

## **Guardian ad Litem in Mental Health Cases**

Johnson v. Lambotte, 363 P.2d 165 (Colo. 1961).

The issue is whether a mentally incompetent person is liable for damages caused by the person's tortious negligence in an action in which the incompetent person is not represented by a GAL, conservator, or other fiduciary.

The general rule is that an insane person may be held liable for his torts the same as an insane person, particularly with negligence, where no intent is required. Rule 17(c) R.C.P.Colo. provides that "the court shall appoint a GAL for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

Here, the incompetent person was represented by competent and qualified counsel and so the appointment of a GAL was not required. The defendant can be liable for the damages caused by her negligent acts.

People in Interest of Clinton, 762 P.2d 1381 (Colo. 1988).

Section 27-10-107(5) requires that "whenever a certification [for treatment] is filed with the court, the court...shall forthwith appoint an attorney to represent the respondent." Section 27-10-107, 11 C.R.S. (1982). The issue here is whether a failure to appoint counsel forthwith results in a defect of jurisdiction, rendering the court's decision invalid.

There are two types of cases that arise when dealing with mental health statutory provisions. The first are cases treating the failure to comply with essential statutory provisions as serious enough to amount to reversible error requiring invalidation of the certification proceeding. The second are cases finding defects in notice or process, or attempts by courts to exercise power over persons not within the scope of the court's statutorily prescribed jurisdiction. In those cases, the court held that the court lacked jurisdiction over the respondent in order to issue the challenged certification order.

It is contended that failure to appoint counsel forthwith is a violation of jurisdiction. We conclude that this is a statutory violation not implicating jurisdictional concerns.

The requirements to obtain legal authority over the respondent, personal jurisdiction, in a mental health proceeding are set forth in the mental health statutes, beginning with Section 27-10-106(6). It is not suggested that the respondent did not receive notice of the certification or that she is not a resident of the county in which the court sits. The appointment of counsel does not affect the residence of a person or notice of the action and therefore does not affect personal jurisdiction.

Pertaining to subject matter jurisdiction, the statutory requirements are described in Section 27-10-111(4). The subject matter jurisdiction of the court is invoked by the filing of the certification petition. The court in which the petition is filed becomes the court of original and continuing jurisdiction of the proceeding. The requirement of appointment of an attorney is not

invoked until after subject matter jurisdiction is established, and therefore does not affect the subject matter jurisdiction of the court.

The key inquiry, then, in dealing with situations of statutory violations that do not affect jurisdiction is whether the violation, here, failure to appoint counsel forthwith, violates an "essential condition" of the statute. It is necessary to consider the inherent importance of the statutory provision and the nature and degree of the deviation from the requirements of the statute. Two factors help with this assessment. First, the gravity of the deviation from statutory provisions, including a consideration of due process concerns must be evaluated, and second, any prejudice to the respondent caused by the deviation must be determined.

Here, the respondent's essential procedural rights were not violated. The delay in appointment of counsel did not deprive the respondent of any essential procedural rights granted by the mental health statutes. The respondent was able to obtain counsel and a hearing was held at which she was able to raise any objections to the certification. The violation was not so serious as to undermine confidence in the fairness and outcome of the proceeding.

People v. Medina, 705 P.2d 961 (Colo. 1985).

There is a multi-faceted issue in this case. The court considers whether an institutionalized mentally ill patient who is incompetent to effectively participate in a treatment decision has a right to initially refuse the administration of antipsychotic medicine and also, if that right exists, the court of the right and the appropriate procedures to be followed in determining whether and under what circumstances antipsychotic medicine may be administered over the patient's objection.

A person certified for mental health care and treatment does not "forfeit any legal right or suffer legal disability" unless specifically and otherwise ordered by the court. Section 27-10-104, 11 C.R.S. (1982). Every human has a right to determine what is done to his body. Certification alone does not vitiate the right to refuse medical treatment. Only if a competent tribunal reaches a finding that the patient's illness has so impaired his judgment that he is incapable of participating in decisions affecting his health may such medication be administered against the patient's will.

Here, no such finding was made as to the patient. The lower court ruled that the medication could be administered based on the patient's being incompetent. This is not enough.

In order for a physician to be granted an order allowing an antipsychotic medication to be administered against a patient's will, certain requirements must be met. First, the patient has the right to court-appointed counsel. The court may also appoint a GAL when circumstances indicate one would be of assistance in the case. The physician must prove by clear and convincing evidence that there is a justification for nonconsensual treatment.

Both the interest of the patient and the state will be adequately served if the physician shows 1) that the patient is incompetent to effectively participate in the treatment decision; 2)

that treatment by antipsychotic medication is necessary to prevent a significant and likely long-term deterioration in the patient's mental condition or to prevent the likelihood of the patient's causing serious harm to himself or others in the institution; 3) that a less intrusive treatment alternative is not available; and 4) that the patient's need for treatment by antipsychotic medication is sufficiently compelling to override any bona fide and legitimate interest of the patient in refusing treatment.