IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT, AT ANCHORAGE

In The Matter of the Necessity for the Hospitalization of William Bigley,

Respondent

Case No. 3AN 08-1252PR

OPPOSITION TO MOTION TO INTERVENE AND ENTRY OF INJUNCTION AGAINST PSYCHRIGHTS

Respondent opposes the Motion for Injunction Against PsychRights (Motion) imbedded in the Motion for Reconsideration of Order Denying Motion for Representation Hearing; and Motion and Memorandum for Injunction Against PsychRights, filed by the Office of Public Advocacy (OPA).

I. OPA'S ENTRY OF APPEARANCE IS IMPROPER AND ITS MOTION TO INTERVENE SHOULD BE DENIED

OPA's entry of appearance is improper because it is not a party. This was explicitly acknowledged by OPA in 3AN 08-493PR, where Ms. Russo, on behalf of OPA, stated, "my office is not actually a party to the commitment petition."[1] OPA is likewise not a party to the forced drugging petition. Furthermore, as set forth below, it can not represent Respondent in this matter because of its conflict with its ward. It's entry of appearance is simply improper because it is not representing any party in this matter.

OPA's back-up motion to intervene should also be denied. First, under Appellate Rule 203, this Court does not have jurisdiction to consider the motion.

[1] Exhibit A.

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Substantively, OPA does not meet the requirements for intervention as of right. Just this last Friday, the Alaska Supreme Court reiterated and applied the requirements for intervention as a matter of right:

> A four-part test determines whether a party is entitled to intervene as a matter of right:
>
> > (1) the motion must be timely; (2) the applicant must show an interest in the subject matter of the action; (3) it must be shown that this interest may be impaired as a consequence of the action; and (4) it must be shown that the interest is not adequately represented by an existing party.[2]

The Alaska Supreme Court held Dr. Bridges did not meet the timeliness requirement and therefore didn't reach the other requirements. Here, OPA has waited until the current proceedings are essentially over and this matter on appeal before moving to intervene. This is untimely. There are not even any pending petitions before this Court as far as Respondent is aware.

Because OPA's motion to intervene is not timely, this Court needn't reach the other factors. However, Respondent will note here that the substantive analysis of whether OPA, as guardian, is entitled to deprive Respondent of his right to a non-Public Defender Agency attorney of his choice,[3] also shows that OPA's intervention fails to satisfy tests (2) & (3). In other words, because OPA does not have the right to reject Respondent's choice of counsel in this dispute, it has no cognizable interest justifying intervention. With

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[2] *Bridges v. Banner Health*, Opinion No. 6329 (December 19, 2008), footnote omitted.
[3] Under AS 47.30.839(c), so long as PsychRights is prepared to represent Respondent, this Court may not appoint the Public Defender Agency.

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respect to test (4), OPA admits at page 10 of its Motion that API is adequately representing OPA's interests.

Fundamentally, OPA's complaint is that PsychRights has been representing Respondent zealously. OPA believes it is in Respondent's best interests to drug him against his will and OPA is, or more accurately now, was, frustrated that the drugging was delayed because of this representation.[4] It therefore asserts a right as guardian to prevent such representation. As set forth below, it does not have this power. In essence, through attempting to remove counsel who is zealously attempting to vindicate Respondent's wish not to be drugged against his will, OPA is making a back-door attempt to authorize the forced drugging.

OPA asserts it has the power to consent to Respondent's forced drugging. However, OPA confuses its power to consent to mental health treatment where its ward is willing, with the power it does not have to force an unwilling ward to endure forced drugging.[5] The former derives from the ward's legal incapacity to consent even though willing, while the latter is prohibited because of the ward's constitutional right to be free from unwanted psychiatric drugging.

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[4] By orders dated December 17, 2008, received by Respondent on December 19, 2008, the Alaska Supreme Court denied Respondent's motions to stay this Court's November 25, 2008 forced drugging order, as amended by its December 3, 2008, order. Counsel understands Respondent is now being drugged against his will under the AS 47.30.839(a)(2) *Parens Patriae* Count of the forced drugging petition.

