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### Alencoy's Estate v. Wysowatcky

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF COLORADO**

IN THE MATTER OF THE  
ESTATE OF JULIAN ALENCOY,  
also known as JULIAN V.  
ALENCOY, Ward,

Plaintiff in Error,

vs.

ANDREW WYSOWATCKY, Con-  
servator of the Estate  
of Julian V. Alencoy,

Defendant in Error.

Error to the  
Probate Court  
in and for the  
City and County  
of Denver  
State of Colorado

THE STATE OF COLORADO

JUL - 6 1968

HONORABLE  
DAVID BROFMAN  
Judge

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ANSWER BRIEF OF DEFENDANT IN ERROR

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MARTIN I. STEINBERG

746 Equitable  
Building  
Denver, Colorado  
Telephone: 623-8419

Attorney for Defendant  
in Error

July, 1968.

I N D E X

	<u>Page</u>
I. SUPPLEMENTAL STATEMENT OF THE CASE. . . . .	1
II. SUMMARY OF THE ARGUMENT. . . . .	4
III. ARGUMENT:	
1. <u>COUNSEL FOR JULIAN ALENCOY HAS ERRED IN PURSUING THIS AP- PEAL, FOR IT IS CONTRARY TO THE WISHES AND DESIRES OF JULIAN ALENCOY.</u> . . . . .	5
2. <u>THE PROBATE COURT PROPERLY EXERCISED ITS DUTY BY APPOINTING ANDREW WYSOWATCKY AS CONSERVA- TOR.</u> . . . . .	14
3. <u>THE PROBATE COURT WAS COR- RECT IN DENYING THE PETITION FOR SUBSTITUTION FILED ON BE- HALF OF JULIAN ALENCOY, HELEN McNELLIS, AND THERESA SHIPMAN.</u> . . . . .	32
4. <u>THE ORDER DENYING THE AP- PLICATION FOR REMOVAL OF THE CONSERVATOR IS NOT A FINAL JUDGMENT TO WHICH A WRIT OF ERROR WILL LIE</u> . . . . .	43
5. <u>THERE WAS NO ERROR IN THE PROBATE COURT'S SELECTING DR. EDWARD J. DELAHANTY TO EXAMINE JULIAN ALENCOY</u> . . . . .	45

6. <u>THE PROCEDURE FOLLOWED IN THE PROBATE COURT RESULTED IN A FAIR HEARING FOR ALL PARTIES</u> . . . . .	46
IV. CONCLUSION . . . . .	51

TABLE OF CASES CITED

<u>Hawkyard v. People,</u> 115 Colo. 35, 169 P.2d 178 (1946) . . . . .	.15, 16
<u>O'Neill v. Irwin,</u> ____ Colo. ____, 414 P.2d 122 (1966) . . . . .	.43, 44
<u>Shapter v. Pillar,</u> 28 Colo. 209, 63 P. 302 (1900). . . . .	25

OTHER AUTHORITIES CITED

Colorado Revised Statutes, 1963:

153-9-2. . . . .	15
153-10-8 . . . . .	32

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ANSWER BRIEF OF DEFENDANT IN ERROR

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I. SUPPLEMENTAL STATEMENT OF THE CASE

The adjudication proceedings involving Julian Alencoy were instituted by a letter of Dr. H. C. Whittington, Director of Division of Psychiatric Services for the City and County of Denver, to Mr. Albert Eckhart, Assistant City Attorney, recommending that the Probate Court initiate a Medical Commission proceeding on Julian Alencoy and that action be taken to protect his

assets pending the Medical Commission (Conservator's Exhibit 3, Folio 587). The next day, the Probate Court ordered the Sheriff to take Julian to the emergency room of the Denver General Hospital (Folio 4). On December 15, the Probate Court entered an order authorizing Andrew Wysowatcky to take necessary steps to protect the assets of Julian Alencoy until a determination was made under the adjudication proceedings (Folio 10). On December 16, Anthony Ferretti, Probate Court Investigator, sent a memorandum to Judge Brofman advising how and when the orders of the Court were carried out in regards to Mr. Alencoy (Conservator's Exhibit 4, Folio 588). On December 18, 1966, John R. Starkey of the Denver U. S. National Bank wrote a letter to Judge Brofman concerning Julian Alencoy (Conservator's Exhibit 2, Folio 586).

On December 21, 1966, the Probate Court appointed a Medical Commission consisting of Doctor Edward J. Delehanty and Bradford Murphey (Folio 20). The next day the Notice of Medical Commission Hearing was served upon Julian Alencoy by the Sheriff (Folios 21-22). The Medical Commission made its examination and filed its Report in which it found Julian Alencoy to be mentally ill. On December 27, 1966, the Court entered an Order of Adjudication (Petitioner's Exhibit B, Folio 584).

On January 5, 1967, at the request of the Probate Court and pursuant to Section 153-9-2, C.R.S. 1963, as amended, Andrew Wysowatcky presented a Petition for Letters of Conservatorship (Folios 37-40) which showed unknown heirs and was duly appointed (Folio 41).

Early in February of 1967, Dr. David Garrison of Denver General Hospital advised the Conservator about Julian Alencoy's condition (Conservator's Exhibit 5, Folio 589), which the Conservator filed with the Probate Court February 17, 1967. On February 8, 1967, Julian Alencoy was discharged from Denver General Hospital (Conservator's Exhibit 1, Folio 585) and placed in the Aurora Golden Ager Manor Nursing Home by the staff of Denver General Hospital.

Not until May 9, 1967, was there filed a Petition For Substitution (Folios 83-93) on behalf of Julian Alencoy, Helen McNellis and Theresa Shipman. Not until May 11, 1967, was there a Motion For Psychiatric Examination filed by the same three (Folios 110-112). On May 22, 1967, the Conservator filed his Answer to Petition For Substitution (Folios 118-129).

On the 15th day of June, the Conservator filed an Intermediate Report covering the period of his Conservatorship from December 16, 1966, to June 9, 1967, which

accounting reported the \$7,744.70 that was found in Julian Alencoy's house.

