4-3-1968

Alencoy's Estate v. Wysowatcky

(1)

NO. 23474

IN THE SUPREME COURT OF THE STATE OF COLORADO

IN THE MATTER OF THE ESTATE OF JULIAN ALENCOY; JULIAN V. ALENCOY, Ward,	)	Error to the Probate Court of the City and County of Denver State of Colorado
Plaintiff in Error,	)	
v.	)	
PROBATE COURT CITY AND COUNTY OF DENVER, JUDGE DAVID BROFMAN, and ANDREW WYSOWATCKY, Conservator of the Estate of Julian V. Alencoy,	)	HONORABLE DAVID BROFMAN Judge
Defendants in Error.	)	

BRIEF OF PLAINTIFF IN ERROR

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BRIEF OF PLAINTIFF IN ERROR

IDENTIFICATION OF PARTIES

The parties will be referred to as they appeared in the trial court or by name.

STATEMENT OF THE CASE

This is a heart-gripping story of a man 87 years of age, who as a common laborer with the Denver and Rio Grande Railroad Company amassed an estate of over $100,000, who was getting along fairly well in his old age, living at his home at 731 Galapago Street, Denver, Colorado, until the friendly old people's Public Relations man from the Denver U. S. National Bank -- a Mr. John R. Starkey -- contacted him to set up a will, etc., through the bank; being unsuccessful in these uninvited endeavors, he contacted the Mental Health Division of the Denver City Attorney's office and set into effect the chain of events that led to the adjudication of petitioner Julian Alencoy (ff. 15-19). This transpired in December 1966 (ff. 26-27). Needless to say, Mr. Starkey "charitably" made his vast endeavors made known to Judge Brofman in requesting that the Denver U. S. National Bank be appointed as conservator (ff. 15-19). However, Judge Brofman appointed Andrew Wysowatcky to the job, apparently considering that Mr. Wysowatcky's job as public administrator entitled him to the nonexistent job of "public conservator." (ff. 7-10, 133-134)

From the Denver General Hospital, petitioner Julian Alencoy was transferred

to Aurora's Golden Age Manor, 10201 East 3rd Avenue, Aurora, Colorado (ff. 68-70). This occurred in March 1967 (ff. 68-70).

In February 1967, conservator Andrew Wysowatcky petitioned the probate court to sell the residence and personalty of petitioner Julian Alencoy (ff. 57-64).

Julian Alencoy opposed both the sale of his home and the sale of his personalty, as well as Andrew Wysowatcky serving as his conservator and contacted Robert Leland Johnson, through a Mrs. McNellis and a Mrs. Shipman, to effect a substitution of conservators and oppose the sale of his property (ff. 83-102). Petitioner Julian Alencoy had never been given an opportunity by the probate court to designate whom he wanted as his conservator. Concurrently with the filing of his "Petition for Substitution" Julian Alencoy filed a motion to have himself examined by a psychiatrist of his own choosing for the purpose of determining whether he was capable of expressing his approval or disapproval of whom he wished to be his conservator (ff. 110-113). The probate court deftly circumvented the motion, in effect denying it, and appointed a psychiatrist of the court's choosing (ff. 133-134), Dr. Delehanty, who also served on the medical commission which made the report when Julian

Alencoy was adjudicated (ff. 23-27). No action was taken by the probate court on petitioner's "Motion to Restrain the Sale of his Personalty or his Realty" but the court set for hearing his "Petition for Substitution" and it was heard and decided on July 24, 1967. A timely "Motion for New Trial or Rehearing" was filed by petitioner Julian Alencoy, supported by the required brief (ff. 154-167). The "Motion for New Trial or Rehearing" was set for September 27, 1967 (f. 174) and on that date was continued over to file affidavits (f. 185). Thereafter, the "Motion for New Trial or Rehearing" was set for hearing on November 13, 1967 (ff. 207-208), at which time the probate court continued the hearing on the "Motion for New Trial or Rehearing" to December 14, 1967 (f. 207). On December 14, 1967, the "Motion for New Trial or Rehearing" was denied on its merits (ff. 208-209).

