IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

IN RE: THE MATTER OF

BISHULLANG SHEN, s/h/a	)	Case No. : 4D11-4271
BISULLANG SHEN,	)	Lower court: MH-C 11-1135
	)	
Respondent/Appellant.	)	

INITIAL BRIEF
IN SUPPORT OF RESPONDENT / APPELLANT

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Table of Contents

Table of Authorities

Cases

Statutes

Rules

I. SUMMARY OF ARGUMENT

Bishullang Shen, an alleged incapacitated person ("AIP") in an adversary proceeding, is entitled to a trial conducted similar to trials in civil suits on the issue of incapacity. The failure to have an evidentiary trial violates the procedural due process protections of the state and federal constitutions, and related statutory protections.

The facts are not in dispute. Petitioner, Kathleen Parkes, filed a petition to determine the incapacity of Ms. Shen. The court issued an order that appointed an examining committee, counsel for the AIP, and declared the proceedings to be "adversary" under Probate Rule 5.025.

The facts were determined by a General Magistrate at a hearing where no witnesses testified[1]. The Magistrate issued a Report and Recommendation finding incapacity, to which exceptions were taken. The trial court found that reliance on the unsworn examining committee reports alone was sufficient to establish respondent's incapacity.

The failure of the court to hold a hearing similar to trials in civil suits on the issue of incapacity combined with reliance exclusively on examining committee reports:

1. violates the procedural due process right to confront and

[1] None testified regarding incapacity, although some testified about steps taken to locate family members.

cross-examine witnesses,

2. violates the statutory right to remain silent, and
3. shifts the burden of proof to the alleged incapacitated person to prove lack of incapacity, i.e., capacity.

A. Issues

The only issue in the case is whether an incapacity hearing held in connection with a petition filed under § 744.3201, Fla. Stat., in a proceeding declared adversary under Probate Rule 5.025, requires live testimony or alternatively, whether the unsworn, unauthenticated examining committee reports are sufficient to establish the purported facts contained therein in the absence of a witness to authenticate the document or prove the purported facts therein, over a timely objection.

B. Procedural History

A petition was filed to determine respondent's incapacity. (Rec. 1-4). The court issued a notice and order re: petition to determine incapacity. (Rec. 7-8). An answer was filed generally denying the allegations in the petition. (Rec. 12). The examining committee members filed their reports. (Rec. 13-29). A hearing was held on September 14, 2011, on the issue of incapacity. That hearing was transcribed. (Rec. 41-66). The Magistrate issued his report and recommendation. (Rec. 30-34). Exceptions were filed on respondent's behalf. (Rec. 35-39). The exceptions were heard on October 24, 2011, and two forms of

essentially the same order were issued, both determining that the findings of fact were adequately supported by the record. (Rec. 67, 68). The October 24, 2011, hearing was transcribed.

C. Facts

Broadly speaking, the facts of the case and the procedural history are the same.

The dispositive facts, however, appear first in the transcript of September 14, 2011, and later in the transcript of October 24, 2011.

1. September 14, 2011: The Incapacity Hearing

At the incapacity hearing on September 14, 2011, the Magistrate closed the hearing to outsiders and invoked "the rule," § 90.616, Fla. Stat., as requested by respondent's counsel. (Tr. P. 5, lines 11-21).

Then, the Magistrate asked if respondent's counsel was ready to proceed and if counsel had reviewed the reports [of the examining committee]. (Tr. P. 6, lines 20-25).

Respondent's counsel objected to the unsworn reports as hearsay. (Tr. P. 7, lines 5-8). The objection was overruled. The Magistrate generously permitted counsel to make an argument and a record. Counsel cited to Fernandez v. Guardianship of Fernandez, 36 So. 3d 175, (Fla. 3d DCA 2010). That case stands for the proposition that in adversary proceedings in contested

matters, due process is required, the rules of evidence apply, and the opportunity for cross-examination must be allowed.

The Magistrate stated that "the examining committee members are the court's witnesses...." However, until they take the stand, take an oath or affirmation, and testify subject to cross-examination, they are nobody's witnesses.

2. October 24, 2011: The Hearing on Exceptions

At the hearing on the exceptions the court inquired of the reason. (Tr. P. 3, lines 10-11).

Counsel argued that reliance on the committee reports alone, in an adversary proceeding, violated the procedural due process right to cross-examine witnesses. (Tr. P. 3, line 12 - P.6 line 11).

The Court denied the motion. (Tr. P.6 line 14).

II. ARGUMENT

A. The Standard of Review

When the trial court’s decision is limited to a question of law the standard of review is de novo. Susan Fixel, Inc., v. Rosenthal & Rosenthal, Inc., 842 So. 2d 204, 206 (Fla. 3d DCA 2003). Review is de novo when the relevant facts are not in dispute. Shelby Homes at Millstone, Inc. v. DaSilva, 983 So. 2d 786, 788 (Fla. 4th DCA 2008) “The trial court’s application of

the law to the facts is reviewed de novo." Hawley v. State, 913 So. 2d 98, 100 (Fla. 5th DCA 2005).

