INSANE PERSONS: Insane persons are entitled to an adjudication of their mental capacity by the Probate Court to determine the necessity of appointing a guardian even when they have been acquitted of a criminal charge by reason of insanity.

FILED NO. 33

May 3, 1950

FILED
33

Hon. R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Mr. Gifford:

Your letter of recent date requesting an opinion of this department being of considerable length, for brevity's sake, will be incorporated herein by reference. The question presented therein is:

> When a person has been acquitted by a jury upon a trial of a criminal case by reason of insanity and the jury further finds that such insanity still exists, and at a later date the Circuit Court upon the verdict of the jury, orders the defendant conveyed to a State Hospital for care and treatment of the insane and the cost of conveyance to and maintenance while in said hospital be paid by defendant's guardian out of defendant's property, if he has property, then, must the Probate Court, upon request, appoint a guardian for such insane person without holding a hearing?

Section 4047 and 4049 of the Revised Statutes of Missouri, 1939, provides the procedure in the Circuit Court when a person has been acquitted of a criminal offense by reason of insanity and the disposition of such person.

Section 4047, supra, reads as follows:

> "If upon such inquiry the said jury shall become satisfied that such person has so become insane, they shall so declare in their verdict, and the court shall, by proper warrant to the sheriff, marshall or jailer, order such person to be conveyed to the hospital for the care and treatment of the insane and there kept until restored

> to reason. And such person shall be thereupon disposed of, and the costs and expenses of conveying him to said hospital and of his support and maintenance at said hospital shall be taxed, paid and collected as now or hereafter provided by law in cases of the insane poor: Provided, if such person shall be adjudged to be insane and shall have property, the costs shall be paid out of his property by his guardian."

Section 4049 reads as follows:

> "When a person tried upon indictment for any crime or misdemeanor shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with as provided in the two preceding sections."

Chapter I, Article 18 Administration. Section 451, R. S. Mo., 1939 provides for the appointment, when, and reads as follows:

> "If it be found by the jury or the court sitting as a jury that the subject of the inquiry is of unsound mind and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such insane person, such guardian to be a resident of the state; and if the person so found to be of unsound mind is, at the time of the finding, a duly qualified public officer of this state, or of any county in this state, or of any municipality in this state, such office shall be deemed vacant, and it shall be the duty of the judge of the probate court holding such inquiry

> to certificate the fact of such finding to the officer or tribunal having power to fill such vacancy; and the vacancy shall be filled during the insanity of such officer: Provided, that if the insane person be the judge of probate in any county, then the inquiry herein provided for shall be had before the county court of said county."

Section 497, R. S. Mo. 1939, with reference to when an insane person may be confined reads as follows:

> "If any person, by lunacy or otherwise, shall be furiously mad, or so far disordered in his mind as to endanger his own person or the person or property of others, it shall be the duty of his or her guardian, or other person under whose care he or she may be, and who is bound to provide for his or her support, to confine him or her in some suitable place until the next sitting of the probate court for the county, who shall make such order for the restraint, support and safekeeping of such person as the circumstances of the case shall require."

Section 498, R. S. Mo. 1939, with reference to orders for confinement of insane persons by certain officers reads as follows:

> "If any such person of unsound mind, as in the last proceding section is specified, shall not be condined by the person having charge of him, or there be no person having such charge, any judge of a court of record, or any two justices of the peace, may cause such insane person to be apprehended, and may employ any person to confine him or her in some suitable place, until the probate court shall make further orders therein, as in the preceding section specified."

Section 9351, R. S. Mo. 1939 with reference to confining insane persons by sheriff and the payment of costs reads as follows:

> "The sheriff or other officer having the custody of insane persons, as required in sections 9349 and 9350, shall if he deem it necessary to their safe custody, confine them to the county poorhouse or county jail until they shall be removed to a state hospital; and if all things needful be not

> otherwise supplied, he shall furnish them; and in such cases, the supplies for the insane poor shall be paid for by the proper county courts out of the county Treasurier; and supplies for others than the insane poor shall be repaid out of their estates; and may be recovered by suit in the name of such officers."

