UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MCCOY	:	
	:	
v.	:	3:85cv456(EBB)
	:	
BELMONT	:	SEPTEMBER 9, 2005

PLAINTIFF'S POST-HEARING BRIEF

A. Procedural History

This dispute arises from litigation initiated two decades ago to assure that Leo McCoy, Jr., and his brother, William McCoy, were provided adequate medical care to address the catastrophic physical and psychological disabilities afflicting each man. Both require round-the-clock care and both were, at the time litigation began, residents of the Southbury Training School, a facility operated by the Department of Mental Retardation. Notwithstanding the mens' residence in the training facility, their parents have remained their legal guardians throughout the litigation.[1] Esther McCoy, the mens' mother, remains their legal guardian to this very day.

The initial litigation was resolved by way of a consent decree between the Department of Mental Retardation and the mens' legal guardians on March 10, 1992. The decree called for the creation of a special living arrangement in a home known as Staff House 2 to serve only Leo and William. The facility required separate staffing by a core staff of at least fifteen persons and accommodations tailored to meet the mens' unique needs. The District Court retained jurisdiction over enforcement of the consent decree, and considerable resources have been devoted to the parties' respective

[1]Mr. McCoy died after a long illness during the summer of 2004.

claims since the time the consent decree was entered into.

In 2001, the trial court heard evidence from November 19, 2001 to December 13, 2001, on the plaintiffs' motion for contempt and the defendants' motion for relief from judgment. On July 15, 2002, the District Court issued a ruling denying the defendants' motion for relief from judgment and granting in part, and denying in part the plaintiffs' contempt motion. Central to the court's decision in this ruling is its finding that "the McCoys must relinquish control and allow people whom they may not know very well to care for their sons. If the McCoys are not prepared to live with this reality, then a State-run program may not be the best choice for them." Ruling, p. 34. The defendants sought, by way of relief from judgment, an order requiring the McCoy parents to establish a family-directed program for their sons. Id., p. 32.

As of 2002, the District Court observed that "[t]he requirements of the Consent Decree [had] never been achieved." The Court noted that fault for this was the responsibility of both the parents and the defendants. In significant part this failure was due, in the Court's view, to the "controlling" presence of Mr. And Mrs. McCoy in Staff House 2, as the couple had lived their with their sons for a number of years. The Court ordered that the home be given necessary renovations and that the parents move out, leaving to the defendants' the task of providing day-today care for William and Leo and for managing the institution. The Court noted the right of Mr. And Mrs. McCoy to have approval of staff necessary to provide a "core staff," but ordered that such approval not be unreasonably withheld. Finally, because the consent decree called for the appointment of an advocate, and the defendants had not yet appointed one, the Court ordered appointment of an advocate. Id., pp. 32-33. The McCoys took an appeal from

the District Court ruling denying certain of their contempt claims.[2] The Second Circuit upheld the trial court by way of Summary Order on August 27, 2003, and a Mandate issued on September 12, 2003.

While the appeal was pending before the Second Circuit new contempt motions were filed by both parties in 2002. The defendants also sought modification or clarification of the Consent Decree. The issues framed by these pleadings are as follows:

1. Whether the Mr. And Mrs. McCoy are in contempt of the Consent Decree due to their continuing harassment, intimidation and otherwise inappropriate conduct toward the staff; whether Mr. And Mrs. McCoy have refused to cooperate in the process of hiring additional staff; and, whether Mr. And Mrs. McCoy continue to attempt to "usurp control" of the program.
2. Whether the terms of the Consent Decree permit the defendants to use the second floor of Staff House 2 for staff-related use or whether the current use of the second floor is in contempt of the decree.
3. Whether the decree permits the imposition of reasonable restrictions on Mr. And Mrs. McCoy's right to visit their children.[3]

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[2]The McCoys' also appealed the trial court's decision to preclude the testimony of Dr. Leslie Rubin their counsel had failed to provide notice of his prospective use as an expert witness.

[3]The pleadings also refer to a third issue: the use of video cameras in the house. That issue appears to have been abandoned given the lack of evidence on the topic in the most recent round of hearings.

4. Whether the defendants have refused adequately to staff the house with registered nurses.

5. Whether the current advocate, Sister Barbara Ehrlich should be replaced as she lacks sufficient independence of Ms. McCoy to act in the best interest of William and Leo McCoy.

