IN THE SUPREME COURT FOR THE STATE OF ALASKA

FAITH J. MYERS, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	))))))))	 Supreme Court No. S-11021 Superior Court No. 3AN 03-00277 PR

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE MORGAN CHRISTEN, PRESIDING

APPELLANT'S OPENING SUPPLEMENTAL BRIEF

James B. Gottstein (7811100)
Law Project for Psychiatric Rights, Inc.
406 G Street, Suite 206
Anchorage, Alaska
(907) 274-7686

Attorney for Appellant
Faith J. Myers

Filed in the Supreme Court of
the State of Alaska, this _____
day of _____, 2004

Marilyn May, Clerk

By: _____
Deputy Clerk

Table of Contents

Table of Cases, Statutes and Other Authorities

CASES

STATUTES

RULES

Constitutional Provisions, Statutes and Court Rules Principally Relied Upon

U.S. CONST. amend. XIV §1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AK CONST. ART. 1, § 1

Section 1 Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

AK CONST. ART. 1, § 7

Section 7 Due Process.

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be **INFRINGED.**

AK CONST. ART. 1, § 22

Section 22 Right of Privacy.

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

42 U.S.C § 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. (Pub.L. 101-336, Title II, § 202, July 26, 1990, 104 Stat. 337.)

AS 13.26.090. Purpose and Basis For Guardianship.

Guardianship for an incapacitated person shall be used only as is necessary to promote and protect the well-being of the person, shall be designed to encourage the development of maximum self-reliance and independence of the person, and shall be ordered only to the extent necessitated by the person's actual mental and physical limitations. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

AS 13.26.105. Petition.

(a) Any person may petition the court for a finding of incapacity and the appointment of a guardian for oneself or for another person.

(b) The petition for appointment of a guardian must state

(1) the name, age, and address of the petitioner and any relationship to the respondent;

(2) the name, age, and present address of the respondent;

(3) the name and address of the person or facility presently having care, custody, guardianship, or conservatorship of the respondent, if any, and the existence of any other restrictions on the legal capacity of the respondent to act in the respondent's own behalf;

(4) the nature and degree of the alleged incapacity;

(5) the particular type and duration of appointment and the protection and assistance being sought;

(6) the names and addresses, unless they are unknown and cannot reasonably be ascertained, of the individuals most closely related to the respondent by blood or marriage;

(7) the facts supporting the allegations of incapacity and the need for appointment of a guardian;

(8) the names and addresses of persons known to the petitioner who have knowledge that might prove helpful in determining the capacity and needs of the respondent.

(c) The petition may also nominate a guardian and include a request for temporary guardianship as provided in AS 13.26.140 if the petitioner believes there is an imminent danger that the physical health or safety of the respondent will be seriously impaired during the pendency of the guardianship proceeding. A request for temporary guardianship must specify facts that cause the petitioner to believe that a temporary guardian is necessary.

(d) If the petition seeks the appointment of a guardian for an incapacitated person who is a veteran or a minor entitled to the payment of money from the United States Department of Veterans Affairs, the petitioner shall give notice of the petition to the United States Department of Veterans Affairs.

AS 13.26.113. Hearing and Determination.

(a) At the hearing scheduled under AS 13.26.106 , the respondent has the right to

(1) present evidence on the respondent's own behalf;

(2) cross-examine adverse witnesses;

(3) remain silent;

(4) have the hearing open or closed to the public as the respondent elects;

(5) be present unless the court determines that the respondent's conduct in the courtroom is so disruptive that the proceedings cannot reasonably continue with the respondent present;

(6) be tried by jury on the issue of incapacity.

(b) The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of proper disposition.

(c) If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of alternatives to guardianship to meet the needs of the respondent.

(d) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action and order an alternative form of protection.

(e) If it is found that the respondent is able to perform some, but not all, of the functions necessary to care for the respondent, and alternatives to guardianship are not feasible or adequate to provide for the needs of the respondent, the court may appoint a partial guardian, but may not appoint a full guardian.

(f) If it is found that the respondent is totally without capacity to care for the respondent and that a combination of alternatives to guardianship and the appointment of a partial guardian is not feasible or adequate to meet the needs of the respondent, the court may appoint a full guardian.

(g) If it is necessary to appoint a guardian, the court shall consider the ward's preference.

(h) At the time a guardian is appointed, the court shall make a reasonable effort to acquaint the ward with the ward's right to request, at a later time, the guardian's dismissal or a modification of the guardianship order. The court shall provide a written statement to the ward, explaining

the ward's rights and specifying the procedures to be followed in petitioning the court.

AS 13.26.116. Guardianship Order.

(a) If the court or jury determines that a person is incapacitated and the services of a guardian are necessary, the court shall enter an order that

(1) names the guardian and establishes a guardian-ward relationship;

(2) includes findings of fact that support each grant of authority to the guardian;

(3) adopts a guardianship plan.

(b) The guardianship plan shall specify the authority that the guardian has with regard to

(1) medical care for the ward's physical condition;

(2) mental health treatment that the guardian considers to be in the ward's best interests;

(3) housing for the ward with consideration of the following:

(A) the wishes of the ward;

(B) the preferability of allowing the ward to retain local community ties; and

(C) the requirement for services to be provided in the least restrictive setting;

(4) personal care, educational and vocational services necessary for the physical and mental welfare of the ward and to return the ward to full capacity;

(5) application for health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward;

(6) physical and mental examinations necessary to determine the ward's medical and mental health treatment needs; and

(7) control of the estate and income of the ward to pay for the cost of services that the guardian is authorized to obtain on behalf of the ward.

