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.	CASE NO. 3AN-08-01252 PR

ORDER

Petition for Court Approval of Administration of Psychotropic Medication
Petition for 90-day Commitment

The State of Alaska, Alaska Psychiatric Institute (API), wants to administer psychotropic medication to William Bigley, who has suffered from schizophrenia for over a quarter century. Bigley opposes that request. He argues, among other things, that the medication is not only contrary to his best interests, but also would cause him injury, specifically brain damage. In advance of and during the hearing on the petition both parties raised many issues. In an effort to simplify the identification of those issues and the resolution of them, the Court will present a chronology of developments before addressing the ultimate issue of the propriety of the administration of the medication.

Commitment and First Medication Petition.

Bigley is 55 years old. He was born on 15 January 1953 in Kodiak. He moved to Sitka as a child. He was married for some time but is now divorced. He has two grown children who were living in Sitka five years ago. He has been hospitalized for his schizophrenia repeatedly, with more frequency in the last year

and decade. In March 1993 he was admitted to API for the tenth time. In July 2002 he was admitted for the fiftieth time. His seventy-fifth admission was on 25 April 2008. His most recent admission appears to be his eighty-first.[1] He has also been seen at other facilities in Anchorage and Sitka, though some of those admissions have resulted in API admissions as well. He has had many interactions with the police as a result of behavior that flows from his schizophrenia.

The parties have agreed that since December 2006 he has been at API fifteen times.[2] In 2008 Bigley was at API from 23 October 2007 to 21 January 2008; 23 February to 14 March; 16-21 April; 25 April to 4 June; 26-30 June; 1-5 August; 22-24 September; 30 September to 1 October; 8 October; and 20 October to the present.[3]

On 15 October 2008 Lisa Davis, a clinician with the Anchorage Community Mental Health Service, filed a petition for a screening investigation of Bigley, pursuant to AS 47.30.700. The Public Defender Agency was appointed to

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1 The parties were not able to agree upon his entire history of API admissions and interactions with judiciary in commitment proceedings. Bigley submitted a narrative of this history with supporting documents. It contained commentary on the events surrounding many of the admissions. API was unwilling to agree to the accuracy of the submission. The Court invited API's counsel to redact the objectionable commentary, in hopes of crafting a relatively accurate and neutral chronology. API claimed that this was not possible. It submitted its own document.

2 *See* Exhibit F. This list of the records generated during his admissions identifies the dates of his recent admissions.

3 *Id.*

represent Bigley. That agency has represented him on numerous occasions. On 17 October a magistrate recommended that petition be approved.

On 20 October Bigley arrived at API. Dr. Kahnaz Khari, a psychiatrist at API, petitioned for judicial approval of the request that API be authorized to administer psychotropic medication to Bigley, pursuant to AS 47.30.839. Dr. Khari filed a petition for the 30-day commitment of Bigley on the same day, pursuant to AS 47.30.730.

On 20 October, while those petitions were pending, API administered emergency psychotropic medication to Bigley pursuant to AS 47.30.838. This was a single dosage.

On 21 October James Gottstein entered a limited appearance on behalf of Bigley.[4] Gottstein sought to represent Bigley "only to any forced drugging under AS 47.30.838 or AS 47.30.839." On 21 October Master Jonathan Lack held a hearing on the commitment petition. The Public Defender Agency represented Bigley. Its attorney played the lead role at the hearing, cross examining the API witnesses. Gottstein also participated, but played only a minor role.

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[4] The roles of Gottstein and that of the Public Defender Agency during this litigation were the subject of some dispute. Normally the Court would ascribe actions taken by a lawyer on behalf of a party as if the party made them. Thus the Court would usually state that Bigley filed a motion when actually it was his lawyer who did. To differentiate what Gottstein did from what the Public Defender Agency did, the Court will identify Gottstein or the Agency as the one filing motions or taking actions, rather than Bigley.

Master Lack recommended that the commitment petition be granted, but referred the medication petition to the superior court without recommendation. A hearing on the medication petition was set for 29 October. On 22 October, after listening to the recording of the hearing,[5] the Court granted the commitment petition.

On 22 October Gottstein filed a motion to dismiss the medication petition. On Friday, 24 October, API withdrew its medication petition, stating that Bigley had responded well to his care at API.

Second Medication Petition.

On Monday, 27 October, API filed a second medication petition. It was later explained that API observed a marked decline in Bigley's condition over the weekend and thus thought medication was necessary. In fact, API administered a second dosage of emergency psychotropic medication that day, again pursuant to AS 47.30.838. Meanwhile, Gottstein filed a motion for summary judgment on the first medication petition.

On 27 October, in response to the second medication petition Master John Duggan again appointed the Public Defender Agency to represent Bigley and appointed a court visitor to report on his condition. Master Duggan set a hearing for 29 October at API with the undersigned judge to preside. Unaware of the dismissal of the first medication petition or the filing of the second medication

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5 *See Wayne B. v. Alaska Psychiatric Institute,* 192 P.3d 989 (Alaska 2008).

petition, the Court issued its own calendaring order for a hearing on the 29th on the first medication petition.

Status Hearing.