SUMMARY OF THE ARGUMENT

A. The trial court abused its discretion in denying the relief prayed for in said "Petition for Substitution" in not appointing Mrs. Helen McNellis conservator. The evidence was insufficient to sustain the denying of said "Petition for Substitution" and the appointment of Mrs. Helen McNellis as conservator. The greater weight of

the evidence did not justify the denial of "Petition for Substitution" as to Mrs. Helen McNellis. The trial court erred in holding that since Andrew Wysowatcky was appointed as his conservator as public administrator when Julian Alencoy was critically ill, that now when he is able to select sensibly his own conservator his wishes cannot be considered under Rule 27 of the trial court and that the law set forth in Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302, does not apply. The trial court erred in ruling that the only way that Julian Alencoy could have a conservator of his own choice appointed or considered would be to show that the present conservator is unfit under Colorado Revised Statutes 1963, 153-10-8. That to deny Julian Alencoy the right to select Mrs. Helen McNellis as his conservator, is a denial of due process and equal protection under both the United States Constitution and the Constitution of the State of Colorado.

B. The trial court erred in refusing to allow Julian Alencoy or his attorney, Robert Leland Johnson, to select and have paid from the estate a psychiatrist to examine Julian Alencoy as to his ability to sensibly select his own conservator.

C. It was error for the trial court to refuse to allow Mrs. Helen McNellis or Robert Leland Johnson to bring Julian Alencoy to the court and in letting conservator Andrew Wysowatcky and his law partner Martin Steinberg to handle this matter, who were hostile to his "Petition for Substitution." The extent to which this hostility was carried was indicated by the remark of Mr. McLaughlin, the then administrator of the Golden Age Manor, who after he had brought Julian Alencoy into the courtroom, remarked of counsel Robert Leland Johnson to Mr. Roy Watkins in Mr. Alencoy's presence, "There is the bastard that caused all the trouble." This same person refused to allow Mr. Alencoy to sit with Robert Leland Johnson, and it was necessary to request the trial court to allow this, but the trial court failed to admonish this person to let Mr. Alencoy alone during the hearing, and this person's constant, uncalled for, and altogether unnecessary insistence upon being with Mr. Alencoy whenever he moved amounted to a ridiculous type of shackling and intermeddling, which made it difficult for Mr. Alencoy to express himself as freely as he had previously with Robert Leland Johnson; and upon this same person's recommendation, returned Mr. Alencoy before the end of the of the hearing. Counsel was not fully

aware of the extent of the hostility until he was informed after the hearing by Mrs. Shipman and Mrs. McNellis of the remarks made by the person as set forth as aforesaid, and was, therefore, unable to combat this unwholesomeness which resulted in unfair hearing for Mr. Alencoy.

ARGUMENT

A. The court abused its discretion in denying the relief prayed for in said "Petition for Substitution" in not appointing Mrs. Helen McNellis conservator. The evidence was insufficient to sustain the denying of said "Petition for Substitution" and the appointment of Mrs. Helen McNellis as conservator. The greater weight of the evidence did not justify the denial of the "Petition for Substitution" as to Mrs. Helen McNellis. The trial court erred in holding that since Andrew Wysowatcky was appointed as his conservator as public administrator when Julian Alencoy was critically ill, that now when he is able to sensibly select his own conservator his wishes cannot be considered under Rule 27 of the trial court and that the law set forth in Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302, does not apply. The trial court erred in ruling that the only way that Julian Alencoy could have a conservator of his own choice appointed or considered would be to

show that the present conservator is unfit under Colorado Revised Statutes 1963, 153-10-8. That to deny Julian Alencoy the right to select Mrs. Helen McNellis as his conservator, is a denial of due process and equal protection under both the United States Constitution and the Constitution of the State of Colorado.

It is indeed ironical that the probate court in denying the "Petition for Substitution" to allow Mrs. Helen McNellis to replace Andrew Wysowatcky held:

1. That at the time Andrew Wysowatcky was appointed conservator the ward (Julian Alencoy) could not give his consent to the appointment of a conservator of his choice (f. 331).

2. That Andrew Wysowatcky had properly administered the estate as conservator under the statute (apparently C.R.S. 1963, 153-10-8(2)) and that the court could not therefore remove him even if petitioner Julian Alencoy so desired (ff. 328-329).

The court then window-dresses its decision by patting itself on the back over its choice of Andrew Wysowatcky as conservator, which really has nothing to do with anything. If it did have anything to do with anything, counsel for petitioner would have put on proper

witnesses, including Wysowatcky, to elicit the long and intimate personal friendship and mutual endeavors of the probate court and Andrew Wysowatcky to show the role that friendship played in this appointment. But certainly if the probate court has the right to refuse to comply with the reasonable request of petitioner Julian Alencoy for the appointment of a conservator of his own choosing and approval, then it probably makes no difference from a legal standpoint whom the probate court appoints -- it could probably appoint its own mother as Julian Alencoy's conservator and be correct. But the point is that petitioner Julian Alencoy was not attacking and is not now attacking Andrew Wysowatcky's competency and fitness, per se, to serve as conservator. The point is that petitioner Julian Alencoy is entitled to have a conservator of his own choosing.