(c) The guardianship plan may not be more restrictive of the liberty of the ward than is reasonably necessary to protect the ward from serious physical injury, illness or disease and to provide the ward with medical care and mental health treatment for physical and mental health. The guardianship plan shall be designed to encourage a ward to participate in all decisions that affect the ward and to act on the ward's own behalf to the maximum extent possible. The court may not assign a duty or power to a guardian unless the need for it has been proven to the satisfaction of the

court and no less restrictive alternative or combination of alternatives is sufficient to satisfy the need.

(d) The duration of the term of guardianship shall be determined by the court order. Upon receipt of a report or other information that requires further consideration, the court may order a review hearing if it determines that the hearing is in the best interests of the ward.

AS 13.26.140 Temporary guardians; authorization of services.

(a) If during the pendency of an initial petition for guardianship it appears that the respondent is in need of immediate services to protect the respondent against serious injury, illness, or disease and the respondent is not capable of procuring the necessary services, the petitioner may request the appointment of a temporary guardian to authorize the services. The request shall state the reasons and factual basis for the request. The petitioner shall immediately file the request with the court and serve copies on the respondent and the respondent's attorney. The court shall conduct a hearing within 72 hours after the filing.

(b) At the temporary guardianship hearing, the respondent shall have the rights set out in AS 13.26.113(a).

(c) The burden of proof at the hearing shall be by clear and convincing evidence and shall be upon the petitioner.

(d) If the court determines that a temporary guardian should be appointed, it shall make the appointment and grant to the guardian only the authority that is least restrictive upon the liberty of the respondent and that enables the temporary guardian to provide the emergency services necessary to protect the respondent from serious injury, illness, or disease.

(e) The temporary guardianship shall expire at the time of the appointment of a full or partial guardian or upon the dismissal of the petition for guardianship.

(f) If no guardianship petition is pending but the court is informed of a person who is apparently incapacitated and in need of emergency life-saving services, the court may authorize the services upon determining that delay until a guardianship hearing can be held would entail a life-threatening risk to the person.

AS 13.26.141 Emergency powers.

Notwithstanding the limits of a temporary guardianship or guardianship order, a temporary guardian and guardian at all times have the right to authorize the provision of emergency life-saving services. This right includes the power to authorize hospitalization without advance court approval.

AS 13.26.150. General Powers and Duties of Guardian.

(a) A guardian shall diligently and in good faith carry out the specific duties and powers assigned by the court. In carrying out duties and powers, the guardian shall encourage the ward to participate to the maximum extent of the ward's capacity in all decisions that affect the ward, to act on the ward's own behalf in all matters in which the ward is able, and to develop or regain, to the maximum extent possible, the capacity to meet the essential requirements for physical health or safety, to protect the ward's rights, and to manage the ward's financial resources.

(b) A partial guardian of an incapacitated person has only the powers and duties respecting the ward enumerated in the court order.

(c) A full guardian of an incapacitated person has the same powers and duties respecting the ward that a parent has respecting an unemancipated minor child except that the guardian is not liable for the care and maintenance of the ward and is not liable, solely by reason of the guardianship, to a person who is harmed by acts of the ward. Except as modified by order of the court, a full guardian's powers and duties include, but are not limited to, the following:

(1) the guardian is entitled to custody of the person of the ward and shall assure that the ward has a place of abode in the least restrictive setting consistent with the essential requirements for the ward's physical health and safety;

(2) the guardian shall assure the care, comfort, and maintenance of the ward;

(3) the guardian shall assure that the ward receives the services necessary to meet the essential requirements for the ward's physical health and safety and to develop or regain, to the maximum extent possible, the capacity to meet the ward's needs for physical health and safety;

(4) the guardian shall assure through the initiation of court action and other means that the ward enjoys all personal, civil, and human rights to which the ward is entitled;

(5) the guardian may give consents or approvals necessary to enable the ward to receive medical or other professional care, counsel, treatment, or services except as otherwise limited by (e) of this section;

(6) if a conservator for the estate of the ward has not been appointed, the guardian may receive money and property deliverable to the ward and apply the money and property for support, care, and education of the ward; however, the guardian may not apply the ward's money or property for the services as guardian or for room and board that the guardian, or the guardian's spouse, parent, or child has furnished the ward unless, before payment, the court finds that the ward is financially able to pay and that the charge is reasonable; notice of a request for payment

approval shall be provided to at least one relative of the ward if possible; the guardian shall exercise care to conserve any excess money or property for the ward's needs;

(7) if a conservator of the estate of the ward has been appointed, the guardian shall pay all of the ward's estate received by the guardian in excess of the money expended to meet current expenses for support, care, and education of the ward, to the conservator for management as provided in AS 13.26.165 - 13.26.315, and the guardian shall account to the conservator for money expended.

(d) A guardian of a ward, for whom a conservator has also been appointed, shall have the custody and care of the ward and is entitled to receive reasonable sums for services and for room and board furnished to the ward as agreed upon between the guardian and the conservator. The guardian may request the conservator to expend the ward's estate for the ward's care and maintenance.

(e) A guardian may not

(1) place the ward in a facility or institution for the mentally ill other than through a formal commitment proceeding under AS 47.30 in which the ward has a separate guardian ad litem;

(2) consent on behalf of the ward to an abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary to preserve the life or prevent serious impairment of the physical health of the ward;

(3) consent on behalf of the ward to the withholding of lifesaving medical procedures; however, a guardian is not required to oppose the cessation or withholding of lifesaving medical procedures when those procedures will serve only to prolong the dying process and offer no reasonable expectation of effecting a temporary or permanent cure of or relief from the illness or condition being treated unless the ward has clearly stated that lifesaving medical procedures not be withheld; a guardian is not civilly liable for acts or omissions under this paragraph unless the act or omission constitutes gross negligence or reckless or intentional misconduct;

(4) consent on behalf of the ward to the performance of an experimental medical procedure or to participation in a medical experiment not intended to preserve the life or prevent serious impairment of the physical health of the ward;

(5) consent on behalf of the ward to termination of the ward's parental rights;

(6) prohibit the ward from registering to vote or from casting a ballot at public election;

(7) prohibit the ward from applying for and obtaining a driver's license;

(8) prohibit the marriage or divorce of the ward.