Open Hearing. On 28 October, having by then learned of the second medication petition, the Court held a scheduling hearing in its courtroom without Bigley being present. Gottstein objected to the notice on the entrance to the courtroom that the hearing was closed to the public. He explained that Bigley had consented to the proceedings being open, pursuant to AS 47.30.735(b)(4). That notice had been placed there by the Court's in-court clerk who had reasonably assumed that this hearing, like most mental health probate matters, was closed. Without objection from API the Court had the notice removed. Gottstein did not object to Bigley not being present since the purpose of the hearing was to sort out the various petitions that had been filed and determine what hearings, if any, needed to be set and for when.

Discovery and Timing of Hearing. At the status hearing the Court ordered API to make Bigley's charts available to Gottstein shortly after they were generated. It ordered API to provide Gottstein with paper copies of Bigley's charts from prior admissions at API for the past year.

AS 47.30.839(e) requires a hearing on the medication petition to be held within 72 hours of the filing of the petition. Gottstein moved to vacate the hearing set for the 29th. He demanded additional time to obtain documents from

API, to conduct discovery, and to prepare. API opposed the motion, citing the statutory deadline for the hearing.

The Court concluded that Bigley's due process rights to discover the evidence that might be used by API in support of the medication petition overrode the statutory deadline for a hearing on the petition.[6] It vacated the hearing on the 29th, setting a new hearing on 5 November at API.

Location of Hearing. Gottstein objected to holding the hearing at API, arguing that Bigley was being deprived of his right to have the hearing open to the public if it was held at a facility that was restricted to the public. The Court kept the hearing at API subject to further review after the first day of the hearing.

On 29 October Gottstein filed a motion for expedited consideration of his motion to hold the hearing set for 5 November at the courthouse rather than at API. The Court granted expedited consideration. On 30 October API opposed

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6 API moved for reconsideration of this ruling at the beginning of the hearing. The Court concluded that discovery was authorized by court rule and statute. The Rules of Probate Procedure apply to proceedings pursuant to AS 47.30. Probate Rule 1(b). No probate rule expressly addresses discovery in commitment or medication proceedings. Probate Rule 1(e) adopts the Civil Rules if no probate rule applies to a specific procedure. Civil Rule 26 governs discovery generally and Civil Rule 30 permits oral depositions.

It is true that AS 47.30.839 does not address discovery, but contrary to API's suggestion, that does not mean that no discovery is authorized in AS 47.30 proceedings. AS 47.30.825(b) mandates the disclosure of information about a patient and his treatment to the patient and his counsel. AS 47.30.850(2) authorizes the release of otherwise confidential information and records to the patient and his designee. AS 47.30.850(3) authorizes the release of those information and records to a person if ordered by a court.

the underlying motion, supported by an affidavit of Dr. Lawrence Maile. He opined that the transportation of Bigley from API posed a risk to him and members of the public. The Court denied the motion, subject to further review upon the Court's observation of the API facility and Bigley at the hearing.

On 30 October Gottstein moved to dismiss the portion of the medication petition that was made pursuant to AS 47.30.838(c) and .839(a)(1). The Court denied that motion at the beginning of the hearing on 5 November.

Depositions.

On 31 October API filed for expedited consideration of its Motion to Quash and Motion for Protective Order. API sought to quash deposition notices served on several of its administrators and physicians. The depositions were to occur on 3 November. API argued that the relevant statutes[7] and probate rules did not provide for discovery by the ward. API sought a protective order "so that the contents of all discovery in this case be confidential, from now and into the indefinite future. Such an order would protect both respondent fro the disclosure of sensitive medical information and the deponents from harassment and embarrassment by respondent's attorney."[8] The Court granted expedited consideration.

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7 AS 47.30.670 -- 47.30.915.

8 Motion for Protective Order (31 October 2008) at 2.

On 3 November the Court held a status hearing. Gottstein appeared in person. Laura Derry appeared telephonically for API. Bigley did not attend, without objection. The Court made various rulings. It:

a) denied API's second 30-day commitment petition as moot, since the Court had granted the first petition;

b) held Bigley's motion for summary judgment in abeyance until it could review the documents submitted by Gottstein;

c) denied the motion to quash, although it modified the timing of one deposition that was set at night by mistake;

d) granted the motion for a protective order in part, ordering that Gottstein could publish filings from the open file to third parties, but could not publish materials obtained in discovery, including Bigley's charts and the depositions to third parties (except as was necessary for the litigation, say to his experts) before 12 November. The Court intended that the depositions take place and then the parties could address the continued need for a protective order after reviewing the deponents' testimony and any request to publish.

On 4 November API filed a number of motions in limine concerning Bigley's proposed witnesses and the use of the term "forced drugging." API moved to strike the depositions that Gottstein had just taken. The Court held in abeyance the motions concerning the witnesses until Gottstein actually called them. The Court denied the motion to preclude Gottstein's use of the term "forced drugging" and the motion to strike.

The Physical Setting of the Medication Hearing.

On 5 November the Court convened a hearing at API.[9] In order to enter the facility one goes into an open, public lobby. There is a receptionist behind a glass wall who gives a visitor an identity badge and arranges to have the visitor escorted to her destination. Opposite the receptionist, across the public lobby, is a meditation room, also open to the public. On either side of the meditation room, are locked doors into a large, high glass walled room with a coffee and snack vendor and various chairs and tables. One may see into the snack room through the clear glass walls.

