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Substitution Of Judgment For Mentally Incompetent In Re duPont - In Re duPont

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Substitution Of Judgment For Mentally Incompetent

In Re duPont[1]

The court-appointed guardians of the estate[2] of Irene duPont, an 86 year old mental incompetent of permanent disability, applied to the court of chancery for authority to make certain gifts from the corpus of the ward's estate to the ward's children and grandchildren by way of an inter-vivos trust. Evidence was introduced to show that the requested transfer would provide the recipients with a substantially greater benefit, through tax savings,[3] than if the assets were to pass under the ward's will and that the incompetent, if sane, would have recognized the tax advantages and made such a distribution. The issue facing the court was whether the chancery court had the power to authorize the guardians to execute an inter-vivos trust on the basis of the probable wishes of the ward. The court, in granting the guardian's application, found that the broad scope of the Delaware Statute, conferring the jurisdiction of the chancery court[4] and the power of the

[1] ... Del. Ch. ..., 194 A. 2d 309 (1963).

[2] The pronounced value of the estate was $176,000,000 which produced a gross cash income of $5,800,000 and an after-tax annual income of $800,000.

[3] The family would be benefited by a savings of approximately $16,100,000.

[4] 12 DEL. CODE § 3914(d) (1962) provides: "In all matters relating to the appointment, qualification, duties, powers, liability to account, and distribution of property at the recovery or death of the ward, such guardian shall be governed by all of the applicable provisions of law and rules of Court relating to the management of the estates of mentally ill persons." 12 DEL. CODE § 3701 (1962) provides: "The Court of Chancery shall have

trustee[5] over the estate of a mental incompetent, empowered the court to *substitute its judgment* for that of the incompetent and do for him as he would probably have done for himself.

The substitution of judgment doctrine was originally announced in England in 1816 by Lord Eldon in *Ex parte Whitbread*.[6] In authorizing certain payments to be made from the surplus income of the estate of the incompetent for the benefit of the incompetent's brothers and sisters to whom he owed no legal obligation, but who were found to be in need of support, the Chancellor said:

> "[I]t is not because the parties are next of kin of the Lunatic, or, as such, have any right to an allowance, but because the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."[7]

The Chancellor went on to say that the amount and proportion of the allowance rests entirely within the discretion of the court.[8]

Subsequent English decisions have applied and, at times, amplified the *Whitbread* principle.[9] The indigence of the recipient seems to have been a persuasive factor in many of these cases.[10] However, the English courts, in cases lacking evidence of the recipient's need,[11] did not refuse a petition for payments when the reasonable intent of the incompetent was otherwise indicated. While almost all of

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the care of mentally ill persons above the age of 21 years, so far as to appoint trustees for such persons to take charge of them and manage their estates."

[5] 12 DEL. CODE § 3705 (1962) provides: "A trustee may, in the name of the mentally ill person, do whatever is necessary for the care, preservation and increase of his estate."

[6] 2 Mer. 99, 35 Eng. Rep. 878 (Ch. 1816). But the original practice of granting an allowance from the incompetent's estate to one whom he owed no legal duty has been traced to the order of Lord Thurlow in the Matter of Cotton, *id.* at 103, n. 1.

[7] *Id.* at 103; see Note, 17 Calif. L. Rev. 175 (1929), for a discussion of the objective, strict subjective and liberal subjective standards used to determine what the lunatic would himself do, in which the author concludes that the objective standard is preferred although the court should employ a judicious combination of the three tests in order to deal properly with the diverse situations in this area of law.

[8] See, *e.g.*, *In re* Hudelson's Estate, 18 Cal. 2d 401, 115 P. 2d 805 (1941); *In re* Brice's Guardianship, 233 Iowa 183, 8 N.W. 2d 576 (1943); *In re* Buckley's Estate, 330 Mich. 102, 47 N.W. 2d 33 (1951).

[9] See Note, *The Surplus Income of a Lunatic*, 8 Harv. L. Rev. 472 (1895), for a lengthy consideration of the early English cases.

[10] See, *e.g.*, *Ex parte* Whitbread, 2 Mer. 99, 35 Eng. Rep. 878 (Ch. 1816); *In re* Blair, 1 My. & Cr. 300, 40 Eng. Rep. 390 (Ch. 1836); *In re* Clarke, 2 Ph. 282, 41 Eng. Rep. 951 (Ch. D. 1847).