AS 47.30.837 Informed consent.

(a) A patient has the capacity to give informed consent for purposes of AS 47.30.836 if the patient is competent to make mental health or medical treatment decisions and the consent is voluntary and informed.

(b) When seeking a patient's informed consent under this section, the evaluation facility or designated treatment facility shall give the patient information that is necessary for informed consent in a manner that ensures maximum possible comprehension by the patient.

(c) If an evaluation facility or designated treatment facility has provided to the patient the information necessary for the patient's consent to be informed and the patient voluntarily consents, the facility may administer psychotropic medication to the patient unless the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions. If the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions and the facility wishes to administer psychotropic medication to the patient, the facility shall follow the procedures of AS 47.30.839.

(d) In this section,

(1) "competent" means that 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;

(2) "informed" means that the evaluation facility or designated treatment facility has given the patient all information that is material to the patient's decision to give or withhold consent, including

(A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;

(B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of 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;

(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment; and

(F) a statement describing the patient's right to give or withhold consent to the administration of psychotropic medications in nonemergency situations, the procedure for withdrawing consent, and notification that a court may override the patient's refusal;

(3) "voluntary" means having genuine freedom of choice; a choice may be encouraged and remain voluntary, but consent obtained by using force, threats, or direct or indirect coercion is not voluntary.

AS 47.30.839 Court-ordered administration of medication.

(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, 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 that 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, the court shall approve 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.

Probate Rule 2. Appointment and Authority of Masters

(a) Appointment. The presiding judge may appoint a standing master to conduct any or all of the probate proceedings listed in subparagraph (b)(2). Appointment of standing masters must be reviewed annually. A standing master in probate shall serve as a registrar. The presiding judge may appoint a special master to conduct a proceeding which is specified in the order of reference and is listed in subparagraph (b)(2).

(b) Authority, Order of Reference.

1. An order of reference specifying the extent of the master's authority and the type of appointment must be entered in every case assigned to a master. The order of reference must be served on all parties.

2. The following proceedings may be referred to a master:

A. all decedent estate hearings;

B. guardianship and conservatorship hearings under Title 13;

C. mental commitment and medication consent hearings under Title 47;

D. hearings on trusts;

E. hearings on emancipations;

F. authorization of emergency life-saving procedures pursuant to AS 13.26.140(f); and

G. hearings in proceedings to bypass parental consent to an abortion under AS 18.16.030 and Probate Rule 20.

3. A master's report is not binding until approved by a superior court judge pursuant to Civil Rule 53(d) and paragraph (f) of this rule, except:

A. a master may enter orders without further approval of the superior court pursuant to Civil Rule 53(b) and (c), and paragraph (d) of this rule;

B. a master's order of removal of a personal representative and appointment of a successor personal representative is effective pending superior court review;

C. a master's order of commitment to a treatment facility is effective pending superior court review;

D. a master's determination of a patient's capacity to give informed consent to medication under AS 47.30.839 is effective pending superior court review; and

E. a master's authorization of emergency life-saving procedures pursuant to AS 13.26.140(f) is effective pending superior court review.

(c) Objection to Reference to a Master. In addition to the peremptory challenge of a master provided for in Civil Rule 42(c), a party may object to the assignment of a master for good cause. The procedural requirements of Civil Rule 42(c) apply to the objection.

(d) Standing Master's Authority to Enter Orders. A standing master is authorized to take the following actions without further approval by a superior court judge:

1. any actions authorized to be taken by a master as a registrar;

2. appoint counsel and guardians ad litem;

3. order home studies, visitor's reports, and psychological, psychiatric and medical evaluations;

4. set hearings and order continuances of the master's hearings;

5. issue orders on motions requesting expedited review pursuant to Civil Rule 77(i);

6. accept and approve stipulations;

7. review and approve uncontested orders on annual review; and

8. order mediation and other forms of alternative dispute resolution under Probate Rule 4.5.

(e) Master's Report, Recommendations. A master may issue a written report or oral findings on the record concerning an order or recommendation which must be approved by a superior court judge.

(f) Objections to Master's Report, Recommendations.

1. Objections, Reply, Oral Argument. Objections to a master's report or recommendation must be filed within 10 days of the date of notice of the report as provided by Civil Rule 58.1(c), unless the court otherwise provides. A reply to the objections must be filed within three days of service of the objections. The superior court may permit oral argument, order additional briefing or the taking of further evidence, or grant a hearing de novo.

2. Request for Stay, Immediate Review. A party may request that a superior court judge stay a master's order issued under paragraph (b)(3)(B)-(D) pending review of the order.

I. Statement of Issues Presented

The court's June 25, 2004, Order requests supplemental briefs on the following issues (Questions):

> 1. Assuming, for the sake of discussion, that the Alaska Constitution requires a judicial determination of best interests before the state could be authorized to subject a committed mental patient to involuntary non-emergency treatment with psychotropic medication,
>
> a. What standard of review would the superior court apply in determining the issue of the patient's best interests?
>
> b. Would the standard of judicial review change if clear procedural rules and substantive standards were adopted under AS 47.30.660(b)(14) & (16) to guide the treatment facility in determining whether the patient's best interest required involuntary administration of psychotropic medication for purposes of requesting a court order under AS 47.30.839?
>
> 2. Under current Alaska law, is a de novo judicial determination of best interests generally required before non-emergency medical treatment may be administered to a person who lacks capacity to give informed consent and has no other alternative form of consent available? *Cf. In the Matter of C.D.M. v. State, 627* P.2d 607, 611 (Alaska 1981).

