

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

IN RE: CHARLES J. TOMMOR, AN  
INCAPACITATED PERSON

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

APPEAL OF: CHARLES J. TOMMOR

No. 1592 EDA 2012

Appeal from the Order Entered May 7, 2012  
In the Court of Common Pleas of Lehigh County  
Orphans' Court at No(s): 2011-1943

BEFORE: PANELLA, J., ALLEN, J., and PLATT, J.\*

MEMORANDUM BY PANELLA, J.

**FILED MAY 10, 2013**

Appellant, Charles J. Tommor, appeals from the order entered May 7, 2012, in the Court of Common Pleas of Lehigh County, which deemed him incapacitated and appointed plenary guardians for his estate and person. After careful review, we are constrained to vacate and remand for further proceedings if necessary.

James E. Tommor ("Petitioner"), Tommor's brother, filed a petition for determination of incapacity and appointment of a plenary guardian of the person and estate of his brother. The petition was filed on November 30, 2011. Petitioner stated in the petition that he was concerned that Tommor was unable to manage his finances and healthcare, and he wanted to be

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\* Retired Senior Judge assigned to the Superior Court.

appointed the plenary guardian of Tommor's estate. The Orphans' court issued a citation, on January 11, 2012, to Tommor to show cause why he should not be adjudged incapacitated and have guardians of his person and estate appointed. The Orphans' court appointed Helen Z. Stauffer, Esquire as "guardian ad litem" for Tommor, and further ordered that Attorney Stauffer was to meet with Tommor at his residence.

On February 13, 2012, the Orphans' court conducted a hearing. Present at the hearing was counsel for Petitioner, counsel for Tommor, and Tommor's "guardian ad litem." Donna Miller, D.O., a specialist in internal medicine with added qualifications in geriatric medicine, testified via telephone at the hearing. Dr. Miller had conducted an evaluation of Tommor.

At the time of the evaluation, Dr. Miller reported that Tommor's grooming was reasonable and he was "very loquacious." N.T., Hearing, 2/13/12, at 10. Tommor expressed during the examination that he did not have any problems with his memory. **See id.**, at 10-11.

Dr. Miller asked Tommor to complete two standardized tests. On the first test, the Folstein Mini-Mental State Examination, a screening test for memory loss, Tommor answered 28 out of 30 questions correctly. Dr. Miller explained that this result "was not surprising" given Tommor's level of education (he is a graduate of Lehigh University with an engineering degree) and his occupation as an engineer. **Id.**, at 14. The second screening test, the St. Louis University Mental Status Exam, is "a little bit more sensitive to

what we call executive function tasks.” **Id.** On that test, Tommor answered 24 out of 30 questions correctly. That score put Tommor in the range of “mild cognitive impairment,” a “pre-dementia category of memory loss.” **Id.**, at 15. Dr. Miller noted that Tommor had “some short term recall deficits on both tests.” **Id.** Dr. Miller concluded that Tommor had “an early memory loss issue, plus a psychiatric issue.” **Id.**, at 16. Dr. Miller also noted that Tommor needs additional neuropsychological testing, which will aid in obtaining a “much more accurate diagnosis...” **Id.**, at 17. Dr. Miller further testified that “there was evidence that he was not consistently paying his bills.” **Id.** Tommor also told Dr. Miller that a friend of his was helping him pay bills, which she found “odd.” **Id.**, at 18.

Dr. Miller concluded that Tommor needed a guardian to help him with his finances and medical issues, as there “was definitely substantial evidence, and historical evidence that he was not managing on his own.” **Id.**, at 18-19.

The Orphans’ court stated that it would appoint an emergency guardian of person and the estate “just to make sure that nothing is being dissipated, and that the assets are protected.” **Id.**, at 27. Tommor’s counsel indicated to the Orphans’ court that he would be sending Tommor to Frank M. Dattilio, Ph.D., ABPP. **See id.**, at 25. Attorney Stauffer, the guardian ad litem, then admitted her report into evidence. **See id.**, at 26. In the report, Attorney Stauffer concludes that, in her opinion, Tommor “would benefit from the appointment of a guardian of his estate and a

limited guardian of his person to provide informed consent for medical treatment in the event of any medical emergency.” Report of Helen Z. Stauffer, Esquire, dated 2/13/12, at 2.

