

FILED
Court of Appeals
Division II
State of Washington
7/19/2019 3:45 PM

No. 53377-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

IN RE THE DETENTION OF
L.K., Appellant.

Appeal from the Superior Court of Pierce County
The Honorable James R. Orlando
No. 17-6-00941-5

BRIEF OF APPELLANT

NICOLE L. BEGES
Attorney for L.K.
WSBA # 47759

JENNIFER VICKERS FREEMAN
Attorney for L.K.
WSBA # 35612

MARY K. HIGH
Attorney for L.K.
WSBA # 20123

Pierce County Department of Assigned Counsel
949 Market Street, Suite 334
Tacoma, WA 98402
(253) 798-6996

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR..... 1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....2

IV. STATEMENT OF THE CASE.....5

V. ARGUMENT12

1. Failure to Comply With the Mandatory Procedures Regarding the Involuntary Administration of Antipsychotic Medication is Unconstitutional and Violates the Due Process Clause.....12

 a. There is a Constitutional Right to Refuse Antipsychotic Medication.....12

 b. When the State Establishes Mandatory Procedures Regarding the Administration of Involuntary Medication, It Creates a Constitutional Due Process Right.....14

 c. The Mandatory Procedures Established by the State for the Authorization and Administration of Involuntary Antipsychotic Medications Created a Due Process Right16

2. The Superior Court Erred by Affirming the Order Authorizing Involuntary Antipsychotic Medications When the State Did Not Comply With the Mandatory Procedures, in Violation of L.K.’s Constitutional Right to Refuse Antipsychotic Medication and Her Right to Due Process.....21

 a. Standard of Review.....21

 b. The Order Authorizing Involuntary Treatment with Antipsychotic Medication was Unlawful.....22

i.	There was no attempt to obtain informed consent from L.K. for treatment with the proposed medications, Risperdal or Fluphenazine	23
ii.	An attempt to obtain informed consent is mandatory, regardless of competency or involuntary commitment	27
iii.	An attempt to determine the person’s desires before the court substitutes its judgment is mandatory; it is error for the court to fail to consider the person’s desires because it would be “futile”	29
3.	This Case Involves a Matter of Continuing and Substantial Public Interest and this Court Should Exercise its Discretion Regarding the Issues Raised	39
VI.	CONCLUSION.....	42

TABLE OF AUTHORITIES

Washington Cases

<i>State v. Adams</i> , 77 Wn. App. 50, 888 P.2d 1207 (1995)	13
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007)	19
<i>Matter of Det. of B.M.</i> , -- Wn. App. --, 432 P.3d 459 (Wash. Ct. App. 2019)	12-13, 39-40
<i>State v. Bunker</i> , 169 Wn.2d 571, 238 P.3d 487 (2010)	30, 32
<i>State v. Dang</i> , 178 Wn.2d 868, 312 P.3d 30 (2013)	22
<i>State v. Farmer</i> , 116 Wn.2d 414, 805 P.2d 200 (1991)	12-13
<i>State v. George</i> , 160 Wn.2d 727, 158 P.3d 1169 (2007)	30
<i>State v. Hernandez-Ramirez</i> , 129 Wn. App. 504, 119 P.3d 880 (2005)	12
<i>Matter of Guardianship of Ingram</i> , 102 Wn.2d 827, 689 P.2d 1363 (1984)	28, 32
<i>In re Detention of Labelle</i> , 107 Wn.2d 196, 728 P.2d 138 (1986)	35, 38
<i>In re Matter of Knight</i> , 178 Wn. App. 929, 317 P.3d 1068 (2014)	21-22
<i>In re Marriage of Moody</i> , 137 Wn.2d 979, 976 P.2d 1240 (1999)	21

<i>Quesnell v. State</i> , 83 Wn.2d 224, 517 P.2d 568 (1973).....	40-42
<i>State v. Ramer</i> , 151 Wn.2d 106, 86 P.3d 132 (2004).....	21
<i>In re Schuoler</i> , 106 Wn.2d 500, 723 P.2d 1103 (1986).....	27-28, 30, 32-35, 37
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	23, 28
<i>In re W.R.G.</i> , 110 Wn. App. 318, 40 P.3d 1177 (2002).....	39
<u>Other State Cases</u>	
<i>Bing v. Thunig</i> , 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957).....	23
<i>Schloendorff v. Society of New York Hosp.</i> , 211 N.Y. 125, 105 N.E. 92 (1914).....	23
<u>Federal Cases</u>	
<i>Canterbury v. Spence</i> , 464 F.2d 772 (D.C. Cir. 1972).....	24
<i>Hewitt v. Helms</i> , 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983).....	15, 20, 22-23, 27, 29
<i>Sandin v. Conner</i> , 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).....	15
<i>Union Pacific Ry. Co. v. Botsford</i> , 141 U.S. 250, 11 S. Ct. 1000, 1001(1890).....	13
<i>Vitek v. Jones</i> , 445 U.S. 480, 100 S. Ct. 1254, 63 L.Ed.2d 552 (1980).....	15

<i>Washington v. Harper</i> , 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)	3, 12-16, 20, 22-24, 26-27, 29, 36
--	------------------------------------

Constitutional Provisions

WASH. CONST. art. §§ 7	12-13
U.S. CONST. amend. I	12-13
U.S. CONST. amend. IV	12-13
U.S. CONST. amend. V	12-13
U.S. CONST. amend. IX	12-13
U.S. CONST. amend. XIV	12-14, 20, 22-23, 27, 29, 32

Statutory Provisions

RCW 7.70.050	28
RCW 71.05.010	19, 41
RCW 71.05.215	10, 16, 17, 19, 20-23, 26-32, 35-37, 39, 41-42
RCW 71.05.217	17-19, 22, 27, 29-37, 39, 42
RCW 71.05.360	28-29
RCW 71.05.370	17

Legislative Authorities

Wash. Sen. Engrossed Substitute Sen. Bill 5672, Session Law, 52 nd Legis., 1991 Reg. Sess. (effective July 28, 1991) (available at http://lawfilesexternal.wa.gov/biennium/1991-92/Pdf/Bills/Session%20Laws/Senate/5672-S.SL.pdf)	18, 29
---	--------

Wash. Sen. Engrossed Substitute Sen., Substitute Senate Final Bill Report, 52nd Legis., 1991 Reg. Sess. (July 28, 1991) (available at <http://lawfilesexternal.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/Senate/5672-S.FBR.pdf>)16, 29

Other Authorities

William M. Brooks, *Reevaluating Substantive Due Process As A Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Ind. L. Rev. 937 (1998).....24, 28

Dennis E. Cichon, *The Right to “Just Say No”: A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283 (1992).....13, 19

U.S. Food & Drug Administration, *FDA Drug Safety Communication: Medication errors resulting from confusion between risperidone (Risperdal) and ropinirole (Requip)* (August 4, 2017), (available at <https://www.fda.gov/drugs/drug-safety-and-availability/fda-drug-safety-communication-medication-errors-resulting-confusion-between-risperidone-risperdal>).....5

I. INTRODUCTION

L.K. was involuntarily committed at Western State Hospital due to her mental illness. During her commitment, the state petitioned the court for an order authorizing the involuntary administration of antipsychotic medications, specifically Risperdal and Fluphenazine. The state did not comply with the mandatory procedure to attempt to obtain informed consent, there was no discussion with L.K. regarding either of the proposed drugs, and there was no attempt to determine L.K.'s desire for either of those medications prior to the hearing.

