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Procedural Rules -- Emergency -- Judge's Discretion

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upon any more than Congressional clarification. Accordingly, lawyers and judges must live with the situation as it stands.

The most probable and under the circumstances the most reasonable approach is that taken by *Levitt* and the previous decisions under the act. That approach is to adopt the law of the state in its entirety, except where the requirement for demand on shareholders or other conditions precedent to bringing of the derivative suit so seriously and unreasonably burden the shareholder as to prevent him from bringing an otherwise bona fide suit under the act.

Following this rationale, *Levitt* will probably have very little effect outside of Massachusetts, but it will have a substantial effect in Massachusetts, the home of many investment companies. The effect will be to make the Investment Company Act available to shareholders who wish to attempt to enforce its provisions against directors without having to make a demand on the multitude of shareholders who are generally not interested in the internal operation of the company.

WILLIAM H. CANNON

Procedural Rules—Emergency—Judge's Discretion

The recent case of *Application of President & Directors of Georgetown College, Inc.*[1] tests the powers of a judge to violate usual procedural rules in an emergency situation. A patient, who had voluntarily submitted herself for treatment at Georgetown Hospital, refused to authorize blood transfusions which the doctors believed necessary to save her life. After the patient's husband had also refused to authorize the transfusions, the hospital's attorneys presented to a federal district judge an order authorizing transfusions "necessary to save her life,"[2] and requested him to sign it. The judge denied the order without comment, and the attorneys then orally petitioned a single judge of the District of Columbia Court of Appeals, Judge Skelly Wright, in chambers to sign the order. Judge Wright went to the hospital, talked with the patient and her husband, and discovered them adamant in their conviction that blood transfusions amount to "drinking blood," a practice strongly condemned by their religious sect, the Jehovah's Witnesses. He advised the patient's husband to obtain counsel, but after making a telephone

[1] 331 F.2d 1000 (D.C. Cir. 1964).
[2] *Id.* at 1001 n.1.

call, the husband informed Judge Wright that he had discussed the matter with his church and had decided he did not want counsel. Judge Wright then, in the presence of members of the hospital staff, the hospital's counsel, and the patient's husband, signed the order just one hour and twenty minutes after it had been first presented to him. The transfusions were administered, and the patient thereafter recovered and left the hospital.

Judge Wright's action was affirmed by the court en banc without explanation in a per curiam decision,[3] accompanied by four concurring and dissenting opinions.[4]

While this case raises a multitude of questions, both constitutional[5] and procedural,[6] the scope of this note is confined to the questions of whether the basic rules of procedure were violated in this case and, if so, whether the violations were justified by the emergency situation. For present purposes it is assumed that Judge Wright had authority to act as a judge of original jurisdiction in this matter.

Judge Wright's action can be attacked on the grounds that no complaint was filed,[7] so that no action was commenced under Federal Rule 3,[8] and the jurisdiction of the court therefore never invoked.[9] Judge Wright treated the order itself as sufficient, since it substantively met all the requirements of a complaint, particularly in view of the fact that under Federal Rule 5(e) "the judge may per-

[3] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010 (D.C. Cir.), *cert. denied,* 377 U.S. 978 (1964).

[4] Judge Washington concurred on grounds that the order had expired by its own terms and was therefore moot. *Ibid.* Judge Danaher "would dismiss for lack of a case or controversy." *Id.* at 1011. Judge Miller, strongly dissenting, argued that the jurisdiction of the district court had never been invoked since there had been no complaint as required by Federal Rule 3, so that an appellate judge could not act, there being nothing to appeal from the district court. He further maintained that a single judge had no authority to hear an appeal. *Ibid.* Judge Berger asserted that the petition should be dismissed on grounds that there was no justiciable controversy, since the hospital had no standing to sue. *Id.* at 1015.

[5] For discussions of constitutional questions, see Note, 39 N.Y.U.L. REV. 706 (1964); Comment, 9 UTAH L. REV. 161 (1964).

[6] For a discussion of the validity of Judge Wright's actions in his capacity as a single appellate judge, see Note, 77 HARV. L. REV. 1539 (1964).