On July 24, 1967, the Probate Court heard the Petition For Substitution (Folios 220-327) and afterwards entered findings and denied the Petition (Folios 328-338).

On July 27, 1967, Robert Leland Johnson filed his Petition For Attorney Fees (Folios 137-143). A fee of \$600.00 was awarded Mr. Johnson by the Probate Court (Folio 208).

There was filed on August 23, 1967, a Petition For Payment Of Costs Of Appeal which included a request for an attorney fee of \$750.00 (Folios 175-179). Subsequently, Mr. Frank Conry filed a Motion For Leave To Withdraw From This Case (Folio 369).

## II. SUMMARY OF ARGUMENT

1. Counsel for Julian Alencoy has erred in pursuing this appeal, for it is contrary to the wishes and desires of Julian Alencoy.

2. The Probate Court properly exercised its duty by appointing Andrew Wyso-watcky as Conservator.

3. The Probate Court was correct in denying the Petition For Substitution



filed on behalf of Julian Alencoy, Helen McNellis, and Theresa Shipman.

4. The order denying the application for removal of the Conservator is not a final judgment to which a writ of error will lie.

5. There was no error in the Probate Court's selecting Dr. Edward J. Delahanty to examine Julian Alencoy.

6. The procedure followed in the Probate Court resulted in a fair hearing for all parties.

### III. ARGUMENT

1. COUNSEL FOR JULIAN ALENCOY HAS ERRED IN PURSUING THIS APPEAL, FOR IT IS CONTRARY TO THE WISHES AND DESIRES OF JULIAN ALENCOY.

It is evident that this matter is before this court because someone other than Julian Alencoy decided that the ruling of the Probate Court should be appealed. The record is quite clear that Mr. Alencoy did not and does not want this appeal.

It was during the hearing of November 30 in regards to the Petition For Payment Of Costs Of Appeal that the Conservator called as a witness one Charles Tesley.

It was through Mr. Tesley that the Conservator offered Conservator's Exhibit A, at which time Mr. Johnson objected and stated: (Folios 467 to 469)

"MR. JOHNSON: Your Honor, I would object until I have interrogated, in Court, Mr. Alencoy on this, because in my opinion this presents a very serious matter. Either Mr. Alencoy wants to appeal this case or he doesn't, and I don't want any question about it. If what he says is true, then I'm guilty of unethical conduct and I want to withdraw right now from this case. If it's not what he says, then I want the Court to determine that he either does appeal or doesn't want to appeal, but what he says there--what is signed right there--indicates that I'm pushing this appeal, and this is not true and I just don't want anything to do with the case at all if there is any kind of implication like that whatsoever. I think it should be set down and Mr. Alencoy brought to Court because if what is said in that letter is true--I think if I presented a petition to this man and did not read it to him and have him read it--I think I

am guilty of the most gross unethical conduct, and if I'm guilty of it and if that's what happened, I don't think that I should even be in court here, and that is not what happened--."

The matter was continued to December 14 at 2 P.M. so that Mr. Alencoy could be brought to court and be given the opportunity to express his view. On that date Mr. Tesley resumed as a witness and through him there was offered and admitted into evidence Conservator's Exhibits A and B (Folios 591 and 592). At the conclusion of Mr. Tesley's testimony, Mr. Johnson indicated to the court that he had no questions of Mr. Tesley. Thereupon, Mr. Alencoy was sworn in as a witness and was interrogated by Mr. Johnson (Folios 511 to 560). During Mr. Alencoy's stint on the witness stand, he stated in every way that he knew how that it was not his desire to appeal.

There follows portions of his testimony while being questioned by Mr. Johnson.

At Folios 530 and 531:

"Q. You understand this, now, do you?

A. You going to appeal it?

Q. Yes. Do you understand that?

A. I don't want no appeal it --."

At Folio 533:

"Q. At that time, did you want to appeal the case? At the time you signed it, did you want to appeal the case?

A. (No answer.)

Q. At that time --

A. Yeah.

Q. -- did you want to appeal the case?

A. Well, that time I told you I don't want to appeal it to the Supreme Court because if one court don't do anything, what the other one going to do? What the Supreme Court going to do?"

At Folio 535:

"Q. All right, during this period of time did Mrs. McNellis discuss with you whether you wanted to appeal or not?

A. She wanted to appeal. Appealing anything, it don't help me at all."

At Folios 537-538:

"A. What I want to appeal for? I don't want. What I'm going to appeal for?

Q. But at the time you signed this petition, did you tell me you wanted to appeal?

A. Not this time.

Q. No, the last time when you signed the petition. Last time, did you tell me that then?

A. (Nodding.)

Q. You didn't? You have to say yes or no because the reporter can't get a nod down.

A. (No answer.)"

At Folio 540:

"Q. All right, now, what did I tell you was the reason to appeal the case?

A. What will appeal do now? Is she appealing now?

Q. I didn't understand you?

A. Appealing the Supreme Court?

Q. Yes.

A. What are you doing? You appealing now?

Q. No, we're not going to appeal unless you want to.

A. No, I don't want to."

At Folios 545-549:

"Q. Do you want me to continue to represent you?

A. Well, you got nothing to represent. I don't want no appealing.

Q. All right, now, you understand --

A. You don't do any good appealing.

Q. And why is this?

A. Jesus Christ. If I want to know anything, tell me we'll give you a statement. He never give me.

Q. And the reason that you don't want to appeal is you think that you may not win?

A. I don't want to appeal it. It don't do no good.

Q. Do you understand that today will be the last time that you will have a chance to say --

A. All right, let it go.

Q. -- that you don't want to appeal or you do want to appeal?

A. I ain't going to appeal. I don't know how long I'll live. If I ever go, I don't take nothing with me. Let her keep it.

Q. And you understand that?

A. Yeah.

Q. Let me ask you the question again. The purpose of the appeal is to reverse the trial court -- you understand that -- to get the decision changed. You understand that that's the purpose of the appeal, is this correct?