After attempts to settle the dispute between the parties failed, and after numerous requests for continuances submitted by both parties, the Court heard evidence on five days in 2005 on the cross-motions for contempt and on an additional issue only recently raised, to wit: whether the advocate currently appointed for William and Leo McCoy, Sister Barbara Ehrlich, should be replaced. Mrs. McCoy submits this post-hearing brief in support of her motion for contempt and in opposition to the defendants' motions.

B. Legal Standard for a Finding of Contempt

A finding of contempt must be supported by the proof of three elements: (1) the order violated was clear and unambiguous; (2) clear and convincing evidence of noncompliance: and (3) no reasonable diligence by the contemnor to comply. United States v. Local 1804-1, Int'l Longshoreman's Ass'n, AFL-CIO, 44 F.3d 1091, 1096 (2d Cir. 1995).

C. Argument

This is a heart-breaking case of seemingly unending difficulty. On the one hand, Mrs. McCoy, how herself advanced in years, seeks to remain active in the lives of her profoundly impaired sons and to satisfy her legal responsibilities as guardian of the

men. Distrustful of the defendants and their staff after years of bitter litigation, she often consults with physicians and specialists off the grounds of the defendants' facility, and seeks to make the sorts of decisions she believes she has a right to make as guardian about the manner and means by which her sons' medical needs are met. She has come to rely upon an expert of her own choosing, Dr. Leslie Rubin, for medical advice about such contested issues as hand-in-mouth behavior and footwear, and she seeks to remain active on a daily basis in the lives of her sons, not unreasonably believing that after almost five decades, she knows the manner and means of their communication better than the intermittent strangers upon whom the men rely for most of their care. In the face of conflict with the defendants about the scope of the her role as guardian, Mrs. McCoy petitioned the Southbury Probate Court for a hearing. That court deferred action pending the outcome of these proceedings.

Mrs. McCoy's belief that she has rights as legal guardian to make decisions about the day-to-day care of her son places her in apparent conflict with the cross-cutting imperatives of the defendants, who are seeking to care not just for the men, but to provide care for many other impaired persons within the care of the State and who believe that Mrs. McCoy's rights as a guardian are far less expansive than the role Ms. McCoy envisions. Although Ms. McCoy has herself gone to the Probate Court to obtain clarification of her role as guardian, the defendants have apparently never challenged her role, nor sought the guidance of a court of competent jurisdiction about what a guardian can and cannot do. Instead, the parties find themselves in the United States District Court arguing issues and concerns that arise under a contract entered between the two of them freely and voluntarily.

This Court sh reject the defendants' motion for contempt as there is no clear and convincing proof of a violation of the decree; additionally, the plaintiff, Mrs. McCoy, cannot on the facts before this Court fairly be said to have failed to use reasonable diligence to comply with the terms of the decree.

1. This Court Lacks Jurisdiction Over Mr. McCoy And Need Not Consider The Defendants' Claims As To Him

Although Mr. McCoy is dead, and has been so since the summer of 2004, the defendants in this action insisted upon putting on evidence of his acts and omissions. Counsel for Mrs. McCoy objected on the grounds of relevance and because of the potential for prejudice. First, she contended that any contempt findings as to Mr. McCoy would be moot given his demise. Additionally, Mrs. McCoy contended that there can be no joint responsibility on which to base a finding of contempt. Evidence of Mr. McCoy's conduct, even of conduct of his taking place in the presence of Mrs. McCoy, could serve but one purpose, to wit: prejudicing the Court by fouling the record with the alleged bad acts of another. Mrs. McCoy requests that this Court make no findings as to Mr. McCoy and parse carefully those claims arising from his conduct.

2. Mrs. McCoy's Interactions With Staff At Staff House Two Do Not Rise To The Level Of Contempt, Rather She Is Merely Trying To Assure That She Fulfills Her Responsibility As Legal Guardian To Her Sons, A Role The Defendants Do Not Challenge, And She Did Not Unreasonably Impede The Hiring Of Staff

There is be no dispute that William and Leo McCoy are catastrophically impaired psychologically and physically and that both men require round-the-clock care. At issue in this case are several related factors: How shall the care be financed? Who has the right to make decisions about the care offered the men? How shall disputes as to final

decision-making be resolved? The consent decree gives the responsibility to pay to the defendants. It does not address issues as to who shall make decisions as that is apparently a matter best left to state law. Finally, the decree is silent as to how disputes shall be resolved. The lack of clarity and the inherent ambiguity of these latter two issues militate against a finding of contempt.