[7] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010, 1014 (D.C. Cir. 1964) (dissenting opinion).

[8] "A civil action is commenced by filing a complaint with the court." FED. R. CIV. P. 3.

[9] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010, 1014 (D.C. Cir. 1964) (dissenting opinion).

mit the papers to be filed with him"[10] rather than with the clerk. This argument is supported by the general proposition that a pleading shall be construed by its contents rather than by its caption.[11]

Judge Wright alternatively asserted that "the lack of a complaint is not jurisdictional and . . . when there has been no timely objection, a valid judgment may properly be entered in such an informal litigation."[12] While there are cases in accord with this argument,[13] it should be observed that in each of these cases there was either express waiver of the complaint by agreement of the parties,[14] waiver by failure of the defendant to answer after he had been duly served,[15] or waiver by the defendant's failure to object to the form of the complaint in his answer.[16] There is no evidence that the patient or her husband waived objection in *Georgetown* unless it can be said that a general appearance was made.[17] Some state cases have held that a judgment is void without proper commencement of the action by the filing of a complaint, *even* when the defendant appears and argues the case on the merits,[18] or when the parties have expressly agreed to waive the pleadings.[19]

But, even assuming that the order is acceptable as a complaint or that the lack of a complaint can be waived, there was no service

[10] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1001 n.2 (D.C. Cir. 1964), quoting from FED. R. CIV. P. 5(e). For a case applying the rule, see Robinson v. Waterman S.S. Co., 7 F.R.D. 51 (D.N.J. 1947), *aff'd on rehearing*. 8 F.R.D. 155 (D.N.J. 1948).

[11] *E.g.*, Harris v. Embrey, 105 F.2d 111 (D.C. Cir. 1939); Russell v. Bovard, 153 Kan. 729, 113 P.2d 1064 (1941); State *ex rel.* Gay v. District Court of St. Louis County, 200 Minn. 207, 273 N.W. 701 (1937).

[12] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1001 n.2 (D.C. Cir. 1964), quoting 2 MOORE, FEDERAL PRACTICE ¶ 3.04, at 719 (2d ed. 1964).

[13] Engineers Ass'n v. Sperry Gyroscope Co., 251 F.2d 133 (2d Cir. 1957) (applying the federal rules); Vider v. City of Chicago, 60 Ill. App. 595, *aff'd*, 164 Ill. 354, 45 N.E. 720 (1896); Leach v. Western North Carolina R.R., 65 N.C. 486 (1871). *Cf.* Hall v. Law, 102 U.S. 461 (1880).

[14] Vider v. City of Chicago, *supra* note 13. See also N. C. GEN. STAT. § 250 (1953).

[15] Leach v. Western North Carolina R.R., 65 N.C. 486 (1871).

[16] Engineers Ass'n v. Sperry Gyroscope Co., 251 F.2d 133 (2d Cir. 1957).

[17] See text accompanying notes 42-43 *infra*.

[18] Rhodes v. Sewell, 21 Ala. App. 441, 109 So. 179 (1926).

[19] New Haven Sand Blast Co. v. Dreisbach, 104 Conn. 322, 133 Atl. 99 (1926). See dictum in Windsor v. McVeigh, 93 U.S. 274, 283 (1876), which states "the decree of a court of equity upon oral allegations, without written pleadings, would be an idle act . . . ."

of process[20] upon the proper parties in this action, and indeed, it is not clear who the proper parties are. However, assuming that the hospital is a proper party to bring the action,[21] then presumably the patient would be the proper defendant, since only she, or her personal representative, would have the right to bring an action against the hospital for malpractice.[22] If so, the service requirement was clearly violated, since the patient was neither served with process, nor did she make an appearance at the "hearing."[23] However, Judge Wright suggested that the patient was obviously incompetent at the time[24] and thus seemed to assume her husband to be the proper party to the action.

