of K.P., p 302). In the court's statutory analysis, the court noted that chapter 3 of the LPS Act (§ 5350 et seq.) requires that willingness or ability to accept voluntary treatment must be considered when a conservatorship proceeding is initiated for a person who is an inpatient but not for an outpatient or reappointment. The court also noted that section 5350 does not include any requirement that the proposed conservatee's willingness to accept voluntary treatment be decided as a separate consideration during the trial. The court added that no such requirement is present within the statutory definition of grave disability. In addition, the court referenced a 1989 amendment to section 5350 that grave disability is not met when a potential conservatee may obtain assistance from another party to meet basic needs, but that it did not add any requirement pertaining to the amenability to receive treatment voluntarily. But, the court added that a conclusion may be drawn by the trier of fact that a potential conservatee may not be gravely disabled if sufficient evidence exists that the person's willingness and ability to accept voluntary treatment would result in meeting basic survival needs. Relying on multiple prior cases, the only question to consider in a conservatorship trial is whether a mental illness renders the proposed conservatee gravely disabled.

The California Supreme Court then considered K.P.'s interpretation of prior cases, *Conservatorship of Davis*, 177 Cal. Rptr. 369 (Cal. Ct. App. 1981) and *Conservatorship of Walker*, 242 Cal. Rptr. 289 (Cal. Ct. App. 1987). K.P. argued that both *Davis* and *Walker* included instructions to jurors that a separate finding of the proposed conservatee's unwillingness or inability to accept treatment is required in order for the trier of fact to find the individual gravely disabled. The court, based on prior case rulings and later enacted amendments to the LPS Act, disapproved the applicability of both *Davis* and *Walker* because they strayed too far from the statutory framework.

K.P. also asserted that federal and state due process principles require that a state must prove beyond a reasonable doubt that a conservatee is unable or unwilling to accept voluntary treatment. K.P. argued that "limiting the jury's consideration to the sole issue of grave disability as defined by the statute would seriously infringe on the conservatee's due process rights" (*Conservatorship of K.P.*, p 308). Although the court acknowledged the significant liberty interests at stake and agreed that the fact finder must be allowed to consider all credible evidence relating to the topic of grave disability, including the proposed conservatee's amenability to voluntary treatment, the court did not agree that the state or federal constitutions require a separate finding on the proposed conservatee's willingness to accept voluntary treatment. The court determined that K.P.'s argument took too narrow a view of the meaning of grave disability in a conservatorship trial, and noted that K.P. did not explain why a proposed conservatee's constitutional rights are not protected by the fact finder's consideration of amenability to voluntary treatment. Thus, the California Supreme Court ruled that the CACI instructions given during the trial were appropriate, the jury's finding of grave disability was sufficient for conservatorship to be reappointed, and that willingness to accept voluntary treatment was properly considered during the trial.

Discussion

The ruling by the California Supreme Court provides further guidance as to what constitutes grave disability due to a mental illness, and under what grounds an individual is suitable for LPS conservatorship. In essence, the ruling further expands suitability for LPS conservatorship for those with mental illness, thereby increasing the population that would meet the criteria to be under conservatorship. The court justified its rejection of making the criteria stricter by acknowledging and deferring to the legislature's attempts to provide more access to care for those deemed gravely disabled: The *Walker* and *Davis* cases "upset the carefully calibrated statutory approach through which the Legislature has endeavored to protect both the mentally ill and the public, and to ensure that those in need can receive prompt, appropriate treatment tailored to their individual condition and circumstances" (*Conservatorship of K.P.*, p 307). In a state caring for a large number of individuals with severe mental illness, the court is supporting the state's efforts to better care for its constituents. This is particularly pertinent as more persons with mental illness are increasingly released into the community because of diversion programs, and jail and prison reform.

Consent for Treatment and Related Matters

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Good Faith Alone Does Not Provide Immunity for Failure to Comply with a Health Care Surrogate's Instructions

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Key words: power of attorney; guardianship; health care directives; surrogate decision maker; immunity

In *Bohn v. Providence Health Services—Washington,* 484 P.3d 584 (Alaska 2021), the Supreme Court of Alaska ruled that the superior court erred in concluding that a hospital was entitled to immunity under Alaska's Health Care Decisions Act (HCDA), *Alaska Stat.* § 13.52.080 (2006). Bret Bohn had sued the hospital arguing that the hospital violated the HCDA when it assumed decision-making authority over his medical care while he was incapacitated and treated him without his consent or that of his parents, whom he had previously authorized to make medical decisions on his behalf if rendered incompetent or incapacitated. The hospital argued that it was entitled to immunity under the HCDA as it held a good faith belief that Mr. Bohn's parents lacked authority to make medical decisions for him, based on conduct that convinced health care providers that his parents were not acting in Mr. Bohn's best interest. This case provided the Supreme Court of Alaska its first opportunity to interpret the HCDA's immunity provisions.

Facts of the Case

In 2007, Bret Bohn executed a Durable Power of Attorney for Health Care in which he authorized his parents to make medical decisions for him if he became incompetent or incapacitated.

In October 2013, Mr. Bohn began to experience insomnia, disorientation, and hallucinations. On October 19, he was admitted to Providence after having seizures and worsening of symptoms. As his psychiatric condition did not improve, medical providers treated him with steroids and antipsychotics.

