IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

Case No. 73,330

IN RE: JOHN WINDER BRYAN, JR.,

Incompetent.

_______________________________________/

FILED
SID J. WHITE
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Deputy Clerk

ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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PREFACE

The parties to this Appeal, JAMES BRYAN and JOHN W. BRYAN, 111, Respondents will be referred to by their proper names. JOHN W. BRYAN, JR., may be referred to as Petitioner, his proper name, or "the ward". The symbol "R" will be used to refer to the Record on Appeal.

STATEMENT OF THE CASE

The Petitioners statement of the case is accepted, with the exception of the following:

The Fourth District held that a preponderance of the evidence was an acceptable standard of review by the lower court to declare an individual incompetent. The Fourth District Court also noted that the trial judge's findings were based on "clear and convincing evidence" as stated in footnote 1, page 2, of the Appellate Opinion (Appendix Exhibit 1), and points out that they do not suggest that the trial court judge was in error in finding clear and convincing evidence, despite the fact that there was conflicting evidence before the trial court judge.

STATEMENT OF THE FACTS

The following facts are either a supplementation or a contradiction to the facts elicited in the Petitioner's Initial Brief.

The Petitioner, JOHN W. BRYAN, JR., age 73, married his former housekeeper, DOROTHY BRYAN, March 30, 1987, spontaneously and without notifying anyone, including his family (R 82). Two medical doctors, John Shook and Bronson J. McNierney testified at the Final Hearing (R-238-255; 126-144). One psychologist, Henry Bessette, also testified (R-6-44). The Petitioner, in his Initial Brief, makes reference to two other psychiatrists who had opinions as to the competency of JOHN BRYAN, JR. The two individuals, Dr. Bond and Dr. Jordan, were not present at the Final Hearing, nor was any deposition introduced into evidence in lieu of their testimony. Although it is true, as the Petitioner has stated, the report was admitted into evidence, at least with respect to Dr. Jordan, any reference to his findings were inadmissible. The trial court, sustained an objection raised by the Appellees/Respondents as to the admissibility of the committees report (R-79). The trial court noted that the committees' report was admitted, conditionally, upon the basis that the doctors' would be present at the Final Hearing, subject to cross-examination (R-79). They were not present at the Final

Hearing. Therefore, any reference by the Petitioner as to the opinions of Dr. Bond, or Dr. Jordan, was inadmissible, not considered by the trial court and any reference thereto should be stricken from the Petitioner's Initial Brief. First National Bank of Fort Lauderdale v. Hunt, 244 So.2d 481 (Fla. 4th DCA 1971).

There were 5 lay witnesses who testified. They were: The Petitioner, JOHN BRYAN, JR.; his wife, DOROTHY; CAROLYN YUZZI, a former tenant of Mr. Bryan; and his two sons, JAMES BRYAN and JOHN BRYAN, III.

Unfortunately, the Statement of Facts, recited by the Petitioner, paints a half picture by only pointing to the evidence tending to show competency. The trial court considered substantial and competent evidence by both the doctors and the lay witnesses, proving incompetency. The trial court, acting as trier of fact, had the opportunity to consider the testimony in its entirety and especially had the opportunity to observe the witnesses when they were testifying. Therefore, it is incumbent on the Respondent to point to this court the following facts upon which the trial court based its ruling of incompetency.

Dr. Henry Bessett, although testifying on behalf of the ward that, in his conclusionary opinion, the Petitioner JOHN BRYAN, JR. could manage his money, did not know whether JOHN BRYAN, JR. had a problem with his memory concerning his

financial affairs (R-20). He further stated that, in fact, JOHN BRYAN, JR. did have a little memory problem (R-20). Dr. Bessett, testifying as the Petitioner's witness, clearly admitted that JOHN BRYAN, JR. relied on his sons and his wife (R-22). In fact, DOROTHY BRYAN, Petitioner's wife, told Dr. Bessett that she has a tough time getting him up and getting him moving and walking. She has been the one who has taken charge of his drinking. Additionally, she has been paying many of his bills for him (R-13). Dr. Bessett further stated that, although he does not believe JOHN BRYAN, JR. is an alcoholic, he is a problem drinker (R-32); and Mr. Bryan has an "adjusted disorder", a maladaptive reaction to an indentifiable psychosocial stress disorder (R-43).

The Petitioner, in his Initial Brief, intimates that Dr. McNierney's finding of incompetency should be disregarded because he did not see JOHN BRYAN, JR. mentally incompetent within the last year. Dr. McNierney, who was JOHN BRYAN, JR.'s primary physician, saw him approximately 40 times over the past 12 years and based his judgment upon JOHN BRYAN'S physical, as well as mental condition. Dr. McNierney considered JOHN BRYAN'S excessive alcohol use, and his unreliability in taking medication. JOHN BRYAN, JR., on February 20, 1987, admitted to Dr. McNierney that he was consuming one quart of alcohol per week (R-134). Dr. McNierney found the Petitioner too unreliable. In fact, his unreliability in taking medications

has caused him to be hospitalized (R-130-131). He has also been plagued by numerous physical problems, such as: his deteriorated physical condition caused by a stroke; heart disease and installation of a pace maker: subsequent strokes: and hospitalizatin for head and back injury due to a car accident (R-128-129).

