4-6-1977

Bridges v. Probate Court In and For the City and County of Denver

IN THE SUPREME COURT

OF THE STATE OF COLORADO

27663

No. _____

DAMITA JO BRIDGES,

Petitioner,

vs.

THE PROBATE COURT IN AND FOR THE CITY AND COUNTY OF DENVER and the HONORABLE ROGER D. BORLAND, sitting as a Judge of the Probate, Court

Respondents.

ORIGINAL PROCEEDING

ERROR TO THE PROBATE COURT IN AND FOR THE CITY AND COUNTY OF DENVER

BRIEF IN SUPPORT OF PETITION FOR RELIEF IN THE NATURE OF PROHIBITION AND ORDER PROPOUNDED BY GUARDIANS-AD-LITEM FOR THE UNBORN CHILD OF THE PETITIONER.

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April 7, 1977

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STATUTES CITED

CASES CITED

The Guardians-Ad-Litem present this Brief in support of a Petition for Relief in the Nature of Prohibition and Order filed on April 5, 1977.

I

ISSUE FOR REVIEW

DID THE PROBATE COURT AND THE JUDGE THEREOF EXCEED THE JURISDICTION OF THE COURT IN ORDERING AN ABORTION FOR A PERSON CERTIFIED FOR SHORT TERM TREATMENT FOR MENTAL ILLNESS ?

II

STATEMENT OF THE CASE

The Guardians-ad-Litem adopt the statement of the case as presented in Petitioner's Brief with the added information that the Guardians-ad-Litem were not appointed by the Court until March9, 1977 and , therefore, did not participate in the hearing on the Motion for Order authorizing an abortion made by the Regents of the University of Colorado and heard on March 8, 1977. The Guardians-ad-litem did file a Brief at the request of the Court which was received prior to the Order by the Court.

The Guardians-ad-Litem further advise the Court that the Petitioner voluntarily admitted herself for treatment. There was no Court-ordered evaluation of her mental status. There was no judicial review of her Certification for short term treatment. There has been no adjudication of her legal status.

III

ARGUMENT

THE JURISDICTION OF THE PROBATE COURT IS NOT GENERAL JURISDICTION BUT IS JURISDICTION CREATED BY STATUTE. THE ACTION OF THAT COURT, WHETHER IN ENFORCING JURIDICAL PROVISIONS OR IN ADJUDICATION AT EQUITY IN DEROGATION OF THE COMMON LAW, MUST BE STRICTLY CONSTRUED PURSUANT TO EXPRESS STATUTORY AUTHORITY.

The jurisdictional authority of the Probate Court in the instant case is limited to application and determination of matters arising under Title 27, Article 10 of the Colorado Statutes. COLO. REV. STAT. 13-9-103 (1973). There is nothing in Article 10 of Title 27 that gives the Probate Court jurisdiction to order an abortion as a form of treatment for mental illness. COLO. REV. STAT. 27-10-101 et seq.(1973-amended). Consent to medical treatment is mandated by statute. The statute presumes that a person being treated for mental illness is capable of consent. If consent cannot be given by a patient knowingly and willingly, there are statutory provisions to allow appointment of person, institution or court who can make a determination and give consent on behalf of the person under legal disability. Absent this procedure, the person to be treated must be deemed able to consent. To find to the contrary is not within the jurisdiction of the Probate Court. Note that there is nothing in Article 10 which permits the Court to consent to or Order specific medical treatment. For the Court to consent to the treatment, the patient must be a ward of the Court under legal disability. For the Court to order treatmentcof the patient,there must be consent.

COLO. REV. STAT. 27-10-116 (2) (a) (1973) directs the Department of Institutions to adopt regulations to assure that each agency or facility shall require...

> "Consent for specific therapies and major medical treatment in

> the nature of surgery. The nature of the consent, by whom it is given, and under what conditions, shall be determined by regulation of the Department."

Consent is the foundation and philosophy of the New Mental Health Statute. It is for that reason that judicial adjudication is not required in every treatment case. The patient is and should be allowed to participate in treatment. COLO. REV. STAT. 27-10-104 (1973) insures that one under treatment for mental illness shall not forfeit any legal right or suffer any legal disability by reason of medical treatment under the provisions of the statute. The Court cannot substitute its consent for that of the patient. This is true,in general,but in this particular treatment only the mother can consent to an abortion. COLO. REV. STAT. 18-6-101 (1973).

Is there no one who can give consent for another ? Yes. the parent for the child; the guardian for the ward; the agent for the principal; but not the Court for this petitioner without express statutory authority. The doctrine of substituted judgment will not apply in the face of limited and express statutory authority. The Probate Court could have causedthis patient to be placed under legal disability in one of two waysCOLO. REV. STAT. 15-14-303 (1973-amended), COLO. REV. STAT. 27-10-125 (1973) and in so doing could have had the authority by statutory jurisdiction to consent to the abortion on behalf of the patient. The Court did not take this action and has no statutory authority to consent to any medical treatment. The Supreme Court must insure that statutory, courts act within their jurisdiction. Denver County Court v. Lee 439 P2nd 737 (1968)

> "It is the duty of this Court to rule strictly with regard to matters of jurisdiction of statutory courts to the end that such courts are kept within the limits of their jurisdiction. Where statutes creating courts fail to confer jurisdiction over certain matters, no entendments

may be indulged in in favor
of such jurisdiction (cite)."

There is clearly no statutory authority for the Order which the Probate Court entered. Without that statutory authority, there is no jurisdiction. Maniatis v. Karalsikios 442 P2nd 52 (1967). The Probate Court, in its Order, states that it was pursuaded by Strunk v. Strunk (ky) 445 S.W. 2nd 145. But the doctrine of "substituted judgment" can only be exercised on the foundation of some jurisdiction. If that jurisdiction is said to be in Equity (which Chancery Courts have always enjoyed), then, it must arise from Common Law. Statutes in derogation of the Common Law must be strictly construed. Board of County Commissioners of Pitkin County v. Pfeifer 546 P 2nd 446 (1976); In the Matter of the Estate of Colacci 549 P 2nd 1096 (1976). The statute in question is in derogation of any common law jurisdiction which the Probate Court may have by virtue of its distant relative, the Court of Chancery. The statute was not strictly adhered to nor was any other statute invoked which would have conferred jurisdiction.

The right to an abortion has been held to be a personal right of the woman. Foe v. Vanderhoof 389 Fed. Supp. 947 (1975). If that personal right needs to be exercised by another on behalf of the woman, it must be done only pursuant to express statutory authority.

Respectfully Submitted,

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