A commissioner signed an order authorizing involuntary treatment with Risperdal and Fluphenazine, finding that L.K. refused the proposed treatment, and substituting its judgment for L.K. L.K. filed a motion to revise the commissioner's ruling. The superior court judge denied the motion to revise, affirming the commissioner's order authorizing involuntary treatment, and stated that an attempt to obtain informed consent would have been futile. L.K. appeals the superior court findings.

II. ASSIGNMENTS OF ERROR

1. The superior court's order, affirming the authorization for involuntary treatment with Risperdal and Fluphenazine when the state did not attempt to obtain informed consent,

was error.

2. The superior court's order, affirming the authorization for involuntary treatment with Risperdal and Fluphenazine, when the commissioner made no attempt to determine L.K.'s desire before substituting the court's judgment for L.K., was error.
3. The superior court's finding that an attempt to obtain informed consent would have been futile, was error.
4. The superior court's finding that the mandatory procedures only apply to competent persons, was error.
5. The commissioner's finding of fact that L.K. refused to consent to treatment with antipsychotic medication, was error.
6. The commissioner's finding of fact that L.K. would consent to being treated with antipsychotic medication if she were capable of making a rational decision concerning treatment, when there was no evidence and no attempt to determine L.K.'s desire, was error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the state create a constitutional due process right when it codified mandatory procedures that the state and court must follow before authorizing involuntary administration

of antipsychotic medication?

2. Is an attempt to obtain informed consent mandatory when the statute says the state *shall* adopt rules that *shall* include an attempt to obtain informed consent? And, did the legislature intend to make the attempt to obtain informed consent mandatory, when it amended the statute in response to *Washington v. Harper*, a United States Supreme Court case, that held there must be procedural safeguards in place before the authorization of involuntary medications in order to comply with due process, and the implementation of mandatory procedures creates a due process right?
3. May a court authorize the involuntary administration of medication when there was no attempt to obtain informed consent from the person regarding the proposed treatment?
4. Is it mandatory that the court attempt to determine the person's desire for the proposed treatment and make findings about the person's desire regarding the proposed treatment before substituting its judgement for the person, when the statute says *shall*? May the court rely solely on the person's objections to Clozaril and its side effects, in

determining their desires regarding the proposed treatment with Risperdal and Fluphenazine, when there was no discussion with the person regarding the proposed treatment? May the court substitute its judgment for the person when it has no information about the person's desires, and made no attempt to determine the person's desire, for the proposed treatment?

5. When the legislature creates a mandatory statutory requirement, and creates no exceptions, may the court disregard the mandatory requirement to attempt to obtain informed consent because the court deems it futile?
6. Do the mandatory due process requirements established by the legislature apply to all persons, regardless of competency, when the statute states that the state shall follow certain procedures and does not make an exception for competency, and where the supreme court has held that even incompetent persons have a right to make choices regarding their treatment?
7. Does the statute, that states it is mandatory to attempt to obtain informed consent, and has no exceptions, allow a mental health professional or the court to find that an

attempt to obtain informed consent would be futile and disregard the mandatory requirements of the law?

IV. STATEMENT OF THE CASE

L.K. was involuntarily committed to Western State Hospital on August 4, 2017. RP1¹ 4, at CP 18. On February 26, 2019, her doctor, Dr. Nagavedu Raghunath, who had been treating her since April 4, 2018, filed a Petition for Involuntary Treatment with Antipsychotic Medication with regard to L.K. RP1 3, at CP 11, 18.

In the petition, the doctor certified and declared under the penalty of perjury that L.K. “had been advised of the need for voluntary treatment with antipsychotic medication(s) listed below and the likely effects (benefits and risks) of such treatment by the professional staff of this facility but has refused to consent to such treatment...” CP 11. He diagnosed L.K. with a mental disorder, Schizo-Affective Disorder – Bipolar type, and sought an order to treat L.K. with antipsychotic medication; specifically, Risperidone² by mouth and later, Risperidone Long Acting Injectable; Fluphenazine Intramuscular if oral Risperidone

¹ RP1 refers to the Report of Proceedings from March 1, 2019.

² In this brief, “Risperidone” will be used interchangeably with “Risperdal,” the brand name for that particular antipsychotic. See U.S. Food & Drug Administration, *FDA Drug Safety Communication: Medication errors resulting from confusion between risperidone (Risperdal) and ropinirole (Requip)* (August 4, 2017), (available at <https://www.fda.gov/drugs/drug-safety-and-availability/fda-drug-safety-communication-medication-errors-resulting-confusion-between-risperidone-risperdal>).

refused. CP 11.

A hearing regarding the Petition for Involuntary Treatment with Antipsychotic Medication was heard before a commissioner on March 1, 2019. CP 12. At that hearing, Dr. Raghunath, the petitioner, was the only individual who testified. RP1. He testified that L.K. was under his direct care and that her symptoms at that time included expressing delusions, talking to herself, lacking insight into her mental illness, and thinking that she does not need treatment. RP1 3-4, at CP 18. Limited by Evidence Rule 703, the doctor testified about specific instances on the ward, which, in his opinion were reflective of L.K.'s deterioration. RP1 5-6, at CP 18.

The doctor testified that he had previously petitioned for a medication override in July of 2018. RP1 6, at CP 18. He noted that at that time, the hospital procured an order to treat L.K. with Clozaril, because during the preceding five discharges from the hospital, L.K. was prescribed Clozaril. RP1 6, at CP 18. Clozaril was selected because there was a history of L.K. responding well to that medication. RP1 6, at CP 18. After the medication override in July of 2018, the hospital started treating L.K. with Clozaril. RP1 6, at CP 18. Despite continuing psychotic behaviors, including making delusional statements, the hospital noted improvement. RP1 7, at CP 18. The doctor testified that as of February, L.K. stopped medications, despite some instances where she took it at random. RP1 7, at CP 18.

The doctor testified that he had done a pharmacy consult, and the plan was to start L.K. “on Risperdal, orally, and supplement that with long acting shots. And to help...during this process to have Prolixin³ IM if she refuses the P.O. [per os, or orally] Risperdal.” RP1 8, at CP 18.

During the hearing, the doctor was asked whether he had attempted to discuss the need for medication with L.K. RP1 8, at CP 18. He testified that he had, and then listed several reasons why L.K. did not want to take *Clozaril*. RP1 8, at CP 18. He stated:

“Yes...I have discussed with L.K. several times about that. Her kind of reason for not taking medication can vary anything from *Clozaril* needed regular blood draws to see how she is reacting to *that*, whether she is developing any kind of side effects to *that*. But she said that she has no blood in her body to give, and so she doesn’t want to have *that* medication. Then she said it makes her too drowsy. She is not able to get up in the morning or (indiscernible). Then she also said that it makes her too tired during the day. So – and of course, she also said that she doesn’t think she needs *that* medication because she has no mental illness.”