At the end of the hearing, Tommor spoke to the Orphans’ Court. He stated that his sister and brother instituted this action because they are upset that he wants to marry (he was 68 years old at the time of the hearing) and have children and “they realized that the assets of my estate would no longer go to them, but rather to my wife and kids...” **Id.**, at 30. The Orphans’ Court then continued the hearing pending the report from Dr. Dattilio.

On February 23, 2012, the Orphans’ Court entered an order appointing Stephen A. Litz, Esquire as emergency guardian of the estate of Tommor. The Orphans’ court held a second hearing on April 25, 2012. Personal counsel for Tommor, counsel for Petitioner, the emergency guardian, and the guardian ad litem all agreed that two expert reports, from Frank M. Dattilio, Ph.D., ABPP, and John P. Titus, M.D., would be “admitted without objection, and without the necessity to call either of the doctors.” N.T., Hearing, 4/25/12, at 5.

Tommor was the only witness who testified at the hearing. He testified that he has no problems handling his finances. **See** N.T., 4/25/12, at 21-22. He stated that some taxes on his rental property were not paid, but that he was waiting for Ryan Frey, an acquaintance, to pay them. **See**

*id.*, at 19. Tommor explained that he is helping Ryan Frey and his family as he felt sorry for them. **See id.**, at 36.

Tommor further noted that he withdrew approximately \$45,000.00 in cash to pay bills prior to the appointment of his emergency guardian. **See id.**, at 17-18. Tommor was concerned that his siblings were creating this legal proceeding as they want his assets. **See id.**, at 22. Tommor noted that Ryan Frey was involved in a credit card bill totaling \$33,000.00. **See id.**, at 38-39.

Admitted into evidence at the hearing was the report of Frank M. Dattilio, Ph.D., ABPP. Dr. Dattilio evaluated Tommor during four office visits. **See** Report of Frank M. Dattilio, Ph.D., ABPP, dated 4/2/12, at 1. The report notes that Tommor "presented himself as a neat and appropriately groomed individual who was polite and congenial . . . ." **Id.** Tommor explained to Dr. Dattilio that he wants to marry and that his siblings are concerned that his assets will pass to his wife or be dissipated during the marriage. **See id.**, at 7-8.

Dr. Dattilio administered the Mini Mental State Examination-2 where he scored a "28/30, which indicates that he was alert, responsive, and oriented in time, place, and person." **Id.**, at 11. Further psychological testing revealed, "there is no indication that Mr. Tommor is suffering from any visible signs of dementia or cognitive impairment." **Id.**, at 13. Dr. Dattilio noted, however, that Tommor is likely suffering from underlying

depression. **See id.** Dr. Dattilio reported that Tommor is highly intelligent. **See id.**, at 12.

Psychological testing revealed “significant psychopathology” with “uneven” judgment. **Id.**, at 13-14. Nevertheless, Dr. Dattilio explains that Tommor’s “decision-making capacity regarding finances is quite good.” **Id.**, at 15. Dr. Dattilio was concerned that Tommor experiences financial difficulties in that “[h]e tends to be easily swayed by others who appeal to his emotional needs.” **Id.** In conclusion, Dr. Dattilio suggested that he remain under the care of a court-appointed guardian. **See id.**, at 16-17.

Also admitted into evidence was the report of John P. Titus, M.D., a board-certified psychiatrist and neurologist. Dr. Titus conducted a psychiatric evaluation of Tommor. Dr. Titus notes in his report that Tommor arrived early to the evaluation, was dressed appropriately, and had driven himself to the appointment. **See** Report of John P. Titus, M.D., dated 4/2/12, at 1. Tommor’s speech was “coherent, relevant and logical.” **Id.**, at 2. Dr. Titus found that Tommor’s “cognitive abilities are intact” as is his “concentration ability.” **Id.** Tommor was able to provide Dr. Titus “a rational history of his problems,” which Dr. Titus deemed “absolutely credible.” **Id.** Dr. Titus found that Tommor’s “abstraction ability was perfectly intact,” that “his judgment is quite intact,” and that “[h]e is able to make rational decisions about even complex matters.” **Id.** The report concludes:

Taking into account of all the events in his life and my psychiatric evaluation of this person, I strongly feel that he is quite competent to take care of his financial, fiscal, and business matters and day to day affairs. He is quite competent and he is not in need of a guardian at this time.

