PROBATE COURT:
MAY APPOINT GUARDIAN
OF ADULT PERSON NOT
ADJUDGED INSANE: WHEN:

Probate court lacks power under Missouri statute to appoint guardian of adult whose sole assets consist of benefit payments other than old age assistance authorized by Chapter 208, RSMo 1949, when recipient was never adjudged insane. But when person is adjudged insane, habitual drunkard, or narcotics addict and incapable of managing his affairs, guardian of person or estate of recipient may be appointed. Cost of proceeding to be paid from person's estate if sufficient, if insufficient, by county.

FILED
37

May 4, 1953

Honorable Jessie B. Harrison
Probate Judge of
Dunklin County
Kennett, Missouri

Dear Madam:

This is to acknowledge receipt of your recent request for a legal opinion of this department, which reads as follows:

> "An opinion is requested of your office on the following matter relative to the administration of the Probate Court of Dunklin County, Missouri.
>
> "1. Has the Probate Judge any authority to appoint a guardian for a person who is not insane but who is incompetent to manage his affairs?
>
> "2. Is there any statutory authority or compulsion for the appointment of a guardian for a person whom his sole property consists of allotments from the Missouri State Welfare Office other than Old Age Assistance?
>
> "3. Is the Probate Court required to pay the costs of the proceeds to appoint a guardian and the expenses of the annual settlements in cases in which the sole property consists of allotments from the Welfare Department?
>
> "I would appreciate your opinion on these matters since there are several cases now awaiting for action on our docket of this type."

None of the above inquiry makes any direct reference to a sanity inquiry in probate court as provided by Section 458.020, RSMo 1949, but since such inquiry is involved in the subject matter of the opinion request we find it necessary to refer to such proceeding in the course of our discussion herein.

The primary purpose of an inquiry into one's sanity is to determine whether or not he is insane, to provide for his welfare, and to preserve his property, and such was held to be the primary purpose of said proceedings in the case of State ex rel. Terry vs. Holtcamp, 330 Mo. 608.

The petition in the proceedings must allege that the person named therein is an idiot, lunatic, or person of unsound mind and is incapable of managing his affairs. Either allegation is insufficient and unless both are made the court cannot acquire jurisdiction over the person or subject matter involved. Unless such allegations appear in said petition, and the court finds them to be sufficiently supported by the evidence adduced at the hearing the adjudication of insanity and the appointment of a guardian of one alleged to be insane is illegal.

Assuming that the allegations of the petition in such instance are sufficient, the court is satisfied that the allegations are true and supported by the testimony then the adjudication of insanity and the appointment of a guardian of such person or of his person and estate as provided by Section 458.070, RSMo 1949, will be valid. Said section 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, or if the court shall be satisfied that it will be for the advantage of such insane person to appoint a curator of the estate, different from the guardian of a person, it shall be lawful to make such separate appointment; 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 certify 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 circuit court of said county."

The first inquiry of the opinion request is whether the probate court is authorized to appoint a guardian for a person who is not insane but who is incompetent to manage his affairs. We assume that the writer has reference to the court's power to appoint a guardian for the person or estate (or both) of an adult person who has never been adjudged to be of unsound mind and incapable of managing his affairs. After careful research we are unable to find any statutory authority for the appointment of a guardian for an adult person who has not been adjudged of unsound mind and incapable of managing his affairs except in those instances when one is alleged to be an habitual drunkard or a narcotic addict and is incapable of managing his affairs as provided by Section 458.030, RSMo 1949; said section reads as follows:

> "If information, in writing, verified by the informant on his best information and belief, be given to the probate court of any county that any person in its county is so addicted to habitual drunkenness or to the habitual use of cocaine, chloral, opium or morphine as to be incapable of managing his affairs and praying that an inquiry thereinto be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind, and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in section 458.070, and shall publish the same notice mentioned in section 458.210; also, shall file an inventory and appraisement, made under the provisions mentioned in sections 458.220 to 458.290."

It is noted that the same general procedure is to be followed under Section 458.030, supra, as in sanity hearings but that in the former proceedings the person may be adjudged of unsound mind and incapable of managing his affairs and that both such facts must be alleged and finally adjudicated.

