

March 7, 2022

Senator David Wilson
Chair, Senate Health & Social Services Committee
State Capitol Room 121
Juneau AK, 99801

Re: SB124

Dear Sen. Wilson:

In my [February 22nd letter](#), I identified some programmatic and constitutional problems with the House Judiciary Work Draft of HB 172, whose companion bill is SB124. This became the House Judiciary Committee Substitute, CSHB 172(JUD), with I think three amendments, including requiring a Report to the Legislature in Sec. 26. The House Judiciary failed to consider any of the constitutional defects in the proposed legislation, and I am submitting proposed amendments to CSHB 172(JUD) to (1) correct the statutes the Alaska Supreme Court has held unconstitutional, (2) correct the most blatantly unconstitutional provisions in CSHB 172(JUD),¹ and (3) include improving patient outcomes in the required Report to the Legislature.

A. Fixing Statutes Declared Unconstitutional by the Alaska Supreme Court

1. Definition of Gravely Disabled.

AS 47.30.915(7) is amended to read:

(9) “gravely disabled” means a condition in which a person as a result of mental illness

(A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or

(B) is so incapacitated that the person is incapable of surviving safely in freedom~~will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person’s previous ability to function independently;~~

Authority: *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 384 (Alaska 2007).
Frankly, it seems subsection (B) could just be deleted entirely.

¹ There are other provisions that are probably unconstitutional, but I am only addressing the ones for which there is no reasonable argument to the contrary.

2. Court-ordered administration of medication.

AS 47.30.839 is amended to read:

(a) An evaluation facility or designated treatment facility may use the procedures described in this section to obtain court approval of administration of psychotropic medication if

(1) there have been, or it appears that there will be, repeated crisis situations as described in AS 47.30.838(a)(1) and the facility wishes to use psychotropic medication in future crisis situations; or

(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.

(b) An evaluation facility or designated treatment facility may seek court approval for administration of psychotropic medication to a patient by filing a petition with the court, requesting a hearing on the capacity of the person to give informed consent.

(c) A patient who is the subject of a petition under (b) of this section is entitled to an attorney to represent the patient at the hearing. If the patient cannot afford an attorney, the court shall direct the Public Defender Agency to provide an attorney. The court may, upon request of the patient's attorney, direct the office of public advocacy to provide a guardian ad litem for the patient.

(d) Upon the filing of a petition under (b) of this section, the court shall direct the office of public advocacy to provide a visitor to assist the court in investigating the issue of whether the patient has the capacity to give or withhold informed consent to the administration of psychotropic medication. The visitor shall gather pertinent information and present it to the court in written or oral form at the hearing. The information must include documentation of the following:

(1) the patient's responses to a capacity assessment instrument administered at the request of the visitor;

(2) any expressed wishes of the patient regarding medication, including wishes that may have been expressed in a power of attorney, a living will, an advance health care directive under AS 13.52, or oral statements of the patient, including conversations with relatives and friends that are significant persons in the patient's life as those conversations are remembered by the relatives and friends; oral statements of the patient should be accompanied by a description of the circumstances under which the patient made the statements, when possible.

(e) Within 72 hours after the filing of a petition under (b) of this section, the court shall hold a hearing to determine the patient's capacity to give or withhold informed consent as described in AS 47.30.837 and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication if previously expressed wishes are documented under (d)(2) of this section. The court shall consider all evidence presented at the hearing, including evidence presented by the guardian ad litem, the petitioner, the visitor, and the patient. The patient's attorney may cross-examine any witness, including the guardian ad litem and the visitor.

(f) If the court determines that the patient is competent to provide informed consent, the court shall order the facility to honor the patient's decision about the use of psychotropic medication.