A. Why I want to appeal it?

Q. Well, do you understand that that is what an appeal is for?

A. I don't know what for. You got nothing to appeal it.

Q. Do you know what an appeal is for?

A. No, I don't know what an appeal is for.

Q. Well, now, haven't I explained to you what an appeal is for?

A. Just monkey around. That's all. One thing I tell. I wish you leave me alone. Don't bother me at court or drag me to the court rooms. That's the first time happening in my life. I never been in a court room in my life. I never had been arrested for nothing. Why give me trouble now in my old age? Why do you give me trouble now?"

At Folios 551-553:

" \*\*\*\*Do I understand you correctly that you do not want me to take your case through this process?

A. (Nodding.)

Q. You have to say yes or no.

A. No, I don't want nothing appealed.



Q. Okay. Now, do you want me to do anything further for you in this case?

A. Let it be the end of it. That's all.

Q. Sir? I didn't hear you.

A. I wish you don't bother me.

Q. You don't want me to do anything more for you in the case then?

A. No.

Q. Now, you understand that this is a final decision and that we can't come in and repeat the court and say tomorrow we do want to appeal?

A. That's all right."

It is difficult, if not impossible, to determine how counsel could have construed the desire of Mr. Alencoy to end the matter as a green light for a charge to the Supreme Court. In making its ruling, the Probate Court also confirmed what everyone in the court room felt when it stated in its findings: (Folio 574)

"Ruling on this matter, as the Court has indicated, is rather difficult. I don't think any court should put

itself in a position where it has prevented an appeal of its decision. That shouldn't happen, and it won't happen, and notwithstanding the fact that Mr. Alencoy has indicated that he does not want to appeal, apparently, and that he does not want a conservator, if it is still his view or counsel's view that this matter should be appealed, I think arrangements to that extent should be made, but I think the present record reflects one upon which the Court could not go beyond authorizing the actual costs of appeal."

We submit that this is not the appeal of Julian Alencoy, and that this matter should be dismissed forthwith because no other persons have standing to prosecute this appeal.

2. THE PROBATE COURT PROPERLY EXERCISED ITS DUTY BY APPOINTING ANDREW WYSOWATCKY AS CONSERVATOR.

After the adjudication of Julian Alencoy, the Probate Court had a duty to appoint a Conservator to preserve his property. The petition of Andrew Wysowatcky showed there were no known heirs in the State of Colorado, and the one heir later reported was a brother who had no definite address. In fact, it is still not determined if he is alive.

The appointment of Andrew Wysowatcky was made by the Probate Court pursuant to 153-9-2 of the Colorado Revised Statutes, which provides:

"153-9-2 CONSERVATOR - WHEN APPOINTED -  
 (1) Whenever it shall appear to the county court that a person has been adjudicated mentally ill or mentally deficient, and is a resident of the county or has property within such county which must be conserved, and has no conservator appointed by any county court within this state, said court shall appoint some fit person as conservator of the estate of said mentally ill or mentally deficient person.\*\*\* "

That it was the duty of the Probate Court to follow 153-9-2 is the ruling in Hawkyard v. People, 115 Colo. 35, 169 P.2d 178 (1946). That case is similar to this one. Hawkyard had been adjudicated by reason of old age and weakness of mind, incapable unassisted of properly managing and taking care of himself or his property. The Court appointed a conservatrix. The ward appealed both the adjudication and the appointment.

This Court on Page 40 of the State Report ruled:

"If the defendant's mental condition was such as was found by the Lunacy Commission, and parenthetically, we observe that the evidence amply supports its finding, it was the Court's duty to conserve the estate of the unfortunate individual by the method provided by statute, i.e., the appointment of a conservator, '35 CSA, Chapter 105, Section 9."

Further on, in the Hawkyard case, this Court stated:

"The record supports the statement that defendant was in comfortable financial circumstances and justifies the finding that by reason of his age, he was a victim of artful persons who had taken advantage of his infirmity in financial transactions. He is 80 years old, has held positions of prominence in his community, and is now, in his weakened mental condition, entitled to all the protection that the law affords. This protection is accorded by our lunacy statutes, which, so far as we are advised, is the only proper method to be followed under the circumstances presented by the record."

We agree with counsel that Julian Alencoy was critically ill at the time

Andrew Wysowatcky was appointed Conservator (Page 15 of Brief of Plaintiff in Error) and that he was not able to sensibly select his own Conservator (Paragraph 4, Motion for New Trial or Re-Hearing; Folio 147).

The Court was well aware of his condition at the time of adjudication and the time of appointment of Conservator. It had before it the letter of December 13, 1966, from Dr. H. G. Whittington, Director of the Division of Psychiatric Services of the City and County of Denver, Department of Health and Hospitals, in which he advised Mr. Albert Eckhardt, Assistant City Attorney: (Conservator's Exhibit 3, Folio 587)

"Following your phone call of December 12, 1966, I arranged a conference on December the 13th with the Visiting Nurse Mental Health Consultant, Mrs. Jane Lockwood, and the district nurse serving that portion of town.

"We reviewed together the observations of the visiting nurse made between December of 1965 and March of 1966. In addition, we discussed a telephone conversation between Mrs. Lockwood and Mrs. R. J. Shipman, a neighbor of Mr.

Alencoy's, on December the 13, 1966.

"The three of us then went together to Mr. Alencoy's residence at 731 Galapago Street. The radio was playing loudly, and as soon as we approached the backdoor and began to knock it was turned off. Despite repeated loud knocking at both the rear and front door, we were unable to gain admittance to the house. Both doors were locked securely. The next door neighbor informed us as we were leaving that Mrs. Buresch had gained admittance to the house that morning to leave a lunch for Mr. Alencoy, since she was going to be otherwise occupied over the lunch hour. It seems clear, then, that Mr. Alencoy was in the house, was probably aware of our visit, but denied us admission.