In the latter proceeding one is alleged to be an habitual drunkard or narcotics addict and incapable of managing his affairs but does not require the further allegation as to the unsoundness of mind of the subject. A judgment in the latter case finding one to be an habitual drunkard and narcotics addict and incapable of managing his affairs and appointing a guardian for such person would be sufficient under the provisions of this statute and it is believed that that portion of the opinion of the Kansas City Court of Appeals in the case of Harrelson v. Flourney, 229 Mo. App. 582, sufficiently substantiates our contention in this respect. At l. c. 591, the court said:

> "Our statute, Section 448, Revised Statutes 1929, providing for the adjudication of one as an insane person and incapable of managing his affairs, requires that such person be a lunatic, an idiot, or a person of unsound mind and incapable of managing his affairs and that he must be so found in order to be placed under guardianship. It is provided by Section 505 of our statutes (Revision of 1929) that whenever the words 'person of unsound mind or insane person' occur in Article 18 (Revision of 1929), relating to guardianships and curators of insane persons, they shall be construed to mean an idiot, or a lunatic or a person of unsound mind and incapable of managing his own affairs, as the case may be upon proof.
>
> "In order that a person may be placed under guardianship in connection with his incapacity to manage his own affairs under the statute relating to guardians and curators of insane persons, his unsoundness of mind must also be made to appear. Otherwise, there is no basis in our statute for the appointment of a guardian for one incapable of managing his affairs (Burke v. McClure et al., 211 Mo. App. 446, 245 S. W. 62), unless under Section 508, Revised Statutes 1929, one be charged as an habitual drunkard or user of cocaine or other drugs therein mentioned. There must be an adjudication of insanity along with the adjudication of incapability. The two are not to be separated.
>
> "In Burke v. McClure et al., supra, l.c. 451, the court quoted approvingly from State v. Montgomery, 160 Mo. App. 724-733, the following:
>
> > '"--the affidavit on which the insanity inquiry is based is required to state two things, viz, that the party is an idiot, lunatic, or person of unsound mind and that he is incapable of managing his affairs. The allegation that he is incapable of managing his affairs is as essential as the allegation that he is of unsound mind."'

Again in the case of Darby v. Cabanne, 1 Mo. App. 126, the St. Louis Court of Appeals held that one not alleged to be an idiot, lunatic or person of unsound mind but who was alleged to be an habitual drunkard and incapable of managing his affairs that such allegations in the petition were good and that when the probate court adjudged the person to be an

habitual drunkard and appointed a guardian the action of the court was proper, at l. c. 129, the court said:

> "The petition nowhere alleges that Francis Cabanne is, or was at the time of the alleged contract, or at any time, an idiot, or lunatic, or person of unsound mind, but merely that he was so addicted to habitual drunkenness as to be incapable of managing his own affairs. Our law provides for appointing a guardian for such persons, though they be not of unsound mind, or idiots, or lunatics. * * *"

In the case of State v. Brown, 227 S. W. (2d) l. c. 644, the court cited the case of Darby v. Cabanne, supra, along with other cases approved by it.

In the Brown case objection was made when a witness was offered for the reason that the witness had been previously adjudged to be an habitual drunkard and incapable of managing his affairs and had been committed to a state hospital by the probate court. The trial court permitted the witness to testify and in reviewing the action of said trial court the Supreme Court said at l. c. 649:

> "* * * The Court did not err in permitting him to testify, because prima facie he was a competent witness. He had not been adjudged to be insane, or a person of unsound mind, nor had he been confined in any institution as such. Sec. 1895, R. S. 1939, Mo. R.S.A., and cases based thereon are not controlling. The facts shown were insufficient to establish mental incompetency as a witness. * * *"

Therefore, in answer to your first inquiry it is our thought that the only instances when the probate court has power to appoint a guardian for an adult person who is not insane are in those proceedings authorized by Section 458.030, supra, in which one is alleged to be an habitual drunkard or narcotics addict as stated above.

The first inquiry specifically asks about the probate court's power to appoint a guardian of a person who is not insane, but the second inquiry fails to state whether it was meant to apply to those instances when the person for whom the guardian was sought to be appointed is alleged to be sane or insane.

The second inquiry is not of such nature that it can be answered affirmatively or negatively but requires some discussion.