It is commonly accepted that a husband can, in an emergency and when his wife is incapable of doing so, authorize medical treatment for her.[25] Whether he is, in such a situation, her guardian for all purposes has apparently never been decided. Perhaps he can be considered a proper "representative" under Federal Rule 17(c).[26]

[20] While under the Federal Rules filing of a complaint is the proper manner of commencing an action (see note 8 *supra*), service of process generally commences an action in the "code" states. See N.C. GEN. STAT. §§ 1-14, -88 (1953). The Federal Rules require service of process to follow the filing of the complaint. FED. R. CIV. P. 5.

[21] Judge Wright contended that the hospital was a proper party to bring a declaratory judgment action (he described the action as "in the nature of an injunction and declaratory judgment," 331 F.2d at 1002), since it faced possible civil and criminal liability if the patient died due to lack of proper treatment. *Id.* at 1009. Judge Berger challenged this contention on grounds that the patient and her husband consented to sign a release. 331 F.2d at 1015. Judge Wright argued that a release could not relieve the hospital's criminal liability. 331 F.2d at 1009 n.18. *Quaere:* What criminal liability could arise under these circumstances?

[22] FED. R. CIV. P. 17(a). A husband has no right of action against a surgeon for malpractice against his wife. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906).

[23] Judge Wright termed the gathering of hospital officials, their attorneys, and the patient's husband at which he signed the order a "hearing." 331 F.2d at 1002 n.4.

[24] There is a serious question as to whether a judge can decide incompetency without a hearing. See text accompanying notes 34-40 *infra*.

[25] However, it should be noted that the authority commonly given for this statement, while implying a husband has such authority, expressly does not decide the point. Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906). See 41 AM. JUR. *Physicians and Surgeons* § 111 (1942).

[26] Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or

It has been held that this rule does not make the appointment of a guardian ad litem mandatory,[27] if the incompetent person is ably represented otherwise.[28] However, failure to appoint a guardian must be the result of the court's considering all the circumstances, and, if such failure is merely an oversight of the judge,[29] or if the representation is inadequate,[30] then it is reversible error. The interest of the court in all cases is whether or not the infant or incompetent is represented adequately *at the trial.*[31] Hence, in *Georgetown,* even though Judge Wright advised the patient's husband to secure counsel and even though he presumably assumed the husband to be his wife's representative, perhaps the fact that the patient's husband did not obtain counsel invalidated a potentially valid representation of the patient at the hearing. For, despite the opportunity the husband was given, the fact that he did not avail himself of that opportunity resulted in the patient's interests not being adequately represented, thus defeating the primary purpose of the rule.[32] Rule 17(c) apparently gives a court no authority over the incapacitated person, other than in his capacity as a party.[33]

Any standing the patient's husband may have as a party to the action must be based upon the assumption that Judge Wright could, on the basis of his brief encounter with the patient at the hospital, declare her legally incompetent. The validity of such an assumption

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incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

FED. R. CIV. P. 17(c).

[27] Westcott v. United States Fid. & Guar. Co., 158 F.2d 20 (4th Cir. 1946).

[28] A representative may be considered sufficient, even though not duly appointed by the court. Westcott v. United States Fid. & Guar. Co., *supra* note 27; Rutland v. Sikes, 203 F. Supp. 276 (E.D.S.C. 1962); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949). See also Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

[29] Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958).

[30] Zaro v. Strauss, 167 F.2d 218 (5th Cir. 1948).

[31] See Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952).

[32] We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the Court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the Court has considered the matter and made *a judicial determination that the infant is protected* without a guardian.

Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35, 39 (5th Cir. 1958). (Emphasis added.)