[5] Respondent acknowledges this Court has, based on testimony by API's witnesses, found as a factual matter that the failure to drug Respondent causes him suffering and rejected Respondent's own experience of the drugs. However, it still seems appropriate to refer to the forced drugging as being endured, especially in light of the United Nations recently acknowledging it constitutes torture under international law. *See*, Exhibit B, page 5, ¶63.

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A. The Guardianship Does Not Override Respondent's Constitutional Right to Contest Being Drugged Against His Will

OPA cites the New York trial court decision of *In re Conticchio*,[6] for the proposition that as guardian it is empowered to consent to forcing Respondent to take psychotropic medications against his will, but fails to mention that the court in *Conticchio* specifically acknowledges that it was disagreeing with a sister New York trial court:

> [There is] a recent decision which put into question the constitutionality and efficacy of this Court's grant of such a power under said MHL provisions (see, *Matter of N.Y. Presbyt. Hosp.*, 181 Misc.2d 142, 693 N.Y.S.2d 405 [Sup. Ct., Westchester County, DiBlasi, J.]). The instant Memorandum is thus being written to clarify the basis for the determination at bar and to record our disagreement with said Westchester decision . . .

In *Presbyt Hosp.*, the court held:

> Most significantly, given the constitutional foundation upon which rests the right to refuse medical treatment, the Court cannot agree with the Hospital that an individual can lose her right to a Rivers hearing based upon a finding of incapacity at an Article 81 proceeding.[7]

As far as Respondent can determine, no higher court has resolved this split between New York trial courts.

However, the Supreme Judicial Court of Massachusetts has specifically addressed this issue.

> The primary dispute in this case concerns the means by which the ward is to exercise his right to refuse treatment, a right which the ward possesses but is incapable of exercising personally. The guardian's position is that the power

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[6] 182 Misc.2d 205, 208, 696 N.Y.S.2d 769, 770 (1999).

[7] 181 Misc. 2d at 149, 693 N.Y.S.2d at 411. The "Rivers hearing" referred to by the court is a hearing under *Rivers v. Katz*, 495 N.E.2d 337 (NY 1986), which is the New York equivalent of *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006). *Rivers* was cited by the Alaska Supreme Court in *Myers*.

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> to exercise this right on behalf of the ward is vested in the guardian simply by virtue of his appointment as guardian. The ward claims that he is entitled to a judicial determination of substituted judgment.
>
> * * *
>
> In order to accord proper respect to this basic right of all individuals, we feel that if an incompetent individual refuses antipsychotic drugs, those charged with his protection must seek a judicial determination of substituted judgment.[8]

Moreover, if the guardian has the power to consent to the forced drugging of its wards, no AS 47.30.839 hearing would be required. As set forth in the next section, OPA's assertion that it has the power to consent to the forced drugging of its wards is contrary to its representations to Respondent, which he relied upon, and also a violation of the settlement agreement in Respondent's guardianship case.

B. The Motion Violates OPA's Representations and Agreement.

In December of 2006, when PsychRights first began representing Respondent, PsychRights filed a petition in Respondent's Guardianship case to, among other things, remove OPA's authority to consent to mental health treatment.[9] In response, OPA represented that it doesn't consent to forced drugging.[10] Most importantly, on July 20, 2007, OPA, API and Respondent entered into a settlement agreement regarding the December, 2006 petition, in which OPA and API agreed that API shall not accept a consent by OPA for psychotropic drugs to which Respondent objects.[11] This resolved

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[8] *Guardianship of Roe*, 421 N.E.2d 40, 51-52 (Mass. 1981), footnote omitted.
[9] Page 53 of the Appendix to Respondent's History.
[10] Exhibit C.
[11] Page 63 of Appendix to Respondent's History.

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Respondent's petition to remove the guardian's authority to consent to mental health treatment Respondent declined.