***Id.***, at 3.

Interestingly, the petitioner did not testify. Following the hearing, on May 7, 2012, the Orphans' court entered an order finding Tommor to be totally incapacitated and appointed a plenary guardian of his estate and a plenary guardian of his person. This timely appeal followed.

Our standard of review is as follows:

In regard to factual determinations, we recognize that the lower court had the opportunity to hear and observe the witnesses. We will not substitute our judgment for that of the lower court absent a clear abuse of discretion, "even though we, had we been sitting in judgment below, might have reached a contrary result, yet if the evidence is sufficient in quality and quantity to sustain the finding of incompetency such a finding should be sustained."

***Estate of Haertsch***, 609 A.2d 1384, 1385-1386 (Pa. Super. 1992).

In his first issue on appeal, Tommor argues that the Petitioner failed to present clear and convincing evidence of incapacity. We agree.

Pursuant to statute, the Orphans' court has the power to declare a person incapacitated. **See** 20 Pa.C.S.A. § 5512.1(a)(1). An "incapacitated person" is "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial

resources or to meet essential requirements for his physical health and safety.” 20 Pa.C.S.A. § 5501.

Our responsibilities in this regard are of the highest level. “A statute of this nature places a great power in the court. The court has the power to place total control of a person’s affairs in the hands of another.” ***Estate of Haertsch***, 609 A.2d at 1386.

We are guided by the cautionary words issued by Judge Mary Jane Bowes on behalf of our Court in ***In re Estate of Rosengarten***, 871 A.2d 1249 (Pa. Super. 2005):

The dangers of the incompetency statute have been recognized since its inception. ***In re Bryden's Estate***, 211 Pa. 633, 633, 61 A. 250, 250 (1905) (statute allowing for declaration of incompetency “is a dangerous statute” and is “to be administered by the courts with the utmost caution and conservatism.”). It is basic to our jurisprudence that a person's property is theirs to dispose of as they wish, even if it results in poverty. ***Id.*** As the Court stated in ***Bryden***, “[T]he basic principle involved, as laid down in ***Lines v. Lines***, 142 Pa. 149, 21 A. 809, [is] that a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family if he chooses to commit such an act of folly.” ***Id.*** Recently, in ***In re Hyman***, 811 A.2d 605, 608 (Pa. Super. 2002) (quoting ***Estate of Haertsch***, 609 A.2d 1384, 1386 (1992)), we noted that the incompetency statute “places a great power in the court. The court has the power to place total control of a person's affairs in the hands of another. This great power creates the opportunity for great abuse.” The above cited and other provisions of Chapter 55 are tailored to ensure that the incapacitated person’s wishes are honored to the maximum extent possible.

***Id.***, at 1254-1255.



There is, of course, a presumption that a person is mentally competent. **See *In re Hyman***, 811 A.2d 605, 608 (Pa. Super. 2002). The burden to prove incapacitation is on the petitioner who must present clear and convincing evidence of incapacitation. **See** 20 Pa.C.S.A. § 5511(a). **See also *In re Hyman***, 811 A.2d at 608.

To establish incapacity, the petitioner must present **testimony, in person or by deposition** from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities and the person's mental, emotional and physical condition, adaptive behavior and social skills.

20 Pa.C.S.A. § 5518 (emphasis added). The Orphans' court *sua sponte* or upon petition of the alleged incapacitated person for good cause shown, may order an independent evaluation "which shall meet the requirements of section 5518 (relating to evidence of incapacity)." 20 Pa.C.S.A. § 5511(d).

