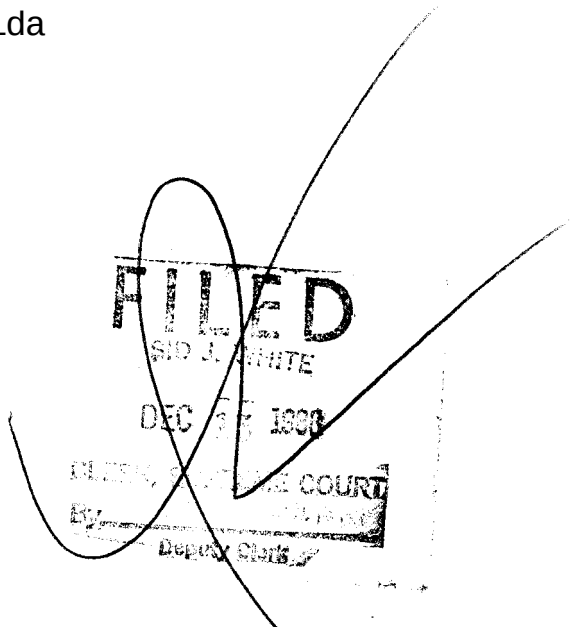
1-7-89

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

Case No. **73,330**

IN RE; JOHN WINDER BRYAN, JR.,
Incompetent.



ON CERTIFIED QUESTION FROM THE **FOURTH DISTRICT** COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

The parties will be referred to by their proper names. The following symbol will be used:

R - Record.

A - Appendix.

STATEMENT OF THE CASE

Mr. Bryan's two sons filed a petition to adjudicate him incompetent in the Circuit Court for Broward County (R 300). Mr. Bryan contested the petition and the case was tried before the court, which found him incompetent. Mr. Bryan appealed, and the Fourth District affirmed, certifying the following question:

> IN A DECLARATION OF INCOMPETENCY, DOES THE STANDARD OF PROOF OF PREPONDERANCE OF THE EVIDENCE SUFFICE IF IT IS BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD.

STATEMENT OF THE FACTS

Mr. Bryan, age 73, got married on March 30, 1987. Mr. Bryan's sons by a former marriage attempted to get Mr. Bryan's wife to execute a post-nuptial contract, which she refused to do (R 84). Mr. Bryan's sons then filed a petition to have him declared incompetent (R 300). The court appointed an examining committee which consisted of Dr. Bronson McNierney, an internist who was Mr. Bryan's family physician, Dr. Gordon

Bond, a psychiatrist, and Edith Thomas, a friend and business associate of Mr. Bryan.

Dr. Bond, the psychiatrist, was of the opinion that Mr. Bryan was competent (R 330). Dr. McNierney said in his report he was incompetent, relating it to "alcohol abuse" (R 300).

Dr. Henry J. Bessette, a clinical psychologist who has been president of the Florida Psychological Association and a member of the faculty of Nova University, examined and tested Mr. Bryan. He gave him an IQ test indicating an IQ of approximately **95 (R 10)**. He is in the 35th percentile of his age group which means that he is functioning better than one-third of the people his age (R **10)**. He also gave him a Rorschach test and the Minnesota Multiphasic Personality Inventory test. Dr. Bessett's opinion was that Mr. Bryan functions normally, although he is presently under stress, and that his reasoning faculties are normal for a person of his age. He further testified he was capable of understanding and managing his own affairs (R **10-12)**. He seemed to be aware of his money, was knowledgeable and astute, and in touch with reality (R **21, 22,** 37). Mr. Bryan told Dr. Bessette his sons were mad about him getting married and were afraid his wife would get his money (R 36). Dr. Bessette's opinion was that Mr. Bryan could manage his money (R **52)**.

Dr. Shook is a board certified internist who examined Mr. Bryan. Dr. Shook testified that Mr. Bryan knew his date of birth, could list the last four presidents of the United States, referring to President Carter as **"peanuts"** and referring to President Nixon as the one "thrown out." He could remember numbers, could recite them backwards and forwards, and was able to perform mathematical calculations. He even told Dr. Shook they thought he was incompetent because he would not take his medication. Dr. Shook felt he was able to understand what was going on and that he was capable of managing his own affairs **(R 238-246).**

The only other medical testimony was that of Mr. Bryan's personal physician, Dr. Bronson J. McNierney, an internist and gastroenterologist (R **126).** Since the trial court relied entirely on this, the only medical evidence against Mr. Bryan, we shall set it forth in detail.