Behind the snack room is a hallway that extends down two wings, coming together at a roughly 90 degree corner directly behind the snack room. This hallway gives one access to the 5 or 6 residential units that are perpendicular to the hallway. The hallway has a ceiling that is perhaps forty feet high. There are large pieces of artwork roughly 75 feet apart on the walls opposite the snack room.

Down the left wing of the hallway are the two rooms that have been used as hearing rooms. One, a smaller room, is labeled as the courtroom. It was partially set up on the morning of 5 November, but the API staff suggested that the hearing be moved to a larger room closer to the entrance from the snack room.

All sessions of the hearing were held in this larger room. It is rectangular, roughly 20 feet along the hallway and 35 feet deep. It is labeled a

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9 The Court heard additional testimony concerning the medication petition on 6, 10, 17, and 18 November.

rehabilitation room and has numerous arts and crafts materials in it. There are cabinets built into half the perimeter of the room, both above and below a countertop. Along one wall perpendicular to the hallway are doors into adjacent offices with a window in the top half of the door and another window adjacent to the doors. Along that wall there are two sets of work stations with four computers. Along the opposite wall are additional counters and cabinets and an alcove with more counters and cabinets. The alcove is perhaps four feet deep. In it is a large, high wooden table. There is a sink in the alcove. Along the wall opposite the hallway is another door and window into another office. There is a restroom in the corner opposite the hallway and behind the alcove.

In the middle of the hearing room were five 3 feet by 5 feet tables setup to form a conference table 5 feet by 11 feet. There were eight chairs around the table. There were at least three additional chairs set back from the table. More could have been brought in if needed. In the middle of the table was a speakerphone that was linked to a regular courtroom where the proceedings were recorded and an in-court clerk kept log notes.

Participants at the Hearing.

Bigley. At the very beginning of the hearing on 5 November Bigley was not present, but he arrived in a few moments. He sat on a chair near Gottstein, but away from the table and to the left and rear of the judge, who was at the narrow end of the table across from the entrance from the hallway. There was an API attendant who accompanied Bigley everywhere. Occasionally Bigley would

leave the hearing room to use the restroom, to eat, or to get coffee. The hearing continued in his absence without objection.

The Court denied Gottstein's request to delay the hearing to permit Bigley to go outside the API building and off its campus in order to smoke a cigarette. It is against API policy to smoke on the campus. Dr. Khari opined that smoking was not good for Bigley, although she acknowledged that he was a heavy smoker and constantly asked to be allowed to smoke.

Throughout the hearing Bigley spoke, usually to himself, as if commenting on the proceedings. Sometimes he reacted more loudly to what was being said, sometimes directing those comments at another participant. For the vast majority of the hearing Bigley's speech did not interfere with the proceedings, particularly once the participants got used to it. His comments were only rarely coherent. Typically one might make out only one or two words. While Bigley was paying attention to the proceedings, he was not actually engaged with any other person for more than a few seconds. At times he was disruptive, usually in reaction to the presence of or testimony of a particular witness. The Court found that it was most effective to not respond to the outbursts in any but the calmest manner. They would pass. The Court often asked him to be quieter and occasionally suggested he might want to go get more coffee. He usually acted on that suggestion. Often I would silently signal to him to be quieter by gesturing with my hand for him to lower his voice or by putting my finger to my lips. He

would always respond to those gestures although often he'd begin speaking again in 10-15 seconds.

After the first day of the hearing the Court concluded that it would not be appropriate to hold the remainder of the hearing away from API. The physical setting of a courtroom, with the judge on the bench above Bigley, would have disturbed him. It was comforting for him to be at the same level as the other participants who were seated around the makeshift conference table. He insisted on sitting away from the table. If he had been forced to sit in a more formal setting, he would not have been as cooperative. Presumably the basic setting of API and perhaps even the particular room where the hearing was held was somewhat familiar to Bigley. He certainly was comfortable with the restroom and dining facilities that he used during the hearing. Finally, and most importantly, it was comforting for him to be able to leave the hearing room and go into the hallway or to get coffee at a small cafeteria a few doors down the hallway. He could not have walked about the courtroom or courthouse in that manner. He would have felt far more restricted in a courthouse and that would have increased his agitation.[10]

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[10] Having concluded that the hearings should not be held in the courthouse, the Court should not be understood to mean that the physical setting for hearings at API is acceptable. The API facility is only a few years old. It is quite beautiful and a tremendous improvement overall from the old facility. It is far from a depressing setting. But API holds hearings on petitions for evaluations and commitments on at least two days every week. In the modest regular "courtroom" there is little more than a conference table. The room that this hearing was in is better only in that it is bigger. But it is obvious that neither room was designed for

On two occasions after the first day Bigley got particularly agitated. At the start of one day, after he learned that API had filed a petition for a 90-day commitment, he came into the room quite upset. He had a pile of papers that included pictures of Al Pacino and President Kennedy, among others. He angrily shuffled through the stack, putting individual pictures on the table for us to see. Part of his delusion is that he is Al Pacino and wants to fly in his plane to Cuba. Occasionally he appears to think he is the president. He got agitated once when he insisted that he be released and that he was a free man.