RP1 8, at CP 18 (emphasis added). Later, he stated “I think when we started on the Clozaril, I think that was discussed with her as to what are the risks – I mean the side effect risks, sedation and weight gain. And of course the need for blood draws...” RP1 16, at CP 18. During cross-examination, the doctor testified that L.K. was not currently prescribed Risperdal:

³ Prolixin is the brand name for Fluphenazine. RP1 11, at CP 18.

Q I mean, right now is she prescribed Risperdal?

A No. Nothing was prescribed.

Q So, has she actually been offered Risperdal and refused it?

A She doesn't want to take any medication because she doesn't want to – she doesn't have any mental illness.

Q Ok. But just to clarify, it is not even currently prescribed for her and she hasn't actually been offered it.

A **No, No discussion has happened.**

RP1 14-15, at CP 18 (emphasis added).

During cross-examination, the doctor testified that he discontinued Clozaril on February 15 and that L.K. had not been offered Risperdal since that time. RP1 15, at CP 18. The doctor's reason for not even offering Risperdal was that L.K. "is not able to negotiate on any medication." RP1 15, at CP 18. During closing argument, counsel for L.K. argued, in part, that L.K. did not have an opportunity to provide informed consent with regard to the medication requested by the doctor. RP1 18, at CP 18.

The commissioner found that the state had met its burden and authorized the involuntary administration of the antipsychotic medication requested by the doctor, Risperdal and Fluphenazine. RP1 21, at CP 18. The commissioner signed Findings of Fact, Conclusions of Law, and Order Authorizing Involuntary Treatment. CP 12. The second finding of

fact in that order states, “Respondent has refused to consent to treatment with antipsychotic medication for the following reasons: She says she does not have enough blood in her body, that it makes her tired and that she does not have a mental health disorder.” CP 12. The sixth finding of fact in the order states, “Rational Decision. The Respondent would consent to being treated with antipsychotic medication if the Respondent were capable of making a rational decision concerning treatment and this Court is hereby substituting its judgment for that of the Respondent.” CP 12. Additionally, the order specified that the duration of the order was for “the period of the current involuntary treatment order...” CP 12. At that time, L.K.’s current involuntary treatment order was an order authorizing up to 180 days of treatment, signed on January 28, 2019. CP 10. So, the involuntary medication order would be valid through July 27, 2019.

On March 11, 2019, L.K. filed a motion for revision in superior court, in part raising the issue of informed consent. CP 17. L.K. argued that there was no evidence in the record that she was advised of the need for treatment with the antipsychotics listed in the petition and no evidence that she had refused to consent to be treated with those medications. CP 17. In its response to L.K.’s motion to revise, the state argued that offering Risperdal would be futile when a patient refuses all medications and that the statute does not require it. CP 19. The state specifically stated, “Such a reading makes little sense in the context of a delusional patient who is not

competent to make a rational decision based on medication counseling from the physician.” CP 19.

Oral argument was heard on L.K.’s Motion for Revision on March 22, 2019, before a Pierce County Superior Court judge. RP2⁴. Counsel for L.K. argued, in part, that there was no attempt to obtain informed consent from L.K. RP2 7-8. Counsel also argued that while there was testimony regarding discussions between the doctor and L.K. regarding Clozaril, there was no testimony regarding any conversations regarding the requested medication in the doctor’s petition: Risperdal or Prolixin. RP2 8-9. Counsel for L.K., specifically referencing RCW 71.05.215(2)(a), argued that despite possible futility, there was a statutory obligation of at least an attempt to obtain informed consent from the patient and that a patient’s unwillingness to take one medication did not necessarily implicate all others. RP2 10-11. In response, the state argued that, “The whole point of an involuntary medication proceeding is essentially for the Court to make a substituted judgment in regards to a patient who is essentially not competent to make that decision themselves.” RP2 12. The Assistant Attorney General stated:

“And essentially, no, he did not offer her, explicitly offer the Risperidone, ‘because she’s not able to negotiate on any medications.’ So I think it really would be a futile exercise for Dr. Raghunath to go through the motions of essentially making that offer, documenting it in the chart, and then

⁴ RP2 refers to the report of proceedings from March 22, 2019.

having to draw up the papers, the petition to come to court to get a medication override. I don't believe the statute requires that level of specificity. I think it's enough to show that there is just a general refusal to take medications."

RP2 13.

In his oral ruling on March 22, 2019, the Pierce County Superior Court judge read into the record several statements from the doctor's petition regarding L.K.'s behavior in the month of February:

The Court: Well, the patient in this case discontinued all of her medications in February. She struck a male peer, disrobed in the hallway. When staff tried to redirect her, she began yelling, screaming, and threatening staff. She called 911 on February 20th claiming that her mother broke her back...

I think that an attempt to obtain informed consent from somebody who is actively psychotic, schizophrenic, threatening, abusive, disrobing, etc., is an exercise in futility. It's not what I think the statute contemplated.

When I used to have patients out there that were stabilized, and they were talking about changing a medication, then frequently the doctor would have the pharmacy folks provide them information as to alternative medications. But that presupposed that somebody was going to be competent to make that decision.

Informed consent also I think implies that the person has a degree of competency such that they can choose between an alternative course in a rational thought process, as opposed to a delusional belief system. I'm going to deny the motion to revise.

RP2 19-20.

The judge signed an Order Denying Respondent’s Motion to Revise. CP 20. L.K. filed a Notice of Appeal to the Court of Appeals on March 29, 2019, CP 23, and now appeals the limited issue of informed consent.

V. ARGUMENT

1. Failure to Comply With the Mandatory Procedures Regarding the Involuntary Administration of Antipsychotic Medication is Unconstitutional and Violates the Due Process Clause.

a. There is a Constitutional Right to Refuse Antipsychotic Medication.

Every person has a constitutional right to refuse the administration of antipsychotic medication. *See* U.S. CONST. amend. I, IV, V, IX, XIV; WASH. CONST. art. I § 7; *Washington v. Harper*, 494 U.S. 210, 221-22, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). The Washington State Supreme Court has iterated that a person “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.” *Harper*, 494 U.S. at 221-22. Additionally, this Court recently recognized that the involuntary administration of medication can also interfere with a person’s right to privacy and right to produce ideas. *Matter of Det. of B.M.*, -- Wn. App. --, 432 P.3d 459, 463 (Wash. Ct. App. 2019) (citing *State v. Hernandez-Ramirez*, 129 Wn. App. 504, 510, 119 P.3d 880 (2005); *see also State v. Farmer*, 116 Wn.2d 414, 429, 805 P.2d 200 (1991)) (“We recognize a similar right to privacy to emanate from the specific guaranties of the Bill of Rights, from the language of the First, Fourth, Fifth, Ninth and

Fourteenth Amendments, as well as from article I, section 7 of the Washington Constitution.”)); U.S. CONST. amend. I, IV, V, IX, XIV; WASH. CONST. art. I § 7. The involuntary administration of antipsychotic drugs also implicates the First Amendment because “of their potential impact on an individual’s ability to think and communicate.” *B.M.*, 432 P.3d at 464 (quoting *State v. Adams*, 77 Wn. App. 50, 56, 888 P.2d 1207 (1995)); U.S. CONST. amend. I.

Autonomous decision making in matters affecting the body and mind is one of the most valued liberties in a civilized society. Dennis E. Cichon, *The Right to “Just Say No”: A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283, 284-85 (1992). The United States Supreme Court has recognized the importance of the values of bodily integrity and self-determination, stating, “No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Id.* at 315 (quoting *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 1001 (1890)).