Dr. McNierney had seen Mr. Bryan approximately 40 times over the past **12** years and last saw him on April 18, **1987** (R **126-127).** His notes reflected that in **1976** Mr. Bryan was consuming one pint of alcohol a day (R **128).** He was always sober when he was in Dr. McNierney's office (R 135).

Mr. Bryan's history, as testified to by Dr. McNierney, was that he was hospitalized in November of **1976** for a stroke,

hospitalized in October of **1980** for heart disease and installation of a pacemaker, suffered subsequent smaller strokes, was hospitalized in **1982** for pneumonia, and in **1983** when he was injured in an accident while a passenger in an automobile **(R 128-129).** His testimony regarding incompetency was as follows:

> Q Do you have an opinion, Doctor, in reference to John's competency to manage his own affairs?
>
> A I don't think John should be left to his own self. He should not live alone and he should not manage his own affairs, including medication, which is my primary concern. He'll sit there and tell me anything and he's most agreeable and he's a pleasant patient to have come in the office, never argumentative, never turn me down for anything. But then he goes out and does pretty much whatever happens.
>
> I've always been relieved when I could have a closer contact with the housekeepers. He's frequently had a full-time, live-in housekeeper over the years. I tried to know them and get them on a basis where they would feel free to call me and let me know when John was not taking care of himself.
>
> Frequently, when he would get into difficulty would be when the housekeeper would leave and he would be between. That's when he would get in trouble, in my opinion. (R **132).**
>
> * * *
>
> Q Do you feel that he is mentally incompetent?
>
> A I believe that at times, he is totally mentally incompetent; at times, he is quite lucid. This has been the history.
>
> Q Have you seen him when he was mentally incompetent in the last year?
>
> A No, sir.

Q Physically, how does he rank with other 73-year-olds that are patients of yours?

A I think he's a walking time bomb.

Q Compared to other 73-year-old patients?

A Yes, sir.

Q You kept him alive for several years, no heart attacks or nothing since 1982, pneumonia?

A I think it's been more of a matter of him being very fortunate with good genes. He's had a series of strokes. He's had severe heart disease, so bad that the cardiologist doesn't even want to catheterize him to find out if they could. That's real unusual for our cardiologists.

He's had high blood pressure and at times, it's been quite high. He gets pneumonia quite easily, at least twice since - once we hospitalized him.

Q Does he need to be put in a rest home?

A No, sir. I think he'd be very unhappy in a rest home.

Q That would have been his death maybe?

A I think almost all my patients are unhappy there. Yes, I think it would hasten his death.

Q Do you think that his marriage to Dorothy Bryan seems to have benefited him?

A I only observed him on one occasion, April 8th. I never saw him look happier. He always comes in very presentable, but particularly well dressed that morning. (R 136-137).

* * *

Q Basically speaking, your incompetence diagnosis is based primarily on your past history of alcoholism and his heart attacks?

A No, sir. Also, multiple strokes. Dr. Murray Todd is the neurologist that saw him both in the first hospitalization at North Broward and at

the subsequent hospitalization at North Ridge Hospital. I spoke to him.

Q No, we can't. We're not here to find out what you spoke to another doctor about.

You have no personal knowledge of any episode of mental competence per se?

A Only that John told me that he just stopped taking his medication in Ormond Beach and almost died. (R **143-144).** (Emphasis added)

Another psychiatrist, Dr. Jordan, also examined Mr. Bryan and found him to be competent (R **338).** The court admitted this report in evidence during the first part of this hearing which occurred on June **8, 1987** (R ***65-66).*** When the hearing resumed a month later, on July ***6,*** **1987,** the court insisted Dr. Jordan would have to testify, but he was out of town at that point (R **78-79).** The court then sustained an objection to Dr. Jordan's report (R **79).**

There were four lay witnesses who testified. Mr. Bryan's wife, Dorothy, and Carolyn Yuzzi, his neighbor who saw him on a daily basis, testified he was competent (R **117, 258).** The two lay witnesses who testified against Mr. Bryan were his sons. His son James felt his father was competent in some areas and not competent in others (R **177).** When asked the basis for this, he testified that his father spent unnecessary sums on insulating his attic and putting in a solar water heater (R **179-180).** His other son, John, felt he was

incompetent because he spent unnecessary sums on burial arrangements (R **212-214**).