Petitioner Julian Alencoy is not contesting the issue of his adjudication or the need therefor. It is, however, interesting to observe the petty innuendoes placed on innocuous and competent management of his affairs as befits his own individuality, a condition which, if existing in a man without an estate of over $100,000, would be ignored. Dr. H. G. Whittingham in his letter of December 13, 1966 (ff. 1-3) says, "It is alleged that he keeps large sums of money in the house,

which is quite unwise considering his infirmity and the characteristics of the neighborhood in which he lives." This counsel takes a good deal of pride in this area of the Westside of Denver, where his office is located less than a block from petitioner Julian Alencoy's home. Is there something wrong with the Spanish, the Negro and the old railroad people that live in this community, or is this a sub-conscious expression of racism by Dr. Whittingham? Indeed, a mother of a Denver judge lives in the area, as does a bailiff for a Denver judge, and numerous employees of the City and County of Denver. The Court's attention is directed to the recent notoriety in East Denver of the Temple Buell mansion. Is Temple Buell incompetent because he kept many thousands of dollars worth of money and valuables in his home? Indeed, the conservator's inventory shows that all cash was in the bank except for $197.26 at his home (ff. 48-49, 247-248); contrary to the $2,000 in cash that Mr. Starkey -- the friendly old people's Public Relations Department representative of the Denver U. S. National Bank -- alleged, and upon which erroneous information Dr. Whittingham based his report (f. 19), based on pure hearsay. Dr. Whittingham seems to imply that petitioner Julian Alencoy sat around the house all day (f. 2) and did himself wash the bandages on his ulcerated

leg (f. 2). Is this reproachable conduct? The way the doctor writes it, it is supposed to imply some sort of bad conduct. Some hypochondriacs go to the doctor's office for a shot of penicillin at the slightest touch of a cold -- others tend themselves at home until a critical case of pneumonia spells immediate death or medical attention as an alternative. Maybe one course is better than another -- maybe an in-between -- but does one course as opposed to the other require condemnation -- is it not more of a personal choice? For the purpose of the argument of the legal points in this appeal, as said before, petitioner Julian Alencoy is not attacking the adjudication. The above is merely pointed out to put the matter in a somewhat proper perspective, for it seems that petitioner Julian Alencoy's greatest sin now as far as the probate court and Wysowatcky is that he dares oppose the appointment of Andrew Wysowatcky as his conservator. In this connection, the probate court refused to appoint a psychiatrist to be selected by himself or by his lawyer, but the probate court again does its own arbitrary selection and selects Dr. Delehanty. This same doctor was on the medical commission that recommended adjudication of Mr. Alencoy (ff. 22-27). In that same medical commission report this same doctor answered the following questions as follows (f. 24):

"3. Are the respondent's intellectual functions so deficient,

arrested, or impaired by disease or physical injury that he lacks sufficient control, judgment, and discretion to manage his property or affairs?

"No.

"4. Are respondent's intellecutal functions so deficient, arrested or impaired that for his own welfare or the welfare or safety of others, he requires protection, supervision, guidance, training, control or care?

"No."

In the letter approving petitioner Julian Alencoy's ability to reasonably select a conservator, Dr. Delehanty said (ff. 133-134):

"I have no doubt he could understand who was handling his affairs and could reasonably select a conservator."

But the probate court in ruling on the petitioner Julian Alencoy's "Petition for Substitution" completely disregarded this and taking from context the horrifying word "paranoid" construed Dr. Delehanty report as diagnosing the man as "paranoid." This the report did not do -- and at no time or place from the beginning of the proceedings to the end was he ever diagnosed as a "paranoid" or a paranoid schizophrenic. Dr. Delehanty merely used the word paranoid as description of a particular emotion and not as a diseased condition. Said he (f. 133):

"However, this man does not comprehend or care who or what a

conservator is, as he is too absorbed in his paranoid thinking this headstrong demand to return to his home."

