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PRACTICE AND PROCEDURE-PROCEEDINGS FOR RESTORATION OF SANITY -WHO MAY APPEAL FROM AN ADJUDICATION OF SANITY

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PRACTICE AND PROCEDURE—PROCEEDINGS FOR RESTORATION OF SANITY —WHO MAY APPEAL FROM AN ADJUDICATION OF SANITY—In a proceeding commenced by a guardian ad litem in a probate court to determine whether an incompetent might be adjudged sane, the committee was made respondent and resisted the adjudication of sanity. From a judgment of competency, the committee appealed to the proper court of general jurisdiction. The applicable statutes specifically gave only the petitioner the right to appeal in proceedings

for restoration of sanity,[1] but another statute gave the right to appeal from probate to circuit courts to "any person interested in any . . . decree of any probate court, and considering himself injured thereby." [2] Petitioner moved in the circuit court to dismiss on the ground that the committee was not entitled to appeal. From a judgment refusing to dismiss, petitioner appealed. *Held*, affirmed. The committee may appeal as a person interested in and injured by the decree of restoration of sanity. *Cobb v. South Carolina National Bank*, (S.C. 1947) 43 S.E. (2d) 465.

It is fundamental that the right of appeal is not inherent but must find its basis in the statutes.[3] The problem of who may appeal a finding of competency in restoration proceedings has arisen when the statutes involved did not specifically designate the persons who might obtain review. Some courts construe the restoration statutes themselves as allowing the appeal.[4] Others, as in the principal case, depend on the right of appeal generally given from probate and other inferior courts to courts of general jurisdiction.[5] Under the latter statutes the crucial problem is whether the person seeking review is interested, aggrieved, or injured by the adjudication of sanity. The cases generally support appeals by a person who has a recognizable personal or pecuniary interest.[6] Thus the incompetent or his guardian ad litem,[7] or his near relative [8] may appeal a finding against competency; and the heir presumptive [9] and a person with the possible duty of support of the incompetent, should he become indigent,[10] likewise are said to have recognizable interests in a decree of competency. Many cases have without comment allowed a committee or guardian (as distinguished from a guardian ad litem) to appeal a lower court decree restoring competency,[11]

[1] S.C. Acts (1943) No. 136.

[2] S.C. Code (1942) § 230.

[3] 2 AM. JUR., Appeal and Error, § 6 (1936); 4 C.J.S., Appeal and Error, §§ 1, 167 (1937).

[4] State ex rel. Wilkerson v. Skinker, 344 Mo. 359, 126 S.W. (2d) 1156 (1939).

[5] Fitzpatrick v. Young, 160 Ky. 5, 169 S.W. 530 (1914); Com. ex rel. Hibbert v. Davidson, 269 Pa. 218, 112 A. 115 (1920); Vinstad v. State Board of Control, 169 Minn. 264, 211 N.W. 12 (1926); Bradford v. Ragsdale, 174 Tenn. 450, 126 S.W. (2d) 327 (1939).

[6] Thus when the guardian is removed for misconduct he may appeal because of his personal interest, Gray v. Parke, 155 Mass. 433, 29 N.E. 641 (1892). Some cases indicate that because he has this right, the guardian also has the right to appeal removal as a result of restoration proceedings, Fitzpatrick v. Young, 160 Ky. 5, 169 S.E. 530 (1914). *Contra:* Kelly v. Probate Ct., 83 Minn. 58, 85 N.W. 917 (1901).

[7] Robinson v. Wagner, 95 Ohio St. 300, 116 N.E. 514 (1917); Vinstad v. State Board of Control, 169 Minn. 264, 211 N.W. 12 (1926).

[8] Shafer v. Shafer, 181 Ind. 244, 104 N.E. 507 (1914); Comm. ex rel. Hibbert v. Davidson, 269 Pa. 218, 112 A. 115 (1920); Bradford v. Ragsdale, 174 Tenn. 450, 126 S.W. (2d) 327 (1939).

[9] Robinson v. Dayton, 190 Mass. 459, 77 N.E. 503 (1906); Appeal of McKenzie, 123 Me. 152, 122 A. 186 (1923).

[10] Comm. ex rel. Hibbert v. Davidson, 269 Pa. 218, 112 A. 115 (1920).

[11] Chase v. Chase, 216 Mass. 394, 103 N.E. 857 (1914); Mellott v. Lambert, 161 Okla. 276, 18 P. (2d) 532 (1933); Re Bearden, (Mo. App. 1935) 86 S.W. (2d) 585.

but where the question of interest has been raised the cases are in conflict. Some courts, as in the principal case, recognize the interest of the guardian without demonstrating how he is interested.[12] A leading Massachusetts case [13] holds that the guardian is not interested in or aggrieved by a finding of competency since he is a mere trustee without a recognizable pecuniary interest. The absence of personal interest seems clear.[14] A Washington case probably best illustrates the view that the guardian is an interested party, stating that he is aggrieved in his representative capacity, as a representative of the incompetent's estate.[15] But this seems questionable since it means that the guardian as a representative has an interest in opposing a decree in favor of the one he represents.[16] Yet a majority of the courts seem to recognize the guardian's interest. Running through all insanity and incompetency proceedings is the interest of the state as parens patriae.[17] It is submitted that perhaps the only explanation for the majority's recognition of the guardian's interest is that those courts want to protect the state's interest in obtaining a proper determination of competency, through an appeal by the guardian, who is an officer of the court.

Chester Lloyd Jones, S.Ed.

[12] Principal case at 466. Semble, Re Olson, 10 S.D. 648, 75 N.W. 203 (1898); Fitzpatrick v. Young, 160 Ky. 5, 169 S.W. 530 (1914).

[13] Ensign v. Faxon, 224 Mass. 145, 112 N.E. 948 (1916).

[14] Ibid.

[15] Re Bayer's Estate, 108 Wash. 565, 185 P. 606 (1919).

[16] In the somewhat analogous field of trusts it has been held that a trustee has a right of review in his representative capacity from the attempted termination of a trust at the instance of the beneficiaries, Ripley v. Brown, 218 Mass. 33, 105 N.E. 637 (1914); Fletcher v. Los Angeles Bank, 182 Cal. 177, 187 P. 425 (1920). But this is justified as a correlative of the trustee's duty to the settlor or the remainder beneficiaries. It is difficult to find such duties owing in the case of guardianship except to the incompetent himself.

[17] Hamilton v. Traber, 78 Md. 26, 27 A. 229 (1893); Hughes v. Jones, 116 N.Y. 67, 22 N.E. 446 (1889); Re Moynihan, 332 Mo. 1022, 62 S.W. (2d) 410 (1933); 14 A.L.R. 307 (1921).