In *Harper*, the United States Supreme Court discussed the balance between an individual’s constitutional right to refuse treatment and the state’s interest in administering medication to prisoners when needed for their safety. *Harper*, 494 U.S. 210. The Court stated that “[t]he forcible

injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.” *Harper*, 494 U.S. at 229. The Court also discussed rights under the Due Process Clause of the Fourteenth Amendment. *Id.* at 222-23; U.S. CONST. amend. XIV. The Court held that there must be “procedural safeguards to ensure the prisoner's interests are taken into account” before the involuntary administration of medications in order to comply with the Due Process Clause of the constitution. *Id.* at 233.

In *Harper*, the Court upheld the procedures used to authorize the use of involuntary medication for a mentally ill prisoner, where the prisoner was given notice, given the reasons that the staff believed the medication was necessary, and then a committee, which could not be comprised of anyone involved in the inmate’s treatment or diagnosis, was required to make findings, and where there was a process for review. *Id.* at 215-16, 233.

b. When the State Establishes Mandatory Procedures Regarding the Administration of Involuntary Medication, It Creates a Constitutional Due Process Right.

“[A] State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures,” particularly when the statutory or regulatory measures use “language of an unmistakably mandatory character, requiring that certain

procedures ‘shall,’ ‘will,’ or ‘must’ be employed” *Hewitt v. Helms*, 459 U.S. 460, 469, 471-72, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983); *Cf. Sandin v. Conner*, 515 U.S. 472, 473, 115 S. Ct. 2293, 2295, 132 L. Ed. 2d 418 (1995) (distinguishing and limiting establishment of due process requirements in prison disciplinary proceedings).

In *Harper*, the United States Supreme Court held that the establishment of mandatory procedures for the authorization of involuntary medication created a constitutional due process right, which mandated that the state comply with its established procedures. *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460).

As a matter of state law, the Policy itself undoubtedly confers upon respondent a right to be free from the arbitrary administration of antipsychotic medication. . . . Policy 600.30 is similarly mandatory in character. By permitting a psychiatrist to treat an inmate with antipsychotic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous, the Policy creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist.

Id. (citing *Vitek v. Jones*, 445 U.S. 480, 488-491, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (state procedures established due process right in being transferred from prison to mental hospital)).

c. *The Mandatory Procedures Established by the State for the Authorization and Administration of Involuntary Antipsychotic Medications Created a Due Process Right.*

As discussed above, the United States Supreme Court held that it is violation of the Due Process Clause to authorize the use of involuntary medication without “procedural safeguards to ensure the [person’s] interests are taken into account.” *Harper*, 494 U.S. at 233. In *Harper*, the Court also held that Washington created a due process right by creating a mandatory procedure for authorizing involuntary medication for prisoners. *Id.* at 221.

In response to *Harper*, our legislature amended RCW 71.05.215 to include a mandatory requirement that the state attempt to obtain informed consent from a person before authorizing involuntary medications. *See* Wash. Sen. Engrossed Substitute Sen., Substitute Senate Final Bill Report, 52nd Legis., 1991 Reg. Sess. (July 28, 1991)⁵. The changes to the statute required that “[t]he facility *shall* attempt to get the informed consent before administering antipsychotic medications against a patient’s will and such attempt must be documented in the patient’s medical record.” *Id.* And, the Senate Bill specifically addressed that the amendments were in response to *Washington v. Harper. Id.* Although the senate was interested in avoiding costs, it is clear that it was aware of the holding in *Harper*, and

⁵ Available at <http://lawfilesexxt.leg.wa.gov/biennium/1991-92/Pdf/Bill%20Reports/Senate/5672-S.FBR.pdf>

was attempting to comply with the due process requirements outlined by the United States Supreme Court. *See id.*

RCW 71.05.215, titled, “Right to refuse antipsychotic medication – Rules,” now states:

(1) A person found to be gravely disabled or presents a likelihood of serious harm as a result of a mental disorder or substance use disorder has a right to refuse antipsychotic medication unless it is determined that the failure to medicate may result in a likelihood of serious harm or substantial deterioration or substantially prolong the length of involuntary commitment and there is no less intrusive course of treatment than medication in the best interest of that person.

(2) The authority *shall* adopt rules to carry out the purposes of this chapter. These rules *shall* include:

(a) An *attempt to obtain the informed consent* of the person prior to administration of antipsychotic medication.

...

(e) Documentation in the medical record of the attempt by the physician, physician assistant, or psychiatric advanced registered nurse practitioner to obtain informed consent and the reasons why antipsychotic medication is being administered over the person's objection or lack of consent.

RCW 71.05.215 (emphasis added).

As part of the same bill, the legislature also made amendments to RCW 71.05.217 (then RCW 71.05.370), but left in place the mandatory procedures that the court must follow before it can order the

administration of antipsychotic medication over an individual's objection. *See* Wash. Sen. Engrossed Substitute Sen. Bill 5672, Session Law, 52nd Legis., 1991 Reg. Sess. (effective July 28, 1991)⁶. The forced administration of antipsychotic medication is governed by strict standards and the burden of proof to justify forced administration of such medication is high. *See* RCW 71.05.217. Now, involuntarily committed individuals have the right not to consent to the administration of antipsychotic medications unless ordered by a court of competent jurisdiction pursuant to certain standards and procedures, including:

- (a) The administration of antipsychotic medication...shall not be ordered unless the petitioning party proves by clear, cogent, and convincing evidence that there exists a compelling state interest that justifies overriding the patient's lack of consent to the administration of antipsychotic medications..., that the proposed treatment is necessary and effective, and that medically acceptable alternative forms of treatment are not available, have not been successful, or are not likely to be effective.
- (b) The court *shall* make specific findings of fact concerning: (i) the existence of one or more compelling state interests; (ii) the necessity and effectiveness of the treatment; and (iii) *the person's desires regarding the proposed treatment*. If the patient is unable to make a rational and informed decision about consenting to or refusing the proposed treatment, the court shall make a substituted judgment for the patient as if he or she were competent to make such a determination.

⁶ Available at <http://lawfilesexst.leg.wa.gov/biennium/1991-92/Pdf/Bills/Session%20Laws/Senate/5672-S.SL.pdf>

RCW 71.05.217(7) (emphasis added).⁷

The legislature carefully created specific rules regarding the right to refuse antipsychotic medicine, which are *mandatory*. See RCW 71.05.215(2); RCW 71.05.217(7). These rules are representative of the strong public policies surrounding autonomy, bodily integrity, and ensuring that committed individuals retain an ability to make and participate in their own treatment decisions. See Cichon, 53 La. L. Rev. at 284-285 (1992). Consistent with these policies, the rules and required procedures outlined in RCW 71.05.215(2) and RCW 71.05.217(7) were created to safeguard the individual rights of patients, like L.K. See RCW 71.05.215; RCW 71.05.217; RCW 71.05.010(1)(d).

Accordingly, the attempt to obtain informed consent is mandatory under RCW 71.05.215. And, the court may only authorize involuntary treatment after making findings about the person's desires regarding "the" proposed treatment, which necessarily requires an attempt to inform the patient regarding the specific medication proposed. RCW 71.05.217.