Petitioner Julian Alencoy was taken from his residence, which he owned, and had received medical care and, according to the conservator's point of view, is now in excellent shape and was at the time of hearing for substitution (ff. 310-327). Is Julian Alencoy supposed to put himself in abject gratitude to his present conservator because of the good shape he has been put in by the nursing home? Indeed, if this type of conduct were to be medically classified, the terminology "catatonic" would probably be appropriate. Must a man's normal desires be always classified medically? Indeed, the issue of his desiring to return to his home has nothing to do with the "Petition for Substitution" for that would be a matter to be determined by a conservator of his choice, conferring with the doctor in charge of him. The point is that he could more easily take a "no" answer from a conservator of his choice than from a stranger foisted upon him by the court. Petitioner Julian Alencoy's feelings in reference to his returning to his home or staying at the nursing home as expressed at the hearing on the "Petition for Substitution" were quite rational (ff. 240-242). But regardless the courts have held that one may

have insane delusions regarding some matters and be insane on some subjects, yet capable of transacting business wherein such subjects are concerned, Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256, and certainly petitioner's desire to have Mrs. McNellis as his conservator was in no way contingent on her allowing him to his home (ff. 240-241). As for this being a headstrong or paranoid desire to return to his house, one must ask is this headstrong position of the conservator herein and the probate court to refuse to allow him a chance with a conservator of his own choice, not a comparable kind of paranoid thinking?

Bateman v. Ryder, 64 S.W. 48, 49: Action for trover by mother against her daughter for the value of $200. Mother was alleged to be paranoiac and doctor so testified:

> "The character of the plaintiff is attacked for credibility and the testimony is given by an expert physician that she is a lunatic of the type known to physicians as a 'paranoiac.' It is explained that the effect is a mania for litigation, and an ungovernable desire and anxiety to be successful. It would appear that this species of lunacy is more common among attorneys than litigants."

In spite of the basic disregard of petitioner Julian Alencoy's rights in the initial appointment of Andrew Wysowatcky, and in spite of the fact that there was never any showing made to the probate court initially that Julian Alencoy was incapable of giving his consent to the appointment of his conservator pursuant to Rule 27 of the probate court (ff. 154-155) and Rule 443 of the Colorado Rules of Civil Procedure, the primary point of law upon which this appeal is based for reversal is THAT THE PROBATE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT SINCE ANDREW WYSOWATCKY WAS APPOINTED AS HIS CONSERVATOR AS PUBLIC ADMINISTRATOR WHEN JULIAN ALENCOY WAS CRITICALLY ILL, THAT NOW WHEN HE IS ABLE TO SENSIBLY SELECT HIS OWN CONSERVATOR HIS WISHES CANNOT BE CONSIDERED UNDER RULE 27 OF THE PROBATE COURT (RULE 443 OF THE COLORADO RULES OF CIVIL PROCEDURE) AND HOLDING THAT THE LAW SET FORTH IN SHAPTER V. PILLAR, 28 COLO. 209, 63 PAC. 302, DOES NOT APPLY.

This Court held in Deeble v. Alerton (1914), 58 Colo. 166, 143 Pac. 1096, that where the executor named in a will is hostile to the insane widow, he should be removed. The same reasoning should be applied to a conservator, and the vigorous, headstrong opposition that Andrew Wysowatcky

has demonstrated throughout the record in this case to considering some sort of accommodation to selecting a competent conservator approved by petitioner Julian Alencoy is demonstrative of this hostility. But more basically, Shapter v. Pillar, supra, does not limit the right of the ward to select a conservator agreeable to him, but provides that this right exists always and at any stage of the proceedings. To hold otherwise would be to give a ward less rights when he has progressed to better mental and physical health than when he was initially adjudicated and in worse physical and mental condition. This would be and is ludicrous.

Petitioner Julian Alencoy's response to what a conservator is supposed to do was:

> "A. Well, he's supposed to help, if I own a house, and he says he's going to help me." (f. 229)

Petitioner Julian Alencoy's decision to have only Mrs. Helen McNellis was stated by him:

> "Q. Do you have an idea, sir, as to who you want to be your conservator?
> "A. Well, just one.
>
> "Q. You just want one?
> "A. Mrs. McNellis."

Petitioner Julian Alencoy always wanted Mrs. McNellis to be his conservator, but for procedural reasons set forth in affidavit form (ff. 186-193) and permitted by the court to be filed (ff. 362-368) Mrs. Shipman was also requested as a co-conservator. As matters now stand and as developed at the hearing on the "Petition for Substitution" it is now and always has been the desire of petitioner Julian Alencoy to have only Mrs. McNellis as his conservator.

The treatment of the old by the younger has recently received considerable attention with the idea of cushioning the old person's last years with due process guarantees and the dignity of humanity rather than the degradation of controlled vegetation. One excellent article appeared in "Case and Comment" November-December 1967, Vol. 72, No. 6, by Elias S. Cohen, entitled "A New Look at Old Age," and because of its philosophical balance it is recited here verbatim:

> During the last several years State Legislatures and the United States Congress have passed a considerable amount of law recognizing the needs of older people. These legislative bodies have taken cognizance of the special conditions that often accompany old age. Amendments to the Social Security Act

affecting medical insurance for the aged in 1965, and its precursor Medical Assistance for the Aged in 1961, are two prominent examples well known to the public. A few states have enacted human relations acts or fair employment practices acts which preclude discrimination on the basis of age (although it must be noted quickly that discrimination on the basis of old age is generally not precluded).

