

PennDOT if PennDOT negligently left gravel or debris on the roadway and such gravel or debris was the proximate cause of plaintiff's injuries. The court will therefore allow the plaintiff the opportunity to proceed under that theory.

ORDER OF COURT

January 24, 1992, the court will not dismiss the case because of the sovereign immunity statute. The plaintiff must prove that this case falls within 42 Pa.C.S.A. §8522(b)(4).

IN RE: DETER, C.P. Franklin County Branch, Orphans Court Division, No. 48 of 1991

Incompetency - Prior Power of Attorney

1. A finding of incompetency does not compel the appointment of a guardian where a durable power of attorney is previously in place.
2. In determining whether to appoint a guardian where a power of attorney is previously appointed, the Court may consider the attorney-in-fact's education, background and experience.

George W. Wenger, Jr., Esquire, Attorney for Petitioner
David C. Wertime, Esquire, Attorney for Respondent

ADJUDICATION AND DECREE NISI

KAYE, J., February 10, 1992:

ADJUDICATION

On June 18, 1991, Charles Deter and Mary Deter filed a petition pursuant to Section 5511 of the Probate, Estate and fiduciaries Code ("PEF Code"), 20 Pa.C.S.A. §5511 et seq., seeking an adjudication of incompetency of their mother, Catherine B. Deter, (referred to in some pleadings as "Catherine W. Deter"), and the appointment of Charles Deter as guardian of her person, and Chambersburg Trust Company, as guardian of her estate. A citation was issued upon the alleged incompetent, and a hearing thereon was scheduled for July 29, 1991.

On July 22, 1991, the alleged incompetent, by Ruth B. Wingert, her attorney-in-fact, filed an answer praying that the petition for incompetency be dismissed or, in the alternative, that Ruth B. Wingert be appointed as guardian of the person and estate of the alleged incompetent. By agreement of the parties, the hearing was continued to August 22, 1991. On the latter date, evidence was taken, and further evidence taken and was marked closed on September 19, 1991. The matter was put down for argument at the October, 1991 argument court. The matter having been fully briefed and argued is now before the Court for decision.

I. ISSUES.

A. Whether the evidence warrants a finding of incompetency.

B. Assuming a finding of incompetency whether a guardian of the person and/or the estate will be granted in this case where a valid durable power of attorney is existent.

II. FINDINGS OF FACT.

A. Cathreine W. Deter (sometimes referred to as "Mrs. Deter" or "the alleged incompetent"), a woman born February 15, 1915, currently is a resident of Menno Haven, Inc., ("Menno Haven") a nursing home facility located in Chambersburg, Franklin County, Pennsylvania.

B. Mary Deter, a resident of 567 Mt. Pleasant Road, Fayetteville, Franklin County, Pennsylvania, is the only daughter of Catherine W. Deter.

C. Charles E. Deter, a resident of 640 Mickey Inn Road, Chambersburg, Franklin County, Pennsylvania, is the only son of Catherine E. Deter.

D. Catherine W. Deter is a widow.

E. George W. Baker, Jr., is a medical doctor licensed in Pennsylvania, and who was physician to the alleged incompetent from about 1970, and had last seen her, prior to his testimony, on April 4, 1991.

F. Dr. Baker diagnosed Mrs. Deter as having suffered a stroke in May, 1988, and as now suffering from Alzheimer's disease.

G. Dr. Baker observed that Mrs. Deter's intellectual functioning is in decline, that she cannot converse or think well, is unable to make decisions concerning her medical welfare, and is likely to become the victim of designing persons.

H. In the opinion of Dr. Baker, Mrs. Deter's condition will not improve, will deteriorate, and is one for which there is no effective medical treatment.

I. On My 20, 1988, Mrs. Deter executed a durable power of attorney in the law offices of Attorney Richard K. Hoskinson. The power of attorney granted general powers to the designated attorney-in-fact, Ruth B. Wingert, sister of Catherine W. Deter, and named Paul B. Wingert, brother of Catherine W. Deter, as successor attorney-in-fact.