Here, the key determination for the Orphans' court in determining that Tommor was totally incapacitated was Dr. Dattilio's report. **See** Trial Court Opinion, 8/21/12, at 8 ("In careful review of all the foregoing, the Court became clearly convinced of the accuracy of the assessment provided by Dr. Dattilio in this matter."). In its own words, the Orphans' court "adopted" Dr. Dattilio's "comprehensive and compassionate analysis[.]" ***Id.***<sup>1</sup>

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<sup>1</sup> The Orphans' court expressly rejected Dr. Titus's report, calling it "rather cursory and strangely repetitive in places" and found the "report does not remotely approach the comprehensiveness and depth of Dr. Dattilio's (Footnote Continued Next Page)

The problem with Dr. Dattilio's *report* is that it does not meet the requirements of § 5518 — there was no *testimony* presented either in person or by deposition.<sup>2</sup> While it is true that the parties stipulated to the admission of the two expert reports, that stipulation, we find, is insufficient to overcome the statutory mandate. The decisions for the court to make, i.e., whether to take away from an individual the right to make decisions on one's own and independent from third-party supervision, and the obligations of the court in arriving at this determination, are too important to be waived by stipulation. This is especially true when the trial court is put on notice that qualified experts disagree on the diagnosis and prognosis.<sup>3</sup>

We must still determine whether, apart from the improperly relied on expert reports, the Petitioner presented clear and convincing evidence to sustain the Orphans' court finding. The testimony at the hearing came from  
(Footnote Continued) \_\_\_\_\_

analysis and, as such, lacks the credibility and persuasiveness of the assessment provided by Dr. Dattilio." Trial Court Opinion, 8/21/12, at 6. This decision was done without any opportunity for the Orphans' Court to make credibility or weight decisions based upon an examination of the respective experts.

<sup>2</sup> There is the same problem with the guardian ad litem's report that was admitted into evidence in the first hearing. The Orphans' court, however, does not cite Attorney Stauffer's report in its opinion.

<sup>3</sup> We are also puzzled by the involvement of the emergency guardian, Mr. Litz, at the hearing held on April 25, 2012. At one point, although he was not counsel of record for any party, Mr. Litz took an advocacy role and cross-examined Tommor as if he represented the petitioner, and then Mr. Litz provided testimony and moved exhibits into the record as if he were called as a witness, yet he was never given an oath.

Dr. Miller and Tommor. The Orphan's court did not even hear testimony from the Petitioner himself, although Tommor clearly testified that there were manipulative intents behind the filing of the petition.

The Orphans' court cites portions from Tommor's testimony in its opinion, *see id.*, at 7, and states that "this testimony viewed in the full context of this case provides further evidence that, as things currently stand, [Tommor] in his current mental state clearly and convincingly lacks capacity to manage his own affairs[,]" *id.* The Orphans' court goes on to explain:

The credible expert testimony and evidence presented in this matter, including the direct observation of [Tommor] by the undersigned, has rendered it quite apparent that the latter situation obtains here, and it is affliction by infirmity which explains the aberrant course of events that have characterized [Tommor's] life over the past year or so.

*Id.*, at 7-8.

The Orphans' court's finding is predicated on a combination of its reliance on an improperly admitted expert report, Dr. Miller's testimony, and portions of Tommor's testimony. Dr. Miller noted that Tommor had "mild cognitive impairment," N.T., Hearing, 2/13/12, at 15, but also noted that he needs additional neuropsychological testing, which will aid in obtaining a "much more accurate diagnosis . . . ." *Id.*, at 17. Thus, this testimony, by itself, falls far short of the highest civil standard, clear and convincing evidence. In any event, as it is clear that the Orphans' court relied on an improperly admitted expert report, we are constrained to vacate the order and remand.

Therefore, we vacate the order entered May 7, 2012, and remand for proceedings consistent with this memorandum. On remand, the Petitioner and the Orphans' court must comply with § 5518 in presenting and receiving evidence.<sup>4</sup>

Order vacated. Case remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, appearing to read "Karen Gambett", written over a horizontal line.

Prothonotary

Date: 5/10/2013

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<sup>4</sup> Our disposition renders Tommor's two other issues presented on appeal moot.