[11] See In the Matter of Drummond, 1 My. & Cr. 627, 40 Eng. Rep. 516 (Ch. 1836).

the cases indicate that the payments were to be made from the surplus income of the estate, the court, in *In re Whitaker*,[12] allowed the funds to be taken from the corpus of the estate. The doctrine was further extended to encompass beneficiaries not related by blood[13] and charitable gifts;[14] it was qualified so as to treat the allowance as an advancement,[15] chargeable against the distributive share of the recipient upon death of the incompetent. Despite the amplification of the doctrine, the English courts have generally recommended that the substitution of judgment practice "was one which could not be regarded with too much caution, and the principle involved in it ought to be narrowed rather than extended in its operation."[16]

A small but growing number of American states have adopted the substitution of judgment doctrine[17] and have granted payments out of the estate of the incompetent to persons to whom the incompetent owed no legal obligation. Initially the principal was accepted as being within the purview of general equity jurisdiction. However, this approach has been met with a barrage of criticism from courts which have refused to accept the doctrine when it was offered as resting upon equity jurisdiction alone.[18] These courts have argued that at common law the care of

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[12] [1889] 42 Ch. D. 119. See also *In re* Brice's Guardianship, 233 Iowa 183, 8 N.W. 2d 576 (1943); *In re* Bond, 198 Misc. 256, 98 N.Y.S. 2d 81 (1950); *In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S. 2d 234, 237 (1940). The court said that in cases where the allowances are drawn out of the corpus of the estate, the intent of the lunatic "must be made to appear . . . even more clearly and convincingly than where there is surplus income available. . . ."

[13] See *In re* Earl of Carysfort, 1 Cr. & Ph. 76, 41 Eng. Rep. 418 (Ch. D. 1840). Here an annuity was made for an old servant of the incompetent. *Cf. In re* Evans, 21 Ch. D. 297 (1882). The court dispensed with the ingredient of intimacy or affection and granted an allowance to a cousin whom, it appears, was not known by the lunatic.

[14] See *In re* Strickland, L.R. 6 Ch. 225 (1871).

[15] See *In re* Sparrow, 20 Ch. D. 320 (1882). The court, in granting an allowance to the nephew, who was the heir-at-law of the lunatic and entitled to an entailed estate, barred the estate tail for the amount of the allowance, in lieu of treating the allowance as an advancement. *In re* Frost, L.R. 5 Ch. 699 (1870); *In re* Croft, [1862] 1 New Rep. 185. See also *In re* Hudelson's Estate, 18 Cal. 2d 401, 115 P. 2d 805 (1941); 11 Paige's Ch. Rep. 257 (N.Y. 1844). But see *In re* Farmer's Loan & Trust Co., 181 App. Div. 642, 168 N.Y. Supp. 952 (1918), where an allowance was treated as an absolute gift.

[16] *In re* Blair, 1 My. & Cr. 300, 303, 40 Eng. Rep. 390 (Ch. 1836). See *e.g.*, *In re* Hudelson's Estate, *supra* note 15.

[17] See generally 160 A.L.R. 1435 (1946); 44 C.J.S. *Insane Persons* § 90 (1945); Note, *supra* note 7; Note, 14 Cornell L.Q. 89 (1928); Note, *supra* note 9, Note, 2 Va. L. Rev. 204 (1914); 54 Harv. L. Rev. 143 (1940); 41 Harv. L. Rev. 402 (1928).

[18] See Kelly v. Scott, 215 Md. 530, 137 A. 2d 704 (1958); Binney v. Rhode Island Hospital Trust Co., 43 R.I. 222, 110 Atl. 615 (1920); and Lewis v. Moody, 149 Tenn. 687, 261 S.W. 673 (1923).

incompetents was the King's prerogative, that this authority passed to the state as *parens patria* and, consequently, is not within the ambit of equity power, and therefore the courts may apply the doctrine only after legislative delegation. In response to this reasoning, the more recent cases have only applied the doctrine when based upon a statutory foundation.

The basis upon which the doctrine has been accepted may be categorized into three classes: (1) the inherent jurisdiction of equity over the person and property of the insane, or (2) a liberal construction of a statute, which was not enacted in terms of substitution of judgment, or (3) a statute expressly vesting the court with this power.