[33] *In re* Ryan, 47 F. Supp. 10 (E.D. Pa. 1942).

is very doubtful. Under the District of Columbia Code equity has jurisdiction over insane persons,[34] but this has been construed to mean *after* an adjudication of insanity has been made.[35] Such adjudication requires investigations by the Commission of Mental Health,[36] service upon the party to be adjudged,[37] counsel for the alleged incompetent person,[38] and a jury trial if the alleged incompetent person demands it.[39] Implicit in all these safeguards is the idea that a person's freedom to make his own decisions is not to be disposed of lightly.[40]

Even if the adjudication procedure could be modified in a proper case and even if Judge Wright is deemed to have appointed the husband as his wife's guardian by implication, the problem of lack of service of process persists.[41] The only alternative to service of process is a general appearance before the court by the person to be served.[42] It could be argued that the patient's husband did make a general appearance in *Georgetown* on the grounds that he must have known Judge Wright's action was to have some legal significance, since he had been informed to obtain counsel, and that he was present at the "hearing" when the order was signed. The fact that he may not have known the legal effect of his appearance is not fatal, as long as the appearance was made.[43]

Even though the rules of procedure have been circumvented in *Georgetown,* perhaps an emergency situation requires some deviation from the normal rules. The emergency aspect of *Georgetown* is analogous to situations that permit a temporary restraining order to

[34] 21 D.C. CODE ANN. § 301 (1961).
[35] Cooper v. Burton, 127 F.2d 741 (D.C. Cir. 1942).
[36] 21 D.C. CODE ANN. § 308 (1961).
[37] 21 D.C. CODE ANN. § 311 (1961).
[38] Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957).
[39] 21 D.C. CODE ANN. § 312 (1961). For similar requirements under state statute, see N.C. GEN. STAT. § 35-2 (Supp. 1963).
[40] See Lynch v. Overholser, 369 U.S. 705 (1962). The Court held that a judge could not, during a criminal trial, declare the defendant insane and commit him to an asylum without his having pleaded insane or his having been adjudged insane by normal procedures. *But see* Moore v. Lewis, 250 N.C. 77, 108 S.E.2d 26 (1959), where the court held that, in a case where a guardian ad litem was appointed for a purpose *other* than that of representing the incompetent at an insanity hearing, "an inquisition to determine the sanity of the defendant is not a condition precedent to the appointment." *Id.* at 80, 108 S.E.2d at 28.
[41] See note 20 *supra.*
[42] See N.C. GEN. STAT. § 1-103 (1958).
[43] Beardsley v. Beardsley, 144 Conn. 725, 137 A.2d 752 (1957).

issue without service of process.[44] Judge Wright indicated that he considered the order he signed a temporary restraining order,[45] and, certainly, the compelling reasons for waiver of process in the more conventional temporary-restraining-order situation are present—urgency, and an alternative result of irreparable injury. Moreover, Judge Wright's primary rationale for signing the order was the classic purpose of any preliminary injunction—"to maintain the *status quo* and prevent the issue respecting the rights of the parties in the premises from becoming moot before full consideration was possible."[46] However, the order did not, in fact, preserve the *status quo;* rather, it "completely changed the *status quo ante* by granting fully and finally all of the relief sought, thus disposing of the matter on its merits,"[47] and leaving nothing more to litigate.[48] But because of the exigency of the situation, the *status quo* in this case could not be preserved by any action, or inaction, of Judge Wright. He was faced with the alternative of either saving the patient's life, with the result that she would be forever "contaminated" by the blood she had received, or allowing her to die, with the result that there is nothing to litigate except the hospital's possible liability for her death.[49]

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[44] FED. R. CIV. P. 65(b).

[45] 331 F.2d at 1003. Judge Wright calls his order a "temporary order," and cites Federal Rule 65(b).

[46] 331 F.2d at 1007. See 7 MOORE, FEDERAL PRACTICE ¶¶ 65.04-.05 (2d ed. 1964).

[47] Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010, 1014 (D.C. Cir. 1964) (dissenting opinion).

[48] It is generally held that interlocutory injunctive relief will not be given when the effect is to give plaintiff the relief he seeks without having a trial. *E.g.,* Kleins' Restaurant Corp. v. McLain, 293 Ill. App. 54, 11 N.E.2d 644 (1937) (where a temporary injunction against defendants' picketing plaintiff's restaurant was set aside); Dallas Independent School Dist. v. Daniel, 323 S.W.2d 639 (Tex. Civ. App. 1959) (where a temporary restraining order reinstating a custodian who had been fired was held to be void).