There is considerable law on the books about old age and senility in connection with proceedings relative to commitment and incompetence. Indeed, not less than twenty states make some reference to old age and senility in their statutes on these subjects.

OLDER AMERICANS ACT

In 1965 the President signed into law the Older Americans Act. Without offering any definition of the term "Older American" or "older people" the statute makes a policy declaration with reference to the elderly unlike any made heretofore. Among other things, it enjoins upon the governments of the United States, and of the several states and their political subdivisions, the duty to assist our older people to

secure equal opportunity to the full and free enjoyment of the following objectives:

(4) full restorative services for those who require institutional care

(5) opportunity for employment with no discriminatory personnel practices because of age

* * *

(8) efficient community services which provide social assistance in a coordinated manner and which are readily available when needed

* * *

(10) freedom, independence and the free exercise of individual initiative in planning and managing their own lives.

There is a deep and growing concern in our land that older people may, from time to time, require special services and special protections. There is a growing recognition that older people are not always dealt with in the same way as younger people in the same condition. There is evidence to indicate that "elderly people in the community show no greater incidence of psychiatric

symptoms than do all adults." On the other hand, there is also evidence that hospitalization for psychiatric illness in public mental hospitals occurs with greater frequency for the elderly than for the general adult population at large.

Like other deprived populations, the elderly present a mixture of the strong and the weak, the vulnerable and the independent, the mentally confused and physically well. What may be different is the heavy concentration of vulnerable persons among them.

A LEGAL GORDIAN KNOT

The dilemma then is this: The elderly are first and foremost adults with all the rights and privileges that accrue to free adults in our society. They enjoy, as a general rule, no special status analogous to that of children in the eyes of the law. Older people, as adults, are entitled to the same independence of action and decision-making as all other adults. In our zeal to provide them with the protection and rights that are stated in the Older Americans Act, we must not pierce the shield which guarantees this independence except under conditions which make it clear and certain that we have done so only to avoid disaster.

In 1962 the Journal of Law and Contemporary Problems published by the School of Law at Duke University devoted its Winter issue to problems of the aging. Apparently the knot was so complex that their editors "copped out" upon what the legal issues were. There were articles by sociologists, economists, statisticians, physicians and others on what the condition of older people in America was. Except for one article on taxation of retirement income, there was little in the entire issue on the legal implications of advancing years. Indeed, there was nothing concerning protection, intervention, commitment, incompetency hearings, guardianship, etc.

Bennett offers a vivid catalog of those elderly persons with whom this paper is concerned:

> The old men whose memory has deteriorated and who can't recall what they did with their funds or their source or amount, don't keep receipts, forget to eat, are either afraid to cash their monthly benefit checks or spend the money (because of the deep emotional significance this has for them), or else squander their funds; or

The elderly who are constantly moving from place to place and don't seem to be able to stay rooted very long in one place or who, having spent their benefit allowance on non-essentials, are without funds to pay their rent; or

The "wanderers" who roam the streets in the dark of night and either forget where they live or actually have no permanent living quarters; or

The alcoholic who spends all his money on liquor and literally begs or starves until his next check is received; or

The elderly recluse, living in squalor in a building that has been condemned but not yet torn down, who neglects himself physically and nutritionally, is using an old portable oil burner for heating and cooking because the gas and electricity have been turned off, who has no known friends or relatives; or

The old woman literally crippled by arthritis and partly bedridden who continues to dwell in a house which she owns and which is vermin-infested by reason of accumulated rubbish and rotting remnants and continues to refuse hospitalization for treatment of infection resulting from untreated injury; or

The elderly woman who is constantly picking quarrels with her neighbors, foraging for scraps in nearby garbage cans, shouting obscenities at passers-by, using her open window as a garbage disposal unit, dressing bizarrely and giving overt evidence of self-neglect; or

The neatly dressed old man who is in good shape physically but forgetful and confused, who continues to operate a small neighborhood store with his business affairs hopelessly entangled and who is heavily in debt but whose entire life is wrapped around his business, and who is about to be evicted from the small living quarters in the back of the store and who has no known relatives or friends to turn to; or

The proud and independent very old lady who is in imminent danger of sustaining grave personal injury by reason of her infirmity but who refuses to consider leaving her home and who will not accept any help in the home.

