

### Ruling and Reasoning

The court ruled that the strict liability drug possession statute violates due process because it criminalizes “innocent passive conduct.” The court took the position that, while the statute did not explicitly impose strict liability, forty years of precedent and legislative assent had established a strict liability interpretation. The court noted that strict liability is inherently at odds with the fundamental principle of jurisprudence that *mens rea* is essential to criminality.

The court recognized exceptions to that principle when imposition of strict liability is within the state’s police power. The court emphasized that due process protection “applies with special force to passive conduct—or nonconduct—that is unaccompanied by intent, knowledge, or *mens rea*” (*Blake*, p 527) and no exception can be made in such cases. The court said that unknowing possession is necessarily innocent and passive for being unknowing. It noted the perverse effects of strict liability, giving the example of criminalizing a postal worker unknowingly carrying a package containing a controlled substance.

The court clarified that strict liability alone is allowable when not applied to innocent and passive conduct. This allows strict liability for other crimes, such as Washington’s child rape statute. The opinion focuses on the distinction between passive and unknowing conduct and either any “intentional activity,” whether knowingly illegal or not, or willful inaction. On this basis, the court found the statute unconstitutional, overturning Ms. Blake’s conviction and all other convictions under the strict liability statute.

### Dissent

In a partial dissent, Justice Stephens commented that the majority’s opinion on protection for innocent and passive conduct was an unnecessary overreach, and that the result could be reached more narrowly by overturning only previous decisions and imputing a *mens rea* element to the statute.

### Discussion

The court’s decision in *Blake* invalidated Washington’s strict liability statute on simple possession of a controlled substance as a violation of state and federal due process. The court found that the state’s statute

exceeded the state’s police power when it imposed harsh penalties for “innocent” or “passive” conduct without a *mens rea* element because passive and innocent nonconduct falls outside the state’s power to criminalize its citizens. This is consistent with most criminal laws, which require the prosecution to prove beyond a reasonable doubt all elements of the charged offense, including the criminal act and *mens rea* elements. Because the court in *Blake* decided that the decision applied both prospectively and retrospectively, the decision has been hailed as potentially affecting tens of thousands of people who have been convicted of simple drug possession.

But, in the aftermath of the *Blake* decision, the Washington State legislature heard mixed responses to the *Blake* decision and passed Engrossed Senate Bill (ESB) 5476 (2021), which has the effect of, again, criminalizing simple drug possession, but makes it a misdemeanor instead of a felony offense. With ESB 5476, the state legislature also passed a provision for persons charged with such offense to be offered diversion into treatment programs at least twice. The changes made by this enacted statute are currently in effect only until July 1, 2023 at which time the provisions of ESB 5476 will sunset and simple drug possession would become noncriminal again (consistent with *Blake*) unless the legislature takes further action.

The *Blake* decision and subsequent legislation in Washington highlights the tension between laws that aim to decrease substances in the community by criminalizing drug possession and competing efforts to decriminalize personal drug use and divert affected users into treatment for substance use. It is important for forensic psychiatrists to be aware of these differing approaches and the laws in the jurisdiction in which they practice.

## The Right to Refuse to Answer

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**Court Considers Requirements for Court-Ordered Mental Health Examination in Guardianship Proceeding**

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In *In re Protective Proceedings of Nora D.*, 485 P.3d 1058 (Alaska 2021), the Supreme Court of Alaska considered whether a lower court’s order that a respondent in a guardianship proceeding must answer all questions at a mental health examination was valid. The court ruled that, except to questions relevant to capacity to make personal medical decisions, an evaluatee may refuse to answer other questions in guardianship evaluations.

**Facts of the Case**

Nora D., an 82-year-old woman residing in an assisted living facility, suffered a stroke in April 2016. As a consequence, she experienced physical and mental limitations. In 2017, she gave general power of attorney to her son, Cliff. In 2018, after receiving reports of harm alleging that Cliff had made decisions that were not in Nora’s best interests, Adult Protective Services (APS) petitioned for a conservatorship. During that same year, the Office of Public Advocacy (OPA) was appointed as Nora’s conservator. In September 2019, Nora’s daughter, Naomi, petitioned for a full guardianship for Nora. Naomi explained that because Nora was unable to attend to her own physical needs, and Cliff was unable to care for Nora, a full guardianship was necessary. The next day, another of Naomi’s children, Kevin, petitioned for review of the conservatorship and requested to be designated as Nora’s guardian, to replace the OPA’s conservatorship. In Alaska, a guardian manages the affairs of the ward and, based on the specific powers granted, can make personal decisions for the ward, including those regarding health care, general care, housing, and finances. This differs from a conservator, who manages only financial affairs.

In January 2020, the superior court held a hearing regarding the petitions. The court mentioned that Nora’s capacity was “a central issue,” and discussed the potential of conducting a mental examination. In February 2020, Kevin retained an expert and sought a mental examination of Nora. The motion was opposed by Nora, who argued that a mental

examination was not needed because there was adequate existing evidence to determine her capacity. She also argued that she had the right to remain silent in a mental health examination. The superior court granted Kevin’s motion and ordered Nora to participate in a mental health examination. The court explicitly prohibited Nora from remaining silent during the examination, and stated that any party who interfered with the examination would be subject to sanctions. After the court denied Nora’s motion for reconsideration, Nora petitioned the Supreme Court of Alaska for review.