J. In addition to the general powers conferred, the power of attorney expressly provided a grant of the following powers:

1. "To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for [her] care."
2. "To authorize medical and surgical procedures."

K. The power of attorney has not been revoked, nor has it been amended in any way since its execution, and its validity is not in question.

L. Mrs. Deter, her sister, Ruth B. Wingert, and a third sister, now deceased, about forty years ago jointly secured the assistance in their investments and other financial affairs, of William M. L. Etter, who was a financial planner at that time. This relationship continued until his retirement three years ago at age 83.

M. Mr. Etter had a long professional relationship with Mrs. Deter, assisting her with financial matters after the death of her husband.

N. Mr. Etter testified at the instant hearing that he was aware of the relationship between Mrs. Deter and her sister, Ruth B. Wingert, and that Mrs. Deter had confidence in her sister regarding business matters.

O. At the time of the preparation of the durable power of attorney, Attorney Richard Hoskinson spoke with Mrs. Deter regarding its content. Mrs. Deter stated how glad she was to have her sister, that she could not rely on her son.

P. On April 19, 1989, Mrs. Deter was taken to Menno-Haven, Inc. by her sister, Ruth B. Wingert, and was enrolled in a program known as Adult Day Care, which provides what was characterized by its assistant director as a social and medical model. She continued in the program until May 24, 1991, on a three day per week schedule. On the latter date, her sister, Ruth indicated she was unable to care for Mrs. Deter during the times she was not at the day care.

Q. Prior to her commencing residence at Menno-Haven, Mrs. Deter resided with her daughter, Mary Deter. On several occasions the administrators of the Adult Day Care program noted that Mrs. Deter arrived at the program not fully dressed, with her hair down, and with her bonnet not in place. Difficulty was experienced in Menno-Haven's attempts to communicate with Mary Deter regarding these matters. Ruth Wingert was the person Menno-Haven considered as the "contact person" for these issues, and Victoria Krentisky, assistant director of Adult Day Care at Menno-Haven, found Ruth Wingert to be generally available to discuss these concerns.

R. During the time prior to Mrs. Deter's admission to Menno-Haven as a resident:

1. Mary Deter would not provide required supervision of her mother, occasionally leaving her alone at night.
2. Mary Deter would not provide requested grocery receipts or assist with payment of household bills, as requested by Ruth Wingert.
3. On several occasions, Mary Deter went out for the evening, and became intoxicated. Unable to find transportation to her residence, she would call Mary Wingert during late night hours to come and pick her up.
4. Charles Deter resided about two miles from his mother, but did not visit regularly. Although he apparently performed tasks if specifically asked, he did very few of the tasks which were required for the maintenance of the mother's residence, and virtually nothing on his own volition and without a specific request.

5. While Catherine Deter was in the Adult Day Care program at Menno-Haven, support group meetings were held in alternate months. Ruth Wingert and Paul Wingert were the only family members who attended these meetings with Catherine.

S. Sometime, apparently in mid-1989, application was made for Mrs. Deter's admission as a resident at Menno-Haven, after a meeting to discuss the issue was held by members of Catherine's family. At that time, family members did not believe her admission was necessary, but recognized that her health was in a state of decline, and therefore concluded that it was inevitable that care in a nursing home setting would be required in the future. As they were aware that a waiting list for admission to Menno-Haven existed, they placed her name on the list so that the delay for her admission would be minimized when her condition warranted the commencement of such care.

T. On May 14, 1991, a meeting of members of Catherine's family was called to discuss Catherine's future care due to her declining health. Because of the conclusions reached at the 1989 meeting, most of those in attendance seemed to believe that the discussion was regarding the timing of the move of Catherine to Menno-Haven, not the appropriateness of that decision. However, Charles and Mary Deter expressed a desire to have Catherine remain in her home, and stated they would move in and take care of her there.