In retrospect the Court's decision to hold the hearing at API was the only possible decision consistent with Bigley's immediate personal needs.

Counsel. Gottstein and two assistant public defenders were present at the beginning of the hearing on 5 November. The assistant public defenders objected to Gottstein being able to enter a limited appearance on Bigley's behalf. They argued that it was not permissible to carve out an appearance by one counsel that was limited to the medication petition while having the Public Defender Agency represent him on the commitment petitions. They alleged that such joint

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the hearings that API knew would be held in them. The audio recording system is preposterous. It is no more than a conference/speaker phone in the middle of the table that has to be moved in front of each speaker so that the court clerk back at the courthouse can make a recording. It is incomprehensible that the new facility was not designed to include a room specifically tailored for these hearings--which does not mean a small version of a regular courtroom. The hearing room should be designed to accommodate the unique needs of the mentally ill persons who are the subjects of the proceedings.

representation was contrary to the Agency's general policy.[11] More specifically, they alleged that the Agency lawyers had disagreed with Gottstein about the representation of Bigley in the past. They did not think that Gottstein and the Agency could cooperate.

The Court ruled that Civil Rule 82(d)(2) permitted an appearance that was limited by "subject matter." The Court permitted the assistant public defenders to attend the medication hearing as it would likely include testimony relevant to his continued or extended commitment. The two lawyers stayed for awhile, but then left and did not return at any other time during the medication hearing.

The Court denied the request of API and the Public Defender Agency that it make inquiries of Bigley to determine if he was competent to decide to have Gottstein represent him. The Court found that Gottstein's representation of Bigley in the past year when API had filed another petition to medicate (superior court case no. 3AN-08-00493 PR, supreme court case no. S-13116) Bigley was sufficient to support his current limited representation. This was a peculiar request from API in light of its allegation that Bigley was then so gravely disabled that he did not have the capacity to give or refuse informed consent to the suggestion that he be administered psychotropic medication. The Court found that it was neither appropriate nor necessary to question Bigly at that

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11 The policy was not more specifically identified. If a written policy exists, it was not produced.

time about his desire to have Gottstein represent him. Nor would it be fruitful to attempt to question him about earlier times when he might have engaged Gottstein as his attorney. The Court found that Gottstein's history as a representative of Bigley when similar and perhaps identical issues were in dispute was an adequate assurance that Gottstein's continued limited representation of Bigley was consistent with Bigley's wishes.[12]

The Press. At the hearing on 5 November it was brought to the Court's attention that a member of the press was in API's public lobby seeking to attend the hearing. The assistant attorney general representing API had instructed API to deny the reporter access to the hearing until she could again raise with the Court questions regarding the openness of the proceeding. The Court ordered the reporter to be permitted into the hearing room immediately. She attended the remainder of the hearing that day. The reporter attended the next day and perhaps for portions of other days as well.

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12 The Court notes that the status of representation of a person who may have a mental illness can be problematic. No one disputed that Bigley has a mental illness and has been deemed incompetent to stand trial in the past year. It would be helpful for attorneys who are engaged by a person who has chronic mental illness problems and might periodically lack the capacity to make decisions about representation in the future to memorialize the client's selection and capacity at the time of the person's engagement of the lawyer so as to avoid just this challenge at a later time. There should be a representation procedure or document analogous to advance health care directives as permitted by AS 13.52. This is a topic that ought to be addressed by the Probate and/or Civil Rules Committees.

The Court instructed the Department of Law that it could not unilaterally determine who could attend the hearing, but must allow any member of the public to attend, subject to any request by a party to have a particular person excluded. The person would be permitted to attend until the Court ruled on the application.[13]

The Protective Order.

The Court clarified the protective order. No party could reveal to third persons the contents of any deposition taken or discovery received in the litigation except as that deposition or discovery was used in open court. API again moved that the hearing be closed, and raised the ongoing issues of the confidentiality of the existing record and the publication of materials generated by the litigation.[14]

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[13] During a subsequent session of the hearing, some days after the first day, API's lawyer disclosed that a representative of the press with unspecified camera equipment had sought access to the hearing, but had been barred entrance by API. The Court had Ron Adler, API's chief executive, provide testimony about this event. He explained that he had made this decision because of the desire to protect the privacy interests of the other patients at API. This was not the decision of the API lawyers involved in the hearing. He explained that he had tried to contact other counsel that API routinely consulted on patient privacy issues, but before he could speak with counsel, the photographer chose to leave. The Court ordered that API was not to bar any member of the press from the hearing although it could enforce its rules about photography of API patients while the photographer came into the hearing room from the public lobby. However, the use of photography in the hearing room would remain under the exclusive jurisdiction of the Court.

[14] On the second day of the hearing the Court distributed copies of the log notes and CDs of the prior day's hearing. The log notes were marked "CONFIDENTIAL." This was consistent with the regular practice for API hearings, but contrary to the Court's order in this particular hearing. The Court

Summary Judgment.

