clear and convincing evidence. Amicus Brief, supra at 18-19. However, the State's averment that "the individual is protected from any possible vagueness in definition by the requirement that the judge must be presented with clear and convincing evidence" is blatently incorrect. This same allegation was raised in Colyar, supra at 433, where the relevant standard of proof was beyond a reasonable doubt. If the State's argument is persuasive here, it should have been all the more persuasive where the standard was even higher. But the court said:

> The defendant urges that any ambiguity in the statute is cured by the fact that the state must prove all the statutory elements beyond a reasonable doubt. This standard of proof is a stringent one, and does work to provide protection for the person facing involuntary commitment. The protection afforded is, however, from the risk of factual error, not from the risk of commitment under an overly broad or unduly vague statute. In Re Ballay [157 U.S. App. D.C. 59, 482 F.2d 648,] 650 [(1973)]. The statute does provide that a person not be committed unless the state shows beyond a reasonable doubt that he can be validly confined. However, the statute does not make sufficiently precise the criteria by which a state can validly commit. If it is not clear what has to be

> proven beyond a reasonable doubt, or if what must be proven is too broad in character, the standard of proof applied is irrelevant. No matter how high the standard, the due process problem of what must be proven remains.

POINT V.

STRICT JUDICIAL SCRUTINY APPLIES.

The State argues that strict judicial scrutiny of the statutory criteria need not be applied by this Court but only by claiming that "the Utah involuntary guardianship statute can pass even the strict scrutiny test... [so that] there is no question that the Utah statute is not [sic] rationally related to a legitimate state purpose." Amicus Brief, supra at 9. The State admits that restrictions on basic personal rights demand strict scrutiny, id. at 8, but then curiously considers only the "suspect class" basis for strict scrutiny and concludes that because the class of involuntary wards is not one usually labelled "suspect" by the United States Supreme Court, that Court would not apply strict scrutiny. Both the State and Appellant agree that fundamental rights are at stake in involuntary guardianship proceedings. When:

> [T]he classification at issue here significantly interferes with the exercise of that [fundamental] right, we believe that "critical examination" of the state interests advanced in support of the classification is required.

Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (overturning Wisconsin's requirement that an ex-spouse guarantee the continuance of child support obligations before being allowed to remarry). The State's citation to Trimble v. Gordon, 430 U.S. 762 (1977), is inapposite because there neither was the

class of illegitimate children "suspect," nor were fundamental rights implicated.

This Court has already recognized the necessity for strict judicial scrutiny when basic personal liberties are at stake. Mildon, supra. Strict scrutiny calls for the State to show a compelling interest in the guardianship statutes as written. See Zablocki, supra. When the statutes reasonably assure that no individual will be unnecessarily deprived of fundamental liberties, then the factfinding of individual guardianship proceedings will comport with constitutional mandates.

CONCLUSION

As the State cannot now show that proper application of the Utah statutes will result in the appointment of guardians for only those persons who require protection because dangerous and bereft of mental capacity, the statutory scheme must fail.

DATED this 5 day of Nov., 1980.

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