II. Argument

In the initial round of briefing and at oral argument, Ms. Myers asserted that before the state may forcibly administer psychotropic drugs under AS 47.30.839, in addition to

1. the statutory requirement that the person be found incompetent to make the decision to decline the medication,

the United States and/or Alaska constitutions require the State to prove that

2. the proposed forced drugging is in the person's best interests;
3. it is the decision the person would make if competent, and
4. there are no less restrictive alternatives.

In responding to Question 2, however, the unconstitutionality of AS 47.30.839 *in toto* under the equal protection clause becomes apparent because those diagnosed with mental illness receive far fewer substantive and procedural protections than other citizens of Alaska have under AS 13.26 who are alleged to be incapacitated to make decisions.

This constitutional violation may be corrected either by incorporating into AS 47.30.839 the rights contained in AS 13.26 or invalidating AS 47.30.839 altogether. In the latter event, the forced administration of psychiatric drugs would be governed by the existing AS 13.26 provisions. Although this issue was not raised below, because it arises inevitably from the *sua sponte* questions of this Court, it is appropriate for the Court to address the issue.

However, the Court may decide to defer the question of the constitutionality of AS 47.30.839. In either event, the answer to Question 1.a., is a *de novo* trial is required. With respect to Question 1.b., while "clear procedural rules and substantive standards" are no doubt desirable and would aid both the facility and the Superior Court in many ways, the Superior Court must still conduct a *de novo* trial. With respect to Question 2, a *de novo* judicial determination of best interests generally is required, but there is a statutory procedure for obtaining such alternative form of consent in almost all situations.

A. <u>Question 1 a.</u>

The court has asked:

> 1. Assuming, for the sake of discussion, that the Alaska Constitution requires a judicial determination of best interests before the state could be authorized to subject a committed mental patient to involuntary non-emergency treatment with psychotropic medication,
>
> a. What standard of review would the superior court apply in determining the issue of the patient's best interests?

Under Alaska's current statutory scheme, authorization to subject a committed mental patient to involuntary non-emergency treatment with psychotropic medication is initiated through a Superior Court action. The statute authorizing this action, AS 47.30.839, does not currently include any best interest determination. The only criterion is the one of competence, and the State agrees a *de novo* judicial finding of

incompetence is a necessary predicate to the forcible administration of psychotropic drugs.[1]

Under Probate Rule 2(b)2.C., the Superior Court can refer such a proceeding to a master, and under Probate Rule 2(a), the presiding judge can appoint a standing master to make recommendations to the Superior Court.[2] Objections to the Master's Report can then be made to the Superior Court under Probate Rule 2(f). Probate Rule 2(f)(1) states that in the event of such an objection,

> The superior court may permit oral argument, order additional briefing or the taking of further evidence, or grant a hearing *de novo*.

If the Alaska Constitution requires a judicial best interest determination, presumably the same procedure would be used. However, it does not appear this statutory and court rule scheme is what the court contemplated with Question 1.a.

---

[1] February 11, 2004, oral argument.

[2] It is an open question whether a Master is constitutionally permitted to deprive a citizen of her fundamental right to be free of the forcible administration of psychiatric drugs in the way allowed by the Probate Rules. Particularly troubling is Probate Rule 2(b)(3)(D), which provides the Master's recommendation to order the forcible administration of psychotropic drugs is effective pending Superior Court review. While a stay is possible under Probate Rule 2(f)(2) such a stay is not automatic. It would thus appear these dangerous drugs may be administered during the pendency of a stay request on the basis of a mere recommendation to the Superior Court. As set forth in Ms. Myers' Opening Brief at pp 3-8, the Excerpt of Record at Exc. 19A-102, 113-221, 249-273 and the testimony of Loren Mosher, M.D., at TR. 174-80 and Grace E. Jackson M.D., at Tr 188-191, not only do these drugs have extremely serious, debilitating, life shortening and even fatal effects, they cause many people to have psychotic relapses. It is therefore not an innocuous event at all to start someone on these drugs because as Dr. Mosher testified at TR 175-6 "those drugs are extraordinarily difficult to get off of."

(1) Standard of Review

Question 1.a. suggests that the Superior Court is reviewing a formal administrative determination (perhaps by the hospital). However, as set forth above, there is no administrative determination to be reviewed, unless one considers the decision to file the forced drugging petition to be an administrative determination. Under the current statutory scheme, if the institutional psychiatrist has reason to believe the person is incompetent to decline the medication, the petition under AS 47.30.839 must include an "allegation" that:

> the facility wishes to use psychotropic medication in a noncrisis situation and has reason to believe the patient is incapable of giving informed consent.

(*See*, e.g. Exc. 1).

In one sense this might be considered a determination of incompetency that is reviewed by the Superior Court, but it is not an appeal in any formal sense. If the Alaska Constitution requires a judicial best interests determination, AS 47.30.839(a) would presumably be construed to require the Superior Court judge to make a *de novo* determination of best interests just as it now does for incompentency. One such construction could be:[3]

> (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 . . .

[3] Inserted text bold faced and double underlined.