The goal of statutory interpretation is to discern and implement the legislature's intent. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In interpreting a statute, this Court looks first to its plain

⁷ These requirements were imposed in 1989, and left in place during the 1991 amendments. See SSB 5362 (1989), available at [http://leg.wa.gov/CodeReviser/documents/sessionlaw/1989c120.pdf?cite=1989%20c%20120%20A7%208;ESSB 5672](http://leg.wa.gov/CodeReviser/documents/sessionlaw/1989c120.pdf?cite=1989%20c%20120%20A7%208;ESSB%205672).

language. *Id.* If the plain language of the statute is unambiguous, then this Court's inquiry is at an end. *Id.* The statute is to be enforced in accordance with its plain meaning. *Id.* In this case, the plain language of RCW 71.05.215 is unambiguous - it mandates an attempt to obtain informed consent of the person prior to the administration of antipsychotic medication. *See* RCW 71.05.215(2)(a). The statute does not include any caveats or limitations. *See id.* In *Harper*, the United States Supreme Court held that when the legislature requires "that certain procedures 'shall,' 'will,' or 'must' be employed," or states that a person will not be treated with antipsychotic drugs against his will unless certain procedures are followed, those procedures are mandatory. *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460).

By codifying mandatory procedures, requiring the state to attempt to obtain informed consent and to document that attempt, the state created a constitutional due process right. RCW 71.05.215; *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460); U.S. CONST. amend. XIV. Authorizing involuntary medications without attempting to obtain informed consent and documenting that attempt is a violation of the Due Process Clause. *Id.*

2. The Superior Court Erred by Affirming the Order Authorizing Involuntary Antipsychotic Medications When the State Did Not Comply With the Mandatory Procedures, in Violation of L.K.'s Constitutional Right to Refuse Antipsychotic Medication and Her Right to Due Process.

a. *Standard of Review.*

In this case, a superior court commissioner authorized the involuntary administration of antipsychotic medications. CP 12. L.K. made a motion to revise the commissioner's ruling, arguing, in part, that the order was unlawful because the state did not attempt to obtain L.K.'s informed consent as required in RCW 71.05.215. CP 17. The superior court denied L.K.'s motion to revise, allowing the lower court's order authorizing involuntary treatment with antipsychotic medications to remain in effect. CP 20. On revision, a superior court reviews both the commissioner's findings of fact and conclusions of law de novo based solely upon the evidence and issues presented to the commissioner. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004). The superior court's review is limited to reviewing the record of the case and the findings of fact and conclusions of law entered by the court commissioner. *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999).

On appeal from the decision of a superior court revising the superior court commissioner's order, the court reviews the superior court's decision, not the commissioner's order. *In re Matter of Knight*, 178 Wn.

App. 929, 936, 317 P.3d 1068 (2014). Constitutional issues are questions of law that are reviewed *de novo*. *State v. Dang*, 178 Wn.2d 868, 874, 312 P.3d 30 (2013). Questions of statutory interpretation are also reviewed *de novo*. *Id.*

b. *The Order Authorizing Involuntary Treatment with Antipsychotic Medication Was Unlawful.*

As discussed above, RCW 71.05.215 and 71.05.217 establish mandatory procedures that must be followed before antipsychotics can be ordered against a person's wishes. *See* RCW 71.05.215; RCW 71.05.217. Compliance with these procedures is mandatory and necessary to comply with due process. *Id.*; *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460); U.S. CONST. amend. XIV. RCW 71.05.215 mandates that there must be an attempt to obtain informed consent. RCW 71.05.215(2)(a). And, RCW 71.05.217 mandates that the court make a finding about the person's desires regarding the proposed treatment. RCW 71.05.217(7)(b).

In this case, the commissioner signed an order authorizing involuntary treatment with Risperdal and Fluphenazine, CP 12, when there had been no attempt to obtain L.K.'s informed consent and no attempt to determine L.K.'s desires regarding the proposed treatment. RP1 14-15, at CP 18. The superior court improperly affirmed the commissioner's order,

finding that an attempt to obtain informed consent would have been futile, RP2 13, even though it is mandatory. *See* RCW 71.05.215(2)(a).

i. There was no attempt to obtain informed consent from L.K. for treatment with the proposed medications, Risperdal or Fluphenazine.

As discussed above, L.K. had a constitutional right to refuse antipsychotic medications and a due process right that required the state to attempt to obtain informed consent prior to authorizing her to be involuntarily treated with antipsychotic medications. RCW 71.05.215(2)(a); *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460); U.S. CONST. amend. XIV.

The doctrine of informed consent refers to the requirement that a physician, before obtaining the consent of his or her patient to treatment, inform the patient of the treatment's attendant risks. *Smith v. Shannon*, 100 Wn.2d 26, 29, 666 P.2d 351 (1983). The doctrine is premised on the fundamental principle that every human being of adult years and sound mind has a right to determine what shall be done with his own body. *Id.* (quoting *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92 (1914) (Cardozo, J.), *overruled on other grounds*, *Bing v. Thunig*, 2 N.Y.2d 656, 667, 143 N.W.2d 3, 163 N.Y.S.2d 3 (1957)). A necessary corollary to this principle is that the individual be given sufficient information to make an *intelligent* decision. *Id.* (citing

Canterbury v. Spence, 464 F.2d 772, 783 (D.C. Cir.1972)). Information regarding antipsychotic medication is imperative, as both the legal and medical professions recognize that psychotropic medication in general, and antipsychotic medication in particular, often produce side effects ranging in nature from short-term and merely discomforting to permanent and life-threatening. William M. Brooks, *Reevaluating Substantive Due Process As A Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 Ind. L. Rev. 937, 938, 947-951 (1998); *Harper*, 494 U.S. at 229-230.

In this case, the state requested authority to involuntarily treat L.K. with two antipsychotic medications: Risperdal and Fluphenazine. CP 11. There was never any attempt by the state to obtain L.K.'s consent to be treated with Risperdal or Fluphenazine. While the doctor testified that he had discussed the need for medication with L.K. several times, the entirety of his testimony was regarding L.K.'s objections to being treated with Clozaril; that she objected to the blood draws required for Clozaril and complained that it made her tired and drowsy. RP1 8, 16, at CP 18. The doctor testified that he had not yet prescribed, and had not yet offered, L.K. Risperdal. RP1 14-15, at CP 18. When asked for clarification, the doctor responded, "*No, no discussion has happened.*" RP1 15, at CP 18 (emphasis added). There was no record made regarding any attempt to

obtain informed consent for the other antipsychotic medication sought, Fluphenazine. *See* RP1.

Nonetheless, the commissioner authorized involuntary treatment with Risperdal and Fluphenazine, finding that L.K. “had refused to consent to treatment with antipsychotic medication for the following reasons: She says she does not have enough blood in her body, that it makes her tired and that she does not have a mental health disorder.” CP 12. Clearly, the commissioner relied on testimony from the doctor that L.K. did not want to take Clozaril. RP1 8, 16, at CP 18. However, Clozaril was *not* the antipsychotic medication requested by the petitioner in this case, and her objection to Clozaril and its side effects has no relevance to her willingness to take other antipsychotic medications. Informed consent requires a discussion of the risks involved so that the person can make an intelligent decision. *See Smith*, 100 Wn.2d at 29. That is impossible when there is no discussion about the particular drugs in question.