Nora argued that Alaska Stat. § 13.26.241(a) (2018), an Alaska statute that refers to the right to refuse to respond to questions in evaluations, authorized her to remain silent in a court-ordered mental health examination. Alaska Stat. § 13.26.241(a) states:

A ward or respondent has the right to refuse to respond to questions in the course of examinations and evaluations. However, the ward or respondent may be required to submit to interviews for the purpose of ascertaining whether the ward or respondent lacks the capacity to make informed decisions about care and treatment services.

Nora also contended that she cannot be required to answer questions at the examination because the examination was not an interview. She argued that the term “interviews” in the statute refers to interactions with the court visitor and her attorney, while the terms “examination and evaluations” refer to interactions with experts and professionals.

**Ruling and Reasoning**

The Supreme Court of Alaska concluded that the superior court’s decision to order Nora D. to participate in a mental health examination was incorrect, vacated the superior court’s order and remanded the case for further proceedings. The court held that Nora may refuse to answer questions at the examination. This decision was noted to be consistent with the meaning of § 13.26.241(a), which provides for requiring a party to answer only those questions designed to determine capacity to make personal medical decisions. The court deemed that based on the description of the examination in question, it seemed unlikely that the examination was intended to determine Nora’s capacity to make personal medical decisions. The supreme court did not find it necessary to consider Nora’s argument regarding the definitions of the terms “interviews” and “examination and evaluations” in the statute.

The court's holding was based on the legislative history of § 13.26.241(a) and related laws, as well as public policy considerations. The court found that the text of the statute, along with other adult guardianship statutes, support the conclusion that "interviews for the purpose of ascertaining capacity to make informed decisions about care and treatment services refers specifically to interviews to determine capacity to make personal medical decisions" (*In re Protective Proceedings of Nora D.*, p 1064). The court found that the phrase "informed decisions" means "informed consent," which in the health care context refers to the principle that a patient must consent prior to a medical treatment or service. With respect to informed consent, the court recognized that the right to refuse medical treatment is a liberty interest that is protected by the United States Constitution. Due to this liberty interest being at stake, the legislature intended that respondents would only be required to answer questions to determine their ability to make personal medical decisions. The court explained that "this exception to the respondent's right to refuse to answer questions ensures that a court has ample evidence before determining whether a guardian is permitted to make sensitive and personal decisions affecting the respondent's bodily autonomy, dignity, and privacy" (*In re Protective Proceedings of Nora D.*, p 1066).

The court noted that there had been a strong focus in the preceding decades, from both a legislative and social policy perspective, on increasing due process protections for respondents in guardianship proceedings and further protecting their rights. When interpreting the statute, the supreme court made it clear that they considered these recent social policy changes and the state's efforts to reform guardianship statutes. They noted that Alaska Senate Bill 3 (SB 3), which passed in 1981, provided that guardianships should be ordered only to the extent necessary to protect well-being and encourage the development of maximum self-reliance and independence of the person. In addition, SB 3 recognized that an individual can be "incapacitated in one respect and competent in another" (*In re Protective Proceedings of Nora D.*, p 1066). This can be seen by the fact that SB 3 aimed to increase the use of limited or partial guardianships, so that guardians would only be authorized based on the magnitude of the incapacitation. The state supreme court also noted that their interpretation of the statute was based on the "strong policy of

restraint" (*In re Protective Proceedings of Nora D.*, p 1066), which explains that an incapacitated person with an ap-pointed guardian is not presumed incompetent, and retains all rights other than those limited by a court. The court made it clear that their interpretation of the statute was based on the social policy goal of reforming guardianship statutes to enhance due process protections.

#### Discussion

In *In re Protective Proceedings of Nora D.*, the Supreme Court of Alaska held that a respondent in a guardianship proceeding should only be compelled to participate in evaluations that are specific to medical decision capacity, and not to any other type of evaluation, including mental health evaluations. This is a substantial decision because it gives very specific limitations to when a respondent's right to remain silent can be overcome. People cannot be forced to give up the right to remain silent without proper legal justification.

The court could have allowed for a broader interpretation of the statute and considered mental health evaluations to have the purpose of ascertaining decision-making capacity. This would potentially allow for more data to be compiled, enabling the trier of fact to make a more informed decision, though at the cost of infringing on liberty rights. The court's decision to interpret the statute more narrowly was based on their view of social policy considerations in Alaska and is consistent with preserving liberty interest over other potential benefits. The court's decision in this case had the goal of safeguarding liberty rights and maintaining due process protections, by incorporating strict and precisely defined exceptions to the right of refusal to speak. A guardianship respondent maintains liberty rights, just like any other person, and those rights should not be lightly curtailed, and only for very specific purposes.

## Acceptance of Voluntary Treatment in Conservatorship Trials

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