These are the people into whose lives we are called upon to intervene, presumably for protective purposes.

The problems on institutional commitment, particularly cases of commitment

to state mental hospitals can be subsumed under the general consideration of protective intervention:

Basic assumptions which underlie this discussion are as follows:

1. There are situations which require the employment of legal sanctions which either deprive a person of his liberty or of certain civil rights. These sanctions are employed because the individuals are either dangerous to themselves or others. Where no question of danger is involved but where the issue is one of offensiveness, the problem is more difficult and standards are more vague.

2. Altering methods and techniques of legal intervention may also require altering practice with reference to assuring due process, extending the responsibility of the courts and increasing the relationship between courts and social agencies.

3. Protective intervention operates within a framework that assumes entitlement to retain possession of liberty and civil rights except in carefully defined situations. An individual has the right to stay in the community even if his behavior is bizarre; and we are under

obligation to help him stay if there is no danger to himself or others, and his behavior is not so disgusting or offensive as to warrant his removal. Incapacity of an individual and danger to himself or others must be related to behavior and not to diagnostic labeling. Incapacity is not static, and an individual's capacity can and does change for good and for ill.

PROTECTIVE INTERVENTION

Within this framework we may identify various stages of protective intervention and some of the issues that are raised at those stages.

The first stage in the intervening process may be regarded as intervention with or without the consent of the individual for purpose of initial investigation upon receipt of information not necessarily a request for help or assistance. Legal authority is required to investigate upon the request of an individual, an agency, or organization, or on its own initiative the life situation of an adult that is thought to be intolerable as tested against legally defined standards. At this stage the individual being investigated should be guaranteed safeguards as to civil liberties and the legally defined standards should authorize investigation only as to those

major aspects of living where there is reasonable evidence or grounds to suspect possible loss of property or serious danger to the health and welfare of the client or to the community.

I would hasten to add that these standards should be no different from those which would be used in testing the life situation of a person of younger years.

Consideration of due process would appear to demand that at this stage as well as at every stage the individual be informed of his right to counsel, that there be proper notice given to interested parties, and that if the individual for one reason or another cannot secure counsel on his own initiative, then counsel should be provided for him to protect his interests.

The second stage deals with overt facts as to the individual's inability to care for himself or his danger to others, without reference to any further diagnosis. It is possible that removal may be effected at this stage, but, if so, it is only for the limited purposes of the next stage.

The third stage constitutes evaluation, differential diagnosis and initial "prescriptions" of the treatment of choice. It is at this stage that further

legal action may be initiated and may be closely tied with service. In this stage, it is desirable to have legislative authority for examination and evaluation of the individual by assignment to an appropriate agency or facility by voluntary or involuntary admission to such facility. Again, at this stage it is crucial that the rights of privacy, "avoidance of self-incrimination," the right to refuse examination or treatment, the right to counsel, etc., are carefully preserved.

The fourth stage represents the disposition of the person, his care, and his treatment. This may involve any one or a combination of services.

I am impressed with the reasoning in Lake v. Cameron. In that case and under the commitment laws governing the jurisdiction of the District of Columbia, the court found that it was not "restricted to the alternative of returning the petitioner, who had pled under habeas corpus, to the hospital or unconditionally releasing her." The case was remanded to district court for inquiry by the court into alternative courses of treatment. It cites the district code that "the Court may order . . . hospitalization for an indeterminate period, or order any other alternative course of treatment that the court believes will be in the best

interests of the person or the public." D.C. Code, Section 21-545(b) (Supp V, 1966).

The court goes on to quote the Department of Health, Education, and Welfare, that "The entire spectrum of services should be made available, including outpatient treatment, foster care, halfway houses, day hospitals, nursing homes, etc."

As for where the burden lies in exploring alternatives, the court said:

> "The Court's duty to explore in such cases as this is related also to the obligation of the state to bear the burden of exploration of possible alternatives an indigent cannot bear . . . . Moreover, appellant plainly does not know and lacks the means to ascertain what alternatives, if any, are available, but the government knows or has the means of knowing, and should therefore assist the court in acquiring such information."

In laying out possible alternatives which the appellant might be compelled to accept, the district court

> may consider, e.g., whether the appellant and the public would be sufficiently protected if she were required to carry an identification card on her

person so that police or others could take her home if she should wander, or whether she should be required to accept public health nursing care, community health and day care services, or whether available welfare payments might finance adequate private care. Every effort should be made to find a course of treatment which appellant might be willing to accept. In making this inquiry, the district court may seek aid from various sources, for example, the D.C. Department of Public Health, the D.C. Department of Public Welfare, the Metropolitan Police Department, the D.C. Department of Vocational Rehabilitation, the D.C. Association for Mental Health, the various family service agencies, social workers from the patient's neighborhood, and neighbors who might be able to provide supervision.