Ms. McCoy testified that one of her principal objectives in launching this litigation in 1985 was to assure home-based care for her two sons. Trial Transcript, hereinafter "TT," July 5, 2005, p.4. Although she and her husband did live in the house with her sons for an extended period, they left the home in compliance with an order of this Court in 2002. Id., p.5.

Since 1985, Mrs. McCoy has relied upon the recommendations of outside medical consultants to provide care for her sons, including Dr. Leslie Rubin. Id., p.6. After her husband's death, Mrs. McCoy became the sole legal guardian for her sons. Id., p.7. Although the staff at the Southbury Training School had previously respected Mrs. McCoy's role as legal guardian for her sons, that began to change after this Court's ruling on the parties' cross-contempt motions in 2002. Id., pp.7-8. The principal change is that she is no longer consulted on issues arising from the day-to-day care of her sons. Id., p.8. In particular, Mrs. McCoy believes her rights as legal guardian give her standing to object to anything that places her sons into harm. Id. Given the fact that she was being ignored by the staff, Mrs. McCoy turned to the Probate Court to enforce her right to be consulted and have decisions about care honored. Id., p.9.

Among the issues on which Mrs. McCoy has sought to intervene was the defendants' abrupt decision to forbid the use of crushed ice in William's drinks, Id.,

pp.9-10. Mrs. McCoy contends that the use of such ice to thicken his drinks is appropriate; the defendants disagree. Mrs. McCoy relies in part upon the advice of Kim Winters, a speech pathologist at the Hospital for Special Needs and on the advice of Dr. Rubin, both of whom supported the use of crushed ice in his drinks. Id., pp. 10-15.

Mrs. McCoy has also sought to intervene to modify the defendants' program to prevent her son William from engaging in hand-to-mouth behavior. She was not consulted before the program to accomplish this behavioral change was implemented, and is concerned that it will impede William's ability to communicate distress. Id., pp. 16-21. Once again, Mrs. McCoy relied upon the advice of physicians, in this case Dr. Erickson and Dr. Schleiter, in reaching the conclusion that William should have some freedom with the use of his hand. Id., pp.24-27. In particular, while Dr. Schleiter recognized the risks of permitting William to put his hand in his mouth, he also recognized that it was an important quality of life issue for William, Id., pp.26-27. Quality of life for her sons remains a principal concern of Mrs. McCoy's. Id., p.14. This concern has been heightened by periodic unexplained injuries to her sons, as was the case when Leo had an unexplained arm fracture in 2004. Id., p..27-28. Mrs. McCoy was later told that Leo injured his arm himself, striking the table with it, something he had never done before in 48 years. Id., p.30.

In apparent response to the arm fracture, staff at the house once again made a change in the manner in which Leo was cared for, this time placing a blue pad on the table to serve as an apparent cushing device. Mrs. McCoy testified that the use of his pad would compound problems with her son's ability to see and detect items on the table before him, a consequence of his decreasing vision, and that she had been able

successfully to manage the risk of injury from Leo's hitting the table simply by turning him away from the table. The staff ignored her concerns. Id., pp. 31-32. Mrs. McCoy views the decision about use of the pad as one she is entitled to make as her son's legal guardian. Id., p. 33. The staff disagree.

In 2004, Mrs. McCoy became concerned about the manner in which Leo was cleansed after using the restroom. She told the staff she did not believe enough people were used to move him safely or to accomplish the necessary cleansing without serious risk of injury to Leo. Her concern was reinforced by a physician at the Hospital for Special Needs who requested of the defendants' staff be retrained on how to transfer Leo. Id., pp. 35-36.