Carolyn Yuzzi was a tenant of the Petitioner, JOHN WINDER BRYAN, JR. She was called to testify as to a subsequent lease agreement which she entered into with the Petitioner. The purpose of this testimony was to, in part, show that the Petitioner did not have the capacity to manage his financial affairs. Ms. Yuzzi had a 10 year lease to rent a duplex from the Petitioner. After 4 1/2 years had expired on the original lease, the Petitioner cancelled the original lease and gave Ms. Yuzzi another lease agreement (R-56-57). The second lease was drawn up identical to the first lease except the second lease did not contain a cost of living index clause (R-58). Furthermore, the original lease did not contain an assignability clause, unlike the second lease (R-108-109). In fact, the ex-tenant, Ms. Yuzzi, since the execution of the subsequent lease, sublet her apartment for $1,000 a month. She pays to the Petitioner, her obligation of $625.00 per month. (R-109). Each month she nets $375.00 because the Petitioner, JOHN BRYAN, JR., entered into this subsequent lease. This was just one of many instances showing the Petitioner's lack of

ability to manage his affairs.

There is further evidence of the Petitioner's inability to manage his own financial affairs. JAMES BRYAN, the Petitioner's son, and one of the Respondents herein testified that his father would write checks without recording them, or letting anybody know he wrote them. (R-155). The Petitioner entered into a contract for approximately $8,000, to have some insulation work done in his attic. However, one year prior, he had already paid Florida Power & Light to reinsulate the home (R-157). The new insulation was of no benefit to the home (R-202). The Petitioner spent approximately $6,000 to purchase a solar hot water heater after he was unable to obtain any solar energy credit on his taxes. (R-158). He paid approximately $2,700.00 to have a metal fascia board put around the outside of his home, which only needed painting (R-158). He spent approximately $1,700 to buy an automatic pool cleaning mechanism, however, he failed to cancel his pool service contract (R-159). He spent approxiamtely $75,000 on a boat plus $20,000 in improvements which, except for 2 or 3 trips, sits in the back of the house (R-159-160). He had a housekeeper who is paid to work throughout the weekend. Unfortunately, she would leave on Friday morning and not come back until Monday, but was still paid for her services by the Petitioner (R-205). He loaned this housekeeper the sum of $1,500 which has never been repaid (R-205).

The Petitioner, JOHN BRYAN, JR., who was an avid card player, was not able to play cards. He wasn't able to count his chips, and couldn't discern whether or not he had a winning hand. (R-207). The Petitioner had previously made plans for cremation but later also bought a burial plot.

The Petitioner, JOHN BRYAN, JR., testified at the Final Hearing. He was questioned about his financial affairs, but did not know the locations or extent of his assets. (R-288-290;293-94).

Furthermore, he has not been accountable for the payment of his bills for years (R-94; 122; 152-153). Lastly, the Petitioner could not even remember the names of his grandchildren (R-287).

As to the ultimate question of competency, the trial court was faced with varying testimony upon which the court had to assimilate and base its determination on the credibility and observations of the witnesses. Dr. Bessett, Dr. Shook and Carolyn Yuzzi testified that either the Petitioner was competent or able to manage his own affairs (R-11-12; 117;246). Dr. McNierney, James Bryan, and John Bryan, 111, testified that Mr. Bryan is incompetent and needs a guardian for his property. (R-136; 170-171; 208; 234).

The trial court found that the Petitioner, JOHN WINDER BRYAN, JR., is incompetent, based upon the clear and convincing evidence. The trial court based this upon the testimony of Dr.

Bronson J. McNierney and other witnesses. The court was impressed with the doctor's credibility, sincerity and knowledge. The trial court also considered the ward's lack of knowledge concerning the extent of his assets, his confusion in paying bills; his entry into a renewal lease which was not beneficial to him; his failure to remember the name of his attorney who he had retained to handle the competency matter; his failure to recall the names of his grandchildren; and the trial court considered the other experts, of which the trial judge did not place a great deal of credence, based upon brief and singular visits with the ward. The trial court also was in a position to view the physical appearance and reactions of the Petitioner, JOHN WINDER BRYAN, JR., and his wife during the entire proceedings, and the court, in its Final Judgment, stated that it considered these observations in its decision to declare the Petitioner incompetent. (R-418-422; Appendix Exhibit 2).