"The review of available information from the Visiting Nurse Service and from Mrs. Shipman would indicate that Mr. Alencoy's plight is grave indeed. He is essentially blind and deaf, he has diabetes which is controlled neither by insulin nor by medication. He has large ulcers on his leg, which he keeps wrapped in bandages which

he launders himself. He is totally unable to care for his personal hygiene or the cleanliness of his house. He spends the entire day in the house, arising late in the morning and sitting about for the rest of the day. 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. His behavior with the visiting nurse previously, which Mrs. Shipman describes as characteristic, was one of suspicion and distrust, and a total unwillingness to seek or receive any kind of medical treatment or assistance."

Dr. Whittington further recommended that the Probate Court initiate a medical commission proceeding in regards to Mr. Alencoy, and that he be admitted to Denver General Hospital for initial evaluation.

The Probate Court had also received the memorandum dated December 16, 1966, from Mr. Anthony Ferretti, Court investigator, containing as follows: (Conservator's Exhibit 4; Folio 588)

"After talking to a neighbor, a Mrs. Shipman, we proceeded to the

back door of the residence. We knocked on the door for some ten minutes before we succeeded in rousing Mr. Alencoy. When he opened the back door, the papers were served by the deputies, and at this point all parties entered the kitchen. Mr. Alencoy shouted that he didn't want to go--what were they going to do with him. I advised him we wanted to take him to the hospital to check his leg, that he had an awful bad looking leg. He was dressed in a filthy old pair of long underwear, and it was decided to wrap him in a blanket. We then went into his bedroom which was absolutely inhuman for anyone to live in and got a blanket from his bed. He was asked if he had a robe, and at this time he directed me to a closet where I found a thin bath robe in a filthy bag which I took out and put on the old gentleman. The blanket was placed around him, and the two deputies then helped him out to the car.

"Mr. Alencoy's right leg which he had bandaged with lettuce leaves was ulcerated, black and blue, and swollen enormously. The other leg was also somewhat affected. He



also was hard of hearing and almost blind.

"The house was unbelievably dirty, we well as the bed, and there were large amounts of dust everywhere.

"After the deputies left with Mr. Alencoy, Mr. Sarconi and I remained and a locksmith was called to change the locks. The locks were changed, and we then closed the place and left. Pursuant to order of court, Mr. Sarconi and I removed all articles of value and delivered them to the office of the Public Administrator for safekeeping."

On December 19, 1966, the Probate Court received a letter from Mr. John R. Starkey, Assistant Cashier, Denver United States National Bank (Conservator's Exhibit 2; Folio 586) advising that:

"It is my understanding that on December 14 you signed an order to have Julian Alencoy taken to Denver General Hospital for observation and evaluation. I was instrumental in bringing this case to your attention and thought it might be well if I gave you some background information on Mr. Alencoy.

"He has had a savings account with our bank since 1919. As part of our bank's Customer Relations Program, I was assigned to visit him in 1963 but was unable to contact him. I tried again in 1964 and after four attempts learned from a neighbor that he was deaf. I wrote a letter to him and after other attempts I finally met him in November, 1965. I realized that he was in very poor health; he was nearly deaf, nearly blind, and had a bad case of diabetes mellitus--one leg being very swollen and discolored. Neither his neighbors or I were able to convince him that he should have a doctor see him although he had had an eye operation at St. Joseph's Hospital in June, 1963, by Dr. Harold C. Leight and had seen Dr. Herbert R. Rothenberg at the same time in relation to his diabetes. His home was very dirty and what little care was given to him or his home was done through the generosity of his neighbors, mainly, Mrs. Helen McNellis, 725 Galapago Street, Mrs. C. W. Buresch, 735 Galapago Street, and Mr. and Mrs. R. J. Shipman, 739 Galapago Street."

Further on in his letter, Mr. Starkey stated:

"Several months ago I contacted the City Attorney's Office concerning Julian; and through the Family and Children's Service, he was called on by the Visiting Nurse, but he would not allow her to return. Father Meunier of St. Joseph's Church (from which his wife was buried) has visited him, but to no avail. Finally, I had my friend, Attorney Grant E. McGee, go with me to visit Julian. When Mr. McGee saw the condition of Julian and his home, he suggested that we contact you; and as a result, Julian is now in Denver General Hospital for observation and determination of his future."

In addition, the Probate Court had the benefit of the advice of Drs. Edward J. Delehanty and Bradford Murphey of the Medical Commission (Petitioner's Exhibit B; Folio 584) that Julian Alencoy suffered from a chronic brain syndrome associated with senility and diabetes, and cerebral arteriosclerosis, and recommended he be confined to Denver General Hospital for physical and mental care. They also remarked that:

"This man in need of physical and psychiatric care. Unable to take care of himself."

Clearly, this is why the Probate Court succinctly stated in its findings and order of July 24, 1967: (Folios 330 to 332)

"The Court is permitted to make appointment in the following circumstances: No. One, with proper notice to the ward, or upon a nomination by the ward. Neither of these appears in this case, but there is a provision which provides that under circumstances where the notice or attempt to serve or obtain a view of the ward would not serve any useful purpose, then the Court can proceed to make the appointment, and that's what happened in this case, and the Court finds at the time that such was proper in view of the record in the case, and that is the report of the commission, which indicated that there was chronic brain syndrome, associated with senility and diabetes, and cerebral arteriosclerosis.

"The further report is by the court investigator; Dr. Whittington; and by Mr. Starkey, all of which

indicated we were dealing at that time with a person who is properly described today in the evidence as one who would not permit anybody to do anything for him, that he apparently was "too stingy" to spend any money on himself. He lived in a place that was dirty and filthy, and that apparently he was using, one of the reports indicated, lettuce leaves to wrap around ulcers and sores.

"The entire picture presented one thing, and that was that he could not give his consent at that time, and that it would be called upon the Court to perform a useless act to require notice on the ward."

The Probate Court had in mind the case of Shapter v. Pillar, 28 Colo. 209, 63 Pac. 302 (1900) in which this Court in affirming the authority to appoint a conservator stated at Page 216 of the State Report, "All things being equal, the Court should, so far as consistent with duty, select a conservator agreeable to the wishes of the ward. Especially is this true if the latter is not so insane that he cannot exercise a sensible opinion upon that question."