Additionally, Mrs. McCoy became aware of a unilateral order from a staff physician that Leo be required to wear shoes at all times, despite a demonstrated history of her son's ability to ambulate effectively in stocking feet. After an initial meeting with a staff doctor, Leo was permitted to wear "stocking slippers" – socks with rubber soles. This lasted for two weeks when the order requiring shoes was reinstated without consultation or explanation. As a result, Mrs. McCoy has noticed a decreasing ability of her son to walk. Id., pp. 37-40. Her objection to this change has been ignored by the staff.

Mrs. McCoy described at trial a pervasive sense of being excluded from decisions and information regarding the day-to-day care of her sons. She was not consulted, for example, regarding a change in William's dietary regime, involving chocolate milk and ice cream. Id., pp. 40-44. Her son Leo suffered an unexplained fracture to his nose in 2003. Id., p. 45. She has discovered medication errors involving

her sons. Id., p. 47. Her sons are not adequately monitored by staff during such critical periods as meal time. Id., pp. 50-51.

She has sought the advice and counsel of non-staff medical persons to determine how best to respond to these issues. Id., 99. 51-52. She has also noticed changes in the attitude of her son's primary care physician, Dr. McDonald, since she and her husband moved out of the home, with communication now characterized as "very poor." Id., pp. 54-55. Although Mrs. McCoy has the right to attend weekly staff meetings regarding the care and treatment of her sons, in recent years she noticed that the staff rarely heeds her. She could think of few instances in which the staff followed one her recommendations, or even did much of anything other than respond in a patronizing manner. Id., p.59.

Although the consent decree calls for a core staff of fifteen persons, Mrs. McCoy observed that since 2002 there has not been a permanent staff in the house, resulting in poorly trained and unskilled personnel caring for her sons' special needs. Id., pp. 60-63. On the third shift at Staff House 2, the defendants have even ceased providing a staff nurse on site. Id., pp. 63-65.

Mrs. McCoy was last consulted about hiring staff about three years ago. Id., p. 66. Notwithstanding this inadequate staff coverage for her sons, staff have in recent years begun to use the second floor of the house as a break room and office, depriving the men of the care and attention of the staff. Mrs. McCoy was not consulted about this change either. Id., pp.68-69.

The defendants presented a number of witnesses to testify as to difficulties they have had with Mr. and Mrs. McCoy since 2002. Without summarizing the evidence of

the defendants, the defendants' case appears to come down to the following: During the transition period following this Court's order requiring the McCoys to move from Staff House 2, the staff was cooperative and willing, ready and able to accept the help and suggestions of the parents regarding how best to care for the men. Thus, at or about the time that Mr. and Mrs. McCoy moved out, staff accepted and largely adopted the McCoy's "routines" in place for caring for the men. As time passed, the staff became more familiar with the day-to-day needs of the men, and the contributions of Mr. and Mrs. McCoy were less appreciated. What was once a family home supported by the state and assisted by state workers increasingly became an institutional setting in which the contributions of the men's legal guardians came to be regarded as an imposition.

Seemingly senseless issues were made over such things as chocolate milk, the placing of ice cream in a microwave to soften it and whether shoe, sock or rubber-soled shoes were preferable. On those occasions when Ms. McCoy had an opportunity to meet with staff to discuss concerns about the treatment of her sons, she was largely ignored, as was her advocate. As her husband neared death, Ms. McCoy attended to him and was absent from the home far more than was customary. Upon her return, staff were less accommodating to her, and she sought the guidance of the Probate Court for clarification of her legal rights and responsibilities. Those issues remain unaddressed, and Mrs. McCoy continues to rely upon the advice and counsel of health-care professionals outside the home as the climate of mistrust has made it difficult for her to trust that her son's are getting the care to which they are entitled under the consent decree. In particular, Ms. McCoy relies heavily upon the advice of Dr. Leslie Rubin, an

expert who testified in the latest round of hearings. TT, May 13, 2005, pp. 129-196.

Dr. Rubin testified that he first became familiar with William and Leo in 1985. Id., p. 133. He testified that crushed ice was acceptable means of thickening William's drinks. Id., p. 145, a position taken by Mrs. McCoy, and he informed Mrs. McCoy that such a means of thickening liquids was acceptable. Id., p. 148. The doctor did not think a blanket prohibition of the behavior was appropriate, but that goal of gradual reduction was reasonable. He thinks he may have discussed this issue with Mrs. McCoy. Id., pp. 151-152. In sum, the doctor's opinion supports the contention that in the many areas in which there has been conflict between the staff and the men's legal guardians, there are a range of medically reasonable responses possible to address the men's needs. Id., p. 156. Put another way, the defendants' insistence that care be provided only as the staff dictates look like something less than medical necessity and more like a struggle for power with the mens' guardian.