[49] Judge Wright's order is somewhat comparable to a preliminary mandatory injunction, and there are occasional dicta declaring that, in cases of extreme hardship where plaintiff's right is clear and certain, a preliminary mandatory injunction will issue, even though it in effect gives plaintiff all the relief he seeks. Dunn v. Retail Clerks Int'l Ass'n, 299 F.2d 873 (6th Cir. 1962); City of Decatur v. Meadors, 235 Ala. 544, 180 So. 550 (1938); Moss Indus., Inc. v. Irving Metals Co., 140 N.J. Eq. 484, 55 A.2d 30 (Ch. 1947). Annot., 15 A.L.R.2d 213, 224 (1951). At least one case so holds. Texas Pipe Line Co. v. Burton Drilling Co., 54 S.W.2d 190 (Tex. Civ. App. 1932). In that case, plaintiff was granted a temporary injunction ordering defendant to carry plaintiff's oil through defendant's pipe line. The court stressed defendant's public duty and the fact that defendant's hardship was trivial when compared with plaintiff's hardship. In *Georgetown* the petitioners'

An analogy can be made between *Georgetown* and the "sick child" decisions[50] that have upheld orders for medical treatment for minor children in emergency situations, despite the religious objections of the parents. This analogy is especially pertinent in view of Judge Wright's assumption that the patient was "*in extremis* and hardly *compos mentis* at the time," making it "the duty of a court of general jurisdiction . . . to assume the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life."[51] The relevancy of the sick child cases is diminished, however, by the strong probability that Judge Wright did not have jurisdiction over the patient as an incompetent.[52] All of the sick child decisions seem to have been decided by authority of some type of statutory grant of jurisdiction over "neglected" children under the doctrine of *parens patria*.[53] Only one case suggests that a court has other than statutory jurisdiction under the *parens patria* doctrine.[54]

The sick child cases, if relevant at all, would seem to be so not so much for their sanctioning of emergency medical treatment as for the procedure that they followed in an emergency situation. Most of the cases follow standard rules of procedure culminating in a hearing at which either a guardian is appointed for the purpose of approving the treatment or the treatment is authorized by a direct court order, as the statute involved dictates.[55] However, two of the

right is by no means clear, and balancing hardships is extremely difficult and produces no clear-cut conclusion.

[50] See, *e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962); *In re* Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933); *In re* Clark, 185 N.E.2d 128 (C.P. Ohio 1962); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

[51] 331 F.2d at 1008.

[52] See text accompanying notes 34-40 *supra*.

[53] People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952) (ILL. ANN. STAT. ch. 23, §§ 2006-07 (Supp. 1963)); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962) (N.J. STAT. ANN. §§ 9:2-9, 9:6-3 to -4, 9:6-11 (1960)); *In re* Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933) (N.Y. CHILDREN'S COURT ACT §§ 1-28); *In re* Clark, 185 N.E.2d 128 (C.P. Ohio 1962) (OHIO REV. CODE § 2151.33 (1953)); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947) (TEX. ANN. CIV. STAT. §§ 2330-37 (1964)).

[54] *In re* Clark, *supra* note 53 (dictum). The court was, however, acting by authority of a statute.

[55] Guardians were appointed in People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); Mitchell v. Davis, 205 S.W.2d 812 (Tex. Civ. App. 1947).

cases, *State v. Perricone*[56] and *In re Clark*,[57] represent a departure from normal procedure. In *Perricone* the complaint was oral, and both the formal pleadings and notice were waived.[58] The procedure followed in *Clark* strikingly resembles that of *Georgetown*. In *Clark* the court received an oral application for authority to administer blood transfusions to the three-year-old son of Jehovah's Witnesses, and the court issued an order authorizing the transfusions before any service was had upon the parents or a hearing was held. While the court had extensive statutory authority,[59] it considered such action within its "broad equitable jurisdiction" even without the statute.[60] The court was not concerned with the fact that the normal rules of procedure had been circumvented, since