(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 **and the specific medication proposed is in the patient's best interest.**

The Alaska Constitution could similarly construe, AS 47.30.839(g) as follows:[4]

(g) If the court determines **by clear and convincing evidence**[5] that the patient is not competent to provide informed consent **and that the specific medication proposed by the facility is in the patient's best interest** 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, the court shall approve ~~the facility's proposed~~[6] use **of specific** psychotropic medication **it has determined is in the patient's best interest**. . . .

In short, the answer to Question 1.a., is the Superior Court must conduct a *de novo* determination of whether the specific proposed medication is in the best interest of an incompetent patient.

---

[4] Inserted text bold faced and double underlined, deletions double strikethrough.

[5] Ms. Myers does not believe there is any disagreement that the proper standard of proof is clear and convincing, but should the State dispute this in its brief, Ms. Myers will address the issue in her reply brief.

[6] The State and the Superior Court below have interpreted AS 47.30.839 to allow the State to forcibly drug the person with any non-experimental drug of its choosing once the forced drugging order has been entered. Ms. Myers pointed out below, even before *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174 (2003), that the Superior Court had to approve the *specific* medication for which forced drugging was sought "because it necessarily requires an analysis of each medication requested to be administered against the Respondent's desires." [Exc. 11] However, the Superior Court agreed with the State that a forced drugging order allowed the State to force Ms. Myers to take whatever medication(s) it wanted. [Exc. 311-13] Under *Sell*, 123 S.Ct. at 2185, though, it is clear the best interest determination must be made as to each specific medication.

B. Question 1.b.

The Court then asks in Question 1.b:

> b. Would the standard of judicial review change if clear procedural rules and substantive standards were adopted under AS 47.30.660(b)(14) & (16) to guide the treatment facility in determining whether the patient's best interest required involuntary administration of psychotropic medication for purposes of requesting a court order under AS 47.30.839?[7]

(1) Standard of Review if Clear Procedural Rules and Substantive Standards Were Adopted.

The Constitution requires that in civil contexts the Superior Court must still determine for itself, based on evidence presented to it, that the proposed psychiatric drugging is in the patient's best interest. In other words, *de novo* determination by the Superior Court would still be required.[8]

In *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), the United States Supreme Court approved a regime allowing involuntary psychiatric medication of convicted criminals in prison through an administrative proceeding, with a right of review by the court. Assuming for the moment that *Harper* survives *Sell*, a question which will be addressed below, the Court in *Harper* was very clear that its holding was limited to convicted criminals in prison and that persons facing forced

[7] Since AS 47.30.839 does not, by its terms, make a best interest determination relevant to the forced drugging decision it is unclear that regulations could properly be adopted that contradict the statute. However, this is left aside here on the assumption that such regulations could be adopted or the Legislature might so amend AS 47.30.839.

[8] This in no way suggests it would not be desirable for the State to adopt such regulations or the Legislature amend the statute.

drugging in the civil context were entitled to a much greater level of due process protection.

> [T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is "reasonably related to legitimate penological interests." This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.

Id. 494 U.S. at 223, 110 S.Ct. at 1037, emphasis added, citations omitted.

Although the decision in *Harper* reflected the Court's traditional deference to correctional decisionmakers,[9] in *Sell*, the U.S. Supreme Court retreated from this deference in the context of an individual found incompetent to stand trial for a non-violent crime. Under *Sell* the determination of medical appropriateness is to be made by the court, with consideration of the specific drug(s) proposed to be forcibly administered by the State:

> the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

123 S.Ct. at 2185.

[9] In *Harper*, 494 U.S. at 228, 110 S.Ct at 1040, the court indicated "the primary point of disagreement between the parties is whether due process requires a judicial decisionmaker." This implies that in non-prison contexts there is no disagreement, but that a judicial decision maker is required.

Thus, it is an open question whether *Harper's* core holding even still applies in the prison context. It is also clear that under the Alaska Constitution, prisoners have greater due process rights than under the United States Constitution. *See* e.g., *McGinnis v. Stevens*, 543 P.2d 1221, 1232, 1236 (Alaska 1975). Of course, this case involves an individual who has not been charged, much less convicted, of any crime. Cases involving the more limited rights accorded prisoners are inapposite. Rather, Ms. Myers has the full panoply of due process rights, which includes a *de novo* judicial determination of best interests ("the court must conclude" emphasis added).

Sell, of course, is based on the United States Constitution and the Alaska Constitution provides at least as much, if not more, protection to individual rights than the United States Constitution, see, e.g. *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (Alaska1997) (right to privacy). In *Gray v. State*, 525 P.2d 524, 527 (Alaska 1974), this court specifically held that Alaska's constitutional right to privacy "clearly . . . shields the ingestion of food, beverages or other substances." In *Gray*, this Court held the state had to prove a compelling state interest, such as promoting the general health and welfare, justifying making the sale of marijuana a crime and that the statute promoted such interest in order to overcome a person's fundamental right regarding government interference with regard to "the ingestion of . . . substances." Here the governmental intrusion into a person's right to make her own decisions about the "ingestion of substances" is much greater because the State is seeking to forcibly administer mind-altering, dangerous and life-shortening, if not fatal drugs, as opposed to prohibiting sale of a street drug alleged to be dangerous.

Subsequently, in *Ravin v. State* 537 P.2d 494, 511 (Alaska 1975), after an extensive review of the medical/scientific evidence regarding the effects of marijuana, this Court concluded that while the State was justified in prohibiting someone from driving while under the influence of marijuana, "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown."

Here the justification for the forced drugging is that it is in the person's best interests. Under Alaska Constitutional principles, as exemplified by *Gray* and *Ravin*, the state must prove the state action *actually accomplishes* this interest, i.e., in the words of *Sell*, is "significantly furthered." This principle is further exemplified under the Alaska Constitution in *Breese v. Smith*, 501 P.2d 159, 172 (Alaska 1972), where the school district's hair length regulation was invalidated because the school district had not come forth with scientifically valid proof that the regulation achieved its purpose of reducing disruptive behavior and improving academic performance.