Mrs. McCoy is a determined advocate for her son, and her sons' unchallenged legal guardians. Notwithstanding the testimony at the recent hearing about the medical need for some of the choices made by the defendants and their agents and the concern that Mrs. McCoy's interventions harm the men, the defendants have not sought to challenge Mrs. McCoy's role as guardian. Instead, they seek a finding of contempt and a modification of the consent decree that would result in something less than what the parties bargained for long ago. This Court should not hold Mrs. McCoy in contempt as her conduct, though at times seemingly difficult, is explicable in terms of her lifelong commitment to assure the best possible care for two sons disabled in some of the most cruel ways imaginable. Her reliance on medical professionals who happen to disagree

with the defendants is not contemptuous or unreasonable.

3. Mrs. McCoy Has Not Unreasonably Refused To Cooperate In The Hiring Of Staff

Notwithstanding the testimony of the defendants regarding Mrs. McCoy's lack of approval for certain staff, there is no evidence to suggest that the house is understaffed, save for the defendants' decision to deprive the men of nursing coverage during the third shift. As a result, this Court should not find Mrs. McCoy in contempt as the conduct complained of causes no harm either to the defendants or to the men. If Mrs. McCoy has in any sense waived her right to participate in staff selection decisions she ought not to be held in contempt. Mrs. McCoy has had in recent years to contend with the protracted and fatal illness of her husband. That she has not had the stamina to participate fully in staffing decisions is not contempt. Indeed, since her husband's death there does not appear to be an issue about staff hiring at all.

4. Far From Attempting To "Usurp Control" Of Staff House 2, Mrs. McCoy Is Merely Trying To Prevent The Transformation Of The Home Into The Sort Of Institutional Setting The Consent Decree Prohibits

Mrs. McCoy's testimony at the recent hearings made clear her fear about what is becoming of the home for her sons. "It's not a home any longer; it's an institution.... My sons lived in the institution across the street, and that's what we were trying to get away from.... [I]t's not a home anymore." TT, June 14, 2005, pp. 69-70.

Several disputes illustrate that the tension in the home flows in both directions. The dispute over the use of the "privacy-screen" purchased for the men by Mrs. McCoy illustrates the petty vindictiveness that sometimes characterizes staff attitudes toward Mrs. McCoy. Rather than use a screen that she purchased to assure privacy for the

men, the staff refuse to use it, saying it does not provide enough privacy for the men at such times as when they are changed in the livingroom area. Rather than use Ms. McCoy's screen, the staff placed it in the basement. Id., p.70. From whom where the staff trying to protect the men, their mother? Is it seriously contended that the staff care more for the mens' dignity than does Mrs. McCoy? The issue is trifling yet the psychic cost to Mrs. McCoy, and potentially to her sons, is dear. She has been deemed somehow unfit to assure the dignity of her sons and her attempt to fill the home with things of her choosing is turned against her as a weapon. Why? Perhaps because it is the staff, and not Mrs. McCoy, who has issues with control of Staff House 2.

When Mrs. McCoy raises an issue whether the hot meals served to her sons are, in fact, permitted to grow cold, she is held out to be a scold. Yet when the home was created, it was created with a kitchen. The decision of the defendants to prepare meals across the street from the home confirms rather than undermines Mrs. McCoy's fear that her sons are being constructively returned to the very sort of institutional care that led to their neglect and abuse in the first place. She settled a law suit to escape what the defendants are seeking to reimpose.