DUE PROCESS FOR YOUNG AND OLD ALIKE

Implementation of a program of services for the client pursuant to examination requires proper judicial review to assure that due process requirements are observed, and the reasonableness of the "prescription" assured. Implementation should include a wide array of possibilities; including all those mentioned in the Lake opinion, as well as those implicit in the appointment of guardians, conservators, representatives, payees, or other fiduciaries.

In our zeal to secure proper services and protective intervention as quickly as possible, we must be certain that we do not deprive the person of his basic rights; hence, in every case of compulsory intervention or application of protective services, including commitment to institutional or other types of service, there should be assurance of adequate representation and counsel for patients.

It would not seem unreasonable to suggest that if the recent opinion of the United States Supreme Court in the matter of the Application of Paul L. Gault, etc., held that the constitutional guarantee of due process of law is applicable in juvenile court proceedings, the same would also hold in civil commitment proceedings. Traditionally proceedings in juvenile courts have been held to be not criminal proceedings. On that basis, the constitutional guarantee of due process has not been scrupulously observed.

A juvenile court proceeding which deprived a youngster of his liberty may in some ways be regarded as analogous to the "non-criminal" commitment proceeding for mentally ill persons. It would seem that if the guarantees of representation, rights of appeal, etc., are extended to those coming before

the juvenile court and if the guarantees are extended under the Gideon v. Wainwright decision of the supreme court where those in jeopardy of losing their liberty because of criminal transgression are concerned, it appears logical to suggest that similar guarantees for the person in jeopardy of loss of liberty and commitment for the most indefinite term of confinement because of mental incapacity, infirmity, illness or defect would be in order.

It is some interest to note that in the Pennsylvania Mental Health and Mental Retardation Act of 1966, provision is made for the appointment of an attorney to represent a person charged with a crime who is detained in a penal or correctional institution and is believed to be mentally disabled so that his commitment is necessary.

However, in a civil court commitment, no such requirement is present and, indeed, the court may order an examination by physicians appointed by the court, presumably without the consent of the person to be examined, or, in the alternative, order a commitment for a period not exceeding ten days for the purpose of examination. Even following such examination it is not necessary or essential, or, at the very least it is not specifically required, that the person be represented, have

an opportunity to confront witnesses, cross-examine them, and otherwise take steps to enable him to retain his liberty if he sought to do so, and to require the state to show that it was essential for his safety or for that of society to deprive him of his liberty.

While the foregoing discussion applies to all adults, there are some distinctions that occur in practice. Perhaps those distinctions become more obvious when we ask the following questions:

How much folly do we permit an old man?

Are we prepared to extend the same right to folly to the elderly that we extend to the young and the middle-aged adult?

Would we permit an elderly man with an estate of $100,000 to invest perhaps as foolishly in highly speculative ventures as we would a younger man who was perhaps both "improvident and of poor business acumen?"

Will we permit an old man folly in his lifetime as we might permit him at his death in disposing of his assets?

Can we devise proper tests that distinguish between true love that results in a May-September marriage, and that which occurs because of the

meeting of an avaricious opportunist, young female and an elderly man with a somewhat irritating enlarged prostate?

When is the behavior of the elderly "disastrous," and when is it merely offensive?

The term senility shows up in a great many statutes, although it is seldom, if ever, defined. It is often held to be something less than mental illness, but nevertheless a cause for removal of civil rights or liberty.

Can we arrive at a special definition that has to do with old age, while ignoring the rights of the elderly as adults?

B. The trial court erred in refusing to allow Julian Alencoy or his attorney, Robert Leland Johnson, to select and have paid from the estate, a psychiatrist to examine Julian Alencoy as to his ability to sensibly select his own conservator.