> the law provides extraordinary remedies too; e.g., the temporary restraining order, whereby, for cause shown, the court may act first and inquire later.
>
> Where a child's well-being, especially his life is concerned, it would be precisely preposterous to withhold all measures in his behalf until a time for hearing had been found (or made) in the court's overflowing calendar; notices had been prepared; citations had been served; and hearing held—at best a week or two later. . . .
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> The court had not only the right but the duty to act in the child's behalf first and give the parents their day in court later.[61]

The constitutional questions raised by the *Georgetown* case challenge Judge Wright's authority to act at all in this situation. But, assuming his authority to act in some manner, the question of proper

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Treatment was administered under direct court order in *In re* Vasko, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933); *In re* Clark, 185 N.E.2d 128 (C.P. Ohio 1962). Assuming Judge Wright could get jurisdiction over the patient under 21 D.C. CODE ANN. § 301 (1961), the broad language of that statute would seem to permit either procedure.

[56] 37 N.J. 463, 181 A.2d 751 (1962).

[57] 185 N.E.2d 128 (C.P. Ohio 1962).

[58] It is not clear from the report how the pleadings and notice were waived. However, the parents were represented at the hearing by counsel, who argued the case on the merits after his motion to dismiss for lack of jurisdiction was overruled. State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

[59] Upon the certificate of one or more reputable practicing physicians, the court may summarily provide for emergency medical and surgical treatment which appears to be immediately necessary for any child concerning whom a complaint or an application for care has been filed, pending the service of a citation upon its parents, guardian, or custodian.

OHIO REV. CODE § 2151.33 (1953). Note that the court in *Clark* considered an oral application sufficient to satisfy the statute.

[60] *In re* Clark, 185 N.E.2d 128, 130 (C.P. Ohio 1962).

[61] *Id.* at 130-31.

procedure presents the dilemma of whether to preserve the basic concepts of law through orderly process, on the one hand, or to act decisively while it is still possible, on the other. Some procedure must be preserved, and perhaps the best way to do that is through the judge's own thought processes. In a recent federal decision[62] concerning failure to appoint a guardian ad litem for a minor, a judge was reversed not because he had failed to appoint a guardian, but because he had failed to give the matter careful consideration, so that his decision was based on inadvertence. Not the decision itself, but the mode of arriving at it seemed significant to the court. Perhaps Judge Wright was on the right track when he gave the interested parties actual notice of his intention to act and when he advised the patient's husband to obtain counsel. Perhaps he should have gone further in actually explaining to the parties the legal significance of what he might do and their rights with respect to it. Of course, there is great virtue in the mechanics of service of process and filing of pleadings, for such devices nurture the American ideal—law over man. But, in an emergency situation, perhaps the best that can be done is to require the judge to adhere to the rules of procedure as closely as possible, yet allow discretion to temper them.

DORIS R. BRAY

Taxation—Estate Planning—The Marital Deduction—Formula Bequests

The marital deduction was first introduced into the federal estate tax law in 1948[1] to eliminate the inequities[2] between tax treatment of estates in common law states and those in community property states. It allows a deduction of up to fifty per cent of the adjusted gross estate[3] for the value of any property interest, other

[62] Roberts v. Ohio Cas. Ins. Co., 256 F.2d 35 (5th Cir. 1958).

[1] Revenue Act of 1948, ch. 168, § 361, 62 Stat. 117, amending Int. Rev. Code of 1939, ch. 3, § 812, 53 Stat. 123 (now INT. REV. CODE OF 1954, § 2056). For a discussion of the history of the marital deduction see, United States v. Stapf, 375 U.S. 118 (1963).

[2] LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXES 368-70 (2d ed. 1962).

[3] INT. REV. CODE OF 1954, § 2056(c)(1). The adjusted gross estate is derived by subtracting from the gross estate expenses and deductions allowed under INT. REV. CODE OF 1954, §§ 2053, 2054. INT. REV. CODE OF 1954, § 2056(c)(2)(A). It is a concept primarily designed for determining the marital deduction. S. REP. No. 1013, 80th Cong., 2d Sess., pt. I, at 5 (1948).