In this instant case, apparently we are not dealing with an indigent insane person, but rather an insane person who is possessed of certain property sufficient at least to pay for his transportation and maintenance to the State Hospital and for that reason we will not refer to indigent insane persons in this opinion.

In the case of In Re Moynihan, 62 S. W. (2d) 410, l. c. 418, 332 Mo. 1022, the Supreme Court of the State of Missouri said:

> "* * * *'As the inherent jurisdiction of the state over persons of unsound mind rests in part upon its duty to protect the community from the acts of those who are not under the guidance of reason, it follows, * * * that if any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person, but only during so long a time as may be necessary to institute and carry to a determination proper proceedings to inquire into the party's condition and provide for his legal custody.' Buswell on Insanity, p. 33, §23. See, also notes, 10 A. L. R. 488, and 45 A. L. R. 1464. But, even in such circumstances, it should be remembered that the preliminary order authorized by sections 498, 499, R. S. 1929, is not a valid final adjudication of the fact of insanity. The hearing provided by section 452, R. S. 1929, (Mo. St. Ann. § 452), must still be had, and the person suspected of insanity still 'is entitled to be present at said hearing and to be assisted by counsel,' as stated in the notice required by section 450, R. S. 1929, (Mo. St. Ann. §450). The practice of sending a person to an insane

> asylum before the hearing might result in preventing the person claimed to be insane from employing counsel or being present at the hearing. * * * * * * * * * * * * * * * * "
>
> (Underscoring ours)

In the case of Ruckert v. Moore, 295 S. W. 794, l. c. 798, the Supreme Court of the State of Missouri said:

> "An insanity proceeding is in invitum, and seeks to deprive the citizen of his liberty or property, or both. Such proceeding seeks to take away from the citizen not only his right to the possession of his own property, but also his right to contract freely with respect to his property, and to dispose of and do with it as he will. Therefore, it is said:
>
> "'Where a statute prescribes a certain method or procedure to determine whether persons are insane, such inquiries must be conducted in the mode prescribed, and the statute regulating such proceedings must be followed strictly.' 14 R. C. L. 556, 557.
>
> "'Proceedings for an adjudication of insanity against an individual are required to be in strict compliance with the statutory requirements.' 32 C. J. 634.
>
> "The statute of this state relating to insanity proceedings (section 444, R. S. 1919) provides:
>
> "'If information in writing, verified by the informant on his best information and belief, be given to the probate court that any person in its county is an idiot, lunatic or person of unsound mind, and incapable of managing his affairs, and praying that an inquiry thereinto be had, the court, if satisfied there is good cause for the exercise of its jurisdiction, shall cause the facts to be inquired into

> by a jury; Provided, that if neither the party giving the information in writing, nor the party whose sanity is being inquired into call for or demand a jury, then the facts may be inquired into by the court sitting as a jury.'

Section 446, R. S. 1919, provides:

> "'In proceedings under this article, the alleged insane person must be notified of the proceeding by written notice stating the nature of the proceeding, time and place when such proceedings will be heard by the court, and that such person is entitled to be present at said hearing and to be assisted by counsel, such notice to be signed by the judge or clerk of the court under the seal of such court, and served in person on the alleged insane person a reasonable time before the date set for such hearing.'
> (Italics ours.)"

Again in the same case at l. c. 800, the court said:

> "The general rule is that, to authorize the appointment of a guardian for an alleged incompetent person, his incompetency must first be adjudicated by the tribunal having jurisdiction in such cases. 32 C. J. 653. Such is the clear direction and intent of our statute (Section 448, R. S. 1919) which provides:
>
> "'If it be found by the jury or the court sitting as a jury that the subject of the inquiry is of unsound mind and incapable of managing his or her affairs, the court shall appoint a guardian of the person and estate of such insane person, such guardian to be a resident of the state.'"