An appellate court must reverse a probate order if either there is an absence of substantial evidence to support the trial court's ruling or the trial court misinterpreted the legal effect of the evidence as a whole. In re: Estate of Yost (Variety Children's Hosp. v. Magee), 117 So. 2d 753, 754 (Fla. 3d DCA 1960). "[I]f the trial court's decision is manifestly against the weight of the evidence or is contrary to the legal effect of the evidence, it becomes the duty of the appellate court to reverse such a decision." Hull v. Miami Shores Village, 435 So. 2d 868, 871 (Fla. 3d DCA 1983), accord, Calvert Fire Ins. Co. v. Tarr, 391 So. 2d 244, 245 (Fla. 3d DCA 1980).

Since the trial court's function was to determine whether there was competent record evidence to support the magistrate's report and recommendation, Reece v. Reece, 449 So. 2d 1295, 1295-96 (Fla. 4th DCA 1984), the appellate court is in no worse position than the trial court to make that review. Accordingly, review here is de novo.

B. The Trial Court's Failure to Require Live Testimony at Trial Created a Constitutional Deprivation of Due Process

"Minimum procedural requirements are a matter of federal law...." Cleveland Board of Ed. V. Loudermill, 470 U.S. 532,

541 (1985). "The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee.'" Id. at 541.

The United States Supreme Court "recognized that [even] for an ordinary citizen, commitment to a mental hospital produces 'a massive curtailment of liberty' and in consequence 'requires due process protection.'" Vitek v. Jones, 445 U.S. 480, 491-92 (1980) (holding that even for a prisoner, the classification of being mentally ill was stigmatizing and therefore required due process protections). The Vitek court expressly recognized that the nature of the inquiry into a person's mental health was a medical inquiry. "It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings.'" Id. at 495.

"The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. In the present context these principles require that a recipient have timely and adequate notice ... **and an effective opportunity to defend by confronting any adverse witnesses** ...." Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (internal quotes and cites omitted, emphasis added). Goldberg involved a procedural rule's failure to provide for cross examination in a hearing to determine whether welfare benefits could be terminated. The Unites States Supreme

Court held, in part, that the failure of the opportunity to cross-examine before termination of benefits is "fatal to the constitutional adequacy of the procedures." Id. at 268. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine adverse witnesses." Id. at 269.

"Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." Crawford v. Washington, 541 U.S. 36, 61 (2004) (criminal case, 6th Amendment). Allowing so-called evidence, "untested by the adversary process, based on a mere judicial determination of reliability ... replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one." Id. at 62.

Florida Courts have held that adversary proceedings to determine incapacity require trials. "[I]n adversary proceedings, 'the proceedings, as nearly as practicable, shall be conducted similar to suits of a civil nature and the Florida Rules of Civil Procedure shall govern....'" Fernandez v. Guardianship of Fernandez, 36 So. 3d 175, 176 (Fla. 3d DCA 2010) (citing Probate Rule 5.025) (reversing the trial court for failure to conduct a trial and instead conducting an inquisition). Each party should be given an opportunity for cross-examination. Id.

[W]hen the state takes away 'a person's

> right to personal freedom, minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his/her own behalf.' Other factors such as the opportunity to confront and cross-examine adverse witnesses before a neutral decision-maker, representation by counsel, findings by a preponderance of the evidence and a record sufficient to permit meaningful appellate review are concomitant rights in this context and 'cannot be abridged without compliance with due process of law....'

In re: Guardianship of King, 862 So. 2d 869, 870-71 (Fla. 2d DCA 2003). "Guardianship proceedings must comport with constitutional notions of substantial justice and fair play." Id. at 871, accord, Shappell v. Guardianship of Naybar, 876 So. 2d 690, 691 (Fla. 2d DCA 2004) (holding that due process, guaranteed by Article I, section 9, of the Florida Constitution, applies even to fee petitions in guardianships).

Furthermore, although the right to cross-examine adverse witnesses is constitutional for all parties, the alleged incapacitated person also has a statutory right to "Confront and cross-examine all witnesses;" as per § 744.1095(5), Fla. Stat., which the lower court denied.

Even in a case decided under the procedures found in § 744.331(5), Fla. Stat., as opposed to the Rules of Civil Procedure required in adversary proceedings by Probate Rule 5.025, "The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner

consistent with due process." § 744.331(5), Fla. Stat.

Due process violations are found by Florida courts in other cases where cross-examination is denied. In Miller v. Miller, 671 So. 2d 849 (Fla. 5th DCA 1996) the court appointed a guardian ad litem ("GAL") to investigate into an alleged change in circumstances in a child custody matter. However, the court refused to allow cross-examination of the GAL. "It is a fundamental right in this country to confront one's accuser and to examine evidence the trial court relies on to reach a decision." Id. at 851. See also In re: Murchison, 349 U.S. 133 (1955) ("We held that before such a [contempt] conviction could stand, due process requires as a minimum that an accused ... have a right to examine witnesses against him....").

