

ESSAY QUESTION NO. 3

Answer this question in booklet No. 3

Mike has been diagnosed as a schizophrenic for the last 10 years. For the first 8 years of his illness he controlled his condition with psychotropic medication. However, he greatly disliked the very serious side effects. Mike weaned himself off the medication and began to control his condition with herbs, diet and meditation.

Recently, Mike began experiencing a schizophrenic episode. He was taken to and properly admitted to a state operated mental health facility. Jill, a mental health professional at that facility, recommended psychotropic medication. Mike adamantly opposed Jill's recommendation. The State attorney for the facility then filed a petition asking a judge for permission to administer psychotropic drugs without patient consent. In that petition, the State said that Mike was incapable of giving consent and that Mike was not violent or in a crisis or an emergency situation but, based on his treatment providers' observations, he was experiencing a "living hell." After reading the petition, the Judge issued an order allowing the State's mental health professionals to use "their own good medical discretion." Mike did not know about the petition until after the order was signed. Jill started Mike on the medication.

Mike is very upset that he was given the medication and he wants to ensure that this will never happen again.

Discuss any violations of Alaska's Constitution under this set of facts (do not discuss any statutory provisions related to involuntary administration of medications).

GRADER'S GUIDE

*** QUESTION NO. 3 ***

SUBJECT: CONSTITUTIONAL LAW

Applicants are not expected to know Alaska's specific statutory scheme regarding mental commitment proceedings or statutes relating to the involuntary administration of psychotropic medication. Applicants are expected to discuss, under Alaska's Constitution, Mike's rights to due process, liberty, and privacy.

I. Nature of the Rights Implicated Under Alaska's Constitution (10 pts)

The question implicates procedural due process rights, liberty, and privacy rights under Alaska's Constitution. Specifically, Article I, section 1 of Alaska's Constitution states: "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of its own industry." Section 7 of Article I further states: "No person shall be deprived of life, liberty or property without due process of law." Finally, Article I, section 22 declares: "The right of the people to privacy is recognized and shall not be infringed."

The Alaska Supreme Court has long held that the federal constitution sets only the minimum protections afforded Alaskans and that the Alaska Constitution "often provides more protection." Myers v. Alaska Psychiatric Institute 138 P.3d 238, 245 (Alaska 2006); Valley Hospital Association v. Mat-Su Coalition, 948 P.2d 963, 966-67 (Alaska 1997).

Specifically, Alaska's guarantee of privacy is greater than the federal constitution's. This is especially true given that Alaskans amended the Alaska Constitution in 1972 to explicitly add a privacy guarantee, a guarantee that is not explicitly found in the federal constitution. 138 P.3d at 245.

Even prior to the addition of Alaska's privacy clause, the Alaska Supreme Court in Breeze v. Smith held that Alaska's guarantee of individual liberty is broader than that found in the federal constitution. Breeze v. Smith, 501 P.2d 159, 170-172 (Alaska 1972).

II. Whether Mike's Constitutional Rights Were Violated

A. Balancing Individual Rights Against State's Interest (20 pts)

In determining the boundaries of individual constitutional rights, the Alaska Courts balance the importance of the individual right "against the state's interest...." Myers v. Alaska Psychiatric Institute, 138 P.3d 238, 245 (Alaska 2006); Sampson v. State 31 P.3d 88, 91 (Alaska 2001).

When state actions place a substantial burden on the exercise of a fundamental right the state is required to articulate a “compelling state interest” and demonstrate “the absence of a less restrictive means to advance [that] interest.” 138 P.3d at 245-246.

But, where the individual’s impinged right falls short of a fundamental right then the state must merely show “a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest.” Id. at 246. (citations omitted).

B. Importance of Mike’s Individual Rights to Privacy and Liberty (20 points)

The Alaska Supreme Court frequently analyzes privacy and liberty interests concurrently. Id. Enumerating the contours of these parallel interests the court has said:

In the past we have recognized that Alaska’s constitutional rights of privacy and liberty encompass the prerogative to control aspects of one’s personal appearance, privacy in the home, and reproductive rights. We have noted few things [are] more personal than one’s body, and we have held that Alaska’s constitutional right to privacy clearly shields the ingestion of food, beverages or other substances. Myers v. Alaska Psychiatric Institute, 138 P.3d 238, 246, (Alaska 2006) (internal quotations and citations omitted).

Addressing the issue of the forced administration of psychotropic medication the Myers court held:

Because psychotropic medication can have profound and lasting negative effects on a patient’s mind and body, we now similarly hold that Alaska’s statutory provisions permitting nonconsensual treatment with psychotropic medications implicate fundamental liberty and privacy interests. Id. at 246.