While the adoption of "clear procedural rules and substantive standards" to guide the initial determination of whether to seek judicial approval of forced psychiatric drugging would no doubt be beneficial, such procedures and standards cannot overcome the patient's right to a *de novo* judicial determination of best interests to override her fundamental right to be free of unwanted psychiatric drugs.

(2) <u>Required Procedural Rules and Substantive Standards</u>

Responding to Question 1.b. raises the question of the content of "clear procedural rules and substantive standards" necessary to meet minimum constitutional

requirements. Under AS 47.30.837(d)(2) the following is required in order to obtain informed consent for the voluntary administration of psychotropic medication:

> (2) "informed" means that the evaluation facility or designated treatment facility has given the patient all information that is material to the patient's decision to give or withhold consent, including
>
> > (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
> >
> > (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of 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;
> >
> > (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment;

This same information should be explicitly considered as part of any best interests determination. The United States Supreme Court's analysis in *Sell* offers some additional fleshing out of these factors that must also be part of any best interests determination required under the United States and Alaska Constitutions. With respect to the prognosis factor, applying the logic of *Sell* to the civil context here, the "court must conclude" the proposed forcible administration of psychotropic drugs,

(a) "will *significantly further*"[10] the State's interest in making decisions in a person's best interest, which in this case means the person's quality of life will be significantly better with the court ordered psychiatric drugging than without it;[11] and

(b) "is *substantially* unlikely to have side effects that will interfere"[12] with the person's ability to achieve and maintain physical and mental health.

Under the Alaska Constitution as under the United States Constitution in *Sell*, "the specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success."[13]

With respect to the less restrictive alternative factor,[14] the Alaska Constitution presumably requires at least as much as the United States Constitution does under *Sell* that "the court must find that any alternative, less intrusive treatments are unlikely to

---

[10] *Sell*, 123 S.Ct. at 2184.

[11] At oral argument the State asserted that restoring people's "ability to function independently" was the State's compelling interest in forcing a person to take psychiatric drugs. Ms. Myers responded and asserts again here that this is an impermissible State interest; that best interests and determining what decision the person would make if competent are the only constitutionally permitted justifications under the *Parens Patriae* Doctrine involved here for the "substantial interference with [a] person's liberty" the "forcible injection of medication into a nonconsenting person's body represents." *See* discussion in Ms. Myers' Opening and Reply briefs.

[12] 123 S.Ct. at 2185.

[13] 123 S.Ct. at 2185.

[14] The State conceded at oral argument the existence of no less restrictive alternative is also required under the Alaska Constitution if the right to be free from involuntary psychiatric drugging is a fundamental right.

achieve substantially the same results."[15] While the Superior Court must make these determinations *de novo* before forced drugging may occur, the hospital should be directed to consider and address these factors prior to filing any petition for involuntary medication.

C. Question 2 -- Requirements for Non-Emergency Medical Procedures in the Absence of Alternative Form of Consent.

Finally, the court asked:

> 2. Under current Alaska law, is a de novo judicial determination of best interests generally required before non-emergency medical treatment may be administered to a person who lacks capacity to give informed consent and has no other alternative form of consent available? *Cf. In the Matter of C.D.M. v. State,* 627 P.2d 607, 611 (Alaska 1981)

In answering this question it is necessary to analyze the current statutory means for authorizing treatment for an incapacitated person. The paradigm is to create an alternative form of consent through the guardianship provisions of AS 13.26. The basic mechanism is that no treatment may be performed on an individual who lacks capacity generally or as to specific matters until a full or partial guardian is appointed to give or withhold such consent. AS 13.26.090 *et. seq.* AS 13.26.105 sets forth the requirements of a petition which, at §(b)(5), requires, "the particular type and duration of appointment and the protection and assistance being sought." AS 13.26.116 sets forth the authority of the Superior Court in granting a guardianship which, at §(b), includes:

[15] 123 S.Ct. at 2185.

> (b) The guardianship plan shall specify the authority that the guardian has with regard to
>
> (1) medical care for the ward's physical condition;
>
> (2) mental health treatment that the guardian considers to be in the ward's best interests; . . .

AS 13.26.150, sets forth the powers and duties of guardians, specifically excluding the right to have someone committed to a mental hospital outside of the normal commitment process. AS 13.26.140 provides an expedited mechanism when needed and AS 13.26.141 sets forth emergency powers.

The *C.D.M.* case cited by the Court in Question 2 involves a situation in which the guardian did not have the power to consent and resort to the court for authorization was necessary before the non-emergency medical procedure could be performed. It is also very clear that for sterilization at least, a *de novo* judicial determination of best interests under very strict protections is required, 627 P.2d at 610-11 (*citing to Strunk v. Strunk*, 445 S.W.2d 145 (Ky. App. 1969).

This Court then went on to discuss the minimum due process standards applicable to the *de novo* Superior Court determination before the non-emergency medical procedure could be authorized where no alternative form of consent was available in the circumstances of that case:

> Basic notions of procedural due process require that the incompetent be afforded a full judicial hearing at which medical testimony is presented and the incompetent, through a guardian ad litem, is allowed to present proof and cross-examine witnesses.