The trial court emphasized its reliance on the testimony of Dr. McNierney in the order:

> 6. The Court made the determination of this finding and need based upon the clear and convincing evidence introduced by the Petitioners and in particular the testimony of Dr. Bronson J. McNierney who had been the incompetent's personal physician for a period of approximately **12** years and had the opportunity to observe and relate with JOHN WINDER BRYAN, JR. on approximately 41 office visits during that period. The Court was impressed with the doctor's credibility, sincerity and knowledge. The doctor indicated that JOHN WINDER BRYAN, JR. had a long time history of alcohol abuse and the same with the general health picture, stroke and heart problem rendered JOHN WINDER BRYAN, JR. a "walking time bomb". In the opinion of Dr. McNierney, JOHN WINDER BRYAN, JR. had numerous hospitalizations and had abused a medical program prescribed for him due to his obstinate approach towards the same or his inability to recall what procedures he was to follow coupled with his alcohol abuse. The doctor opined that JOHN WINDER BRYAN, JR. was incompetent and unable to handle his daily affairs. (R **418**).

The trial court also noted that Mr. Bryan had entered into a sudden marriage with a lady who had previously been his housekeeper Dr. McNierney testified that he had never seen Mr. Bryan happier than since his marriage to Dorothy (R **137**).

The trial court also noted that Mr. Bryan had renewed a lease with a tenant which was not as favorable to him as the prior lease. The tenant of the apartment, Carolyn Yuzzi,

explained that she and Mr. Bryan executed a new lease after she went through a divorce because she made a lot of improvements to the apartment, which was badly in need of repair. She put in new wallpaper, carpet, window treatments, lights, ceiling fans in every room, painted the outside and landscaped it (R **107-108**). Mr. Bryan testified he entered into the new lease with the tenant because he felt sorry for her and was doing her a favor (R **283**).

The trial court also found that Mr. Bryan did not know the extent of his assets and was confused. This court should read Mr. Bryan's testimony in its entirety. Although he was slightly confused about a few things, he obviously had an understanding of what was going on in his life. He testified that he did not tell his sons that he was getting married because it wasn't any of their business (R **283**). He testified that his sons were upset because he got married and they were afraid his money would disappear (R **274**). He testified as to medications he was taking (R **279-280**). He testified he had four grandchildren, two by each son, but could only think of the name of one of them at the time (R **287**). He also testified as to his assets (R **289**).

The court adjudicated him incompetent and Mr. Bryan appealed.

SUMMARY OI ARGUMENT

Taking away a person's right to control his own property should not be determined by the mere preponderance of evidence, like an automobile accident. The consequences are so drastic that a higher standard of proof, at the very least clear and convincing evidence, should be required. This would not be inconsistent with prior Florida decisions and this standard has been adopted in some other states.

The testimony in the present case did not even show incompetency by a preponderance of the evidence. The lower court placed great emphasis on Dr. McNierney's testimony. Dr. McNierney was Mr. Bryan's family physician and had been treating him for 12 years. It is clear from a reading of Dr. McNierney's testimony that his opinion as to incompetency was based on Mr. Bryan's drinking, his irresponsibility in taking his medication, and his stroke (which occurred in 1976). This is not the type of evidence sufficient to support an order of incompetency, particularly in light of the testimony of the clinical psychologist who tested Mr. Bryan extensively and found him to be a normal 73-year-old man. In addition, the only psychiatrist on the committee to examine Mr. Bryan also found him to be competent. So did Dr. Shook and Dr. Jordan.

The certified question should be answered in the negative and the judgment should be reversed.

ARGUMENT

CERTIFIED QUESTION

IN A DECLARATION OF INCOMPETENCY, DOES THE STANDARD OF PROOF OF PREPONDERANCE OF THE EVIDENCE SUFFICE IF IT IS BASED ON COMPETENT AND SUBSTANTIAL EVIDENCE IN THE RECORD.

POINT II

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF INCOMPETENCY UNDER ANY STANDARD OF PROOF.

We are combining the argument under both issues because the two issues are related and if the arguments were separated it would result in unnecessary repetition.

Section **744.331,** Florida Statutes (1987), provides in part:

> **744.331.** Adjudication of persons mentally or physically incompetent; procedure.
>
> **No** guardian of the person or of the property, or both, of a person alleged to be mentally or physically incompetent shall be appointed until after the person has been adjudicated to be incompetent in proceedings instituted for that purpose, in the following manner:
>
> **(1)** When a person is believed to be incompetent because of mental illness, sickness, excessive use of alcohol or drugs, or other mental or physical condition, so that he is incapable of caring for himself or managing his property or is likely to dissipate or lose his property or inflict harm on himself or others, a verified petition may be filed where the alleged incompetent resides or is found, for a judicial inquiry into the mental or physical condition, or both, of the alleged incompetent.