The commissioner erred by finding that L.K. refused to consent to treatment and authorizing involuntary treatment with Risperdal and Fluphenazine. On revision, L.K. argued that it was not possible to have refused to consent to treatment with Risperdal and Fluphenazine when Dr. Raghunath had not had a discussion with her about it, it had not been

prescribed to her, and she had not actually been offered the medication. RP1 14-15, at CP 18; CP 17. Nonetheless, the superior court upheld the commissioner's order authorizing involuntary medications, which included the finding of fact that L.K. had refused to consent to treatment with antipsychotic medication. *See* CP 20, CP 12. Specifically, at the motion for revision, the court stated:

“I think that an attempt to obtain informed consent from somebody who is actively psychotic, schizophrenic, threatening, abusive, disrobing, etc., is an exercise in futility. It's not what I think the statute contemplated...Informed consent also I think implies that the person has a degree of competency such that they can choose between an alternative course in a rational thought process, as opposed to a delusional belief system.”

RP2 20. The superior court erred when it denied the motion for revision, when there was no evidence that the state attempted to obtain L.K.'s informed consent to treatment with Risperdal and Fluphenazine. The court also improperly stated that the statute requiring informed consent implies “a degree of competency.” *Id.* And, the superior court erred by finding that an attempt to obtain informed consent, which is mandatory, “is an exercise in futility.” *Id.*

The law mandates an attempt to obtain informed consent, a procedure adopted to protect the individual's constitutional right to refuse antipsychotic medication. RCW 71.05.215(2)(a); *see also Harper*, 494

U.S. at 221 (citing *Hewitt*, 459 U.S. 460); U.S. CONST. amend. XIV. Competent or not, courts have determined that an individual still retains the right to refuse medical treatment. *See In re Schuoler*, 106 Wn.2d 500, 505, 723 P.2d 1103 (1986). The legislature left no discretion to the court or the doctor to determine whether an attempt to obtain informed consent would be futile or not. *See* RCW 71.05.215(2)(a). The legislature has mandated that an attempt must be both made and documented. RCW 71.05.215(2)(a),(e). Here, it was not.

Not only was L.K. deprived of the opportunity to make an *intelligent* decision regarding the proposed treatment, she was stripped of making a decision altogether. The failure to attempt to obtain informed consent violated L.K.'s constitutional right to refuse such psychotropic treatment and her right to due process. RCW 71.05.215, 71.05.217; *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460); U.S. CONST. amend. XIV.

- ii. *An attempt to obtain informed consent is mandatory, regardless of competency or involuntary commitment.*

An attempt to obtain the informed consent is required, regardless of the individual's competency. The involuntary commitment statute provides for the needs of a group of people, individuals who are a danger to themselves or to others, or who are gravely disabled. *Schuoler*, 106

Wn.2d at 505. These individuals may or may not be legally competent. *Id.* The Supreme Court of Washington has recognized the “fundamental principle” that competent adults have a right, grounded in both common law and constitutional principles, to determine what shall be done to their own bodies. *Id.* at 506 (citing *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983); RCW 7.70.050). Virtually every state provides that, notwithstanding involuntary commitment, patients remain competent as a matter of law absent a specific finding to the contrary. Brooks, 31 Ind. L. Rev. at 938. That is true of Washington.

Here, the law is clear that “[n]o person shall be presumed incompetent as a consequence of receiving an evaluation or voluntary or involuntary treatment for a mental disorder.” *See* RCW 71.05.360(1)(b). Even so, the high court of this state has decided that even an individual found incompetent retains the right to choose one type of medical treatment over another, or to refuse medical treatment altogether. *Schuoler*, 106 Wn.2d at 507 (citing *Matter of Guardianship of Ingram*, 102 Wn.2d 827, 838-39, 689 P.2d 1363 (1984)). Competency in no way dictates the statutory requirements of RCW 71.05.215(2) or diminishes the constitutional right to refuse treatment with antipsychotic medication. *See id.*; RCW 71.05.360(1)(b). In this case, the superior court, during its oral ruling, stated, “Informed consent also I think implies that the person has a

degree of competency such that they can choose between an alternative course in a rational thought process, as opposed to a delusional belief system.” RP2 20. There were no findings regarding L.K’s competency in this case and competency is irrelevant to the requirement to attempt to obtain informed consent. *See* RCW 71.05.360(1)(b); RCW 71.05.215(2)(a). The court’s finding that the state can forego the mandatory requirement to attempt to obtain informed consent if a person is not competent, is error.

- iii. *An attempt to determine the person’s desires before the court substitutes its judgment is mandatory; it is error for the court to fail to consider the person’s desires because it would be “futile.”*

As discussed above, the legislature amended RCW 71.05.215, in response to Harper, and creating a mandatory requirement that the state attempt to obtain informed consent. ESSB 5672; *see also* RCW 71.05.215; *Harper*, 494 U.S. at 221. That requirement is mandatory and creates a right to due process. *Harper*, 494 U.S. at 221 (citing *Hewitt*, 459 U.S. 460); U.S. CONST. amend. XIV. There are no exceptions. RCW 71.05.215.

RCW 71.05.217 discusses when the court may order involuntary treatment and sets out the procedures the court must follow. It requires that the court make a specific finding of fact concerning the person’s desires regarding the proposed treatment. RCW 71.05.217(7)(b)(iii). A

court cannot order involuntary treatment without attempting to determine the person's desires because an attempt to do so *would* be "futile." *Schuoler*, 106 Wash. 2d at 507–08 (court order authorizing electroconvulsive therapy was reversed when doctor testified attempt to determine person's desires would be futile and court did not attempt to determine person's desire). The statutory requirement that the court make a specific finding of fact regarding the person's desires regarding the proposed treatment is necessarily informed by RCW 71.05.215(2)(a) and (e). Questions of statutory interpretation are reviewed de novo and courts are to interpret statutes to give effect to the legislature's intentions. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). Statutory interpretation starts by examining the plain language of the statute and the "plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Id.* Further, "[a]n act must be construed as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous." *Id.* at 578 (quoting *State v. George*, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007)).

Consideration of the provisions of RCW 71.05.215 and RCW 71.05.217 together is imperative, as the outcome of following the requirements of RCW 71.05.215 *is* what informs the findings of fact that a

court is required to make under RCW 71.05.217(b). This is especially true in the case of a patient who does not come to court for his or her hearing, like L.K. CP 12. When the mandatory provisions of RCW 71.05.215(2)(a) and (e) are correctly followed, there would be documentation regarding the patient's response to the attempt to obtain informed consent. – i.e. specific concerns, objections, or statements made regarding the attempt to discuss the proposed treatment – available for the court to consider. *See* RCW 71.05.215(2)(e). Notably, the statute requires that the finding of fact made by the court be specific as to the person's desires regarding *the proposed* antipsychotic treatment, not any treatment whatsoever. *See* RCW 71.05.217(7)(b).