New York, the first state to adopt the doctrine,[19] is illustrative of the implied or inherent power theory which maintains that the equity court in inheriting all the power and authority which the Court of Chancery formerly had, is charged with the responsibility of protecting incompetents. In the early New York cases, the *Whitbread* principle was applied without statutory authority, while recently it has been used notwithstanding the enactment of a specific statute in the general area.[20] The New York courts have given the doctrine its most extensive application[21] only to be surpassed in breadth by *duPont*. Similarly, the Court of Chancery of New Jersey first assumed the power to give effect to the purpose of the ward as expressed during his sanity[22] and later continued to recognize the doctrine beyond the scope of a statute enacted in the area.[23] Pennsylvania has also applied the doctrine without statutory authority.[24]

The second category of states have employed a flexible interpretation of statutory language which places with the

[19] See *In re* Willoughby, 11 Paige's Ch. Rep. 257 (N.Y. 1844).

[20] See *In re* Schley, 201 Misc. 522, 107 N.Y.S. 2d 884 (1951). The court, finding that the lunatic's daughter-in-law was not a member of his "family" within the meaning of the Civil Practice Act § 1357, which provides for "the safe keeping and maintenance, and the education, when required, of the incompetent person and his family," applied the substitution of judgment principle in lieu of the statute.

[21] See *ibid*; *In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S. 2d 234 (1940), allowance taken out of the principal; *In re* Flagler, 130 Misc. Rep. 544, 224 N.Y. Supp. 27 (1926), incompetent's probable intention need not be proved beyond a reasonable doubt; *In re* Heeney, 2 Barbour's Ch. Rep. 326 (1847). Chancery has power to expend money from the lunatic's estate for charitable and religious institutions not exceeding the amount that the lunatic had been in the habit of giving.

[22] Potter v. Berry, 53 N.J. Eq. 151, 32 Atl. 259, 34 L.R.A. 297 (1895).

[23] See *In re* Johnson, 11 N.J. Eq. 268, 162 Atl. 96 (1932). But see *In re* Groebe, 49 N.J. Super. 111, 139 A. 2d 317 (1958); *In re* Roger's Estate, 96 N.J. Eq. 6, 125 Atl. 318 (1924).

[24] See Hambleton's Appeal, 102 Pa. 50 (1883).

court the responsibility for caring for the affairs of the lunatic, and an application of equitable principles in the exercise of this statutory jurisdiction to justify the use of the substitution of judgment doctrine. For instance, in the Michigan case, *In Re Buckley's Estate*,[25] the court found that the lunatic's destitute brothers and sisters were members of "his family"[26] within the meaning of a statute which directed the guardian to pay ". . . all expenses incurred in the care, support or comfortable and suitable maintenance of such ward, and his family if there be any, as may be approved by the judge of probate."[27] The court, doing as the insane "in all probability" would have done, allowed payments to be made to them. In an Iowa case, *In Re Brice's Guardianship*,[28] the court found that the making of payments to the incompetent's destitute nephew fell within the terms of an Iowa statute which provided that the "Guardian . . . must prosecute and defend for their wards, may employ counsel therefor, lease lands, loan money, and in all other respects *manage their affairs*, under proper orders of the court or a judge thereof."[29]

The *duPont* case falls within this category. On the basis of the statutory power[30] placed with the court to appoint trustees to manage, care, preserve and increase the incompetent's estate, the guardians[31] were permitted to do as the lunatic would have done and make gifts to the lunatic's children and grandchildren. Although the court recognized "that the court should move with great caution in this area,"[32] it might be argued that the court's extensive utilization of the doctrine comes dangerously close to abuse. The American cases have indicated that the in-

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[25] 330 Mich. 102, 47 N.W. 2d 33 (1951).

[26] For a liberal interpretation of the term "family," see *In re* Freeman's Estate, 171 Miss. 147, 157 So. 253 (1934); Seley v. Howell, 115 Tex. 583, 285 S.W. 815 (1926).

[27] MICH. STAT. ANN. § 27.3178 (217) (Cum. Supp. 1949).

[28] *In re* Brice's Guardianship, 233 Iowa 183, 8 N.W. 2d 576 (1943).