II. RESPONDENT IS ENTITLED TO A NON-PDA ATTORNEY IF AVAILABLE TO HIM

OPA asserts it can terminate PsychRights, but does not cite any cases on point. The closest is *Guardianship of Holley*,[12] which OPA acknowledges is contrary to its position. In *Holley* the court held:

> We reject Appellees' assertion that this right to an attorney of one's own choosing does not extend with the same force to a person who has already been declared a ward in a guardianship proceeding.

Holley is not directly on point because it involves selection of the ward's attorney in the guardianship case itself.

However, *In re: Zaltman*,[13] is directly on point. There, the Massachusetts Court of Appeals held that a ward was entitled to select her own attorney in resisting forced psychiatric drugging over the objections of her guardian unless found incompetent to do so, and

> if it is determined that she does not have such capacity, new, independent counsel must be appointed to represent her *zealously* in those statutory proceedings.[14]

The concerns that normally arise when a ward selects an attorney is the attorney might take financial advantage of the ward, or fail to zealously represent the ward, or both. Here, (a) PsychRights is providing its services on a *pro bono* basis, and (b) OPA is complaining that

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[12] 164 P.3d 137, 144 (Ok 2007)
[13] 843 N.E.2d 663 (Mass. App. 2006).
[14] 843 N.E.2d at 679, emphasis added.

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PsychRights is zealously representing Respondent's desire not to be drugged against his will ("PsychRights is not acting in Mr. Bigley's interest"). In other words, by its Motion, OPA is explicitly seeking to deny Respondent zealous representation.

In this regard, while it involved commitment proceedings, the Montana Supreme Court accurately described a representation regime in these cases, that "routinely accepts--and even requires--an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation," going on to say:

> As a starting point, it is safe to say that in purportedly protecting the due process rights of an individual subject to an involuntary commitment proceeding--whereby counsel typically has less than 24 hours to prepare for a hearing on a State petition that seeks to sever or infringe upon the individual's relations with family, friends, physicians, and employment for three months or longer --our legal system of judges, lawyers, and clinicians has seemingly lost its way in vigilantly protecting the fundamental rights of such individuals.[15]

It is not, as OPA asserts, PsychRights' role to determine what are Mr. Bigley's best interests; that is the courts' role. The *K.G.F.*, court addressed this as well:

> [T]he proper role of the attorney is to "represent the perspective of the respondent and to serve as a vigorous advocate for the *respondent's wishes*." . . .
>
> In the courtroom, an attorney should engage in all aspects of advocacy and vigorously argue to the best of his or her ability for *the ends desired by the client*.[16]

To do otherwise, completely eviscerates our judicial paradigm and would make such legal representation a sham. This is simply improper and should be rejected out of hand.

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[15] *In re K.G.F.*, 29 P.3d 485, 492-93, ¶42, footnote omitted.
[16] 29 P.3d at 500, ¶86, emphasis added.

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III. COMMUNICATIONS BETWEEN PSYCHRIGHTS AND RESPONDENT

In support of the Motion, OPA presents the affidavit of Jonathan Hughes reciting that Respondent told Mr. Hughes that PsychRights had not informed Respondent of the November 25th forced drugging order and Respondent wanted to terminate PsychRights' representation of him. With respect to the former, PsychRights informed Respondent of the November 25th forced drugging order the same day it was issued.

With respect to the latter OPA presents a paper Respondent signed in the middle of July in support of its suggestion that Respondent does not want PsychRights to continue to represent him. Attached as Exhibit D is an exchange of e-mails about this in which PsychRights makes clear that it has no problem ceasing to represent Respondent if and when PsychRights believes that is Respondent's desire. OPA subsequently learned from Respondent that he didn't want to terminate PsychRights' representation. Should PsychRights believe that Respondent no longer wishes PsychRights to represent him, PsychRights will take the steps it believes are appropriate.

IV. CONCLUSION

For the foregoing reasons, this Court should reject OPA's effort to oust PsychRights as Respondent's attorney and not issue an injunction against such representation.