Actually, the Petition For Substitution never raised the question of the

validity of the appointment of Andrew Wyso-watcky as Conservator. It was purely a request that he be removed and that Helen M. McNellis and Theresa Shipman be appointed as Co-conservators. (Folio 87) No evidence was presented concerning the original appointment and the Probate Court never had the opportunity to determine the validity of the original appointment.

It is interesting to note that immediately prior to adjudication, Anthony Sarconi, investigator for the Public Administrator, met Mr. Alencoy at his home at the time he was picked up by the Sheriff's Office and taken to Denver General Hospital. Mr. Sarconi helped to secure the house and protect Julian Alencoy's possessions after adjudication (Folios 295 to 299). Shortly after adjudication, Mr. Sarconi visited Mr. Alencoy at the nursing home on several occasions. The purpose of these visits was described by Mr. Sarconi (Folios 300-306). Part of Mr. Sarconi's testimony goes as follows:

"Q. When was the next time you saw Mr. Alencoy?

A. That was several weeks later out at the nursing home, Golden Age Manor, in Aurora.

Q. And when you went to see him, there, what did you go there for?

A. I went out to see what his condition was, and to see if there was anything that he needed.

Q. And were you doing this as an employee of the administrator of the conservator?

A. That's right.

Q. What did you discuss with Mr. Alencoy?

A. He asked about his bank books and money that was in the house, and his pension check, and wanted to know if we had found those things. I told him that we had, and we had secured them, and that we were receiving his pension checks, and they were being credited to his account.

Q. When you went to see him on this occasion, what did you tell him, as far as your identification? What sort of information did you supply him?

A. Oh, I told him I was a representative of his conservator, and I showed him my identification.

Q. Did you have an opportunity to see him again after that visit?

A. Yes, I saw him several times after that for the same purpose, to see how he was getting along, and to see if there was anything that he needed. On the first visit to the nursing home, I discussed his condition with the manager of the nursing home, as well as the head nurse of the nursing home, and asked for their evaluation of his condition."

Yet, not until over four months after the adjudication of Julian Alencoy was the Petition For Substitution filed.

We further submit that Julian Alencoy cannot yet make a sensible choice as regards a Conservator, nor does he know what a Conservator is. The record staunchly supports this fact. Firstly, the Petition For Substitution filed by Julian Alencoy, Helen McNellis and Teresa Shipman on May 9, 1967 (Folios 83 to 87) requests that Andrew Wysowatcky be removed and Helen McNellis and Teresa Shipman be appointed as Co-Conservators.

Later, when called as a witness in the hearing of July 24, 1967, Mr. Alencoy testified on direct examination as follows (Folios 231 to 234):

"Q. What are the duties that a conservator is supposed to do?



A. I don't know what they're supposed to do. I don't know what he is supposed to do. You have to tell me what he is supposed to do.

THE COURT: Would it be a legal conclusion under our statute that you're calling for?

MR. JOHNSON: Well, yes. I am trying to get him to have some kind of expression.

Q. (By Mr. Johnson) 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.

Q. Why do you want Mrs. McNellis?

A. Well, I don't know. She insults me awfully bad.

Q. Mrs. McNellis?

A. No, Shipman.

Q. Well, why do you want Mrs. McNellis?

A. Well, why - she's an honest lady.

Q. Do you want her to handle your affairs for you then as conservator?

A. Well, it's all right. If you want to."

On cross-examination, Mr. Alencoy testified (Folio 240):

"Q. Mr. Alencoy, do you want to change conservators?

A. Change?

Q. Yes. Do you want a change of conservators?

A. If you want to change, it's all right with me.

Q. Do you want a change?

A. If you want to change it, change it.

Q. Mr. Alencoy, do you want a change?

A. You do nothing else. I don't see anything done."

Still later, on September 27, 1967, Mrs. Helen McNellis was called as a witness

in connection with the hearing on the Motion For New Trial. She testified (Folio 353) that Mr. Alencoy wanted Mr. Johnson and Mr. Conry to take over as Conservators for him, but they did not want to. So then it was decided that Mrs. Shipman and Mrs. McNellis would do it.

Still later, on the 30th day of November, 1967, Mr. Johnson stated to the Court (Folio 393) that he believed from talking to Julian Alencoy that it would make Mr. Alencoy very happy if Mrs. McNellis would be appointed co-conservator with Mr. Wysowatcky.

Subsequently, on the 14th day of December, 1967, Charles Tesley, a witness for the Conservator, testified (Folios 485-508) about the numerous visits he made to the nursing home to see Mr. Alencoy on behalf of the Conservator. He told the Court how Conservator's Exhibit B came into existence, said Exhibit B (admitted in evidence November 30, 1967, Folio 592) being a notarized statement signed by Julian Alencoy on August 29, 1967, in which he states:

"It is my desire that Andrew Wysowatcky continue to act as my Conservator and look after my affairs."

We question seriously what Mr. Alencoy wants, if he knows. We submit that Mr.

Alencoy came as close to the real answer as he can when he testified in regards to the appeal. He blurted out about Mrs. McNellis (Folio 535):

"She wanted to appeal."

If all of these alleged desires of Mr. Alencoy had been given effect by the Probate Court, there would have been five different changes in Conservators, or combinations of Conservators, since the original appointment of Andrew Wysowatcky was made.

3. THE PROBATE COURT WAS CORRECT IN DENYING THE PETITION FOR SUBSTITUTION FILED ON BEHALF OF JULIAN ALENCOY, HELEN McNELLIS AND THERESA SHIPMAN.