[29] IOWA CODE ANN. § 668.9 (1939) (emphasis added).

[30] See statutes cited notes 4 & 5 *supra*.

[31] The court-appointed guardians were Irenee duPont, Jr. and Crawford H. Greenewalt. See generally 44 C.J.S. *Insane Persons* § 42 (1945), which maintains that the court may appoint any proper person, including relatives, as a guardian of a mental incompetent. *Cf.* Tate v. Tate, 190 Tenn. 39, 227 S.W. 2d 50, 52 (1950). The court, refusing the petition of the guardian of the incompetent, who was also the sister, seeking funds for her own support, said:

> "The policy of the law so to separate the interests of trustees and beneficiaries as to leave no room for casuistry and the least possible temptation for divided allegiance, is so general and so salutary that a legislative purpose to depart from it will not be presumed in the absence of positive expression or unambiguous implication."

[32] . . . Del. Ch. . . ., 194 A. 2d 309, 317 (1963); *accord*, note 16 *supra*.

digence of the recipient is a decisive factor,[33] yet in *duPont* there was certainly "no problem of need." Furthermore, it is amply clear that the underlying purpose of the guardian's petition was tax avoidance.[34] Nevertheless, the court aided the petitioner's anomalous objective by allowing them to employ the *Whitbread* doctrine as the vehicle to escape the tax collector. Also, the court's firm approval of the withdrawal of the gift from the principal of the estate[35] was an action rarely taken by even the most liberal jurisdictions. These considerations tend to indicate that the Delaware court has subjected the doctrine to its most strained application.

The third class of states have, by statute, expressly authorized their courts to substitute the court's judgment for that of the ward. This approach accommodates the interests of judicial flexibility with the desirability of statutory safeguards which prevent an abuse of judicial discretion. For instance, the California court in *In Re Hudelson's Estate*,[36] claimed that its treatment of a monthly allowance to the incompetent's adult daughter as an advancement on her inheritance was a proper exercise of the discretion vested in the court by a California statute which provides:

> "On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if such ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary in the court, but the court shall give consideration to the . . . amount which the ward would, in the judgment of the court, have allowed said next of kin, had said ward been of sound mind."[37]

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[33] See *e.g.*, *In re* Brice's Guardianship, 233 Iowa 183, 8 N.W. 2d 576 (1943); *In re* Buckley's Estate, 330 Mich. 102, 47 N.W. 2d 33 (1951); *In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S. 2d 234 (1940). The relative's need is an important factor in determining whether the incompetent, if sane, would have made the payment. See Note, *supra* note 7. The author contends that before the court will consider the application, it must be shown that the beneficiary is reliant upon the incompetent for support.

[34] But see Bulloch Estate, 10 Pa. Dist. & Co. R. 2d 682 (1957).

[35] *Compare In re* Fleming's Estate, 173 Misc. 851, 19 N.Y.S. 2d 234 (1940), *with In re* Schwartz, 27 Del. Ch. 223, 34 A. 2d 275 (1943).

[36] 18 Cal. 2d 401, 115 P. 2d 805 (1941).

[37] CALIFORNIA PROBATE CODE § 1558 (1956).

This statute, in permitting the court to exercise the doctrine, specifies the boundaries — kinship and surplus income — beyond which the court may not stray.

The only Maryland case which discusses the *Whitbread* principle is *Kelly v. Scott.*[38] The *Kelly* court rejected the doctrine, reversing an order of the Circuit Court of Baltimore County which had granted to the incompetent's infant granddaughter, who was neither a member of the incompetent's household nor dependent upon him, the sum of $125 a month for her maintenance and support. The court declared that it had no inherent jurisdiction[39] to make an allowance from the estate of an adjudicated incompetent, and that its statutory authority[40] was limited to payments made either for the benefit of persons within the incompetent's household[41] or for the "support and maintenance of the incompetent's dependents."[42] But the court concluded by saying:

> "No doubt, there is force in the suggestion that the equity courts in Maryland ought to have power to deal with the disposal of the surplus income of an incompetent, comparable to that exercised by the courts in other jurisdictions, particularly in hardship cases. But we think that is a problem for the Legislature."[43]

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[38] 215 Md. 530, 137 A. 2d 704 (1958).