5. The Decree Cannot Fairly Be Read In Such A Manner As To Limit The Access Of The Men's Legal Guardian To Periods Of Reasonable Visitation The Consent Decree

Paragraph 18 of the Consent Decree gives to Mrs. McCoy the right to "visit any residence developed for the plaintiffs under this Consent Decree at any time, unannounced." Para. 18. The defendants seek a modification of the decree, requiring, in effect, that the legal guardian for the men be given limited visiting hours. This would

have the practical effect of relegating Mrs. McCoy to the status of visitor to an institution housing her sons. She seeks the rights of a mother and legal guardian to care for men who are unable to care for themselves to the full extent of her ability to do so. The decree should not be modified in this regard as the defendants have shown no compelling necessity for such a change in the regime now in place. Indeed, limitations on access to her son in the face of this record would not permit the men's legal guardian any effective means to determine whether the men's heretofore unexplained injuries were the result of the sort of abuse that made this litigation necessary in the first place.

Admittedly, relations between staff and Mrs. McCoy are tense. However, on this record the Court may well infer that the cause of that tension is not solely Mrs. McCoy. The Court may well infer what common sense dictates: The staff and administrators caring for William and Leo McCoy are dedicated health-care professionals. They care for William and Leo, and they care for others. Yet only William and Leo are given the extraordinary treatment required by the Consent Decree. William and Leo have a parent who even into her seventies is energetic and committed enough to be an aggressive and seemingly tireless advocate for her sons. Does it strain reason to conclude that the staff also harbors some resentment that Leo and William are given treatment other equally deserving men and women do not get? Does it strain reason to conclude that the staff would prefer not to have Mrs. McCoy as guardian in the home? It would be far easier, after all, to work unobserved.

6. The Defendants Have Failed, Refused And Neglected To Provide Adequate Nursing Coverage Of The Home In Violation Of The Consent Decree

Paragraph two of the consent decree requires that "[n]ursing services shall be available at all times" in Staff House 2. Unaccountably, and without notice to Mrs. McCoy, the defendants now refuse to staff the house with nurses during the third shift. The defendants contend that having nurses on duty across the street at the Southbury Training School makes nurses available, as a nurse can be redirected to Staff House 2 as needed. This convenient reading of the decree eviscerates one of the decree's principal objectives, as stated in the first paragraph of the decree: "the defendants shall develop a living arrangement, to serve only Leo and William,..." Para. 2, Consent Decree.

The decree speaks in broad terms of the exclusive character of William and Leo's home, yet the behavior of the staff reflects a desire to undermine this exclusivity. Whereas the decree calls for "[s]pecial arrangements ... to ensure that the food for William and Leo is prepared by trained kitchen staff," the defendants now require the food to be prepared across the street and brought to the men. Whereas the decree calls for the home to meet or exceed "ICFMR certification requirements in all respects," the staff routinely settles for something less, blaming first Mr. and Mrs. McCoy and now Mrs. McCoy alone for their failure. The retreat from the nursing coverage required by the decree is but another example of the war of attrition waged by the staff to undo the decree.

7. The Defendants' Transformation Of Parts Of The Home To Staff-Areas Is In Violation Of The Decree

The transformation of the second floor of Staff House 2 into staff areas, used both as a "break room" and as a no office frustrates the very purpose of the Consent Decree. Paragraph three of the decree calls for core staff of fifteen persons specially trained to meet the needs of the McCoy men. "The individual needs of Leo and William shall determine the staff rations within the living arrangement." Para. Three. Among other requirements of the decree is that the Case Manager assigned to the house have a caseload of no more than 1:40. Para. Eight. Additionally, the "defendants shall maintain 1 to 1 staff to resident ratios on all three shifts in the residence." Para. 12.

The decree contemplates a regime in which the men will not be left unattended. It further contemplates direct round-the-clock care by competent staff specially trained to meet the men's special needs. Permitting the staff to be segregated from the men for significant period of time during the day increases the likelihood that an untoward medical event will occur.

At the hearing, the defendants did not put on evidence that would permit this Court to conclude that the second floor of the home can be converted to staff use while at the same time assuring the level of care called for by the decree. For example, should the Court permit the use of the second floor, what becomes of the 1:1 requirement at all times? Will staff be said to attending the men's needs when they are upstairs taking a break or doing clerical work?