Throughout October and November of 2013, Mr. Bohn and his parents tried to prevent the administration of medications as they believed the medications caused his symptoms. His parents were unable to remove him from the hospital, as he was "not medically stable" enough for discharge.

On October 25, Mr. Bohn's mother notified Providence that Mr. Bohn had executed a power of attorney appointing his parents as his surrogate decision makers. Later that day, the hospital received a call from Mr. Bohn's parents' attorney stating that his mother had verbalized multiple times that she would like her son to commit suicide rather than be hospitalized. Based on this call and her previous behavior of physically restraining him without apparent reason on October 23, Providence filed a risk for neglect report to Adult Protective Services (APS). On October 31, Mr. Bohn's parents provided Providence the power of attorney document. On November 5, APS filed a guardianship petition in superior court. APS expressed concerns about his mother's decisions and "interference" with his care. On November 9, Mr. Bohn's mother sent Providence a letter seeking his "emergency evacuation" to "any other" facility. On November 14, the court appointed the Office of Public Advocacy (OPA) as Mr. Bohn's temporary guardian.

Mr. Bohn remained hospitalized at Providence until he was transferred to Harborview Medical Center in Seattle in March 2014. His parents removed him from Harborview on April 22, 2014. The police apprehended them three days later and returned Mr. Bohn to Harborview. In early May, he was discharged from Harborview.

Mr. Bohn filed suit against Providence, alleging that Providence administered medications over his parents' opposition, violating his rights under the HCDA to have his parents act as his surrogate decision makers. Providence moved for summary judgment on the basis of HCDA immunity. Providence pointed to *Alaska Stat.* § 13.52.080(a), which immunizes a health care provider from liability for declining to comply with a person's health care decision so long as the provider in "good faith" and in accordance with "generally accepted" health care standards holds a "good faith" belief that the surrogate decision-maker lacked authority to make health care decisions. Providence supplied an affidavit from Dr. Harold Johnston, the director of Providence's Family Medicine Residency. Dr. Johnston stated that the doctors treating Mr. Bohn provided care within the applicable standard of care for "family medicine physicians" along with having a "good faith" belief they were acting in Mr. Bohn's best interest and that

his parents were not, which would disqualify them from being his surrogate decision-maker. Providence argued based on this affidavit that it satisfied all the conditions for immunity under the HCDA.

After the court accepted Providence's argument and granted summary judgment to the hospital on all of Mr. Bohn's claims, he moved for reconsideration, which was denied by the superior court. Mr. Bohn appealed to the Supreme Court of Alaska.

Ruling and Reasoning

The Supreme Court of Alaska ruled that Providence was not entitled to immunity under the HCDA, reversing the grant of summary judgment and remanding for further proceedings. The court explained its reasoning by first examining *Alaska Stat.* § 13.52.080(a), which provides:

> A health care provider or health care institution that acts in good faith and in accordance with generally accepted health care standards applicable to the healthcare provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for. . .
> (3) declining to comply with a health care decision of a person based on a good faith belief that the person then lacked authority.

The Supreme Court of Alaska noted that the lower court had accepted the argument advanced by Providence that its doctors had the following good faith beliefs: that Mr. Bohn's parents were not acting in his best interest; that because his parents were not acting in his best interest, they were disqualified to act as health care surrogates; and that because Mr. Bohn's parents were disqualified to act as health care surrogates, they lacked authority. The Supreme Court of Alaska ruled that the lower court failed to differentiate between the good faith required in the first clause of *Alaska Stat.* § 13.52.080(a), and the second reference to "good faith" in sub-section (a)(3). As subsection (a)(3) requires a second level of good faith related to Providence believing the surrogate lacked authority, the Supreme Court of Alaska noted that Providence's belief that Mr. Bohn's parents were stripped of authority because they were not acting in his best interest is not sufficient under subsection (a)(3).

The court explained that under Providence's interpretation any provider who disagreed with a surrogate's direction could plausibly assert a good faith belief that the surrogate is not acting in the patient's best interest. From the provider's perspective, if the surrogate were acting in the patient's best interest, the surrogate would have made the same decision as the provider. And if the surrogate did not make the same decision, the provider would then be able to assume that because the surrogate was not acting in the patient's best interest, that person lacked authority to direct the patient's care. As a result, any provider in that situation would be free to ignore any direction from the surrogate without fear of liability.

The court further ruled that Providence was not entitled to immunity for failing to transfer Mr. Bohn under the HCDA, as a health care provider "must cooperate and comply" to transfer the patient elsewhere upon the request of the patient or surrogate. The court also ruled that Providence had violated another section of the HCDA by appointing itself as a surrogate as the HCDA in Alaska Stat. § 13.52.030(k)(2008) does not allow a surrogate to be an owner, operator, or employee of the health care facility where the patient is receiving care.

Discussion

In *Bohn v. Providence Health Services—Washington,* a health care provider or entity in Alaska cannot use a paternalistic argument to satisfy immunity protection from liability afforded by Alaska's HCDA. Merely stating a patient (or patient's surrogate in the event of the patient's incapacity) is not making a decision in the patient's best interest does not automatically confer immunity. As with similar judicial decisions in other jurisdictions involving consent to treatment, an appropriate basis would be needed to override a patient's or patient's surrogate's wishes.

Challenges of Litigating While Incarcerated

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