

IN THE SUPREME COURT OF THE STATE OF ALASKA

FILED
STATE OF ALASKA
COURTS

IN THE MATTER OF THE)
PROTECTIVE PROCEEDINGS FOR)
)
)
BRET BYRON BOHN.)

2013 DEC 26 AM 10:01

CLERK, APPELLATE COURTS

Supreme Court No. S-15409

DEPUTY CLERK

Trial Court Case No. 3AN-13-02737 PR

Circ FC ✓

**RESPONSE OF ADULT PROTECTIVE SERVICES
TO EMERGENCY PETITION FOR REVIEW AND OPPOSITION TO
EMERGENCY MOTION FOR STAY**

Introduction

Petitioners, the parents of Bret Bohn, a critically-ill adult, ask this Court to prevent the superior court from gathering the evidence necessary to make life-saving medical care decisions. They also ask the Court to declare without evidence that they alone should be able to make health care decisions for Mr. Bohn. But hospital officials have expressed grave concerns about whether the parents are able to act in Mr. Bohn's best interests, and the trial court suspended their power of attorney and appointed a temporary guardian. Granting petitioners' request for relief would delay critical fact-finding scheduled to take place today, December 26, 2013, at 2 p.m. At that hearing, doctors will present evidence to show that Mr. Bohn's rapidly deteriorating condition requires that he be transferred to an internationally known hospital for diagnosis and treatment. The hearing will also provide the parents an opportunity to present evidence that they would be appropriate decision-makers for their son. Neither law nor logic provides a reason for canceling today's hearing.

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Statement of the Case

The Alaska Department of Health and Social Services, Adult Protective Services (“APS”) received a letter from Providence Alaska Medical Center on November 1, 2013. [See Exhibit A, attached.] In this letter, Providence requested appointment of a guardian for Bret Bohn, a 26-year-old man who could no longer make decisions about his own care. Although Mr. Bohn came to the hospital initially complaining only of insomnia and anxiety, as of November 1 he was demonstrating consistent delirium and was determined to have lost decision-making capacity. [Id.] Mr. Bohn’s mother had durable power of attorney for healthcare decisions, according to a document that had been executed years ago, but Providence believed that the mother was not acting in Mr. Bohn’s best interest. [Id.] She had made numerous threats and had attempted to remove Mr. Bohn from the hospital when he was not stable, against medical advice. [Id.] She had forcefully restrained Mr. Bohn in his hospital bed “for no legitimate reason.” [Id.] She had stated that she would prefer that Mr. Bohn commit suicide rather than be hospitalized; she did not want him to receive medical care “and will instead plan his funeral.” [Id.]

APS filed a petition for guardianship on November 5, requesting an emergency hearing to appoint a temporary guardian. The trial court issued an order of temporary appointment for the Office of Public Advocacy (“OPA”) to represent Mr. Bohn and for Stanley and Associates to serve as court visitor, and scheduled a hearing for November 14.

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2 APS attempted to serve Mr. Bohn's parents with the notice of the hearing by
3 courier and certified mail, but did not have a current address for them.
4 [Petition, attachment B at 5] APS also telephoned Mr. Bohn's mother and left a
5 message. [Petition, attachment B at 5] According to the petition for review, the mother
6 was busy and did not hear her phone ring. [Petition at 4]

7
8 At the November 14 hearing, the attorney appointed for Mr. Bohn asked the
9 court to change her status to guardian ad litem, because Mr. Bohn could not
10 communicate with her and did not appear to understand the guardianship.
11 [Petition, attachment B at 6-7] As guardian ad litem, the attorney recommended
12 appointment of OPA as temporary guardian. The court visitor agreed with this
13 recommendation. [Petition, attachment B at 7, 10] The court visitor also stated that
14 Providence Alaska Medical Center did not believe that Mr. Bohn has a mental illness; it
15 was running toxicology screens and panels to determine whether Mr. Bohn was being
16 poisoned; and it was "continuing to look at Munchausen by proxy disorder."
17 [Petition, attachment B at 10]. The trial court appointed OPA as temporary guardian and
18 suspended the parents' power of attorney. [Findings and Order of Temporary
19 Guardianship dated November 14, 2013, attached to Petition]

20
21 When they were notified that the OPA had been appointed temporary guardian,
22 Mr. Bohn's parents filed a flurry of motions, including a request to remove the OPA as
23 guardian. The court denied this request.
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25 The parents then filed a motion asking that that their power of attorney be
26 restored; that Providence be enjoined from administering psychotropic drugs to

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2 Mr. Bohn; that visitation rights be restored; and that Mr. Bohn be kept in Alaska. The
3 court scheduled a hearing on these motions for December 9 before Master Gandbhir.

