

Opinion No. 58-69

April 1, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Fred M. Calkins, Jr.,
Assistant Attorney General

TO: Mr. Manuel A. Armijo, Director, New Mexico Veterans' Service Commission, P. O.
Box 1723, Santa Fe, New Mexico

QUESTION

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During an involuntary hospitalization proceeding pursuant to Secs. 34-2-1 through 34-2-25, NMSA, 1953 Comp., may a person be declared by a court mentally incompetent and may a guardian be appointed to manage his estate when such person, in fact, has no actual notice that his competency will be placed in issue?

CONCLUSION

No.

OPINION

ANALYSIS

The facts in the instant case, as we know them, are as follows:

An application for involuntary hospitalization was filed in district court against an individual who is a veteran of World War II. A warrant of apprehension was issued by the district court and an order setting a date of hearing and appointing an attorney to represent the said veteran was entered. In due course, a hearing was held at which time the veteran's wife and his examining psychiatrist appeared. The veteran himself did not appear pursuant to a written recommendation of the examining doctor and the approval of the recommendation by the court who excused the veteran's attendance. The proceeding resulted in the court entering an order for the involuntary hospitalization of the veteran and as far as the order is concerned the same appears to be regular and valid.

In addition to the order for the veteran's involuntary hospitalization, however, the court found "The patient is mentally incompetent and lacks the capacity to manage his own affairs and it is necessary to have a guardian appointed to manage his estate". The order further directed "that the New Mexico Veterans' Commission be and hereby is appointed guardian of the estate of . . .".

The above order was duly entered in the clerk's office. It is assumed that the court acted upon its own motion or upon the oral suggestion of the parties in making the adjudication of incompetency and appointing a guardian since no proceedings were filed toward that end nor did the veteran have any actual notice that his competency would be placed at issue. These later proceedings were instituted and concluded without notice to the New Mexico Veterans' Service Commission. An attested copy of the order was served on the New Mexico Veterans' Service Commission which has qualified and letters of guardianship have been issued. Wages due and owing from the veteran's former employer have been released to the New Mexico Veterans' Service Commission and it appears that certain pension payments will soon be paid to the veteran which, in turn, will be turned over to the New Mexico Veterans' Service Commission. Based on the foregoing facts, we are called upon to determine whether the appointment of the New Mexico Veterans' Service Commission as guardian of the estate is valid and effective and if the New Mexico Veterans' Service Commission may properly proceed with the administration of his estate either as a de jure or de facto guardian.

Turning to the applicable statutory law, Art. II, Chapter 32 of the New Mexico Statutes relating to guardian and ward, pertains to the hospitalization of the mentally ill. This Article, among other provisions, provides for involuntary hospitalization of an individual having a psychiatric or other disease which substantially impairs his mental health and provides for a judicial procedure to be followed at Sec. 34-2-5. Generally, this section provides that a proceeding for involuntary hospitalization may be commenced by a friend, relative, spouse, guardian or other interested person. Notice of the hearing may be omitted and there is no requirement that the proposed patient be present at the hearing. If, after the hearing, which is held in an informal manner, it is determined that the proposed patient is mentally ill or because of his illness is likely to injure himself or others or if he is in need of custody, care or treatment in a mental hospital, he may be ordered to be hospitalized for an indeterminate period not exceeding six months. Apparently, the entire act relates to only one question, to-wit, whether the person cited into court is a proper subject for hospitalization.

We have carefully reviewed this Act and find no authority allowing the court to make a determination that the patient is incompetent or providing for the appointment of a guardian as was done in this case. The provision relating to the adjudication of incompetency is Sec. 32-3-1, NMSA, 1953 Comp. In brief, this section provides for an allegation of incompetency and a hearing, the taking of testimony and, if demanded, a jury trial. Sec. 32-3-2, NMSA, 1953 Comp., states the law pertaining to the appointment of a guardian of an insane or incompetent person. This section states in part if a person has been adjudged incompetent, the court may, without the filing of any further petition, appoint a guardian of his estate. Further, if a person has not been adjudicated incompetent, the court must so find at the time the verified petition for the appointment of a guardian is heard.

In the instant case, a veteran, without notice at a hospitalization proceeding was adjudicated incompetent and a guardian to manage his estate was appointed. The

statutory procedure for adjudicating him incompetent was not followed nor was Sec. 32-3-2, pertaining to the appointment of a guardian, followed in this case by the filing of a verified petition. Since this veteran has not been adjudicated incompetent in a court proceeding nor had a guardian appointed pursuant to Section 32-2-2, we, therefore, answer the question raised in this opinion in the negative.