DATED: December 22, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein, ABA # 7811100

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IN THE SUPERIOR COURT AT ANCHORAGE ALASKA

IN THE MATTER OF)
)
WILLIAM BIGLEY,)
)
Respondent.)
)

Case No. 3AN-08-00493PR

VOLUME I

TRANSCRIPT OF PROCEEDINGS

April 30, 2008 - Pages 1-111

30-DAY COMMITMENT HEARING

BEFORE THE HONORABLE LUCINDA McBURNEY

Anchorage, Alaska
April 30, 2008
8:47 o'clock a.m.

APPEARANCES:

FOR THE PETITIONER: JAMES TWOMEY
ATTORNEY GENERAL'S OFFICE
Human Services Section
1031 West 4th Avenue
Suite 200
Anchorage, Alaska 99501

FOR THE RESPONDENT: ELIZABETH D. BRENNAN
LINDA R. BEECHER
ALASKA PUBLIC DEFENDER AGENCY
900 West 5th Avenue
Anchorage, Alaska 99501

GUARDIAN AD LITEM: ELIZABETH RUSSO

These things come up so quickly. And -- and they are of necessity with -- with respect to the involuntary commitment, because of the massive curtailment of liberty represented by the commitment, that those have to be held quickly.

Normally, the forced drugging petitions are supposed to be held, you know, more normally. In this case, we've got this petition for -- for emergency -- authorization for continued emergency petition. So we've actually got both of -- I mean, I don't know, Your Honor, how you plan to proceed with that. But that's potentially live right now even before the commitment. I don't know what the hospital's intention is on that.

MS. RUSSO: Your Honor -- sorry -- if I may, my -- my office is not actually a party to the commitment petition. I'm here on behalf of the Office of Public Advocacy. But we do have an opinion as to the representation issue that the P.D.'s office has brought up. Basically, it's not -- this continued fighting is just not, in -- in our opinion, in Mr. Bigley's best interest about who's going to represent Mr. Bigley when he deserves to have a commitment hearing as soon as possible.

I think the continued questions surrounding

United Nations A/63/175

General Assembly

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Sixty third session
Item 67 (a) of the provisional agenda*
Promotion and protection of human rights: implementation of human rights instruments

Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted in accordance with Assembly resolution 62/148.

* A/63/150.

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Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 62/148, the Special Rapporteur addresses issues of special concern to him, in particular overall trends and developments with respect to questions falling within his mandate.

The Special Rapporteur draws the attention of the General Assembly to the situation of persons with disabilities, who are frequently subjected to neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. He is concerned that such practices, perpetrated in public institutions, as well as in the private sphere, remain invisible and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment. The recent entry into force of the Convention on the Rights of Persons with Disabilities and its Optional Protocol provides a timely opportunity to review the anti-torture framework in relation to persons with disabilities. By reframing violence and abuse perpetrated against persons with disabilities as torture or a form of ill-treatment, victims and advocates can be afforded stronger legal protection and redress for violations of human rights.

In section IV, the Special Rapporteur examines the use of solitary confinement. The practice has a clearly documented negative impact on mental health, and therefore should be used only in exceptional circumstances or when absolutely necessary for criminal investigation purposes. In all cases, solitary confinement should be used for the shortest period of time. The Special Rapporteur draws attention to the Istanbul Statement on the Use and Effects of Solitary Confinement, annexed to the report, as a useful tool to promote the respect and protection of the rights of detainees.

Contents

I. Introduction

1. The present report is the tenth submitted to the General Assembly by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. It is submitted pursuant to General Assembly resolution 62/148 (para. 32). It is the fourth report submitted by the present mandate holder, Manfred Nowak. The report includes issues of special concern to the Special Rapporteur, in particular overall trends and developments with respect to issues falling within his mandate.

