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

4 In the Matter of the Necessity)
5 For the Hospitalization of:)
6 WILLIAM BIGLEY,)
7 Respondent.)

REC'D JAN 05 2009

Case No. 3AN 08-01252 PR

8 **REPLY TO OPPOSITION TO MOTION TO INTERVENE**
9 **AND ENTRY OF INJUNCTION**

10 The Office of Public Advocacy (OPA), public guardian, responds to the Law
11 Project for Psychiatric Rights' (Psychrights) Opposition to Motion to Intervene and Entry
12 of Injunction (Opposition) by noting it is clear that Psychrights does not appreciate
13 certain qualities of this case which make it distinguishable from almost any other case
14 that can be found. Admittedly, this case is confusing and unusual. Through this
15 response, OPA will clarify the situation and show how Psychrights' opposition is
16 unfounded.

17 As a brief introduction, OPA notes that the evidence presented before this court
18 at the 30-day commitment hearing, the medication hearing, and the 90-day
19 commitment hearing demonstrated that Mr. Bigley is one of the most mentally ill people
20 in the state. He has been found incapacitated by his mental illness to such an extent
21 that he requires the assistance of a full guardian. See 3AN-04-545 PR. A full guardian
22 has the same powers and duties with respect to its ward as a parent does to its child.
23 A.S. 13.26.150(c). In addition, OPA was specifically given the power to consent to the

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1 administration of psychotropic medication on Mr. Bigley's behalf.¹ Thus, trying to
2 compare this case to others that do not involve respondents who have been appointed
3 guardians or to presume that Mr. Bigley has the capacity to make important legal
4 decisions is comparable to trying to insert a square peg into a round hole; it just does
5 not work.
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7 Psychrights contends that OPA's Entry of Appearance is Improper; that OPA is
8 not a party. OPA, as Mr. Bigley's guardian, has a duty to ensure he enjoys all the civil
9 rights to which he is entitled. A.S. 13.26.150. Thus OPA has every right and indeed, a
10 duty to participate when it is apparent that its ward needs its assistance.² While
11 Psychrights alleges OPA has a conflict with its ward, that "conflict" is not a reason to
12 not allow OPA to act on its ward's behalf. The relationship between a guardian and its
13 ward is not akin to that of an attorney with a client. If a guardian could not act
14 whenever it had a disagreement with its ward, there would be no point to the
15 guardianship. The purpose of guardianship is to "promote and protect the well-being"
16 of an individual. A.S. 13.26.090. This is because the individual has been found to be
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18 ¹ See 3AN-04-545 PR, Findings and Order of Guardianship, Order paragraph 2: "The guardian's powers
19 and duties shall be those set out in the Guardianship Plan and pursuant to AS 13.26.090 through .155,
20 including the power to make medical decisions and to approve administration of any and all medications
21 to be prescribed for the respondent, and to approve medical procedures and administration of
psychotropic medications" (emphasis added). For the present purposes, the court need not concern
22 itself with the Massachusetts case cited by Psychrights, because the guardian here is not presently
23 exercising this authority, it is merely noting that it has been given it unlike the situation in Roe in which
24 the ward timely appealed the granting of a similar authority. In re Roe, 421 N.E.2d 40, 43 (Mass. 1981).
25 In that case, the Massachusetts court determined that in non-civil commitment settings, the guardian
26 must apply to the court for a judicial determination of "substituted judgment." Id. at 61. This court has
made the determination to authorize the use of psychotropic medication during this period of civil
commitment. In addition, Roe can be distinguished because that guardianship was decided under a
"preponderance of the evidence" standard versus the more stringent "clear and convincing evidence"
standard required by Alaska. Compare In re Roe, 421 N.E.2d at 43 with In re O.S.D., 672 P.2d 1304,
1305-1306 (Alaska 1983).

² Psychrights' allusion to counsel's statements underscores this very fact. It is true OPA is not a
traditional "party" to a civil commitment proceeding; when it believes it needs to advocate for its ward's
rights, it participates. However, because this is not a well-settled topic of law, OPA has alternately
moved to intervene in this proceeding.

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2 unable "to provide the essential requirements for [their] physical health or safety without
3 court-ordered assistance." AS 13.26.005(5). Thus, the entire relationship between
4 guardians and wards can be fraught with tension. When the court orders a full
5 guardianship over an individual, it grants the guardian the right to act in spite of the
6 ward's stated desires, precisely because the ward's desires have led him to act in such
7 a way that he is incapable of safely caring for himself. For these reasons, OPA should
8 be considered a party to this case and its Entry of Appearance was proper.

9 In the alternative, as explained in its original motion, OPA meets the 4-part test
10 to intervene in this matter. Its motion is timely.³ Appellate Rule 203 has no bearing on
11 this because this case is open on the trial court level. If API determines that a review of
12 the current commitment is necessary or if future commitment or medication is
13 warranted, any petitions for such would be submitted under this case number to this
14 court.