(g) If the court determines by clear and convincing evidence that

1. the patient is not competent to provide informed consent and ~~by clear and convincing evidence~~ was not competent to provide informed consent at the time of previously expressed wishes documented under (d)(2) of this section;

2. the proposed medication is in the best interests of the patient considering, at a minimum, the factors listed in AS 47.30.837(d)(2)(A)-(E); and

3. there is no feasible less intrusive alternative,

the court shall approve the administration of a specific drug or drugs at a certain dose or doses it finds to be in the patient's best interests ~~the facility's proposed use of psychotropic medication~~. The court's approval under this subsection applies to the patient's initial period of commitment if the decision is made during that time period. If the decision is made during a period for which the initial commitment has been extended, the court's approval under this subsection applies to the period for which commitment is extended.

(h) If an evaluation facility or designated treatment facility wishes to continue the use of psychotropic medication without the patient's consent during a period of commitment that occurs after the period in which the court's approval was obtained, the facility shall file a request to continue the medication when it files the petition to continue the patient's commitment. The court that determines whether commitment shall continue shall also determine whether the patient continues to lack the capacity to give or withhold informed consent by following the procedures described in (b) - (e) of this section. The reports prepared for a previous hearing under (e) of this section are admissible in the hearing held for purposes of this subsection, except that they must be updated by the visitor and the guardian ad litem.

(i) If a patient for whom a court has approved medication under this section regains competency at any time during the period of the patient's commitment and gives informed consent to the continuation of medication, the evaluation facility or designated treatment facility shall document the patient's consent in the patient's file in writing.

Authority: *Myers v. Alaska Psychiatric Institute*, 138 P3d 238 (Alaska 2006), and *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 187-188 (Alaska 2009).

B. Correct Constitutional Defects in CSHB 172(JUD)

1. Proposed New AS 47.30.707(b)

Insert "the respondent is suffering an acute behavioral health crisis and, as a result, is likely to cause harm to self or others or is gravely disabled and" after (1) "determines that" in line 30 of page 4 of CSHB 172(JUD) to read as follows.

Formatted
First line: 0
Numbering: 1
Alignment: l
at: 1", Tab

Formatted

Formatted

Formatted

Formatted

Sec. 47.30.707 (b) If the professional person in charge at the crisis stabilization center determines that the respondent is suffering an acute behavioral health crisis and, as a result, is likely to cause harm to self or others or is gravely disabled and there is probable cause to believe that the respondent's acute behavioral health crisis will be resolved during admission to a crisis residential center and the respondent is not willing to voluntarily go to the crisis residential center, a mental health professional may submit an ex parte application to the court under AS 47.30.700 for detention at the crisis residential center. Based on the application, if the court finds that probable cause exists to believe that the respondent's acute behavioral health crisis will be resolved during admission to a crisis residential center, the court shall grant the application. If the court finds no probable cause, the court shall order the respondent released.

2. Proposed New AS 47.30.707

Insert "and, as a result, is likely to cause harm to self or others or is gravely disabled after "crisis" in line 26 of page 5 to read as follows.

Sec. 47.30.708 (c) If a mental health professional admits a respondent to a crisis residential center and a judicial order has not been obtained, the mental health professional may apply for an ex parte order under AS 47.30.700 authorizing admission to the crisis residential center. Based on the application, if the court finds that probable cause exists to believe that the respondent is suffering an acute behavioral health crisis and, as a result, is likely to cause harm to self or others or is gravely disabled, and the respondent's acute behavioral health crisis will be resolved during admission to a crisis residential center, the court shall grant the application. If the court finds no probable cause, the court shall order the respondent released.

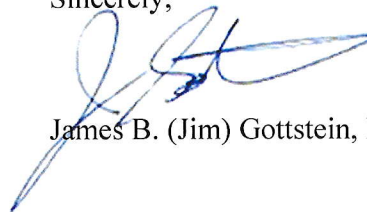
C. Report

At page 12, lines 10, of CSHB 172(JUD) insert "improve patient outcomes and" after "could" to read as follows.

(2) identify and recommend any additional changes to state statutes, regulations, or other requirements that could improve patient outcomes and enhance patient rights, particularly involving involuntary admissions, involuntary medications, and the practical ability of patients to avail themselves of their rights; and

Thank you for your consideration of these amendments. I apologize in advance if I have made any drafting errors; they are inadvertent.

Sincerely,



James B. (Jim) Gottstein, Esq.