4 At this hearing, the Master found that the parents are parties to the guardianship
5 case and should be given access to the court file and confidential records. [Master's
6 Findings and Recommendation on Guardianship Hearing, dated December 10, attached
7 to Petition]. The Master deferred a decision on the parents' motions pending a full
8 evidentiary hearing, which was scheduled for December 19. [*Id.*] She indicated that
9 because APS objected to the appointment of the parents as guardians and would present
10 evidence about this at the December 19 hearing, the appointment of OPA as temporary
11 guardian would continue at least until that hearing. [*Id.*] The Master also ruled that
12 because Providence was not a party to the case, she could not order it to permit the
13 parents' visitation and stated that the court could consider the parents' motion for
14 joinder of Providence at the December 19 hearing. [*Id.*]

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17 APS appeared at the December 19 hearing prepared to present witnesses—
18 including doctors, an advanced nurse practitioner, a social worker, and a nurse from
19 Providence—to testify both about Mr. Bohn's capacity and the appropriateness of his
20 parents as guardians. The parents agreed that Mr. Bohn is incapacitated and should have
21 a guardian, but argued that the court should have a de novo hearing at which the State
22 would have to show by clear and convincing evidence that their power of attorney
23 should be set aside. The parents believed that they would otherwise have the burden to
24 prove why OPA should be removed as temporary guardian. *See* Petition at 8. As a
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1 result, they refused to go forward with the evidentiary hearing. [Log notes of
2 December 19 hearing, attached to Petition]
3

4 The court denied the motion for injunctive relief, but ordered that the parents
5 should receive notice if an out-of-state medical facility became available for Mr. Bohn
6 and Providence recommended a transfer. The court had initially suggested that seven-
7 days' notice would be appropriate, but after further discussion among the parties about
8 the feasibility of a week's notice in light of Mr. Bohn's fragile medical condition, the
9 court ultimately ordered only that the parents be given notice and an opportunity to
10 object. [Log notes of December 19 hearing, attached to Petition]
11

12 In compliance with the court order, attorneys for Providence filed an emergency
13 motion on December 23 to transfer Mr. Bohn to Johns Hopkins Hospital, an
14 internationally specialized tertiary hospital, which had just agreed to accept him as a
15 patient, with a bed available December 27 or 28. [Providence Emergency Motion to
16 Transfer Bret Bohn to Johns Hopkins, attached as Exhibit B] The reason that
17 Mr. Bohn's doctors requested this transfer is because they had conducted numerous
18 tests on Mr. Bohn but had been unable to determine the cause of his condition and thus
19 could not formulate the best means of treating it. [*Id.*] According to Providence's
20 motion, his condition requires testing and treatment that Providence cannot provide, and
21 "[m]ost importantly, Mr. Bohn's condition is deteriorating such that immediate transfer
22 of Mr. Bohn to Johns Hopkins on Thursday or Friday is medically necessary." [*Id.*]
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24 The court scheduled a hearing for December 26. It ordered the State or
25 Providence to present Mr. Bohn's doctor, a Providence social worker, and an advanced
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2 nurse practitioner to testify to Mr. Bohn's current medical condition, the availability of
3 medical care at John Hopkins Hospital, and the urgency of securing additional care for
4 the patient. [Hearing Order dated December 23, attached to Petition]. The court
5 indicated that it would inquire into the patient's medical treatment since his admission
6 to the hospital and the actions of his parents leading up to Providence's decision to seek
7 assistance from APS and request appointment of a temporary guardian to act in his best
8 interest. [*Id.*]
9

10 Mr. Bohn's parents have now filed a petition for review and a motion to stay the
11 proceedings in this case, including today's hearing.

12 Arguments

13 I. Granting the requested stay will preclude Mr. Bohn from receiving 14 necessary medical treatment.

15 The hearing scheduled for 2 p.m. today is necessary to ensure the rights of all
16 parties and most especially Mr. Bohn. Mr. Bohn's parents oppose his transfer to Johns
17 Hopkins Hospital. But as it stands now, the uncontradicted evidence in the record shows
18 that Mr. Bohn's medical condition is deteriorating and that transfer by
19 December 28th, 2013 is medically necessary. The hearing should be held as scheduled
20 to preserve both Mr. Bohn's rights to receive appropriate life-saving care and the
21 parents' rights to present any medical evidence in opposition to the transfer. At the
22 scheduled hearing, Mr. Bohn's parents will have the opportunity to present medical
23 evidence suggesting that another course of treatment is in Mr. Bohn's best interest.
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2 Without a hearing, Mr. Bohn will not receive necessary medical treatment that is
3 available only out of state, and his parents will have no meaningful opportunity to
4 present evidence that the transfer is not in his best interests. Neither situation is
5 acceptable. This Court should allow the hearing to go forward as scheduled.