When, at the beginning of the hearing on 5 November, the Court indicated its intention to deny his Motion for Summary Judgment, Gottstein pointed out that there had not been oral argument and that he wanted to argue the motion. The Court heard oral argument on the motion and found there were significant genuine issues of material fact concerning Bigley's recent and current mental health and whether it was in his best interests to be administered particular psychotropic medications. The Court ruled that its consideration of the motion was not limited to evidence submitted by API with its formal opposition to the motion. Instead the Court was required to consider the entire file, including affidavits submitted in support of other motions. The factual issues concerning the impact of the proposed medication on Bigley, as well as his prognosis if not administered psychotropic medication, made it impossible for the Court to grant the motion as a matter of law.

AS 47.30.839.

API may seek court approval for the administration of psychotropic medication pursuant to AS 47.30.839(a) if

> (1) there have been, or it appears that there will be, repeated crisis situation as described in AS 47.30.838(1)[15] and the

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clarified that the log notes were not confidential, but were open to the public, as were the contents of the court file and the hearings themselves.

15 A crisis is defined to be an existing or impending situation "that requires immediate use of the [psychotropic] medication to preserve the life of, or prevent

> facility wishes to use psychotropic medication in future crisis situations; or
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> (2) the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

API alleged that both circumstances were present in Bigley's case

If a court finds that the patient is competent to give informed consent, then API must honor the patient's decision about the use of the medication.[16] If the patient is found not to be competent, "and, by clear and convincing evidence, was not competent to provide informed consent at the time of previously expressed wishes[,]"[17] then the court may authorize the administration of the medication if it further "finds by clear and convincing evidence that the proposed treatment is in the patient's best interests and that no less intrusive alternative is available."[18]

The best interest analysis requires a court to consider the following statutory factors:

> (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
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> (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of

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significant physical harm to, the patient or another person, as determined by a licensed physician or a registered nurse[.]" AS 47.30.838(a)(1).

16 AS 47.40.839(f).

17 AS 47.30.839(g).

18 *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006).

dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;

(C) a review of the patient's history, including medication history and previous side effects from medication;

(D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and

(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.] [19]

In addition, the court should consider the following:

(1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;

(2) the risks of adverse side effects;

(3) the experimental nature of the treatment;

(4) its acceptance by the medical community of the state; and

(5) the extent of intrusion into the patient's body and the pain connected with the treatment.[20]

Competency and Informed Consent.

A patient is competent to make mental health decisions, such as whether to take psychotropic medication, if the patient

(A) has the capacity to assimilate relevant facts and to appreciate and understand the patient's situation with regard to those facts, including the information described in (2) of this subsection;

(B) appreciates that the patient has a mental disorder or impairment, if the evidence so indicates; denial of a significantly disabling disorder or impairment, when faced with substantial evidence of its existence, constitutes evidence that the patient lacks the capability to make mental health treatment decisions;

(C) has the capacity to participate in treatment decisions by means of a rational thought process; and

(D) is able to articulate reasonable objections to using the offered medication.[21]

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19 AS 47.30.837(d)(2); *Myers*, 138 P.3d at 252.

20 *Myers*, 138 P.3d at 252.

21 AS 47.30.837(d).

Marieann Vassar, the Court Visitor, and Dr. Khari, Bigley's primary treating psychiatrist at API, testified about his current capacities and condition. Both opined that Bigley is not competent. The Court agrees.

Current Capacity. The Court finds that Bigley suffers from chronic paranoid schizophrenia. Although he has not received long term psychotropic medication for nearly a year, he as recently been administered several doses of emergency psychotropic medication. On 7 October he was taken to Providence Alaska Medical Center because he was walking in and yelling at traffic. He was given Haldol (5mg) and Ativan (2 mg).[22] While incarcerated between 16-20 October he was given two doses of Haldol and Ativan by the Department of Corrections medical staff. At API he was administered emergency psychotropic medications on 22 and 27 October. After his admission on 20 October he began yelling loud obscenities, invading other person's spaces, banging the walls with a platter, and throwing himself against the walls even after being taken to a quiet

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[22] Haldol is a typical anti-psychotic medication. This is an older category of anti-psychotic drug that may produce a variety of negative side effects for some patients. A newer category of anti-psychotic drugs that allegedly pose a lower risk of side effects are labeled atypical anti-psychotics. Whether these are actually more benign is controversial in some quarters and hotly contested by Gottstein. API seeks to administer Risperdal Contra, a brand of the generic drug risperidone, to Bigley. It is an atypical anti-psychotic. Ativan is an anti-anxiety drug.

room. The last four administrations of psychotropic medications were involuntary. It is not clear whether the dosage at Providence was voluntary.[23]

Bigley does not appreciate that he has a mental illness, in fact he denies it. He is delusional, thinking at times that he is Al Pacino and/or President Kennedy or the president. He currently cannot interact with other people in any meaningful way. Although for brief periods during the recent admissions at API he has been more cooperative with API staff, normally he cannot engage in a conversation for even a few sentences. Most often he speaks incoherently. Usually he is either speaking to himself or making comments about the events he is observing. His words are not often understandable and his thought process can rarely be tracked, regardless of whether they are rational or not. If agitated he will yell loudly, sometimes making statements of aggression. He does not act out on these comments. He is not capable of participating in treatment decisions, indeed he cannot participate in any treatment at all as he does not engage with others.