In the instant case the jury in the trial of the criminal case acquitted the defendant by reason of insanity. The Circuit Court in conformity with that verdict made an order directing the defendant to be conveyed to the State Hospital for care and treatment of the insane and the expense of such conveyance and maintainance be paid out of his property by his guardian.

The Circuit Court, in accordance with the verdict did all that it could do under the law in such case and made an order accordingly, but the verdict of the jury, in the trial of the criminal case, did not make the finding that the defendant was incompetent and incapable of managing his or her business and affairs which is essential to the appointment of a guardian by the Court. The defendant, however, can be confined in the State Hospital on the order of the Circuit Court and there kept until his or her condition warrants the superintendent of the institution to discharge such patient.

In the appointment of a guardian by the Probate Court it is necessary to hold a hearing to determine the person's competency to managing his property, business and affairs and this action can be instituted in the Probate Court after confining the defendant in a State Hospital.

Under the order of the Circuit Court, the sheriff or prosecuting attorney may, if it is thought advisable, institute a proceeding in the Probate Court to have the defendant adjudged incompetent. The defendant should be served with notice of the hearing, the same as though competent, and is entitled to a hearing as in other cases and if the Probate Court finds him incompetent, a guardian should be appointed. If the hearing results in a finding that the defendant is not of unsound mind, it would determine only the fact relative to the proceeding for the appointment of a guardian and would not affect the confinement under the order of the Circuit Court.

If the Probate Court should find that the defendant is capable of managing his business and affairs and declines to appoint a guardian, then action could be instituted in the Circuit Court to recover the cost of transportation and maintenance of the patient in the State Hospital and the Circuit Court could appoint a guardian ad litem to represent the defendant in such matter.

In the case of Graves v. Graves, 255 Mo. 468, l.c. 482, it is said:

> "'Likewise where a guardian or committee has not been appointed, or if appointed refuses to qualify or has been removed, a guardian ad litem should, upon a proper suggestion or petition, be appointed to defend in the name of the insane person, even though defendant has not been judicially declared insane, if the fact of insanity is shown by affidavit or otherwise. A guardian ad litem so appointed is under the direct control of the court, and may make any defense either by way of answer or cross bill or both that occasion may require or the court may order.' (Underscoring ours.)
>
> "This court has specifically recognized the rule in the case of Bensieck v. Cook, 110 Mo. l.c. 183, whereat we said:

Hon. R. M. Gifford

> "'The trial court pursued the right course in appointing a guardian ad litem for defendant, Joseph Cook. (Mitchell v. Kingman, 5 Pick. 431; Buswell on Insanity, sec. 132; Sturges v. Longworth, 1 Ohio St. 544.) And the power of the court to appoint such a guardian, of necessity, concedes the power of the court, upon the proper basis of facts being presented, to render a judgment as binding on the lunatic and his property interests, as a similar judgment would be upon a sane person.'"

As stated above, relative to the appointment of a guardian ad litem, where there has been no judicial finding of insanity, the same rule would apply and the court could appoint a guardian ad litem for the person, where he had been found to be of unsound mind by the verdict of the jury in the defense of a criminal case.

Therefore, it will be necessary to hold a hearing in the Probate Court, and to accord the defendant his constitutional rights of being present and represented, and have an adjudication of his or her mental capacity to managing his or her business and affairs in order for a guardian to be appointed by the Probate Court and the Probate Court can only appoint a guardian after such adjudication and determination.

CONCLUSION

Therefore, from the foregoing it is the opinion of this department that a defendant is entitled to a hearing as provided by statute in the Probate Court to determine his or her mental capacity to manage his or her business and affairs prior to the appointment of a guardian.

Respectfully submitted

GORDON P. WEIR
Assistant Attorney General

APPROVED

J. E. TAYLOR
ATTORNEY GENERAL