The proof in the present case fell far short of demonstrating that Mr. Bryan is "incapable of caring for himself or managing his property" An almost identical situation was presented in In re McDonnell, 266 So.2d 87 (Fla. 4th DCA 1972), in which the Fourth District reversed an order determining a woman incompetent. She was also aged 73 and drank alcohol to excess. She had many of the same physical ailments as Mr. Bryan. She had made a bad investment of $10,000 and an uncollectible loan of $6,000. As in the present case it was the children who were opposing her efforts to regain control over her own affairs. In reversing an order determining her to be incompetent, this court stated on page 88:

> No one, no matter how astute, is immune from bad investments. It is little more than pure speculation to conclude from these isolated examples that she cannot manage her own property or is likely to dissipate it or become the victim of designing persons. In our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather previous individual rights.
>
> Mrs. McDonnell's efforts to be restored to competency were resisted by the guardians of her person, the guardians being her two married daughters. The evidence which they caused to be brought before the court at the time of the hearing on the petition for restoration of competency certainly tends to establish that Mrs. McDonnell indulges in alcoholic beverages to an excess with sufficient frequency as to be harmful to her physical health. On a number of occasions she has become intoxicated to the extent that she has required someone to help her physically. The medical testimony established that her continued excessive use of alcohol would be harmful physically and could impair her ability to manage her own property.

> Well-intentioned though her daughters may have been in seeking to provide her help for what approaches physical incompetency, it is clear to us that at the time of the hearing on the petition for restoration Mrs. McDonnell was not mentally incompetent. To the contrary, she was of sound mind and capable of managing her own affairs. ...

In the present case the court relied entirely on the testimony of Dr. McNierney. The last time Dr. McNierney had seen Mr. Bryan was on April 8, 1987 (R 127), three months before the trial before the court. He had not seen him to be incompetent during the last year (R 136-137). In contrast two psychiatrists, Dr. Jordan and Dr. Bond, an internist, Dr. Shook, and a clinical psychologist, Dr. Bessette, all examined Mr. Bryan during the pendency of these proceedings and were of the opinion he was competent.

In In re Pickles' Petition, 170 So.2d 603 (Fla. 1st DCA 1965), the court traced the history of competency proceedings from ancient times, through its development in England, in America, and in Florida. In reversing an order of incompetency, based on the diagnosis of schizophrenia, the First District stated on page 614:

> No question of bad motive on anyone's part is demonstrated in this proceeding. The concern of the trial judge and the examining committee has obviously been directed toward assisting Appellant. It is apparent that Appellant's parents have "walked the long mile" in trying to aid her when she has gotten into trouble. She admits to having passedworthless checks and embezzling funds which resulted in her seeking assistance fromherparents. It is likewise apparent that Appellant has violated the mores of conduct regarded as normal by the present day

> standards of society. We do not condone these derelictions on Appellant's part: however, the proofs submitted herein do not constitute sufficient grounds for adjudicating a person to be incompetent. As stated by the doctor who testified in behalf of Appellant, "many people get into trouble -- they are not incompetent."
>
> A person under restraint of his liberty is entitled to liberation where reasonable doubt exists as to his mental condition. An adjudication of incompetency is a partial deprivation of it.

Section 394.467, Florida Statutes (1973), governs involuntary hospitalization for mental illness. Section 394.455(3), Florida Statutes (1973), defines mental illness:

> "'Mentally ill' means having a mental, emotional, or behavioral disorder which substantially impairs the person's mental health."

The constitutionality of Section 394 was upheld by this court in In re Beverly, 342 So.2d 481 (Fla. 1977). In that case this court reviewed decisions from other jurisdictions and determined that Florida would follow the vast majority of other states in requiring clear and convincing evidence in commitment proceedings. This court reversed an order for involuntary hospitalization, although it recognized that the appellant was mentally ill and in need of care or treatment.

If clear and convincing proof is necessary to involuntarily commit a person, it should also be necessary to take

away a person's rights to manage his own property. Earlier cases appear to support that view.

In Flewwellin v. Jeter, 189 So. 651 (Fla. 1939), the validity of one of our prior and similar incompetency laws was in issue. This court upheld the act, but stated on page 654:

> If the statute was such as to be invoked other than for the protection of the property and the person of the alleged defective or infirm person, it would be in conflict with Section 1 of the Declaration of Rights of our Constitution andwould, therefore, be invalid; but when it may only be used to protect the sacred rights guaranteed by Section 1 of the Declaration of Rights of our Constitution, it is a valid and wholesome Act. See In re Storick, 64 Mich. 685, 31 N.W. 582; Burke v. McClure, 211 Mo.App. 446, 245 S.W. 62
>
> For the reasons above stated, it is necessary that the courts apply the statute with caution because such statutes are easily capable of abuse by designing people to accomplish that very thing which the statute was enacted to guard against. See In re Hoffman's Estate, 209 Pa. 357, 58 A. 665; In re Bryden's Estate, 211 Pa. 633, 61 A. 250. (Emphasis added).