What was intended to be a home for men with special needs increasingly looks like the very institution the decree forbade. Nurses are off sight; the food is prepared off

site; now staff assigned to provide 1:1 care is apparently relieved of that very responsibility. Simply put, the defendants have failed to show that the decree can be honored with this modification. The fact that they have converted the second floor to their use without first seeking Court approval is an implicit acknowledgment of their contempt of the decree. What is requested is judicial blessing of a practice unjustified under the decree. Mrs. McCoy requests that the defendants be held in contempt

D. The Motion To Oust The Current Advocate Should Be Denied As Sister Barbara, The Current Advocate, Has Long Known Leo And William And Has The Confidence Of The Men's Legal Guardian

The defendants moved, years after filing the contempt motions returning this case to Court, for replacement of the current advocate with another person. They argue, essentially, that the current advocate is a mere tool or alter ego of Mrs. McCoy. The court should reject the suggestion that the advocate is not capable of protecting the interests of Leo and William McCoy. That the defendants have difficult with the very concept of an advocate for the men is clear. It took a prior finding of contemp against the defendants to compel them to honor the consent decree's requirement than an advocate be appointed and funded. Merely agreeing with Mrs. McCoy that the defendants and staff attending the McCoy men could do a better job of caring for them is an insufficient reason for her removal.

Sister Barbara Eirich is a Franciscan nun and an employee of an entity called WeCAHR; she is also a registered nurse with a master's degree in social work. She specializes in the care of persons with developmental disabilities. TT, June 8, 2005, pp.158-160. Sister Barbara has worked with the McCoy family for more than two

decades, beginning her work with them prior to the filing of the Complaint that spawned this litigation. She has developed great familiarity with the medical condition and needs of the men. Sister Barbara became the men's advocate in 2003; the McCoy case is the only one in which she has served as a court-appointed or court-recognized advocate. Id., pp.160-162.

Sister Barbara tries to spend about eight hours each week with the men. Id., pp. 163-164. She understood her role initially to be to observe the men on a regular, consistent basis, to document her visits and to write summaries of her observations. Id., pp. 165-166. She initially attended periodic administrative meetings regarding planning of care for the men. Id. P. 167. Since becoming advocate, she has noticed the defendants and their staff take a more aggressive role in management of the home. Id., pp.168-169. Mrs. McCoy has expressed concerns about her sons' care to Sister Barbara; the defendants and their staff, however, have never expressed concerns to Sister Barbara about Mrs. McCoy. Id., p.169. Aware of growing tension at the home, Sister Barbara has discussed the issues with Mrs. McCoy. Id., p.170.

Relations between the Mrs. McCoy and the defendants and their staff reached a turning point at about the time the crushed-ice issue surfaced. Sister Barbara questioned why the prohibition on crushed ice was mandated, as nothing had happened in William's life to require such a change. Id., pp.170-171 She expressed her concerns about this change at a staff meeting. Id., p.173. When Sister Barbara raised a question at the staff meeting about the rights and responsibilities of the men's legal guardian, Mrs. McCoy, no one answered her. Id., p.174-175. She met a similar reaction when she discussed her concerns that changing William's hand-to-mouth behavior

could undermine his will to live. Id., pp.176-177. She learned that the communication between the William's treating physician and staff was sometimes poor, resulting in too draconian an effort to modify William's hand-to-mouth behavior. Id.,p. 179. Additionally, she observed no consultation either with herself or with Mrs. McCoy on the need to require that Leo's footwear be changed. Id.,p.180-181.

Far from being Mrs. McCoy's alter ego, Sister Barbara has disagreed with Mrs. McCoy. In particular, the two disagreed about the program to modify hand-to-mouth behavior. While Mrs. McCoy opposed it in general, Sister Barbara supported it so long as the staff implementing it were well-trained and sufficiently monitored. Id.,pp.184-185.

When Sister Barbara observed the staff ignore Mrs. McCoy's questions about the rights and responsibilities of a guardian she became uncomfortable. Once Mrs. McCoy turned to the Probate Court for relief, Sister Barbara ceased attending staff meetings, waiting for the Probate Court to rule. Sister Barbara discussed this course of conduct with a supervisor at WeCAHR. Id.,pp.189-191 She continued to visit the men at their home for approximately eight hours per week during this period, although she did not attend staff meetings. Id., p.191. Sister Barbara returned to the periodic staff meetings when asked to do so by her supervisor at WeCAHR. Id.,p.193.

Sister Barbara has attempted to discuss with the defendants and their staff her concerns about inadequate staffing and inadequate nursing coverage at the home. She fears that inadequate nursing coverage places both men at risk. Id.,pp.193-194. Sister Barbara's concerns have not apparently been addressed any better than have those of Mrs. McCoy.