627 P.2d at 612.

> The court must assure itself that a comprehensive medical, psychological, and social evaluation is made of the incompetent. If it is necessary in

> meeting this standard that independent advice be obtained then the court should, on its own motion, obtain such advice. . . .
>
> In short, the proponents of sterilization must show that there is no less restrictive alternative to the proposed operation. . . .
>
> [T]he court must examine closely the motivation behind the petition. The court should give careful consideration to whether the petition is motivated by genuine concern for the best interests of the incompetent rather than concern for the petitioner's own or the public's convenience.
>
> The above-stated guidelines are not intended to be an all-inclusive list of the various factors which the superior court should consider before ruling on a petition for sterilization. Rather, they set forth what we believe to be the minimum inquiries necessary to protect the constitutional rights of the incompetent. The need for additional inquiries and the weight to be given to each factor will vary with the particular facts and circumstances of each case.

627 P.2d at 613.

It is no doubt true that "the awesome power to deprive a human being of his or her fundamental right to bear or beget offspring,"[16] played a significant part in this formulation. However, it is also true that the power to forcibly administer mind-altering drugs with debilitating, life shortening, and even potentially fatal effects is at least equal to, if not greater than, the interests at stake in sterilization.[17]

It is also quite clear that while guardians are precluded from consenting to psychiatric hospitalization, the Legislature provided that guardianships would be a mechanism to consent to mental health treatment for individuals who were incompetent by reason of psychiatric disability. The comprehensive statutory scheme under AS

[16] 627 P.3d at 610.
[17] *See*, discussion and cases cited in Ms. Myers Opening and Reply briefs.

13.26 is fully capable of providing the necessary mechanism to authorize mental health treatment for incapacitated individuals, including expedited procedures where necessary.[18] Certain medical decisions are prohibited from being assigned to guardians, such as sterilization, mental commitment and psychosurgery[19] but it appears in all other instances, including mental health treatment, there is a mechanism for an "alternative form of consent" as asked in Question 2.

Thus, in final answer to Question 2, a statutory mechanism already exists to authorize medical or mental health treatment for an incapacitated person in the form of the guardianship procedures provided by AS 13.26 for most situations, but where not, a *de novo* Superior Court determination is required.

D. <u>AS 47.30.839 Appears to Violate the Equal Protection Clause.</u>

The preceding section inescapably raises the question of whether AS 47.30.839 is a violation of the equal protection clause because it strips from people who have been diagnosed with mental illness the protections everyone else has before their medical decision making authority can be removed. More specifically, AS 13.26 provides a comprehensive set of procedures and rights that must be followed before someone's decision making authority can be taken away. This includes the right to a guardian *ad litem*,[20] the right to an independent expert,[21] the right to a jury trial, at least as to

[18] AS 13.26.140
[19] AS 13.26.150(e)
[20] AS 13.26.112
[21] AS 13.26.109(c)&(d)

capacity,[22] and a number of other protections a person facing forced psychiatric drugging is not afforded by AS 47.30.839. In fact, AS 13.26 specifically contemplates that authorization for mental health treatment, other than commitment to a mental hospital, for someone unable to provide informed consent will utilize the guardianship proceedings.[23] For example, the visitor's report required under AS 13.26.108(c)(3) is to include:

> (c) an evaluation of the respondent's need for mental health treatment and whether there is a substantial probability that available treatment will significantly improve the respondent's mental condition.

AS 13.26.116(b)(2) specifically provides that the required guardianship plan to be contained in the guardianship order, "shall specify the authority that the guardian has with regard to . . . (2) mental health treatment that the guardian considers to be in the ward's best interests."

Where, as here, a fundamental interest is involved, under federal equal protection analysis, "when a statute infringes upon a fundamental interest the state must show that the statutory classification furthers a compelling state interest, yet utilizes the least restrictive means available." *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1377 (Alaska 1988), citing to *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600, 615 (1969).

---

[22] AS 13.26.113

[23] It is interesting to note that the United States Supreme Court in last year's *Sell* decision cited to AS 13.26.105(a) and AS 13.26.116(b) as the statutory authorization to force someone to submit to unwanted psychiatric drugs under Alaska law. 123 S. Ct. at 2185.

In analyzing equal protection cases under the Alaska Constitution, this court has adopted a

> a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interests at stake: first, we determine the weight of the individual interest impaired by the classification; second, we examine the importance of the purposes underlying the government's action; and third, we evaluate the means employed to further those goals to determine the closeness of the means-to-end fit.

Malabed v. North Slope Borough, 70 P.3d 416, 420-1 (Alaska 2003).

Of course, the United States Constitution sets the floor for constitutional rights and this Court has held that the Alaska Constitution's equal protection clause contains greater protections than under the federal constitution. *Malabed*, 70 P.3d at 420. Under this standard, AS 47.30.839 appears to be a patent violation of the equal protection clause.

First, the interest the state has advanced for forcibly drugging people is to make them able to function independently in the community.[24] This itself is not a compelling interest justifying the governmental intrusion; the only legitimate compelling interests are that the medication is in the person's best interest[25] and it is the decision the person would make if competent.[26]

---

[24] Counsel's statement in oral argument, February 11, 2004.

[25] At oral argument, the State's counsel asserted institutional psychiatrists decide whether to seek the forcible administration of psychotropic drugs based on best interests, but it clearly is not one of the statutory criteria. Nor, as indicated, does the state assert best interests is the state's interest in forcibly drugging people. More likely, and consistent (continued)

Second, there does not appear to be any justification for a separate classification that strips away from people diagnosed with mental illness the procedural and substantive protections afforded everyone else. In *Malabed* terms, there is no means-to-ends fit at all. This is a violation of equal protection.