Bigley does not express any reasonable objection to medication in general or to the proposed specific medication. He does claim the drugs are killing him or his brain. He does fear that he is being poisoned by medication that he has received in the past. But this is part of his delusional thought pattern and not an

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[23] The medic chart from Providence states that Bigley took the medication voluntarily, but it is unclear if this was meant to signify that he was capable of giving informed consent (which would be dubious) or merely that he cooperated in the administration of the medication, say by taking the pill when it was handed to him.

objection based upon his experience with or reaction to medication. Thus he also fears that his food at API is poisoned, often waiting until others eat the food before he will. Nor does he identify any side effects of medication that he wishes to avoid. He has in the past exhibited mild symptoms that might be tardive dyskinesia, but he makes no mention of that currently. He has experienced other mild side effects that may have been from medications, such as mood swings or sexual dysfunction, but he currently does not mention those effects.

Prior Expressed Wishes. At times in the past Bigley has declined medication. In the past year he has been declining psychotropic medication. It appears that during this past year that he has not been competent to give informed consent regarding medication. This conclusion is supported by the number of interactions with police that Bigley has had and the observations of API and other health care facilities that have treated Bigley this year.

For roughly 16 months before late 2007 Bigley was taking a prescribed psychotropic, risperidone, at first in shot acting pill form and later in longer acting injections of Risperdal Contra. He was living in an apartment and being given medications twice a day orally. Mental health aides would visit his home and offer the medication to him. He usually took them without objection. Occasionally he declined them for short periods, of up to two days. Usually he would only decline for a much shorter period, often because when the aides came to his apartment to administer the medication they interrupted his sleep or something he was doing.

These refusals cannot be construed as a general objection to all psychotropic medication or even to a specific medicine. Nor can they be construed as an expression of his unwillingness to take medications in the future or when in any given mental state.

Then for a period of months Bigley would come to API voluntarily to get his risperidone in the form of an injection every two weeks (Risperdal Contra). It is not clear why he stopped taking the medications.

During past hospitalizations API staff would ask Bigley if he wanted to take pills or get a shot. He usually agreed. Gottstein argued that this constitutes an admission by API that Bigley was then competent to give informed consent, otherwise why bother to ask him? He argues that API concludes that Bigley is competent when he takes medication but incompetent when he declines. That is not API's stated position.

The Court finds that even when Bigley is not competent API asks him to take the medication that API has prescribed for him for two reasons. First, it is respectful and gives a patient a sense of empowerment, and second, it is easier if the patient physically cooperates in the mechanics of the administration of the medication. Neither eating a pill rather than being physically forced to swallow it, nor lowering one's pants so that medication can be injected into a buttock rather than being held down by staff while the shot is given, is necessarily proof of competence.

The Court finds by clear and convincing evidence that Bigley has never expressed a decision not to take psychotropic medications in the future, nor conditioned his willingness to take medication in the future on the existence of certain circumstances. He has never expressed anything that may be construed as an advance health care directive as defined by AS 13.52. Nor can his expressions about psychotropic medications, even when he has declined medication, be construed as an opinion about his willingness to take the same or similar medication in the future.

The Court finds by clear and convincing evidence that Bigley is not competent to provide informed consent.[24]

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[24] By this conclusion the Court should not be understood to minimize the difficulty of determining competency, particularly at the time, perhaps months or years prior, of some expression about medication under different circumstances. Even if a person makes an emphatic expression in opposition to the taking of all or some forms of psychotropic medication, it is difficult to construe that expression, some months or years earlier, as being informed consent or objection to a proposed medication under the new, current circumstances. It will nearly always be difficult to determine if the person at the time of the expression was capable of informed consent, much less to determine whether that ancient expression has any reliability when it comes to the decision the physician, patient and court are facing in the present.

These difficulties are to some extent avoided by the use of an advance health care directive. But the memorialization of the directive and the condition and knowledge of the patient at the time it was executed is critical. If not done carefully the directive is ambiguous if not meaningless.

For persons who have chronic mental illness but have periods of relative lucidity, it might be helpful for a facility like API to videotape the person while floridly mentally ill for the sole purpose of showing the person the tape when he has returned to relative mental health and capacity. Then, as a part of the creation of an advance health care directive, the person can be shown the tape so that he

Bigley's Best Interests.

Since March 2008 Bigley has for the most part been unmedicated, although he has been given medication involuntarily at API and when incarcerated during that period. On at least one occasion in October 2008 he appears to have accepted medication at Providence Hospital, although the circumstances of that administration were not made clear to the Court.

When not medicated he has deteriorated mentally, emotionally, and physically. He cannot maintain employment (nor can he if medicated) or a residence. He cannot provide himself with basic nutrition. His thoughts are confused and his actions threatening to others. He is repeatedly asked to leave commercial premises. He is often has interaction with the police and is frequently arrested.[25] He is charged with a minor crime but those charges are dropped when

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may have some "objective" evidence of his condition when not medicated. The Court appreciates that this could be a harmful and even cruel technique for some persons. The point is that there should be greater exploration and recordation of a patient's wishes during those periods when he is most healthy and capable rather than waiting until the patient is doing the most poorly and others are left to try to evaluate the significance of sporadic and often confusing and even conflicting expressions about medication.