2. The Special Rapporteur draws attention to document A/HRC/7/3, his main report to the Human Rights Council, in which he explored the influence of international norms relating to violence against women on the definition of torture and the extent to which the definition itself can embrace gender sensitivity and discussed the specific obligations upon States which follow from this approach. According to the Special Rapporteur, the global campaign to end violence against women when viewed through the prism of the anti-torture framework can be strengthened and afforded a broader scope of prevention, protection, justice and reparation for women than currently exists.

3. Document A/HRC/7/3/Add.1 covered the period 16 December 2006 to 14 December 2007 and contained allegations of individual cases of torture or general references to the phenomenon of torture, urgent appeals on behalf of individuals who might be at risk of torture or other forms of ill-treatment, as well as responses by Governments. The Special Rapporteur continues to observe that the majority of communications are not responded to by Governments.

4. Document A/HRC/7/3/Add.2 contains a summary of the information provided by Governments and non-governmental organizations (NGOs) on implementation of recommendations of the Special Rapporteur following country visits. The Government of Mongolia has not provided any follow-up information since the visit was carried out in June 2005. Documents A/HRC/7/3/Add.3 to 7 are reports of country visits to Paraguay, Nigeria, Togo, Sri Lanka and Indonesia, respectively.

II. Activities related to the mandate

5. The Special Rapporteur draws the attention of the General Assembly to the activities he has carried out pursuant to his mandate since the submission of his report to the Human Rights Council (A/HRC/7/3 and Add.1-7).

Communications concerning human rights violations

6. During the period from 15 December 2007 to 25 July 2008, the Special Rapporteur sent 42 letters of allegations of torture to 34 Governments, and 107 urgent appeals on behalf of persons who might be at risk of torture or other forms of ill-treatment to 42 Governments. In the same period 39 responses were received.

disabilities, and primarily upon persons with mental or intellectual disabilities, warrants greater attention.

63. Inside institutions, as well as in the context of forced outpatient treatment, psychiatric medication, including neuroleptics and other mind-altering drugs, may be administered to persons with mental disabilities without their free and informed consent or against their will, under coercion, or as a form of punishment. The administration in detention and psychiatric institutions of drugs, including neuroleptics that cause trembling, shivering and contractions and make the subject apathetic and dull his or her intelligence, has been recognized as a form of torture.[35] In *Viana Acosta v. Uruguay*, the Human Rights Committee concluded that the treatment of the complainant, which included psychiatric experiments and forced injection of tranquillizers against his will, constituted inhuman treatment.[36] The Special Rapporteur notes that forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment.

d. Involuntary commitment to psychiatric institutions

64. Many States, with or without a legal basis, allow for the detention of persons with mental disabilities in institutions without their free and informed consent, on the basis of the existence of a diagnosed mental disability often together with additional criteria such as being a "danger to oneself and others" or in "need of treatment".[37] The Special Rapporteur recalls that article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty.[38]

65. In certain cases, arbitrary or unlawful deprivation of liberty based on the existence of a disability might also inflict severe pain or suffering on the individual, thus falling under the scope of the Convention against Torture. When assessing the pain inflicted by deprivation of liberty, the length of institutionalization, the conditions of detention and the treatment inflicted must be taken into account.

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[35] E/CN.4/1986/15, para. 119.

[36] Human Rights Committee, views on communication No. 110/1981, *Viana Acosta v. Uruguay*, adopted on 29 March 1984 (CCPR/C/21/D/110/1981), paras. 2.7, 14 and 15.

[37] See HRI/GEN/1/Rev.8, sect. II, Human Rights Committee, general comment No. 8 (1982) on the right to liberty and security of the person, para. 1, where the Committee clarifies that article 9 applies "whether in criminal cases or in other cases such as, for example, mental illness ...". See also the report of the Working Group on Arbitrary Detention (E/CN.4/2005/6), para. 58. See further the discussion by the European Court of Human Rights in *Shtukaturov v. Russia*, application No. 44009/05, judgement of 27 March 2008.