U. Other members of the family expressed surprise at the proposal due to their prior experiences with Charles and Mary, because they had given little help in providing care for their mother in the two year period between the prior meeting and the current one, and because all had believed the decision had been made previously to admit Catherine to Menno-Haven, with the only remaining issue to be the timing of her admission. During the intervening period, the issue was continually, though not formally, discussed, and neither Charles nor Mary expressed opposition to it, nor did they make any offer to assist in Catherine's care.

V. The 1991 meeting resulted in a division in the family, with all but Charles and Mary deciding it was in Catherine's interest to admit Catherine to Menno-Haven.

W. Within several days after the 1991 meeting, the family was informed that space was available at Menno-Haven to admit Catherine, and that a decision had to be made within three (3) days of that

notification. She was admitted, was placed in the "Walden Unit", which is designated for Alzheimer's patients, and remained there as of the hearing date.

X. Catherine has a private room in the unit, which contains a total of 41 patients. Special provision is made to prevent patients from wandering off, e.g. electronic bracelets on patients cause alarms to sound if they should go outside the designated area.

Y. Upon Catherine's admission, the list of authorized visitors did not include Charles and Mary Deter, but it has been subsequently amended to provide for their visits.

Z. Charles and Mary propose that their mother be adjudicated incompetent and that Chambersburg Trust Company be appointed guardian of her estate and Charles or, in the alternative, the Franklin County Office for the Aging, be appointed guardian of Catherine's person.

AA. Under petitioners' (Charles and Mary's) plan, Catherine would be removed from Menno-Haven, and be returned to her former residence, where Charles, his wife, Deborah, a Christine DeVinney, who is a nurse's aid, and other family members propose to care for her. Charles' wife will quit her present job to assist in Catherine's care.

BB. Ruth Wingert and some other family members challenged this proposal by citing the past indifference shown by Charles to his mother, and the fact that on April 17, 1991, Charles' wife had filed a petition under the Protection from Abuse Act in which she alleged, inter al.:

"1. Date March 29, 1991 Time 4 A.M. Location our home The defendant (Charles) threw me (Charles' wife) up against the wall, then on the bed and started choking me. I was in fear for my safety. As a result I had red marks on my neck, and my throat was sore. The police were called."

"(3-91) I had asked the defendant for a divorce. He threatened if he ever seen me with anyone else he would shoot me. I am in fear for my safety."

"(Summer 1990) During an argument the defendant beat my exhaust fan above my stove. I went back the hallway and the defendant followed me. He then punched a hold in the bedroom door. I was afraid. Then the defendant ripped my clothes off. I went and put some other clothes on and ran out the door. The

defendant then ripped the wires off my car so I couldn't leave. I left and called my parents. I was in fear for my safety."

[Protection from Abuse Petition,
"6, Respondent's Exhibit 1].

CC. On April 25, 1991, the Court entered a consent decree, effective for one year, which, *inter al.*, directed Charles not to abuse his wife. The order remained in effect as of the date of the instant proceeding.

DD. Charles and his wife think they have resolved their marital problems, and that the allegations in the Protection from Abuse petition were exaggerated.

III. DISCUSSION.

The first issue for our consideration is whether Catherine Deter is an incompetent person. Under the Probate, Estates, and fiduciaries Code,

"Incompetent" means a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:

- (1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or
- (2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.

20 Pa. C.S.A. §5501.

In this connection, we heard testimony from Mrs. Deter's physician, George W. Baker, M.D., who stated that he had cared for her medical needs since 1970, and that she currently cannot converse, think well, or care for herself, that she would likely be subject to designing persons. It was his opinion that she is a victim of Alzheimer's disease, which causes a progressive loss of intellectual function, and for which there is no treatment nor predicted improvement. Additionally, we received evidence regarding her gradually increasing reliance on others to provide for her personal needs, her unawareness when her clothing and hair were in disarray, and increasing inability to socialize with others in the Adult Day Care program in which she formerly was

involved. Indeed, there was no evidence at all which would indicate to us that her mental state has not deteriorated so significantly that she currently would be capable of managing her own affairs. It is perfectly clear that she currently is unable to manage her own affairs and that, if she were to attempt to do so, would either dissipate it or would be victimized by others. We conclude that she is an incompetent person.