This case is replete with the probate court's exercising every choice that should belong to petitioner Julian Alencoy, including that of an independent psychiatrist not connected with the court, to impartially evaluate his ability to sensibly select a conservator. Petitioner Julian Alencoy petitioned for this (ff. 110-113). In

effect, Julian Alencoy was challenging the court and this was tantamount to the opposition in a case where there is a plaintiff and a defendant selecting the sole medical witness for the opposing side, which the opposing side must use. In the informal procedure followed by the probate court in the handling of its affairs, there appears no definite order denying petitioner's request, merely the petitioner Julian Alencoy's "Petition for Psychiatric Examination" (ff. 110-113), Dr. Delehanty's letter acknowledging the court's appointment (ff. 133-134) and petitioner's "Motion for New Trial or Rehearing" (f. 148), and the court's denial of the "Motion for New Trial or Rehearing." (ff. 577-579)

Perhaps this was harmless error, since Dr. Delehanty's report was that petitioner Julian Alencoy was capable of sensibly selecting a conservator, but that is something that this Court in its wisdom must weigh in light of the probate court's lifting from said letter, and the less patronizing tone of a letter that a psychiatrist of Julian Alencoy's own choosing would probably have written. An interesting commentary in this regard to lawyers, and which is equally applicable to doctors, is made in the tentative draft of the American Bar Association on Minimum Standards of Criminal Justice (June 1967), p. 19:

"A system which does not guarantee the integrity of the professional

relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain. Inequalities of this nature are seriously detrimental to the fulfillment of the goals of providing counsel. They are quickly perceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system, and ultimately, of society itself. Much of the dispute concerning the merits of various systems has centered on their capacity to guarantee professional independence. The study by the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid Association concluded that the necessary independence could be guaranteed under any type of system, from public defender to assigned counsel, if and only if the system is properly insulated from pressures, whether they flow from an excess of benevolence or from less noble motivations. See EQUAL JUSTICE FOR THE ACCUSED 61, 67, 71, 74-75. The importance of assuring the undivided loyalty of defense counsel to his client has been emphasized in previously adopted standards. See Appendix A, No. 5; Appendix B, No. 4."

C. It was error for the trial court to refuse to allow Mrs. Helen McNellis or Robert Leland Johnson to bring Julian Alencoy to the court and in letting conservator Andrew Wysowatcky and his law partner Martin Steinberg to handle this matter, who were hostile to his "Petition for Substitution." The extent to which this hostility was carried was indicated by the remark of Mr. McLaughlin, the then administrator of the Golden Age Manor, who after he had brought Julian Alencoy into the courtroom, remarked of counsel Robert Leland Johnson to Mr. Roy Watkins in Mr. Alencoy's presence, "There is the bastard that caused all the trouble." This same person refused to allow Mr. Alencoy to sit with Robert Leland Johnson, and it was necessary to request the trial court to allow this, but the trial court failed to admonish this person to let Mr. Alencoy alone during the hearing, and this person's constant, uncalled for, and altogether unnecessary insistence upon being with Mr. Alencoy whenever he moved amounted to a ridiculous type of shackling and intermeddling, which made it difficult for Mr. Alencoy to express himself as freely as he had previously with Robert Leland Johnson; and upon this same person's recommendation, returned Mr. Alencoy before the end of the hearing. Counsel was not fully aware of the extent of the hostility until he was informed after the hearing by

Mrs. Shipman and Mrs. McNellis of the remarks made by the person as set forth as aforesaid, and was, therefore, unable to combat this unwholesomeness which resulted in unfair hearing for Mr. Alencoy.

This conduct is set forth in more detail in the record (ff. 186-193, 348-355). By itself, this type of conduct on Mr. McLaughlin's part may seem relatively unimportant, but when weighed in context of the total situation is a shocking demonstration of the mental attitude of the "wage earner's" attitude toward Julian Alencoy as a commercial by-product of society to be exploited to the fullest and the underlying hostility of the conservator and his agents to Julian Alencoy's attempt to pursue the legal rights and choices that should be accorded him.

CONCLUSION

It is apparent from the facts as disclosed by the record that Julian Alencoy was and is capable of sensibly selecting his own conservator, and his choice is Helen McNellis; it is respectfully submitted that upon each of the propositions outlined in his Summary of Argument, plaintiff in error and petitioner Julian Alencoy is entitled to the judgment and order of this Honorable Court reversing the

decision of the court below and directing the probate court to remove Andrew Wysowatcky as conservator and appoint in his stead Mrs. Helen McNellis; or that a new hearing be ordered. It may seem a small thing to this Court and that having a conservator of one's own choice when one is old is not too significant -- but it is fervently to be hoped that this Court will be inclined philosophically and legally to grant Julian Alencoy his right of selection. As the late Normal Hall -- a cousin of mine whose understanding mind I warmly admire -- wrote in Mutiny on the Bounty:

> "'I have been many years at sea,' Christian went on, 'and I can tell you that the welfare of men on shipboard depends on things which seem small. A joke at the right moment, a kind word, or a glass of grog is sometimes more efficacious than the cat-of-nine-tails.'"

Respectfully submitted,

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