[38] During the convention-making process, some States (Canada, Uganda, Australia, China, New Zealand, South Africa and the European Union) supported deprivation of liberty based on disability being permitted when coupled with other grounds. Finally, at the seventh session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Japan, with the support of China, sought to amend the text of article 14 to read "in no case shall the existence of a disability 'solely or exclusively' justify a deprivation of liberty". However, the proposal was rejected. See daily summary of discussion at the seventh session, on 18 and 19 January 2006, available at www.un.org/esa/socdev/enable/rights/ahc7summary.htm.

Date: Mon, 11 Dec 2006 14:57:42 -0900
From: James Parker <james_parker@admin.state.ak.us>
Subject: Re: B.B.
To: Jim Gottstein <jim.gottstein@psychrights.org>
Organization: State of Alaska
X-Accept-Language: en-us, en
User-Agent: Mozilla/5.0 (Windows; U; Windows NT 5.0; en-US; rv:1.7.3)
Gecko/20040910

JIm- I did not copy the orders this AM but will get them tomorrow. Is it okay if I fax them?

Jim Gottstein wrote:

> Hi Jim,
>
> It's great to hear OPA is not consenting to the forced drugging. That was my assumption based partly on BB's guardianship paperwork, but mostly from Ron Adler's statement that court ordered drugging had gone down to only 57 out of 1,452 admissions. I will say it is not entirely clear to me that Ms. Russo would know if OPA has been consenting to forced drugging. You should be able to find out, of course.
>
> When I was at API the first time with BB, API refused to let BB get his own commitment/forced drugging paperwork or authorize API to give it to me (ie, a Release of Information), saying only his guardian, Steve Young, could authorize it. I thought I had written Steve asking for it, but in going back I see it was maybe ambiguous. **Please provide me with copies of his commitment/forced drugging paperwork.** I would tend to agree that the pressure on the guardianship proceeding will be off upon review of the commitment/forced drugging file. I would also probably withdraw my motion to disqualify. BB has expressed to me he does want to terminate the guardianship so I do think I have to pursue it now that I am in the guardianship case.
>
> I still want to depose Mr. Adler to find out what is going on. My understanding is there has been no significant, if any, decrease in the percentage of people receiving drugs at API (virtually 100%) so Mr. Adler's statement about the reduction in court ordered forced drugging needs to be explored. It might be possible to do that within the other proceeding, however. The January 4th expiration of the current commitment does present a problem for me, however, since I will be out of town from December 22nd to January 15th.
>
> At 09:14 AM 12/11/2006, James Parker wrote:
>
> > Jim- I went to Probate Court today and read Bill's file for his most recent API admission. A hearing occurred on October 10 and a 90 day commitment order was issued, nunc pro tunc to October 4. There was also an involuntary medication hearing held on the same day that resulted in a judicial finding that Bill could receive involuntary medication during the duration of the current commitment, i.e., January 4. Mr. Bigley is not receiving medication pursuant to his guardian's consent, but rather as a result of a court order.
> >
> > Beth Russo informs me that it is the hospital's policy to conduct involuntary medication hearings and not seek a guardian's consent for involuntarily committed wards who, like Mr. Bigley, do not wish to receive medication while they are committed.
> >
> > Given these facts, I do not understand why you are mounting a challenge to Mr. Bigley's

guardianship, seeking appointment of another guardian of Mr. Bigley's choosing, seeking modification of the guardianship order and plan, etc. In any event, this information leaves me more convinced that there is no reason for these telephonic depositions of your expert witnesses to occur during the week of December 18.

Note New E-mail Address

James B. (Jim) Gottstein, Esq.

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Psych Rights ®
Law Project for Psychiatric Rights

The Law Project for Psychiatric Rights is a public interest law firm devoted to the defense of people facing the horrors of unwarranted forced psychiatric drugging. We are further dedicated to exposing the truth about these drugs and the courts being misled into ordering people to be drugged and subjected to other brain and body damaging interventions against their will. Extensive information about this is available on our web site, http://psychrights.org/. Please donate generously. Our work is fueled with your IRS 501(c) tax deductible donations. Thank you for your ongoing help and support.