6
7 **II. Petitioners have not demonstrated that interlocutory review is warranted on**
8 **their legal questions.**

9 Petitioners appear to be requesting review of the superior court's
10 December 19, 2013 decision not to conduct a de novo hearing at which the state would
11 have been required to establish by clear and convincing evidence that the parents should
12 not be Mr. Bohn's guardians.¹ At the hearing, the court was ready to proceed and to
13 hear evidence about who should be Mr. Bohn's guardian. But Mr. Bohn's parents
14 insisted on coming to this Court immediately to resolve the issue of the burden of proof.
15 They argue that their due process rights have been violated and that a lack of admitted
16 clear and convincing evidence in the record supports the reinstatement of the power of
17 attorney. [Petition at 11-12]

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19 The parents do not have a due process right to make decisions on behalf of their
20 adult son, nor are they correct about the burden of proof.² While a petitioner for
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22 ¹ To the extent that Mr. Bohn's parents are seeking review of the November 14,
23 2013 decision appointing temporary guardianship to OPA, a petition from that order is
24 untimely.

25 ² See *In re Tammy J.*, 270 P.3d 805, 816 (Alaska 2012) ("We therefore . . . decline
26 to hold that parents have a substantive due process right to make decisions regarding the
care and custody of their adult developmentally disabled child unless shown to be unfit
by clear and convincing evidence The Constitution requires the state to determine
guardianship for any adult based on the adult's best interests, nothing more.")

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2 temporary guardianship must, under AS 13.26.140, show by clear and convincing
3 evidence that the respondent is not capable of procuring services to protect himself
4 against serious injury, illness, or disease, the question of whether Mr. Bohn requires a
5 guardian is not in dispute here. All parties, including his parents, agree that he is
6 incapacitated and requires a guardian. For that reason, the parents can only argue that
7 they have a priority for guardianship under AS 13.26.145, an analysis that does not
8 require clear and convincing evidence.
9

10 But whether or not they are correct about the law, the parents have not shown
11 under Appellate Rule 402 why the Court should intervene at this point. If the superior
12 court is able to go forward with its planned evidentiary hearing—regardless of what
13 burden of proof it requires—this Court will have an actual order³ and a factual record to
14 review. If Mr. Bohn’s parents prevail under the “incorrect” standard and are given
15 control of their son’s health care decisions, an interlocutory appeal will be unnecessary.
16 If Mr. Bohn’s parents do not prevail, they will have a final appealable decision.
17

18 For these reasons, the issue will not evade review if the Court does not grant this
19 petition. Appellate Rule 402(b)(4). Postponement of review until appeal can be taken
20 from a final order will not result in injustice because it will not impair the parents’ legal
21 rights. Appellate Rule 402(b)(1). Immediate review will not advance the ultimate
22 termination of the case or advance an important public interest that might be
23 compromised if the petition is not granted. Appellate Rule 402(b)(2). Nor has the trial
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26 ³ Under AS 13.26.145(f), the trial court must make written findings as to why it
would be in the best interest of the ward to appoint an individual with a lower priority.

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2 court so far departed from the accepted and usual course of judicial proceedings as to
3 call for the appellate court's power of supervision and review. Appellate Rule
4 402(b)(3). To the contrary, the trial court is attempting to hold a contested hearing at
5 which evidence can be heard and all parties can present argument; that is the
6 appropriate, accepted, and usual course of judicial proceedings and this Court has no
7 reason to preempt it.

8
9 The Court should deny the motion for stay and the petition for review, and it
10 should do so immediately so that this afternoon's hearing may proceed.

11 DATED December 26, 2013.

12 MICHAEL C. GERAGHTY
13 ATTORNEY GENERAL

14 By: 
15 Nevhiz Russell Calik
16 Assistant Attorney General
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CERTIFICATE OF SERVICE AND TYPEFACE

I hereby certify that on December 26, 2013 true and correct copies of the
Response of Adult Protective Services to Emergency Petition for Review and Opposition
to Emergency Motion for Stay, and this *Certificate of Service* were served by U.S. Mail
with a courtesy copy by a combination of email and fax to the following:

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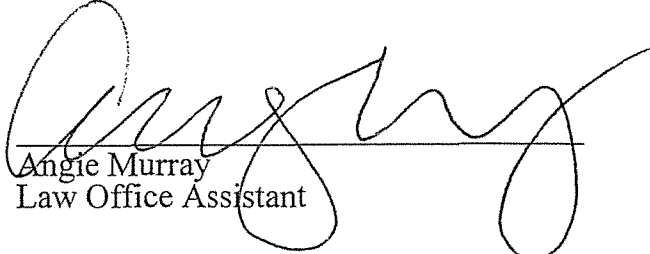
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And by facsimile to:

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I further certify, pursuant to App. R. 513.5, that the aforementioned documents were prepared in 13 point proportionately spaced Times New Roman typeface.



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