Nothing in the record before this Court supports a finding that Sister Barbara is a

mere tool of Mrs. McCoy's. The Sister has long known the men and their parents. She is a trained health-care professional with expertise in the care of the developmentally disabled. While she shares some of the same concerns as Mrs. McCoy, she does disagree with Mrs. McCoy from time to time. While her decision not to attend staff meetings while awaiting rulings from the Probate Court may be questionable, it is defensible given the undisputed fact that in this case Esther McCoy is the men's legal guardian and that Mrs. McCoy had gone to court for relief she could not get from the defendants.. Sister Barbara and Mrs. McCoy share a legal unity of interest in the welfare of the men. The defendants have not sough the replacement of Mrs. McCoy as guardian, which would be their right and responsibility if they believed that she was harming her sons. Neither have they claimed that Sister Barbara's performance of her duties has harmed the men. Simply put, the defendants appear to dislike the fact that when it comes to such issues as crushed ice, shoes versus socks with rubber soles and hand-to-mouth behavior, Sister Barbara does not always agree with the defendants. Neither, apparently, does Dr,. Rubin, the physician in whom Mrs. McCoy has placed her trust. Should Dr. Rubin be banned from the premised because he disagrees with staff?

E. Conclusion

In 1992, the defendants and the parents for Leo and William McCoy entered into a consent decree on the eve of jury selection in which the plaintiffs were poised to prove that two profoundly retarded men were poorly. To avoid the risk and embarrassment of trial, the defendants entered into a consent decree, providing that the men be cared for outside an institutional setting, in a home designed and maintained for their benefit. The defendants were under no obligation to enter into such

an agreement.

It turns out that the care offered the McCoy men exceeds that offered others in the care and custody of Southbury Training School. On several occasions during trial, counsel for the defendants asked witnesses whether they were aware of similar care and expense being devoted to others. The answer was always "no."

Has the contempt motion been filed by the defendants because of concern for the health of Leo and William McCoy? The only conceivable answer is no. If there were a serious concern about Mrs. McCoy's intervention on her son's behalf, the defendants would undoubtedly have turned to the Probate Court to oust Mrs. McCoy as guardian. No such move has been made. Instead, the defendants contend that they and staff cannot work with Mrs. McCoy. Yet history belies this assertion. For more than an uneasy decade Mrs. McCoy, her sons and staff have existed in a tense and mutually unsatisfying marriage. The lack of ease is less a function of the fault of Mrs. McCoy than it is that she has refused to abandoned her sons to the care of strangers and has fought every battle necessary to assure that they be treated well and with human dignity. No court should expect a mother to do less; and this Court should not hold Mrs. McCoy in contempt for giving her life to two men apparently destined to enjoy far less of a life than the rest of us take for granted.

Many of the issues resulting in this latest round of hearings seem sadly unnecessary. Having won the right to remove Mrs. McCoy from the home, the defendants seem almost eager to create issues designed to offend Mrs. McCoy, engaging in a passive-aggressive battle for control. Shoes versus socks, crushed ice or not, chocolate milk or not. If these are medical issues at all, the evidence shows that

they are issues on which reasonable medical minds may, and do, disagree. What the defendants appear to object to is Mrs. McCoy desire to have Staff House 2 operate as it was intended to operate: as a home for two men in need.

It is expensive to run Staff House 2. But the defendants knew it would be when they signed the consent decree. Modification of the decree should not be ordered simply because William and Leo McCoy have had the good fortune to outlive everyone's expectations. The defendants' contempt motions, indeed, the defendants, course of conduct in recent years, is less about what is good for Leo and William McCoy than it is what is convenient for a busy and harried staff. Mrs. McCoy urges this Court not to hold her in contempt and not to modify the consent decree. Leo and William McCoy are entitled to their legal guardian's and mother's best efforts to provide care. She should not be faulted for fighting efforts to return her sons by fiat to institutional care.

THE PLAINTIFFS,
William McCoy and Leo McCoy Jr.

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CERTIFICATE OF SERVICE

This is to certify that the forgoing Appearance was mailed on this date to the following: 9/9/05

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