See ~~also~~ Brand v. Anderson, 192 So. 194 (Fla. 1939).

Although our research does not reveal any Florida cases in which it was specifically held that the clear and convincing test is applicable where a person is declared incompetent to manage his property, it was so held in In re Guardianship of Corless, 440 N.E.2d 1203 (Ohio Ct. App. 1981), wherein the court stated on page 1207:

> For these reasons, this court feels that the degree of proof required should be clear and convincing evidence. Once a guardian has been

> appointed, the ward can no longer direct the disposal of his own property, create legal relations, enter contracts, or transact any other business. While he or she may remain physically unconfined, mentally there is almost total confinement. Thus, the consequences to the proposed ward are so drastic that nothing less than this degree of proof will adequately protect the rights of that person.

In Mever v. Sanderson, **165** Cal.Rptr. **217, 106** Cal.App.3d **611 (1980),** a conservator (which is the California equivalent of a guardian) was appointed, and the appellate court reversed, stating:

> Balancing the benefit and purpose of the probate conservatorship proceedings against the adverse consequences to the individual clearly suggeststhe proper standard is clear and convincing proof. The deprivation of liberty and stigma which attaches under a probate conservatorship is not as great as under an LPS conservatorship. However, to allow many of the rights and privileges of everyday life to be stripped from an individual "'under the same standard of proof applicable to run-of-the-mill automobile negligence actions'" cannotbetolerated.
>
> **165** Cal.Rptr. **217, 222.**

There are surprisingly few other cases in other jurisdictions which discuss the standard of proof. There is an annotation at **9** A.L.R.3d **774,** in which it is stated on pages **778-779:**

> Under statutes or at common law, the general test is usually the mental ability to manage property or business with some degree of competency. While it is difficult to state the test applied by the courts more precisely, it is clear that no very high standard of competence is to be exacted: mere lack of good business sense not amounting to some degree of mental incompetency is ordinarily not

> regarded as sufficient to require guardianship. Usually, before a guardian of the property will be appointed, it must be shown that the ward's property is being recklessly or foolishly wasted or dissipated, or that the ward is in a mental state such that he has come under the influence of unscrupulous persons who are fleecing him of his goods, or that he is likely to do so if left to his own management.
>
> The mere fact that the alleged incompetent is managing his property with less than normal business competence, has made investment or other business errors, or has chosen advisers or objects of expenditure not approved of by the applicant for guardianship, has usually been held insufficient to justify intervention by the courts.
>
> As has been indicated above, the management incompetency necessary to justify appointment of a conservator must usually be found to be associated with some degree of mental unsoundness. Mere physical disability, from age or other causes, has usually, although not universally, been regarded as not calling for guardianship, even though it may substantially preclude the subject of inquiry from caring for his own property. (Footnotes omitted)

In the present case Mr. Bryan was examined by a clinical psychologist, tested extensively, and the psychologist was of the opinion that he was competent. Mr. Bryan was also examined by Dr. Bond, a psychiatrist, one of the members of the committee appointed by the court, who also determined he was competent. Dr. Jordan, another psychiatrist, reported he was competent as did Dr. Shook, an internist. The trial court chose to disregard these opinions and rely solely on the testimony of Mr. Bryan's family physician, whose opinion was based on a stroke which had occurred ten years earlier, excessive use of alcohol, and a failure to regularly take his

medication. Dr. McNierney had not even seen Mr. Bryan within the three months prior to this trial, nor had he seen him incompetent during the last year. This proof certainly did not meet the test of clear and convincing evidence, which is applicable in commitment proceedings, nor did it did meet the preponderance of the evidence test.

CONCLUSION

This court should answer the certified question in the negative and hold that clear and convincing evidence is required to declare a person incompetent. If this court determines that the preponderance of the evidence is sufficient, then the opinion of the Fourth District should still be reversed because the evidence in this case did not meet that test.

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By 
LARRY KLEIN

CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing, together with Appendix attached, has been furnished, by mail, this 13th day of December, 1988, to: GARY S. MAISEL, PATTERSON MALONEY & GARDINER, 600 South Andrews Avenue, Suite 600,, Fort Lauderdale, FL 33301.

LARRY KLEIN