No statutory provision requires the probate court to appoint a guardian for an adult person whose sole property consists in some form of allotment other than Old Age Assistance authorized by Chapter 208, RSMo 1949, and received from the Missouri State Welfare Department when the recipient has not been adjudged to be insane or when he has not been adjudged to be an habitual drunkard or narcotics addict. However, in the event such recipient has been adjudged of unsound mind and incapable of managing his affairs or hasbeen adjudged to be an habitual drunkard or narcotics addict and incapable of managing his affairs, then his allotments from the Welfare Department shall be paid to his legally appointed guardian as provided by Section 208.180, and which reads in part as follows:

> "Benefits hereunder shall be delivered to the applicant in person, or, in the event of his incompetency, to his legally appointed guardian, and in the case of a dependent child to the person or relative with whom he lives. * * *"

If no guardian of the incompetent person has been appointed then upon proper application being made to the court by any person in behalf of said person praying that a guardian of the person of such incompetent one and of his estate be appointed and the court is satisfied that good cause exists for the appointment of the guardian then the court shall appoint the guardian and allotments or benefit payments of the incapacitated person shall be paid to his guardian as provided by Section 208.180, supra.

It is believed that Sections 458.070 and 458.030, supra, authorize the appointment of a guardian of such persons under the circumstances mentioned above.

The inquiry in the probate court to determine whether one is an habitual drunkard or narcotics addict is provided by Section 458.030, supra, and among other things provides how the court shall proceed and reads as follows:

> "* * * the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic, or person of unsound mind, and if a guardian is appointed on such proceedings, * * *."

The third inquiry fails to state whether it was meant to refer to proceedings for the appointment of a guardian of the person and estate of one whom the court had adjudged to be insane, or whether the inquiry was meant to refer to proceedings for the appointment of the

guardian of a person and estate of one not alleged or adjudged to be an insane person.

Regardless of the exact meaning of the third inquiry, it appears that there can be no appointment of a guardian of an adult person who has not been adjudged to be of unsound mind unless such person is found to be an habitual drunkard or narcotics addict within the meaning of Section 458.030, supra.

Section 458.080, RSMo 1949, provides that the costs of a sanity hearing shall be paid from the estate of the person adjudged to be insane, and by the county if such estate is insufficient. Said section reads as follows:

> "When any person shall be found to be insane according to the preceding provisions, the costs of the proceedings shall be paid out of his estate, or, if that be insufficient, by the county."

It is believed that this section is sufficient authority for holding that the expense of the appointment of a guardian of one adjudged to be insane are a part of the costs incidental to the sanity hearing and that such costs shall be paid from the estate of such person, if sufficient, or by the county if the assets of the estate are insufficient.

Section 458.090, RSMo 1949, provides that when the person alleged to be insane in the sanity hearing is discharged, the costs of the proceeding shall be paid by the informant. Said section reads as follows:

> "If the person alleged to be insane shall be discharged, the cost shall be paid by the person at whose instance the proceeding is had, unless said person be an officer, acting officially according to the provisions of this chapter, in which case the costs shall be paid by the county."

In answer to your third inquiry, it is our thought that the probate court is never required under any statute, to pay the costs of a sanity proceeding in which one was adjudged incompetent and a guardian of the person and estate of such person is appointed by said court. That the court lacks the power and cannot appoint a guardian of the person and estate of an adult person without a finding that such person is of unsound mind and incapable of managing his affairs, or a finding that the person is an habitual drunkard or narcotics addict, and this is also true when the entire assets of such person's estate consist of allotments of some form received from the State Welfare Department, other than Old Age Assistance.

When an adult person is adjudged to be insane, an habitual drunkard, or a narcotics addict, and a guardian of the person or estate is appointed and such person is receiving some form of benefit payments other than Old Age Assistance from the State Welfare Department, authorized by Chapter 208, RSMo 1949, supra, then the costs of the particular proceeding, including that incidental to the appointment of a guardian shall be paid from the person's estate if sufficient, if insufficient, by the county.

CONCLUSION

It is the opinion of this department that a probate court lacks the power under Missouri statutes to appoint a guardian of the person and estate of an adult person whose sole property consists of some form of benefit payments other than old age assistance authorized by Chapter 208, RSMo 1949, when such person was never adjudged insane, unless he has been adjudged to be an habitual drunkard or narcotics addict and incapable of managing his affairs. In such instance the court may within its discretion appoint a guardian of such person and the costs of the proceedings shall be paid from said person's estate if sufficient, and if insufficient, by the county.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Very truly yours,

JOHN M. DALTON
Attorney General

PNC:hr:sw