15 The Motion for an Injunction Against Psychrights does not violate OPA's
16 Representation and Agreement. By making such an assertion, it is clear that
17 Psychrights does not appreciate the significance of the medication hearing that was
18 held or the thorough order of this court that followed as a result. While OPA does have
19 the authority (as stated above) to consent to Mr. Bigley receiving psychotropic
20 medication, OPA has not granted API permission to administer such medication to Mr.
21 Bigley.⁴ Rather API filed the petition for the administration of psychotropic medication
22 and the court held an extensive hearing on the issue and after thorough consideration
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25 ³ As explained in OPA's underlying motion, it meets the remaining requirements for intervention.

26 ⁴ As a practical matter, even though OPA has this authority with regards to Mr. Bigley and other wards, it does not regularly exercise it against a client's expressed wishes.

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2 of all the evidence presented it, ruled in favor of granting the hospital's petition. The
3 settlement agreement does not prohibit OPA from abiding by a court's decision, nor
4 does it prohibit OPA from acting on behalf of its ward or for advocating for its ward as it
5 sees fit. If the hospital determines that Mr. Bigley's commitment needs to be extended
6 past the current 90-day term and that Mr. Bigley requires medication during that 180-
7 day period, OPA expects the hospital to again file another medication petition. OPA
8 will not authorize the use of psychotropic medication at API and it does not expect that
9 even if it did, API would accept the guardian's consent. Thus, OPA is continuing to
10 abide by the terms of the settlement agreement.

11 OPA does not seek to deny its client zealous representation. To the extent that
12 its motion was interpreted to attempt to do so, it apologizes. On the contrary, OPA is
13 seeking to advocate for its ward. It is obvious to the guardian that Psychrights is no
14 longer the attorney of Mr. Bigley's choice, nor is such a relationship in Mr. Bigley's best
15 interest. There is no other entity that can assist Mr. Bigley in advocating this position,
16 thus the guardian must intercede with the court on his behalf.

17 OPA's complaint is not that "Psychrights has been representing Respondent
18 zealously" as stated in page 7 of the Opposition. OPA expects all attorneys who
19 represent its wards to act with zeal.⁵ What OPA objects to with this particular
20 representation is that it is now apparent that Psychrights has crossed the line from
21 zealous representation of Mr. Bigley's position to advocating its own mission and using
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24 ⁵ OPA recognizes the difficulties inherent in representing mentally ill clients. As a guardian, it agrees
25 with the commentators who have noted that attorneys representing such clients need to be cognizant of
26 their best interests. See Dennis G. Carlson, *Representing a Mentally Ill Client*, THE NEBRASKA LAWYER,
27 (December 1998) for a discussion of ethics opinions relating to how to act if a client's stated wishes
conflicted with her best interests. See also, Henry Chen, *The Mediation Approach: Representing Clients
with Mental Illness in Civil Commitment Proceedings*, GEO. J. LEGAL ETHICS, 599 (Summer 2006).

1 Mr. Bigley as a "vehicle" to do so.⁶ Throughout its Opposition, Psychrights mentions
2 that it would gladly step aside if it believed that Mr. Bigley no longer wishes to retain its
3 counsel; however, it completely neglects the evidence of that desire which is why OPA
4 has had to go to the extraordinary step of involving the court in this dispute. OPA
5 submitted with its motion the paper on which Mr. Bigley wrote his instructions to fire
6 Psychrights in July as well as the affidavit of guardian explaining Mr. Bigley's current
7 thoughts on the subject. It also submitted the affidavit of assistant attorney general
8 Erin Pohland dated November 7, 2008 which describes Mr. Bigley's attempts to hire
9 her as his attorney. Psychrights ignores this evidence of Mr. Bigley's desire in its
10 Opposition. Thus, OPA has no choice but to ask the court for its assistance in
11 prohibiting Psychrights from representing Mr. Bigley any further in this proceeding.
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14 DATED this 2nd day of January, 2009, at Anchorage, Alaska.

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16 OFFICE OF PUBLIC ADVOCACY

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19 Elizabeth Russo
20 Assistant Public Advocate
21 Alaska Bar No. 0311064

22 ⁶ See www.psychrights.org/states/alaska/caseseven.htm, attached to original Motion as Exhibit C, under
23 the heading "Psychrights Begins Representing Mr. Bigley": "[Psychrights] was looking for an appropriate
24 vehicle to subpoena what have become known as the Zyprexa Papers, and advance other strategic
25 litigation objectives that might be possible through representing him." Although Psychrights notes in its
26 Opposition that it is representing Mr. Bigley on a *pro bono* basis, that does not automatically free it from
any cloud of potential conflicts of interest. Psychrights has received extended publicity from national
publications such as the New York Times as a result of its representation of Mr. Bigley. OPA does not
know what effect, if any, this media attention has had on Psychrights and its ability to pursue its agenda.
However, the guardian is troubled by the apparent lack of insight that the potential for a conflict of
interest still exists even if services are offered on a *pro bono* basis.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered to: Derry, AGO; Brennan, PDA; Marieann Vassar, CV and mailed to: AAG Stacie Kraly; James B. Gottstein, Esq.

J. CARBAUGH 01/02/2009
Name Date

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