In certain circumstances, the statute allows the court to make a substituted judgment for a patient with regard to the proposed treatment. *See* RCW 71.05.217(7)(b). It states that “*If* the patient is unable to make a rational and informed decision about consenting to or refusing the proposed treatment, the court shall make a substituted judgment for the patient as if he or she was competent to make such a determination.” *Id.* (emphasis added). First, this conditional provision does not negate the statutory requirement of RCW 71.05.215(2)(a). If the court could make a substituted judgment without even considering a patient's response to the attempt to obtain informed consent, RCW 71.05.215(2)(a) would be

rendered superfluous, contrary to the principles of statutory interpretation. *See Bunker*, 169 Wn.2d at 578. Next, the antecedent of RCW 71.05.217(7)(b) is required for the court to first consider before even getting to the consequent of substituting its judgment. Here again RCW 71.05.215(2)(a) informs the court's findings of fact procedure. An attempt to determine the person's desires before the court substitutes its judgment is mandatory. *See* RCW 71.05.215(2)(a); RCW 71.05.217(7)(b).

In *Schuoler*, the Supreme Court of Washington reversed a lower court's attempt to substitute judgment for an involuntarily committed patient, finding that the lower court did not make any attempt to determine the patient's desire for treatment. *Schuoler*, 106 Wn.2d 500. *Schuoler* was decided in 1989, *before* the legislature codified the requirements in RCW 71.05.215 and 71.05.217, outlining the need to attempt to obtain informed consent, make findings regarding the person's desires regarding the proposed treatment, and when the court may substitute its judgment. The requirement to determine the person's desire before making a substituted judgment is rooted in constitutional privacy interests. *Ingram*, 102 Wn. 2d at 836; *see also* U.S. CONST. amend. XIV.

In that case, *Schuoler* challenged a trial court's authorization of electroconvulsive therapy (ECT) pursuant to the involuntary commitment statute. *Schuoler*, 106 Wn.2d at 501. *Schuoler* was brought to the Yakima

Valley Memorial Hospital in 1983, where she was disoriented and refused to take the medication that had been prescribed for her during an earlier admission. *Id.* at 502. Schuoler had not been eating, sleeping, and was unable to communicate basic information. *See id.* At her 14 day involuntary commitment hearing, the treating psychiatrist requested and the court ordered ECT at the discretion of her treating psychiatrist. *Id.* Like antipsychotic medication, involuntarily committed patients have the right to refuse to consent to performance of ECT unless ordered by a court pursuant to certain standards and procedures. *See RCW 71.05.217(7).* Schuoler appealed the finding of the trial court ordering her to undergo ECT. *Schuoler*, 106 Wn.2d at 503.

After analyzing the case, the Supreme Court of Washington held that a trial court can order electroconvulsive therapy for a nonconsenting patient *only after* considering and setting forth findings, one being a finding on the nature of the patient's desires. *Id.* at 513. The Court stated that:

“A court asked to order ECT for a nonconsenting patient must therefore consider the patient's desires before entering an order, including previous and current statements of the patient, religious and moral values of the patient regarding medical treatment and electroconvulsive therapy, and views of the individuals that might influence the patient's decision. If the patient appears unable to understand fully the nature of the ECT hearing – as severely mentally ill patients often are – the court should make a ‘substituted

judgment' for the patient that is analogous to the medical treatment decision made for an incompetent person... Finally, the court should enter a finding on the patient's desires."

Id. at 507.

Notably, while the Court held that it must consider the patient's desires before entering an order, there is not a mandatory statutory provision to attempt to obtain informed consent for ECT, like there is for antipsychotic medication. *See* RCW 71.05.217. In *Schuoler*, the Court expressed concern that it had no assurance that the lower court heard *Schuoler's* side of the issues. *Schuoler*, 106 Wn.2d at 512.

The *Schuoler* court also held that the trial court failed to make a substituted judgment about the patient's desires. *Id.* at 508. There, the Court found that the lower court should have made a substituted judgment for *Schuoler*, as both doctors had testified that discussing ECT with *Schuoler* "was" futile. *Id.* at 507. The doctors did not testify that a discussion "would have been" futile, the Court's statement was that the testimony stated it "was futile"; the necessary implication being that an attempt was made to discuss the proposed treatment with *Schuoler*. In analyzing whether an appropriate substituted judgment was made, the Supreme Court of Washington referenced the fact that the lower court made no attempt to inquire into the views of individuals close to the

patient and ultimately accepted the hearsay testimony of the doctor that Schuoler's family was not interested in her treatment. *Id.* at 507. Ultimately, the Court stated, "The court made no findings about the desires of Schuoler or her family members. We conclude that the court failed to conduct the investigation necessary to make a 'substituted judgment' for Schuoler." *Id.* at 508.

Based on the plain language of the RCW 71.05.215 and 71.05.217, and the holding in *Schuoler*, there must be an attempt to obtain informed consent and an attempt to determine the person's desire for treatment, *before* the court may substitute its judgment. *See* RCW 71.05.217; RCW 71.05.215; *Schuoler*, 106 Wn.2d at 500. The legislature left absolutely no discretion to either the medical staff or a judicial officer to determine whether an attempt to obtain informed consent would be futile or not. *See* RCW 71.05.215(2)(a). If a psychiatrist could independently decide that an attempt to obtain informed consent from a patient would be futile, then RCW 71.05.215(2)(a) and (e) would be stripped of any meaning whatsoever.

A mental health professional does not have authority to determine that an attempt to obtain informed consent would be futile. *See In re Detention of Labelle*, 107 Wn.2d 196, 207, 728 P.2d 138 (1986). In *Harper*, the United States Supreme Court relied, in part, on the fact that

that the procedures established review by a panel that did not include the treating psychiatrist. *Harper*, 494 U.S. at 215-16, 233. Additionally, our legislature established procedures for judicial review. RCW 71.05.215 and 71.05.217. Based on the case law and legislative history, discussed above, it is clear that the legislature did not intend to defer to those treating the person to determine whether or not an attempt to obtain informed consent was necessary.

In this case, the commissioner substituted her judgment for L.K. without any information regarding L.K.'s desire, and the superior court affirmed the commissioner's order, finding that an attempt to obtain informed consent would have been futile. CP 12. The superior court erred because the commissioner must determine L.K.'s desire, and cannot disregard that requirement by determining it would be futile.

The commissioner's order states, "The Respondent would consent to being treated with antipsychotic medication if the Respondent were capable of making a rational decision concerning treatment and this Court is hereby substituting its judgment for that of the Respondent." CP 12. However, the commissioner had no basis to make a finding regarding L.K.'s desire for treatment. The ability of a court to make a finding regarding the person's desire for the proposed treatment presupposes the fact that the person has been informed of the proposed treatment, or at the

very least, the required attempt to do so has been made. *See* RCW 71.05.215; RCW 71.05.217. In the case of L.K, the record fails to establish any attempt to obtain informed consent regarding the *proposed* treatment, *see* RP1, and the only finding of fact⁸ as to L.K.'s desires were based on a prior medication prescribed to her:

“Yes...I have discussed with L.K. several times about that. Her kind of reason for not taking medication can vary anything from Clozaril needed regular blood draws to see how she is reacting to that, whether she is developing any kind of side effects to that. But she said that she has no blood in her body to give, and so she doesn't want to have *that* medication. Then she said it makes her too drowsy. She is not able to get up in the morning or (indiscernible). Then she also said that it makes her too tired during the day. So – and of course, she also said that she doesn't think she needs *that* medication because she has no mental illness.”