The Court understands that some patients would opt to forego some or all medication, in order to avoid some unpleasant and unwanted affect of the medication, a choice perhaps ultimately only understood by the patient after experiencing them. But many patients would choose medication, particularly if they had the added appreciation of viewing themselves while undedicated.

[25] *See* Attachment C to the Court Visitor's Report. This is a chart of police calls for service involving Bigley between 10 March and 10 August 2008. It has 48 entries.

he is deemed incompetent to stand trial. After a period of incarceration and perhaps medication, he is released from prison, returned to the streets without services.

Bigley does have a public guardian who handles his meager finances and tries to get him housing, but without medication there are no facilities where he is acceptable for residency.

The longer that he is without medication, the lower the level of his baseline of capabilities which can be expected to return if and when he is medicated. His public guardians have noticed a decline in his condition. He is more frequently having confrontations or unwanted interactions with the public. He is sometimes so delusional that he has wandered in traffic, oblivious to danger.

When medicated, Bigley has remained actively schizophrenic. But when taking risperidone (Risperdal Contra) he was capable of maintaining an apartment for nearly 16 months with some assistance from his guardian to purchase food and other items. He was less agitated. He could engage with other persons. He could do those activities that he enjoys—buy and smoke cigarettes, drink coffee, watch live musical performances, ride the bus, buy trinkets and decorate his apartment, and engage in conversations. He could laugh when medicated.

API seeks to administer risperidone at first orally and then by injection. The injections would be effective for roughly two weeks. It would take

four to six weeks for the risperidone to be fully effective. There are no expected to side effects, although tardive dyskinesia is possible. He should not consume alcohol while taking this medication. Bigley rarely drinks alcohol.

Gottstein objects to the proposed medication.[26] He contends that Bigley has been seriously injured by the administration of various psychotropics for nearly 30 years. He contends these drugs cause permanent brain damage. The Court finds that he has not proven that Bigley has been damaged by the psychotropic medications in general or by any specific medication.

Dr. Aron Wolfe testified that API should evaluate Bigley for brain damage by the use of an MRI. API is not convinced that he would tolerate that procedure. Dr. Wolfe thought even one as prone to agitation as Bigley could be given Valium or some other anti-anxiety drug so that he could tolerate the MRI procedure. When asked if one could determine the etiology of any brain damage found, specifically could one determine if the brain damage was the result of psychotropic medications, Dr. Wolfe stated that he had read in the *New York Times* the day before of a new protocol that allowed this determination. That is not convincing.

Gottstein has raised significant concerns about long term administration of psychotropic medication. These concerns should be taken more seriously by API. The Court is not finding that the concerns have yet been proven,

but API should be careful that it is not failing to explore these concerns in part because of its irritation at Gottstein's challenges to its practices.

The Court is willing to assume that past medications have damaged Bigley's brain. It is further willing to assume that additional brain damage will result if API is allowed to administer more psychotropics. But that does not end the analysis.

The Court finds that the danger of additional (but uncertain) damage is outweighed by the positive benefits of the administration of medication and the emotional and behavioral problems that will escalate if Bigley is not medicated. Even if the medication shortens Bigley's lifespan, the Court would authorize the administration of the medication because Bigley is not well now and he is getting worse.

The Court appreciates that if the medication were to dramatically shorten Bigley's lifespan and the benefits of medication were low, then at some point it would not be in Bigley's interest to take the medication. But currently the possibility of such damage is the more uncertain variable, whereas the recent experience with risperidone has been very positive for Bigley. If Bigley were returned to his condition in 2007 by the administration of risperidone, then Bigley's quality of life would be profoundly improved.

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[26] Gottstein submitted various affidavits and prior testimony of witnesses. The Court permitted this to function as the direct testimony of the witness and required Gottstein to make the witness available for cross examination.

It is true that Bigley acted rather calmly during the hearings and has been getting more sleep and nutrition. But he remains gravely disabled and his delusions are debilitating. He cannot function outside of an extremely controlled environment. His deterioration over the past year is troubling and will likely continue if he is not medicated.

If Bigley is medicated and his competency to make health care decisions is restored, then Bigley might execute a health care directive. Then, if he does not want to be medicated he can effectuate that desire. The Court must caution that the status of his mental health must be carefully documented at the time he executed any directive so that the evaluation required by AS 47.30.839(e) can be made at some future time if an entity sought to involuntarily medicate Bigley.

Alternative, Less Intrusive Treatments.

Gottstein argues that Bigley should be kept off psychotropic medications for at least a year so that the impact of his consumption of them in the past several years may be minimized, if not eliminated, and he could be better evaluated. During the next year API and other agencies, both public and private should provide Bigley with a fulltime set of attendants. These attendants would accompany Bigley as he interacted with the community so as to avoid having the public resort to calling the police. The hope is that the attendants could redirect Bigley before minor incidents escalate.

The Court finds that this proposal would not work with Bigley. He has an attendant accompany throughout API, at least when he is outside of his residential unit and in the more open areas of API, such as the hallway outside the hearing rooms. If Bigley cannot navigate the controlled environment of API alone, then he certainly could not succeed alone in the community. No attendant could adequately monitor Bigley in the community if he remained in his current state.