[39] The court argued that the English Court of Chancery had no inherent jurisdiction over the person and property of an incompetent, as this power resided in the King as an executive prerogative on the theory of *parens patriae* and was delegated to the Lord Chancellor as the King's representative by means of an official instrument called the "Sign Manual."

[40] The statutory authority of courts of equity in Maryland to take charge of the estates of persons adjudicated *non compos mentis* is derived from the Act of 1785, ch. 72, § 6 which provided, "The court shall have full power and authority in all cases, to superintend and direct the affairs of persons *non compos mentis*, both as to care of their persons and the management of their estates, and may appoint a committee, or a trustee or trustees for such persons, and may make such orders and decrees respecting their persons and estates as to the court may seem proper." MD. CODE Art. 16, § 132 (1957).

[41] Maryland under the Declaration of Rights, Art. 5, has adopted the Statute, *De Praerogativa Regis*, 17 Edw. 2 (1326), which provided that the lands and tenements of lunatics should be "safely kept without Waste and Destruction, and that they and their Households shall live and be maintained competently with the Profits of the same." See Matter of Easton, 214 Md. 176, 133 A. 2d 441 (1957). The court relates the development of this area of law in Maryland.

[42] The scope of the equity court's jurisdiction was broadened by legislation in 1929 which provided, in part, that: "The committee or trustee shall care for and manage the property of the incompetent and may upon proper order of the court expend cash for the incompetent's support and maintenance, as well as for the *support and maintenance of the incompetent's dependents.*" MD. CODE (1957) Art. 16, § 135 (Cum. Supp. 1963) (emphasis added).

[43] Kelly v. Scott, 215 Md. 530, 537, 137 A. 2d 704 (1958).

The effect of the *Kelly* decision has been "modified by subsequent legislation"[44] (Art. 16, Sec. 135A) which, prompted by the suggestion of the *Kelly* court provides:

> "The court in its discretion . . . may allow, upon the application of any guardian, committee or trustee of an incompetent's estate, where there is a surplus of income in the committee or trust estate, and where a hardship case exists additional payments of support and maintenance. Such payments may be made to such person, or persons as the incompetent would reasonably have been expected to make had he been in a sound state of mind and capable of managing his affairs."[45]

An emphasis of the terms "additional" (modifying "payments") and "such" (modifying "person or persons") might lead one to construe this statute as relating directly to an earlier enactment, Art. 16, Sec. 135,[46] which allows the trustee, upon order of the court, to make payments "for the support and maintenance of the incompetent's dependents." Such an interpretation would limit Sec. 135A to additional payments made in hardship cases to incompetent's dependents, only. This position is untenable and would render Sec. 135A superfluous, since at the time of its passage any payment to a dependent was already adequately covered by Sec. 135. A proper construction would not restrictively interpret "person or person's" as meaning dependents but would allow payments to be made to *any* person to whom the incompetent would have made such payments.

It appears then that the legislature has placed Maryland among those whose courts are explicitly vested with the power to apply the substitution of judgment doctrine. However, it should be noted that this delegation is restricted to recipients who could be classified as "hardship cases," and to payments which could be withdrawn from "surplus income." Petitions for payments from an incompetent's estate, which base their claim upon the substitutional judgment doctrine but fail to conform to these statutory requirements and which fail to come within the statutory province of either dependency[47] or household membership,[48] will be governed by the *Kelly* decision

[44] Scott v. First National Bank, 224 Md. 462, 464, 168 A. 2d 349 (1961).
[45] MD. CODE (1957) Art. 16, § 135A (Cum. Supp. 1963).
[46] *Supra* note 42.
[47] *Ibid.*
[48] *Supra* note 42.

and therefore will be denied. Thus, notwithstanding this statute, the essence of *Kelly* — that the court's power to grant payments from the estate of an incompetent is dependent upon statutory delegation — remains. Clearly then, a petition such as *duPont,* which is not within the ambit of the statutory delegation of the power to apply the substitution of judgment principal, would be rejected by the Maryland courts.

In conclusion, the *Whitbread* principle provides the court with the necessary latitude to deal fairly with the estate of an incompetent. It is hoped that its increasing acceptance, by either statutory or judicial adoption in the American jurisdictions, will be coupled with a prudent application, responsive both to the ward's probable wishes and to those that have a bona fide claim in his estate.

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