We now turn to the issue of whether, having so concluded, the Court should appoint a guardian for her person and/or estate. In considering this issue, we necessarily must be cognizant of the execution by Catherine Deter of a durable power of attorney in which she granted a general power to her sister, Ruth B. Wingert or her brother, Paul B. Wingert, as successor. In addition to the general powers conferred, she granted the following specific powers:

"A. To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care."

"B. To authorize medical and surgical procedures."

[Excerpt from Respondent's Exhibit 3].

The authority for the grant of such powers is set forth in Chapter 56 of P.E.F. Code, 20 Pa. C.S.A. §5601 et seq. and in particular at section 5602(a)(8) and (9) thereof.

Moreover, there is statutory authority which delineates the relationship between the attorney-in-fact and a court-appointed guardian:

"(1) If, following execution of a durable power of attorney, the principal is adjudicated an incompetent and a guardian appointed for his estate, the attorney-in-fact is accountable to the guardian as well as to the principal. The guardian shall have the same power to revoke or amend the power of attorney that the principal would have had if he were not incompetent."

20 Pa.C.S.A. § 5604 (c)(1).

In the instant case, Catherine Deter, while competent, secured the services of an attorney to draft for her a durable power of

attorney, in which she designated her sister as her attorney-in-fact, and her brother as successor. In the instrument, she expressly gave the attorney-in-fact the authority to make decisions concerning her future medical care and possible placement in a nursing home.

From the evidence in this case, it is clear that this action was a reflection of the well-deserved confidence which Catherine had in her sister to carry out her wishes. There existed a long history in which Catherine, with her now deceased sister, and her surviving sister, jointly called upon the same investment advisor to assist them with financial planning. Over the years, they appear to have acted closely with respect to their investments. Additionally, it was Catherine's sister, Ruth, who undertook the responsibility to provide for the needed care of Catherine as the health of the latter was in decline, and it was Ruth who foresaw the day when Catherine would require more care than could be provided in the home, and thus caused her to be put on a waiting list at Menno-Haven so that an appropriate facility would be available when that almost inevitable day would arrive.

In the interim, it was Ruth who was the primary moving force in arranging for Catherine's care and involvement in an adult day care program. During this period, Catherine's children, Mary and Charles Deter, seemed satisfied to let others provide for Catherine's care and it was only after her admission to the nursing home that they seemed to take an active interest in her care. In this latter regard, we would further note that Mary and Charles propose that some sort of a plan be devised which would permit their mother to be returned to the home where she would be cared for under arrangements made by Charles, a plan which would necessitate the involvement of both Charles and his wife in the provision of much of her care. While we are considering at this juncture the need for the appointment of a guardian for Catherine, nonetheless we think it appropriate to note that Charles currently is subject to an order of court not to abuse his wife who alleged that he had done so on no less than three occasions within the relatively recent past, and that the abuse was of sufficient concern to her that she sought the assistance of the Court in this matter.

In determining the issue of the necessity for the appointment of a guardian for Catherine Deter, we have found that the decision in

Howard, Incompetent, 9 Fiduc. Rep. 2d 338 (York, C.P., 1989), to be persuasive. After citing, *inter al.*, *Conover, Incompetent*, 4 Fiduc. Rep. 2d 200, for the proposition that a finding of incompetency does not compel the appointment of a guardian, Judge Miller's well-reasoned opinion states the following:

The rationale of these cases is that the principal has anticipated a future incompetency and acted to provide for the management of his affairs after the time passed when he himself would be able to do so. Experience also tells us that a person executing a power of attorney normally names as attorney-in-fact that person in whom he or she reposes great confidence. We are, therefore, satisfied that [the incompetent] reposed great confidence and trust in [the attorney-in-fact], her son, when she made him her attorney-in-fact. We are satisfied that he has the training, education and background to efficiently administer her estate, and see no reason to create another layer of responsibility by making a separate appointment of a guardian of the estate. We note that the terms of the durable power-of-attorney executed by the incompetent empower his attorney-in-fact to act in matters relating to her "personal relationships and affairs." We are therefore satisfied that it is also not necessary to appoint a guardian for her person. [The son], the attorney-in-fact, shall continue to act in that capacity.