It makes no sense in an incapacity proceeding to constitutionally require the elevated degree of proof of clear and convincing evidence, see, e.g., Addington v. Texas, 441 U.S. 418 (1979) and Santosky v. Kramer, 455 U.S. 745 (1982), and then allow that proof to be made based on evidence untested by constitutionally required confrontation and cross-examination.

Unfortunately, that is precisely what happened here, and what happens in almost every case in Broward County. The Magistrate himself stated that the examining committee members are "court witnesses". Transcript page 10, lines 2-4. However, "[d]ispensing with confrontation because testimony is obviously

reliable is akin to dispensing with jury trial because the defendant is obviously guilty." Crawford, 541 U.S. at 62.

Evidence Code Items

"Except as provided by statute, hearsay evidence is inadmissible." § 90.802, Fla. Stat. Unless there is a stipulation to a fact, testimony must be under oath and subject to cross-examination, or it is not evidence. Sloan v. Sloan, 393 So. 2d 642, 644 (Fla. 4th DCA 1981) (holding that trial court properly rejected master's findings as unsupported by record evidence). The Fernandez court also stated that Rule 90.616 (exclusion of witnesses) should have been applied upon petitioner's request. 36 So. 3d at 176.

Section 90.615, Fla. Stat., allows the court to call witnesses, but "all parties may cross-examine."

Furthermore, although documents could theoretically be offered upon a certification without a live witness, the reasonable written notice under § 90.803(6)(c) requires a party, amongst other things, to "make the evidence available for inspection sufficiently in advance to provide any other party a fair opportunity to challenge the admissibility of the evidence." This would conflict with § 744.1095(5), Fla. Stat., which provides the AIP the right of cross-examination. Since the reports are typically not available until one or two days before the hearing, there is no fair opportunity for challenge.

The lower court erred by effectively converting what was to be an evidentiary hearing, or trial, into a summary judgment hearing without notice of intent to do so. Having improperly and tacitly converted the proceedings into summary judgment, the lower court further erred by relying on unsworn documents for their contents, and denying the AIP the due process right of cross-examination, thereby committing reversible error.

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This court must be careful when analyzing the facts in this case to note that the proceedings were declared adversary as per Probate Rule 5.025, thereby invoking the rules of civil procedure. (Record at 7-8.) An alternative procedure to determine incapacity can be found in § 744.331, Fla. Stat., which appears to permit reliance solely on unsworn reports and furthermore, to require dismissal when those reports determine no incapacity. See, Levine v. Levine, 4 So. 3d 730, (Fla. 5th DCA 2009).

The two procedures are very different, and for good reason. In a hearing under § 744.331, Fla. Stat., there are minimal, if any, due process protections, and therefore incapacity can only be determined as of the date of the incapacity order. Baskin v. Sherburne, 520 So. 2d 103 (Fla. 2d DCA 1988).

However, incapacity can be determined retroactively, for example, in cases to set aside a deed executed during incapacity

Parks v. Harden, 130 So. 2d 626 (Fla. 2d DCA 1961), Jordan v. Jordan, 601 So. 2d 287 (Fla. 3d DCA 1992), in will contests Alexander v. Estate of Callahan, 132 So. 2d 42 (Fla. 3d DCA 1961), American Red Cross v. Estate of Haynesworth, 708 So. 2d 602 (Fla. 3d DCA 1998), and to determine a criminal defendant's insanity if it is a valid defense to a particular crime. Eason v. State, 421 So. 2d 35 (Fla. 3d DCA 1982) ("The main focus of the defense at trial and on appeal is the sanity of the defendant"), In re: E.P., 291 So. 2d 238 (Fla. 4th DCA 1974) ("The sole issue on appeal is whether appellant ... was entitled to the common law presumption of incapacity to commit a crime.").

This makes sense because these matters are not heard using the "summary proceedings" described in § 744.331, Fla. Stat. Rather, they are heard in full-blown trials under either the rules of civil or criminal procedure with full procedural due process protections.

III. CONCLUSION

Federal and State constitutional procedural due process requires that when an incapacity proceeding is adversary under Probate Rule 5.025, it is reversible error to conduct the trial of the issue of respondent's incapacity without the witnesses to that incapacity being present, in court, to testify subject to cross-examination. Examining committee reports are not pre-

approved, nor are they outside the rules of evidence which are designed to protect litigants. Alleged incapacitated persons are further protected by § 744.1095(5), Fla. Stat., preserving the right to confront and cross-examine all witnesses.

This Court should reverse the finding of incapacity as unsupported by the record and remand for a trial at which the AIP shall have respected the constitutional right to due process including the right cross-examine witnesses and have the rules of evidence apply.

IV. Certifications

Steven K. Schwartz hereby certifies that:

1. A copy hereof has been served by first-class mail January 16, 2012, upon:

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2. This brief has been prepared in Courier New 12 as required by Rule 9.210(a)(2).

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