

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

Case No. 73,330

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

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FILED

SID J. W.

JAN 11 1973

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

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ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT  
COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

DINGWALL & STANLEY  
Cumberland Bldg., Suite 500  
800 East Broward Blvd.  
Fort Lauderdale, FL 33301  
(305) 463-5700

and

LARRY KLEIN, of  
KLEIN & BERANEK, P.A.  
Suite 503 - Flagler Center  
501 South Flagler Drive  
West Palm Beach, FL 33401  
(407) 659-5455

TABLE OF CONTENTS

Page

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.

1-3

Conclusion

4

Certificate of Service

4

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.

Respondents emphasize on page 2 that the Fourth District noted that the trial judge stated that his findings were based on clear and convincing evidence. The Fourth District did not find that there was clear and convincing evidence. Indeed if the Fourth District had felt there was clear and convincing evidence, it would not have certified the issue to this court, because the question would be moot.

On page 3 respondents state that the trial court sustained an objection to the admissibility of the report of the committee appointed to examine Mr. Bryan, referring to page 79 of the record. This is not correct. Respondents' counsel objected to the report of Dr. Jordan, because he was not appointed to the committee, and the court ultimately sustained that objection (R 79). The report of Dr. Bond, a psychiatrist who was a member of the committee, was not excluded from evidence, nor even objected to (R 79).

Respondents emphasize the testimony of lay witnesses, because clearly the preponderance of the evidence of the experts, including psychiatrists and psychologists, was that Mr. Bryan was not incompetent.

On page 6 respondents argue that Caroline Yuzzi was making a profit by subletting her apartment which she rents from Mr. Bryan. She explained, however, that she had made many improvements to the apartment, including new wallpaper, carpet, window treatments, lights, ceiling fans in every room, outside paint, and landscaping (R 107-108).

The lay witnesses whom respondents rely on are themselves. It is important to remember that the respondents are Mr. Bryan's sons by a prior marriage and want to make sure Mr. Bryan does not use up his money so that they will inherit it. There was no sudden change in Mr. Bryan's ability to handle his affairs when he got married. Yet his sons were perfectly content to allow him to manage his own affairs until he got married, at which time they attempted to have Mr. Bryan's wife execute a post-nuptial contract (R 84). Dr. McNierney noted that Mr. Bryan had a good marriage and he had never seen Mr. Bryan happier (R 137).

Respondents recognize on page 11 that the trial court based its conclusions on the testimony of Dr. McNierney. This case was tried in July of 1987. Dr. McNierney had last seen Mr. Bryan in

April of 1987 (R 126-127). Dr. McNierney had not observed Mr. Bryan to be mentally incompetent during the last year (R 136-137). Dr. McNierney was the only physician on whom the trial court relied, and his testimony, set forth on pages 4 through 6 of our initial brief, demonstrates that it was primarily Mr. Bryan's failure to take his medicine which was the basis of his testimony. His testimony really does not support a finding of incompetency.

Dr. McNierney is an internist. Another internist, Dr. Shook, testified Mr. Bryan was competent. Dr. Bessette, a clinical psychologist, tested him extensively and testified he was competent, and two psychiatrists, Dr. Bond, who was on the examining committee, and Dr. Jordan (whose report we recognize had questionable admissibility) were both of the opinion he was competent. The evidence was insufficient under any standard of proof.

Respondents' argument that the standard of proof should not be clear and convincing evidence is contained on pages 12 through 14 of respondents' brief. It contains no citations of authority from Florida or any other jurisdiction which would indicate that the standard should be less than clear and convincing.

CONCLUSION

The order should be reversed.

DINGWALL & STANLEY  
Cumberland Bldg., Suite 500  
800 East Broward Blvd.  
Fort Lauderdale, FL 33301  
(305) 463-5700

and

LARRY KLEIN, of  
KLEIN & BERANEK, P.A.  
Suite 503 - Flagler Center  
501 South Flagler Drive  
West Palm Beach, FL 33401  
(407) 659-5455

By



LARRY KLEIN

CERTIFICATE OF SERVICE

I CERTIFY that copy of the foregoing, together with Appendix attached, has been furnished, by mail, this 13<sup>TH</sup> day of January, 1989, to: GARY S. MAISEL, PATTERSON, MALONEY & GARDINER, 600 South Andrews Avenue, Suite 600, Fort Lauderdale, FL 33303.



LARRY KLEIN