Id. at 339-340.

We think the language in the foregoing opinion to be applicable to the case *sub judice* with a few modifications. Unlike the attorney-in-fact in *Howard, supra*, we do not know that the attorney-in-fact herein personally possesses the business acumen and other skills necessary to administer an incompetent's estate. However, we observe that she has a long history of calling upon those who possess this type of training to assist her in financial matters, dating back to a time when financial planning was not widely known or understood. Given this long history of intelligent decision-making in financial matters, her obvious devotion to her sister, and the trust Catherine Deter obviously reposed in her, Ruth Wingert manifestly appears to us to be fully capable and desirous of acting in this fiduciary capacity for Catherine. While we would not hesitate for a moment to appoint a guardian if circumstances warranted, in the facts extant herein, we think to do so would serve only to frustrate the plan for

Catherine Deter, and we will not do so.

IV. DECREE NISI.

NOW, February 10, 1992, Catherine W. Deter is declared to be an incompetent person pursuant to the provisions of the Probate, Estate and Fiduciaries Code.

It appearing that the incompetent executed a durable power-of-attorney while still competent and that there is no need at present for the appointment of a guardian, the Court declines to appoint a guardian of the Estate or of the Person of the said incompetent.

This decree shall become absolute unless exeptions are filed within the time provided by Pa. O.C.R. 7.1

ALEXANDER, ET AL. V. CROWN AMERICAN CORPORATION, ETC., ET AL., C.P. Franklin County Branch, Civil Action, A.D. 1991-140

Slip and Fall - Ice - Summary Judgment

1. In a slip and fall case involving icy conditions, a plaintiff no longer has to show the accumulation of ice into ridges or elevations in order to recover.
2. The question of whether an ice patch is an obvious risk is for the jury and a summary judgment is inappropriate.

William P. Douglas, Esquire, Attorney for Plaintiff
William A. Addams, Esquire, Attorney for Crown American Corporation
Kevin E. Osborne, Esquire, Attorney for Charles E. Brake Co.

OPINION AND ORDER

WALKER, J., February 12, 1992:

FINDINGS OF FACT

On April 4, 1991, the plaintiffs, Steven S. and Marilyn K. Alexander, filed suit against the defendants, Crown American Corporation t/a/d/b/a Chambersburg Mall ("Chambersburg Mall") and Charles E. Brake Co. ("Brake"). The complaint alleged that on March 9, 1989,¹ while walking on the Chambersburg Mall parking lot, Mr. Alexander slipped and fell on an accumulaton of ice. The complaint further alleged that this fall was a direct result of the defendant's negligence in maintaining the parking lot free of snow.

On April 17, 1991, the defendants filed an answer.

On December 12, 1991, defendant Brake filed a motion for summary judgment.

On December 16, 1991, defendant Chambersburg Mall also filed a motion for summary judgment. These motions were scheduled for argument on February 6, 1992.

On February 6, 1992, argument was heard on the defendant's motions. William Douglas - counsel for the plaintiffs, William Addams - counsel for defendant Chambersburg Mall, and Kevin Osborne - counsel for defendant Brake were all in attendance. In addition, briefs from the parties were received prior to argument. Thus, this matter is ripe for determination.

DISCUSSION

¹ Interestingly enough, the briefs for both defendants assert that the accident occurred on March 9, 1991. To make matters even more interesting, at one point even plaintiffs' complaint asserts that the accident occurred on March 9, 1991. See complaint, paragraph 7.

This is of course impossible. The plaintiffs filed a praecipe for issuance of writ of summons on March 8, 1991. It was received by the sheriff's department for service on the same day. Therefore, unless counsel for the plaintiffs is omniscient, the accident could not have occurred on March 9, 1991.

Further review by this court establishes that the accident in question did in fact occur on March 9, 1989. See complaint paragraph 18; deposition of Steven Alexander, pages 22,23,26.