The Petition For Substitution was in reality a "Petition For Removal" of the Conservator. Sec. 153-10-8 of the Colorado Revised Statutes is quite clear in enumerating the grounds necessary to support an order removing the fiduciary. This section provides:

"158-10-8 Removal Of Fiduciaries--  
Effect-- \* \* \* \*

(2) The Court shall have the power to remove any fiduciary of an estate

and to revoke the letters of such fiduciary whenever such fiduciary shall be or become disabled; an habitual drunkard; convicted of a crime; shall waste or mismanage the estate; or conduct himself in such a manner as to endanger a cofiduciary, surety, or any person interested in the estate; or shall abscond or remove from the state or refuse or neglect to perform any material duty or fail to comply with an order or direction of the court; or if such appointment was obtained by false pretense or representation; or for any other good and sufficient reason in the opinion of the court. \* \* \* \* "

Not one shred of evidence was adduced by the petitioners to support the "Petition For Removal" of the Conservator. The Probate Court, after hearing all of the evidence, stated in its findings and Order of July 24, 1967 (Folio 329):

"The question as to properly administering the estate and caring for the ward is one that apparently there's no conflict on. There isn't any evidence to indicate that the acts of the Public Administrator are not proper under

the circumstances, and the only complaint in that regard is from the ward himself, who is not acquainted with Mr. Wysowatcky, but rather is acquainted with one of the representatives of his office, who was acting on behalf of Mr. Wysowatcky's office."

Further on the Probate Court stated (Folios 333 to 336):

"As has been indicated, we are dealing with a man who is properly described in Dr. Delehanty's report who has paranoid thinking, directed to one thing, and that one thing is that he wants to go to his home. A man of his attitude and conditioned by that attitude over a period of years, is apparently shocked by the realization that he has to pay \$10.00 a day for care and maintenance. I am surprised that he is getting such good care for only \$10.00, but none the less, it's shocking to him, and he would like very much to go back to his home.

"I think that it's agreeable with everyone here, apparently, that just could not happen, because he couldn't take care of

himself, and the fact that he couldn't take care of himself has been indicated by the condition in which he lived in the past, and in which he made no effort whatsoever to remedy that condition. Most certainly he's unable to take care of his affairs, because they were not taken care of at that time, and it appears to the Court that under the circumstances of this case, as has been indicated by the evidence, we have a man who has only one thing in mind, that is to get back to the same condition he was in before. That cannot be permitted, and I think the Court would be neglecting its duty if the Court did anything whatsoever to permit a wedge that might indicate some hope to him in that direction, and that would be through the appointment of any one other than a person who could objectively and forcefully, and with the authority and experience to proceed to see that Mr. Alencoy got all of the treatment that is necessary under the circumstances.

"The matter of expense is no problem. He has a sufficient estate, and he should have been taking care of himself; and persons of interest, knowing of this

condition, should have advised the authorities. As I see the file, it is completely lacking in this, except from one source, and that is from Mr. Starkey at the bank who apparently notified the authorities for the second time. Apparently there was some previous communication, but no action was taken.

"The Court, therefore, finds that the appointment was proper, that the fiduciary has carried out his duties, and in a commendable manner and most highly."

In contrast to the lack of evidence supporting the "Petition For Removal," the Court had been fully advised by the Conservator in his Answer (Folios 118-129) of the history of this case and the steps that had been taken to improve Mr. Alencoy's state of health. There were also the following exhibits which had been admitted in evidence:

1. Petitioner's Exhibit A, letter from Dr. Edward J. Delehanty to the Court, dated June 2, 1967 (Folio 583).

2. Petitioner's Exhibit B, Order of Adjudication, Order of Commitment or Custody, and Certificate of Judge; Report of



Guardian ad Litem; Report of Medical Commission (Folio 584).

3. Conservator's Exhibit 1, Discharge Summary from the Denver General Hospital dated March 27, 1967 (Folio 585).

4. Conservator's Exhibit No. 2, letter dated December 19, 1966 from Mr. John R. Starkey, Assistant Cashier of the Denver United States National Bank to Judge David Brofman (Folio 586).

5. Conservator's Exhibit 3, letter dated December 13, 1966 from H. G. Whittington, Director of Division of Psychiatric services of the City and County of Denver to Albert Eckhart, Assistant City Attorney (Folio 587).

6. Conservator's Exhibit 4, Memorandum from Anthony Ferretti, Court Investigator, dated December 16, 1966 to Judge David Brofman (Folio 588).

7. Conservator's Exhibit No. 5, letter dated February 8, 1967, from Dr. David Garrison of the Denver General Hospital staff to Andrew Wysowatcky (Folio 589).

Also, the Court had the benefit of the testimony of the following witnesses: Julian Alencoy (Folios 227-252); Mrs. Theresa Shipman (Folios 252-273); Mr.

Otto F. Winters (Folios 273-278); Mrs. Helen Marie McNellis (Folios 279-292); Mr. Anthony Sarconi, investigator for the Public Administrator (Folios 294-306); Mr. Ray G. Watkins, Administrator of the Golden Age Manor Nursing Home (Folios 307-316); and Mrs. Nora Vorheis, registered nurse at Golden Age Manor Nursing Home (Folios 317-326).

On cross-examination, Mrs. Shipman testified (Folios 261-266):

"Q. Mr. Alencoy was in bad shape in December of last year, wasn't he, when he was taken to the Denver General Hospital?

A. Very bad shape.

Q. What do you mean by "very bad shape"?

A. He could hardly walk, and he still had a good appetite, but he couldn't eat very well because his teeth were in too bad a condition.

Q. How about his legs?

A. They were terrible.

Q. What do you mean by "terrible"?

A. All swollen and, I know you said that I'm not here to give medical testimony, but one time I went over there and there was pus and blood on the floor, his leg was all swollen up, and it was running. He had running ulcers on his leg.

Q. How long did he have those running ulcers, Mrs. Shipman?

A. For a couple of years.

Q. How about his eyes?

A. His eyes have been in very bad condition. I believe he had one cataract operation a few years ago, but he needed another one.

Q. He needed another one?

A. Yes.

Q. Why didn't he have the other one?

A. I'm supposed to tell the truth--I think he's too stingy to spend the money. He is very careful and conservative with his money, and he didn't want to spend the money.