Thus, Mike has a protected fundamental liberty and privacy interest in refusing to take psychotropic medications. Accordingly the state must show a compelling state interest to force psychotropic medication on Mike. Remember that this was neither a crisis nor emergency situation. In absence of a “crisis” or “emergency” the Alaska Supreme Court in Myers was unequivocal:

[t]he right to refuse to take psychotropic drugs is fundamental; and we further hold that this right must extend equally to mentally ill persons so that the

mentally ill are not treated as persons of lesser status or dignity because of their illness.

When no emergency exists, then the state may override a mental patient's right to refuse psychotropic medication only when necessary to advance a compelling state interest and only if no less intrusive alternative exists.

Myers, 138 P.3d at 248. (internal quotations and citations omitted).

C. The State's Interest (20 points)

Applicants might argue that the state's interest is grounded in two separate concepts: the state's police power and its *parens patriae* duty. These were the grounds asserted by the state in Meyers. There, the court summarily rejected the police power premise in cases, such as the instant one, where no emergency exists. Id. at 248. Specifically the court held:

If there is no emergency, hospital personnel are in no danger; the only purpose of forcible medication would be to help the patient. But the basic premise of the right to privacy is the freedom to decide whether we prefer to be helped, or to be left alone.

Id. at 248-49. (citations omitted).

Given this framework the purpose of alleviating Mike's "living hell" may not reach the level of a compelling state interest. Mike's condition is not detailed in the facts. The analysis is more important than the conclusion.

The closer argument regarding the state's compelling state interest, if any, is related to *parens patriae* (the inherent power of the state to protect the person or property who lacks legal age or capacity). As a threshold, the Myers court held that the state's *parens patriae* obligation can, in some situations, give the state a compelling state interest to involuntarily administer psychotropic medication. Id. at 249.

The questions then become: What are the situations and who decides? The answer to the first question seemingly is when the psychotropic medication is in the individual's "best interest" and there is no less restrictive alternative. Id. at 249-250. The second question dovetails with Mike's potential due process arguments.

D. Due Process Violations

1. Notice and Opportunity to be Heard (15 points)

Here, Mike was not informed until after the Judge had issued the order that the State mental health facility was seeking court permission to administer the

medication. This clearly violates procedural due process. As the Alaska Supreme Court said in a case similar to Mike's.

As a general principle, due process requires that notice of a hearing must be appropriate to the occasion and reasonably calculated to inform the person to whom it is directed of the nature of the proceedings.

Wetherhorn v. API, 156 P.3d 371, 380 (Alaska 2007). Mike was given no notice and no opportunity to prepare.

2. No Independent Judicial Determination (5 points)

Here, Mike has an additional due process argument because the Judge abdicated the court's authority to the State mental facility by allowing them "to use their own good medical discretion." The Myers court held that only the court may use its discretion:

[B]efore a state may administer psychotropic drugs to a non-consenting mentally ill patient in a non-emergency setting, an independent judicial best interests determination is constitutionally necessary to ensure that the proposed treatment is actually the least intrusive means of protecting the patient.

The constitution itself requires the courts, not physicians, to protect and enforce the guarantees.

Id at 250.

Among the court's concerns is "the inherent risk of procedural unfairness that inevitably arises when a public treatment facility possesses unreviewable power to determine its own patients' best interests." Id.

Thus, it is clear that a Judicial Officer cannot, in a non-emergency situation, defer to a medical professional in a decision as fundamental as forcing someone to take powerful medication against his will.

As noted, under Myers, the required procedure in a nonemergency setting is an independent judicial determination concerning the proposed administration of psychotropic drugs to a non-consenting mentally ill patient. Here, the court did not follow the required procedure.

Examinees may discuss the issues in terms of substantive due process violations. However, substantive due process is not implicated when a court fails to follow the required procedure. Substantive due process relates to defects in the procedure itself. See Application of Obermeyer, 717 P.2d. 382, 386-387 (Alaska 1986)(citing Bachner v. Pearson, 479 P.2d 319, 334 (Alaska

1970)). Under current case law, the procedure itself is not defective. See Meyers.

3. Right to Counsel (10 points)

Examinees may note that not only was Mike denied a hearing he was denied a right to counsel. Mike was given no opportunity to hire an attorney or to seek a court appointed attorney. As noted, arguably Mike's fundamental liberty and privacy interests were infringed in such a case. In such situations the Alaska Supreme court has found: "the right to counsel in civil proceedings is guaranteed by the due process clause of the Alaska Constitution." *Wetherhorn* at 383; *V.F. v. State* 666 P.2d 42, 45 and n.2 (Alaska 1983) (holding that the due process clause of the Alaska Constitution guarantees effective counsel in termination of parental rights cases).