SUMMARY OF ARGUMENT

To involuntarily commit a person into a mental health facility, a judge must find clear and convincing evidence. To appoint a guardian for a person without involuntary commitment is clearly less intrusive, and does not warrant such a stringent burden of proof as required in commitment proceedings. The legislature of Florida has dictated an elevated standard of proof in civil commitment proceedings. Fla. Stat. Sec. 394.467(1). It has not required this higher standard in guardianship actions under Chapter 744, although guardianship actions arose from Chapter 394. The remedies in a guardianship action are not necessarily anymore harsh than other civil actions such as the appointment of a receiver for one's property, or declaring that a testator lacked testamentary capacity to dispose of his property by will, all of which require a preponderance standard.

The testimony established not only that the Petitioner could not manage his financial affairs, but in fact, that he did not know the whereabouts and extent of all his assets. He did not know the name of 2 of his grandchildren, he drank in excess, he is on medication because of a stroke he previously had, and has failed to take the medication, which has caused him to be hospitalized. He made several unnecessary business purchases, costing him thousands upon thousands of dollars.

The trial court determined, upon clear and convincing evidence, that the Petitioner is incompetent. The trial court based this upon the expert testimony of Dr. McNierney, who had been the incompetent's personal physician for approximately 12 years. The trial court paid special attention to Dr. McNierney's testimony, and considered his credibility, sincerity and knowledge. The trial court also considered other witnesses testimony and numerous other facts, as elicited specifically in the Final Judgment, all of which support the fact that there was not only a preponderance of the evidence to support the trial court's finding, but clear and convincing evidence as well.

The certified question should be answered in the affirmative, and the judgment should be affirmed.

ARGUMENT

Certified Question

IN A DECLARATION OF INCOMPETENCY, DOES THE STANDARD OF PROOF OF PREPONDERANCE OF THE EVIDENCE SUFFICE IF IT IS BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD

Section 744.331, Fla. Stat. governs the procedures for a court to declare a person mentally or physically incompetent. The Statute does not specify the standard of proof to be used to make that determination. There is, however, some guidance which should be looked at to make the determination as to the applicable standard.

Florida Statute Sec. 744.31 (now amended as Sec. 744.331) has its place of origin from Chapter 394 (proceedings for involuntary placement). Section 394.467 sets forth the criteria in which a person may be involuntarily committed into a mental health facility. Chapter 85-167, Sec. 28, amended Sec. 394.467(1) to provide that a person may be involuntarily placed for treatment upon a finding of the court by clear and convincing evidence. The obvious intent of the legislature was that because of the harsh remedy of involuntary commitment, the legislature felt that a preponderance of evidence was not sufficient, as in most civil actions.

Section 744.31 (now amended as 744.331) was amended by Section 12, Chapter 71-131 which separated the procedural

requirements for petitioning for the appointment of a Guardian, from the procedures for involuntary commitment into a mental health facility. One critical distinction between a proceeding pursuant to Chapter 744 and a proceeding pursuant to Chapter 394 is the court's ability to have a person involuntarily placed for treatment. One may assume that this was one reason to set out separate criteria and procedures.

The legislature, in determining whether a higher standard of proof than in most other civil actions was appropriate, has spoken in the affirmative in regards to involuntary commitment proceedings requiring clear and convincing evidence. See: Section 394.467(1). Yet, the legislature did not require that same elevated standard of proof in an action pursuant to Chapter 744.331 where the harsh remedy of commitment does not exist. The legal maxim, expressio unius est exclusio alterius, seems most apropos in answering the certified question in the affirmative holding a preponderance of the evidence is the appropriate standard.

There is a large distinction between being declared incompetent to manage your property, and being involuntarily committed. As the Fourth District Court of Appeals, in its opinion (Appendix Exhibit 1), at page 3 stated:

> "... we agree that being declared incompetent to manage property is a very serious matter, but being involuntarily committed is much worse. Preponderance of the evidence is the acceptable level of proof in nearly all civil cases. Many

> such involve results almost as drastic as the one pertaining here. For instance, as a result of dissolution proceedings, a parent may have his or her children taken away. A large adverse Judgment may completely wipe out a defendant financially."

There are other instances as well which involve results similar to that of appointing a guardian: When the court appoints a receiver to manage an entities affairs because of the incapacity of the individuals behind the entities incapacity to manage the company because of physical or mental infirmities of the individual(s) or because of wrong doings by the individual(s); Likewise, the burden of overthrowing a will on the ground of the defendant's lack of testementary capacity alleging the inability to dispose of one's property, may be sustained by a preponderance of the evidence. In Re: Kiggins' Estate, 67 So.2d 915, 918 (Fla. 1953); citing Myers v. Pleasant, 118 Fla. 715, 160 So. 204; In Re: Dunson's Estate, 141 So.2d 601, 605 (Fla. 2d DCA 1962). There should be no distinction between declaring someone unable to manage their affairs while alive and declaring someone incompetent to dispose of their own property by will, and subsequently attack the will after death.