Q. How about his ears, were they infected?

A. Same way with his ears.

Q. Were they infected with mastoids?

A. I don't know what was wrong with them, he just couldn't hear.

Q. Did he have any treatment for his ear condition?

A. Not that I know of.

Q. You mentioned a Dr. Rothenberg. Was this the doctor who was treating his diabetic condition?

A. I believe it was.

Q. And this is the doctor that you testified about that you'd made appointments, but he just wouldn't go?

A. Yes.

Q. In other words, this was his history, he just wouldn't go to doctors for medical treatment?

A. Well, I never personally made an appointment with Dr. Rothenberg for Julian, but I did call Dr. C. R. Starks, and he would wait until the morning of the day that he was supposed to go, and then he'd tell me

he would go next week; but he did see Dr. Rothenberg, and I believe that was the doctor, and he had him in fairly good condition; and then he refused to go any longer.

Q. And all during this time Mrs. McNellis was living on one side of him?

A. Yes. And I called the United Charities, or whatever it is, United Aid, and I called the Nursing Service, and they would come out, and I would go over there with them, and we tried to help him, but he just wouldn't let us help him."

Mrs. McNellis testified on cross-examination (Folios 283-286):

"Q. What was Mr. Alencoy's condition in December of last year?

A. Well, it was, the first part, I think they took him to the hospital; but the first part was very poor.

Q. Would you describe his condition?

A. Well, he was a real sick man, I would say. There was times, I feel, that he was in a coma like, from the diabetic condition; his legs were

terribly swollen and had running ulcers; his teeth was bad, and he was a real sick man.

Q. And did you ever try to get him to see a doctor?

A. Yes, I did.

Q. And did he go?

A. No, he would tell me, "No, tomorrow," or "next week".

Q. So, you didn't have much control?

A. No, I couldn't. Only to try to coax, and that's the best I could do.

Q. That didn't do very well. In fact, the only way they got him to the hospital was taking a cab, and they took him forcibly?

A. Yes, I think.

Q. Do you think Mr. Alencoy should go back to his home at 731 Galapago?

A. Oh, I do not. I think he would get in the same condition.

Q. Have you always had the same idea?

A. I always felt that, well, in the last ten years he's been going down. I felt he should have care."

No other conclusion can be drawn from this evidence than that the Probate Court was correct in denying the "Petition For Removal." No grounds for removal were presented, but rather the evidence was strong to the contrary. The issue of removal was the only one presented by the Petition For Substitution and no issue was raised or presented regarding the original appointment.

4. THE ORDER DENYING THE APPLICATION FOR REMOVAL OF THE CONSERVATOR IS NOT A FINAL JUDGMENT TO WHICH A WRIT OF ERROR WILL LIE.

Since the issue of removal of the personal representative was the only issue raised in the Probate Court, a serious question is presented here as to whether the denial of the application for removal of Andrew Wysowatcky is a final judgment to which a writ of error will lie. O'Neill vs. Irwin, \_\_\_ Colo. \_\_\_, 414 P.(2d) 122, (1966).

In the O'Neill case, a petition was filed for removal of the Executor. The trial court denied the petition as in the case at Bar. This Court stated, at Page 123 of the Pacific Reporter:

"In Colorado, the question whether an order denying an application for removal of a personal representative is a final judgment to which a writ of error will lie depends not upon the parties but upon the effect the order will have upon the status of the parties after its entry. Such an order is deemed to be interlocutory and not appealable where the charges upon which removal is sought involve conduct which can be corrected and controlled by court order; it is deemed to be final and appealable where the charges involve absolute disqualification of a fiduciary or his inability to qualify. *Flowers v. Zeilinger*, 102 Colo. 556, P.2d 879; *Handley v. Hilliard*, 114 Colo. 286, 163 P.2d 651; *Parks*, Colorado Probate Practice Manual, 140. See also 37 A.L.R. 2d 751, 780."

and dismissed the writ of error.

It appears that the Probate Court's denial of the removal of Andrew Wysowatcky is similar to the denial of the removal of the Executor in the O'Neill case, and as a result, the order is not appealable and this writ of error should also be dismissed.



5. THERE WAS NO ERROR IN THE PROBATE COURT'S SELECTING DR. DELEHANTY TO EXAMINE JULIAN ALENCOY.

There was filed by Julian Alencoy, Helen McNellis and Theresa Shipman on May 11, 1967, a Motion For Psychiatric Examination (Folios 110 to 112). On or about Monday, May 22, 1967, counsel for the Conservator, Martin I. Steinberg, and Mr. Johnson appeared in the chambers of the Probate Court, whereupon this motion and other pending matters were discussed with the Court. The Court indicated that he thought it best that he appoint a psychiatrist to examine Julian Alencoy. No objection was made at that time to such a procedure by either Mr. Steinberg or Mr. Johnson.

The Judge selected Dr. Edward J. Delehanty, who was a member of the Medical Commission, to make the examination of Mr. Alencoy. The Court felt that since Dr. Delehanty had examined Mr. Alencoy previously, an examination would be much more accurate if Dr. Delehanty was appointed to make the new examination, thus lending continuity to the diagnosis of this man. No objection was made to the appointment of Dr. Delehanty by either Mr. Steinberg or Mr. Johnson.

In fact, it appears from Dr. Delehanty's letter dated June 2, 1967 (Folios 133-

134) to Judge Brofman that Mr. Johnson contacted Dr. Delahnaty in regards to the examination. For after stating in his letter that Mr. Alencoy does not comprehend or care who or what a Conservator is, as he is too absorbed in his paranoid thinking, Dr. Delehanty further stated that: "Mr. Robert Johnson will attempt to enlighten this man on the legal nature of a conservatorship."

Actually, the record reflects that no objection was made to the Court's exercise of its judgment in appointing Dr. Delehanty until after the trial and after Mr. Johnson himself had introduced Dr. Delehanty's letter as Petitioner's Exhibit A (Folio 583). The first time it appears to have been objected to was in Paragraph 7 of the Motion for New Trial or Re-Hearing (Folio 148).