To be clear, even if the proposed attendants were available, the Court would not find that alternative to be viable. Even if Bigley were afforded the most protective wraparound set of services, such as a home and the team of attendants, the Court would authorize the medication.

Having come to that conclusion, the Court should not be understood to find the current set of options for the mentally ill in the community to be acceptable. API repeatedly pointed out that it is an acute care facility that depends upon medication as its primary (but not exclusive) mode of treatment. It is not a long term care facility. It is not a long term residential facility. While it did arrange for its patients, when discharged, to have their immediate needs cared for by other service providers, it does more as a transition from API than as a long term treatment option.

In *Myers* the Alaska Supreme Court held that when the state seeks to administer psychotropic medication against a patient's wishes, it may do so constitutionally only after showing that "the proposed treatment is actually the

least intrusive means of protecting the patient."[27] There will be patients whose chronic illness and immediate needs are not as sever as Bigley's. For those patients it will be possible to identify less intrusive means of protecting them than medication. But if API cannot deliver those means of treatment or array of services, is that failure to provide that less intrusive means justification for the medication? That seems highly unlikely. The question that must be anticipated by API and other state agencies, is what responsibility or obligation does API or the state have to provide those services, whether by public facilities or by public funding.

The Court cannot and need not answer these questions. But there is no doubt that it will soon have cases before it that will require that they be answered. It is hoped that API and the state begin exploring those questions now rather than have to develop ad hoc responses in litigation. To this end the Court is encouraged to see that DOC, the Anchorage Police Department and other state and municipal entities have begin exploring what to do with persons like Bigley. The endless cycle of arrest, emergency medication while incarcerated, evaluation at API and discharge to homelessness and further degradation must be ended.

API and the Department of Law must understand that the advocates for the mentally ill will not go away. In *Myers,* API argued that the legal and judicial system should play little or no role in medication decisions, instead

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27 *Myers*, 138 P.3d at 250.

leaving them to doctors.[28] That suggestion has been soundly rejected.[29] That means there will be an increasing number of challenges to API's treatment and proposed treatment of the mentally ill. Both agencies will have to change their attitudes about the admittedly time consuming and sometimes contentious litigation process. This is not to say that all advocates for the mentally ill are right or take reasonable positions or are not bothersome at times. But they can be expected to resort to the judicial system on behalf of their clients. More litigation, not less, should be anticipated.

Should the Medication Order Be Stayed?

On 19 May 2008 Judge Sharon Gleason granted API's earlier petition for involuntary medication in 3AN-08-00493 PR. On 23 May 2008 in S-13116, a single justice stayed that order pending appeal. The Supreme Court denied API's motion for reconsideration on 25 June 2008. Oral arguments are scheduled for the middle of December 2008.

If the Court were asked to stay its ruling pending appeal at a time when there was no related case now on appeal, it would deny that request. It would conclude that Bigley has deteriorated since May 2008 and should not have to wait longer for medication. But if the Court were to permit API to begin medicating Bigley, it would effectively moot the Supreme Court's stay of the

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28 138 P.3d at 249-50.

29 *Id.*

earlier (but different order) and perhaps the appeal. The Court will not do that. Instead, it will grant a stay of the medication order until **15 December 2008.** This will give API an opportunity to allow the Supreme Court to review its stay in light of the briefing and oral argument in the pending appeal as supplemented by this Court's findings.

Petition for 90-Day Commitment.

On 17 November API petitioned to have Bigley committed for 90 days, pursuant to AS 47.30.740. The Court heard testimony on 21 November. Liz Brennan and Linda Beecher, assistant public defenders, appeared for Bigley, who was also present. Scott Friend appeared for API. Bigley was present. The Court heard testimony from Dr. Khari

The Court announced its decision to grant the petition at the hearing. The Court found that Bigley had not attempted to harm others since his admission, does not have a current plan to harm others, and is not a direct danger to himself, that is, he will not inflict physical harm to himself. The Court does find that if he were released from API without having first been stabilized with psychotropic medication, he would not be able to care for himself. He would be at risk of injury from the winter elements, from other persons with whom he might interact in ways that they found threatening, or he might wander in traffic or into other inherently dangerous situations. If not treated with medication he will continue to suffer mental and emotional distress that affects his ability to exercise judgment, reason and behave in a manner that is not dangerous and which distress is directly the

product of his mental illness. The Court finds that Bigley's condition is such that his distress is so incapacitating that he cannot live safely outside a controlled environment.[30]

Conclusion.

The Petition for Court Approval of Administration of Psychotropic Medication, specifically risperidone, is GRANTED. The order is STAYED until ***15 December 2008*** *or until further order of this Court or the Alaska Supreme Court. The Petition for 90-day Commitment is GRANTED (effective 21 November 2008).*

DONE this 25th day of November 2008, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 25 November 2008 a copy of the above was mailed to each of the following at their addresses of record: s/faxed

J. Gottstein
AGO: L. Derry; E. Pohland
PDA: L. Beecher, L. Brennan

Ellen Bozzini
Judicial Assistant

30 *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 373, 378 (Alaska 2007).