This court should answer the certified question in the affirmative and affirm the trial court's ruling.

POINT II

THERE IS SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF INCOMPETENCY UNDER A PREPONDERANCE OF EVIDENCE STANDARD AS WELL AS CLEAR AND CONVINCING EVIDENCE STANDARD

Assuming this court holds that clear and convincing evidence should be the appropriate standard of proof in adjudicating a person incompetent, there are sufficient facts in the record to support such a finding in the present case. The trial court, in its amended order, at paragraph 6, specifically made its finding based upon clear and convincing evidence. The appellate court found that there was at least a preponderance of the evidence, based upon substantial and competent evidence, to affirm the trial court. The appellate court, in footnote 1 of its opinion, specifically noted that it does not suggest that the trial judge was in error by saying that the evidence clearly convinced him. The evidence introduced before the trial judge as elicited specifically in the trial court's findings, not only supports an adjudication of incompetency by preponderance of the evidence, but by clear and convincing evidence as well.

Throughout the jurisdictions of the United States, there have been numerous different definitions of "clear and convincing evidence". In Florida, the Fourth District Court of Appeals has provided a workable definition of clear and convincing evidence which contains both qualitative and quantitative standards.

> "We therefore hold that clear and convincing evidence require the evidence must be found

> to be credible; the facts to which the witnesses testify must be distinctly remembered; testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

Although the Petitioner argues that the case of In re: McDonell, 266 So.2d 87 (Fla. 4th DCA 1972) is almost identical to the present situation, such is not the case. In McDonell, supra, the ward appealed from an order denying a Petition for restoration of competency, after she was adjudged mentally incompetent at the age of 73. All of the physicians who examined and treated Mrs. McDonell expressed the view that she was not drinking, was alert, and well oriented as to her circumstances and surroundings and capable of taking care of herself and of managing her own affairs. McDonell, supra, at 88-89.

Obviously, in the present case, there is competent and sufficient evidence as to the ward's inability to manage his own affairs, and there is much evidence that at many times the ward, JOHN BRYAN, JR., was not oriented. Furthermore, in the case of McDonell, supra, at 88, the court considered the wards testimony which amply demonstrated that she was fully aware of the nature and extent of her financial holdings. Again, this is not present in the case sub judice. (R 289-293). The trial

court made findings and adjudicated the Petitioner, JOHN BRYAN, JR., incompetent.

The trial court made specific findings, in its amended order, many of which were based upon the credibility, and the judge's personal observation of the witnesses. The trial court judge, sitting as trier of fact, considered all the evidence, and listened to all the testimony elicited by both sides (R 419). The trial court considered the testimony of Dr. McNierney, who believed that the Petitioner is incompetent. The court was impressed with the doctor's credibility, sincerity, and knowledge. (R 419). The court considered Dr. McNierney's testimony concerning the Petitioner's long history of alcohol abuse, the general health picture, including the strokes and heart problems, his abuse of medication and his inability to handle his daily affairs. (R 301-302).

The trial court also considered the Petitioner's testimony, as well as his personal appearance and reactions during the entire proceedings. The trial court found that the Petitioner displayed confusion regarding payment of his bills, his inability to recall the names of his grandchildren; his lack of awareness as to the extent of his assets, and the whereabouts of the same; and other findings included in the Amended Final Judgment. (R 418-422) (Appendix Exhibit 2).

This court should not disturb the trial court's findings unless the evidence shows it was clearly erroneous. Flemming

v. Flemming, 352 So.2d 895 (Fla. 1st DCA 1977). This court should not re-weigh the actual findings of the trial court. It should only determine whether the findings are legally sufficient to support the judgment. Crooks v. Atlantic National Bank of Florida, 445 So.2d 1042 (Fla. 5th DCA 1984).

The evidence elicited at trial supports the trial court's findings not only by preponderance of the evidence, but by clear and convincing evidence, as defined in Schlomowitz, supra.

CONCLUSION

This court should rule in the affirmative, and hold that in a Declaration of Incompetency, the appropriate standard of proof should be that of preponderance of the evidence. If this court determines that preponderance of the evidence is sufficient, then the trial courts amended order should remain affirmed, because the evidence in this case met that test. If this court determines that clear and convincing evidence is appropriate, then the trial courts amended order should still be affirmed because the evidence in this case met this elevated standard, as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U. S. Mail to DINGWALL & STANLEY, Cumberland Building, Suite 500, 800 East Broward Boulevard, Fort Lauderdale, Florida 33301 and to Larry Klein, KLEIN & BERANEK, P.A., Suite 503 - Flagler Center, 501 South Flagler Drive, West Palm Beach, Florida 33401 this 3rd day of January, 1989.

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