There is also little question that AS 47.30.839 is a violation of the federal Americans with Disabilities Act, 42 U.S.C § 12132, under the reasoning of last August's decision by the Second Circuit in *Hargrave v. Vermont*, 340 F.3d 27 (CA2, 2003). There, the Second Circuit held that the state of Vermont could not discriminate against people diagnosed with mental illness in having their durable powers of attorney (DPOA) overridden in order to forcibly administer psychiatric drugs, holding that it is discrimination

> on the basis of mental illness if it treats a mentally ill individual in a particular set of circumstances differently than it treats non-mentally ill individuals in the same circumstances.
>
> * * *
>
> Put another way, Act 114 establishes a procedure whereby only mentally ill patients who have been found to be incompetent may have their treatment preferences as expressed in their DPOAs overridden in family court; equally incompetent patients who are physically ill or injured enjoy the

---

with the State's counsel's other statements at oral argument, the administrative goal of getting people out of the hospital quickly is the State's primary objective. It seems particularly applicable here to take heed of this Court's caution in *C.D.M.* that, "The court should give careful consideration to whether the petition is motivated by genuine concern for the best interests of the incompetent rather than concern for the petitioner's own or the public's convenience." This is a well known problem described in Ms. Myers' Opening and Reply briefs.

[26] *See*, discussion in Ms. Myers' Opening and Reply briefs.

> security of knowing that their DPOAs may only be abrogated in probate court after appointment of a guardian to protect their interests.

(340 F.3d. at 37). The same logic applies in this case; it is discrimination and therefore a violation of the Americans with Disabilities Act because AS 47.30.839 treats people diagnosed with mentally illness differently than it treats people who have not been so diagnosed with respect to taking away their decision making authority.

In order to remedy this violation it seems AS 47.30.839 must be invalidated in its entirety and the guardianship provisions of AS 13.26 utilized, or the protections afforded everyone else in AS 13.26 must be provided in the AS 47.30.839 procedure.

E. <u>The Court May Decide the Equal Protection Issue</u>

Under *Crittell v. Bingo*, 83 P.3d 532, 536 (Alaska 2004), this Court recently re-iterated that issues not raised below may still be decided by this court where deciding the issues correct "plain error or do not depend on new or controverted facts, are closely related to the appellant's arguments at trial, and could have been gleaned from the pleadings." Here, the unconstitutionality of AS 47.30.839 is manifest and the decision does not depend on new or controverted facts. It is, however, a stretch to say the issue is closely related to arguments at trial or could have been gleaned from the pleadings. Nevertheless, since it is the Court's own Question and request for additional briefing that brought the issue forward, albeit indirectly, and it is strictly a legal question, the normal basis for not addressing questions not raised below seems inapplicable. This appears to be confirmed by *Keturi v. Keturi*, 84 P.3d 408, 415 (Alaska 2004), in which this Court

made clear that where an issue is raised *sua sponte* by the Court it can be decided. Appellees are not prejudiced because they have the opportunity to respond.

III. Conclusion

Because of the manifest unconstitutionality of AS 47.30.839 under the equal protection clause, this court should construe AS 47.30.839 as requiring the same procedural and substantive rights as other people under AS 13.26 or invalidate it altogether.

Should the Court, however, decide to leave the equal protection issue for development in a new case, the answer to Question 1.a., clearly seems to be that a *de novo* trial is required in the sense that the Superior Court is determining the factual issue of best interest based on testimony and other evidence presented directly to it. With respect to Question 1.b., while "clear procedural rules and substantive standards" are no doubt desirable and would aid the Superior Court in many ways, under *Sell* at least, the Superior Court "must determine" *de novo* the question of best interests. With respect to Question 2, a *de novo* judicial determination of best interests generally is required before non-emergency medical treatment may be administered to a person who lacks capacity to give informed consent and has no other alternative form of consent available.

In addition, whether the Court rules on the equal protection issue or not, in addition to the relief requested in Ms. Myers Opening and Reply briefs,[27] she respectfully suggests it will be helpful to the Superior Court for this Court to issue guidelines regarding such a best interest determination. The following is a potential formulation of such guidelines:

> In order to approve the involuntary administration of psychotropic medication the Superior Court must determine that such medication will *significantly further* the respondent's interests, which means the respondent's quality of life will be significantly better with the involuntary administration of the medication than without it. The court should give careful consideration to whether the petition is motivated by genuine concern for the best interests of the respondent rather than concern for the petitioner's own or the public's convenience.
>
> In arriving at such a determination, the Superior Court must assure itself it has been given all information that is material to such determination, including
>
> > (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;

[27] To wit: that when the State seeks to obtain a court order authorizing the forcible administration of psychiatric medication against a person's will, the State must prove by clear and convincing evidence, under proper evidentiary standards for expert opinion testimony, i.e., *State v. Coon,* 974 P.2d 386 (Alaska 1999)., that:

(a) the person is incompetent to refuse such medication, and
(b) the proposed medication is objectively in the person's long-term best interests, including (i) consideration of probable benefits, (ii) potential side effects, and (iii) the long term prognosis with and without the proposed medication, and
(c) the person would make a decision to accept the medication if he or she were competent, and
(d) there is no less restrictive alternative.

The best interest factor (b) is further fleshed out in this brief.

(B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions;

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

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

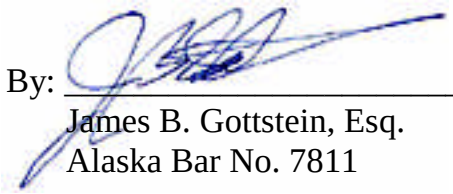
(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment.

This determination must be made on a specific drug by drug basis. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

Ms. Myers appreciates the opportunity to submit this brief in response to the Court's Questions.

RESPECTFULLY SUBMITTED this __26th__ day of July, 2004.

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC



By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811