6. THERE WAS NO ERROR COMMITTED BY THE PROBATE COURT IN ALLOWING TRAINED NURSING HOME OFFICIALS TO BRING JULIAN ALENCY TO COURT.

The record reflects that on May 9, 1967, there was filed by Julian Alencoy, Helen McNellis and Theresa Shipman a Petition For Leave To Have Julian V. Alencoy At Hearing on the "Petition For Substitution" (Folios 103-105). At the informal conference held in the Probate Court's chambers during which Mr. Steinberg and Mr. Johnson were in attendance, this matter was fully

discussed and at the conclusion of which the said Mr. Steinberg was directed by the Probate Court to issue instructions to the nursing home officials to make sure that Mr. Alencoy was in court at the designated time so that he could be present at the hearing on the Petition For Substitution. No objection was made by either Mr. Steinberg or Mr. Johnson to this procedure. We believe it was at the same informal hearing that Mr. Johnson suggested that everything be done to fit Mr. Alencoy with a hearing aid by the time of the hearing. Mr. Steinberg advised the Court and Mr. Johnson that Mr. Alencoy was already under treatment by a Dr. Swanson, an eye, ear, nose and throat specialist, and that everything would be done to secure a hearing aid for Mr. Alencoy.

Subsequently, on July 24, 1967, at the hour of 2 p.m., the date and time designated for the hearing, Mr. J. E. McLaughlin, Administrator and Mrs. Nora Voorheis, Supervisor of Nurses of the Golden Age Manor Nursing Home, brought Mr. Alencoy to the Probate Court, as they had been directed by Mr. Steinberg. The hearing was opened with a statement from Mr. Steinberg advising the Court (Folios 222-223) as to the steps taken by the Conservator to make sure that Mr. Alencoy was fitted with a hearing aid. He indicated that Dr. Swanson had treated Mr. Alencoy's mastoids and referred the matter of fitting

the hearing aid for Mr. Alencoy to Lipincott Hearing Center. He further advised the Court that Mr. Alencoy was fitted with a heavy duty type hearing aid and that it did work, but that Mr. Alencoy did not like it and refused to use it. Mr. Steinberg further advised the Court that a speech therapist had been called in to help Mr. Alencoy adapt to the hearing aid. To this Mr. Johnson stated: "This is all right by me," and then requested the Court as follows (Folios 223, 224):

"Your Honor, may I ask that Mr. Alencoy be seated by me, as his counsel?"

THE COURT: Certainly.

MR. JOHNSON: (Continuing) so I can consult with him.

\* \* \* \*

ROBERT JOHNSON: Your Honor, there are certain medical reports that we have stipulated to, and also there is a letter from Dr. Delehanty which we would stipulate to and would actually offer as our testimony."

The record does not reflect when Mr. Johnson had ever made an objection to this procedure. At no time was Mr. Alencoy restrained by Mr. McLaughlin or Mrs. Voorheis when he was in the courtroom, and it was

quite obvious to everyone in attendance that their concern for Mr. Alencoy while in their custody was the usual and natural concern for a man of over 80 years of age and a man of Mr. Alencoy's condition, for whom they were responsible.

It is to be noted that after Mr. Alencoy had completed his testimony on the witness stand, he resumed sitting in his seat next to Mr. Johnson and remained seated there throughout the testimony of Mrs. Shipman and Mr. Winters. About 3:10 p.m., it was called to the Court's attention (Folio 278) that Mr. Alencoy was getting tired and if he was not needed any further, it would perhaps be best for him to be returned to the nursing home for rest. Whereupon, with the Court's permission, Mr. Steinberg and Mr. Johnson conferred with Mr. McLaughlin and it was decided he would return to the nursing home with Mr. McLaughlin. No objection was made by Mr. Johnson.

Much concern is made by Mr. Johnson about a remark alleged to have been made by Mr. McLaughlin in reference to Mr. Johnson. We can hardly believe, if made, that this remark had any effect, since Mrs. McNellis, who was in the courtroom at the time, testified on cross-examination in connection with that remark as follows (Folios 356-357):

"Q. Mrs. McNellis, you were in the Court the date of the hearing, weren't you?

A. Yes.

Q. In what tone of voice were questions asked Mr. Alencoy at the time he was on the witness stand?

A. Well, they were loud.

Q. They had to shout to him, did they not?

A. Yes.

Q. So, if somebody wasn't shouting in his ear -- in fact, when questions were asked him, didn't Mr. Johnson and I, like I'm here now, getting close to you, didn't we shout and yell in his ear?

A. Yes.

Q. So, any of the conversation had in the back, or heard in the back, he wouldn't have heard, would he?

A. No, I don't think he heard it."

We believe that the care and treatment provided for Mr. Alencoy is the best indication of the concern that the nursing

home officials and the Conservator had for Mr. Alencoy. Nothing was spared, and as a result, a man who came to the Golden Age Manor Nursing Home in a wheelchair, unable to walk (Folio 310), appeared in the Probate Court on July 24, 1967, without wheelchair and on his own two feet. The Probate Court took notice of this on December 14, 1967, stating (Folio 572):

"As far as his physical health is concerned, on the basis of the Court's observation, I think those who are responsible have done an outstanding job, because he looks to me now that he has been well taken care of."

A review of this entire record refutes the contention of Mr. Johnson for it is vividly clear that the procedures followed in the Probate Court resulted in a fair hearing for all parties.

#### IV. CONCLUSION

We respectfully submit that the Probate Court correctly ruled in denying the petition for removal. No grounds for removal were presented, but rather the evidence was strong to the contrary. The issue of removal of the Conservator was the only one presented by the Petition For Substitution and no issue was raised or presented regarding the original appointment.

Equally important, is that Julian Alencoy did not want the ruling of the Probate Court appealed to this Court.

We therefore respectfully submit that this matter should be dismissed forthwith as not being the appeal of Julian Alencoy or that the judgment of the Probate Court be affirmed.

Respectfully submitted,

MARTIN I. STEINBERG

746 Equitable Building  
Denver, Colorado  
Telephone: 623-8419

Attorney for Defendant  
in Error

July, 1968.