RP1 8, at CP 18 (emphasis added).

Additionally, the commissioner failed to conduct the investigation necessary to make a “substituted judgment” for L.K. The doctor testified that he did not know if there were any family members or persons close to L.K. who had expressed an opinion about medication. RP1 9, at CP 18. Like in *Schuoler*, the commissioner did not make any findings about the desires of L.K. or her family members regarding the proposed treatment. CP 12. Further, the commissioner's finding of fact regarding L.K.'s

⁸ Finding of Fact #2 stating, “The Respondent has refused to consent to treatment with antipsychotic medication for the following reasons: She says she does not have enough blood in her body, that it makes her tired...” CP 12.

desires regarding treatment in this case were clearly regarding Clozaril, which was not the proposed treatment requested. CP 12. The court had no way to know L.K.'s desires regarding the *proposed* treatment, Risperdal and Fluphenazine, because there was no record that anyone ever spoke with her about either medication. *See* RP1, at CP 18. Thus, L.K.'s desires regarding treatment with Risperdal and Fluphenazine were not considered by the court and there was no basis for the commissioner's findings.

In this case, the court had no evidence regarding L.K.'s ability to make an informed decision about consenting to or refusing the proposed treatment and made no attempt to discern L.K.'s desire. Generally, where the trial court has weighed the evidence, appellate review is generally limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *In re Labelle*, 107 Wn.2d at 209. Here, substantial evidence does not support the commissioner's findings. It was error for the superior court to deny the motion for revision when the commissioner did not have any information to determine L.K.'s desires, as is mandated by statute and by the Due Process Clause.

The authorization to treat L.K. involuntarily, with antipsychotic medications, when the state and the court did not comply with all of the

mandatory procedures in RCW 71.05.215 and 71.05.217 was unlawful and violated L.K. due process rights.

3. This Case Involves a Matter of Continuing and Substantial Public Interest and this Court Should Exercise its Discretion Regarding the Issues Raised.

The Order Authorizing Involuntary Treatment with Antipsychotic Medications in this case is only valid through July 27, 2019. *See* CP 10; CP 12. Because this Court cannot provide effective relief for L.K., it could be argued that this case will be moot by the time this Court receives all briefing from the parties. *See In re W.R.G.*, 110 Wn. App. 318, 40 P.3d 1177 (2002). However, this Court has specifically recognized that an appellate court may still decide a moot case if it involves “matters of continuing and substantial public interest.” *Matter of Det. of B.M.*, 432 P.3d at 463 (quoting *In re W.R.G.*, 110 Wn. App. at 322). When orders have adverse consequences in future commitment proceedings, an appeal is not moot. *Id.* at 463. This Court recently considered and discussed mootness in *Matter of Detention of B.M.*, a case similarly involving the involuntary administration of antipsychotic medication. *Id.* In that case, this Court held that:

An order to involuntarily administer antipsychotic medication as part of B.M.’s prior medical history may have weight in future commitment orders. *See* RCW 71.05.012. Because each order to administer antipsychotic medication may have collateral consequences in future

proceedings, this appeal is not moot even though B.M.'s order has expired. Thus, we exercise our discretion and consider the issues raised.

Id.

Despite the fact that L.K.'s order will expire soon before this Court reviews this appeal, the collateral consequences discussed in *Matter of Detention of B.M.*, are equally present in this case. Thus, this Court should also exercise its discretion here and consider the issues raised.

Further, as a matter of public policy, this issue should be addressed, analyzed, and decided. If this Court does not consider the arguments raised this case, patients like L.K. will not have an opportunity to challenge violations of the right to refuse antipsychotic medication, as the orders will almost always be expired by the time of judicial review. Additionally, it is important to correct the process of the lower courts, if inconsistent with the law. The Supreme Court of Washington has stressed the importance of protecting the procedural safeguards of the rights of mentally ill persons:

The subtle, paternalistic contention that the state's obligation as *Parens patriae* contemplates and permits some deviation from according an accused the full guarantee of due process was forcefully rejected... Further, the use of beneficent, self-serving labels such as 'civil', 'clinical', and 'treatment' as a means of supporting procedural aberrations in the mental illness hearing constitutes an intolerable abuse of the duty to ensure stringent protection of constitutional and statutory rights. The most

formidable abridgment of due process guarantees however occurs where ‘lip service’ is paid to certain rights of the accused as a mere formality, with the consequence that any substantive protection is woefully lacking.

Quesnell v. State, 83 Wn.2d 224, 233-34, 517 P.2d 568 (1973).

Arguably, most patients at a state psychiatric hospital will display symptoms similar to those of L.K. If the court believes that it, or the medical professional, has the authority to determine the potential futility in engaging in a conversation with a symptomatic individual regarding proposed treatment, then attempts to converse will not occur. What follows is the subtle and serious erosion of the rights of involuntarily committed individuals, contrary to the legislative intent of the statute. *See* RCW 71.05.010(1)(d) (provisions of statute are intended by the legislature to safeguard individual rights).

The legislature left no room for exception when it comes to informed consent regarding antipsychotic medication under RCW 71.05.215, and neither should this court. This is especially true in this instance, where an attempt to converse with a patient requires de minimis effort on the part of the state. If the opinion of the lower courts is that the law allows a substituted judgment for a patient who has not even had an opportunity to provide informed consent, then the courts will continue to improperly make those findings. That practice abridges the due process

guaranteed to patients like L.K., with mere lip service paid to her rights to be informed about and to determine whether to consent to proposed treatment, with the reality being that the state did not attempt to assess either. The Supreme Court of Washington stated:

Today the astounding rate of involuntary admissions to the nation's mental hospitals poses for our courts the difficult task of establishing a process of evaluation and administration that is not merely efficient, but fair to the individuals involved. These ends of fairness and efficiency can be antagonistic or complementary depending upon the nature of this judicial process.

Quesnell, 83 Wn.2d at 228.

Whether an exercise in futility or not, both the law and the rights of L.K. were disregarded in this case. This case involves a matter of continuing and substantial public interest and should be decided.

VI. CONCLUSION

In conclusion, it was error for the superior court to affirm the commissioner's order authorizing the involuntary administration of Risperdal and Fluphenazine. The state failed to comply with the mandatory procedures in RCW 71.05.215 and RCW 71.05.217, which violated L.K.'s constitutional right to refuse antipsychotic medication and her right to due process. The order authorizing involuntary treatment with antipsychotic medication was unlawful; the court failed to make the required finding about L.K.'s desires regarding the *proposed* treatment, it

failed to conduct the necessary investigation, and it improperly made a substituted judgment for L.K. regarding treatment. Appellant respectfully requests that this Court reverse the superior court's denial of L.K.'s motion to revise the commissioner's order and remand with instructions to vacate the March 1, 2019 order authorizing the involuntary administration of antipsychotic medication.

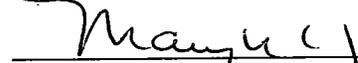
RESPECTFULLY SUBMITTED this 19th day of July 2019.



NICOLE L. BEGES, WSBA# 47759
Attorney for Appellant



JENNIFER VICKERS FREEMAN
WSBA# 35612
Attorney for Appellant



MARY K. HIGH, WSBA# 20123
Attorney for Appellant

CERTIFICATE OF SERVICE

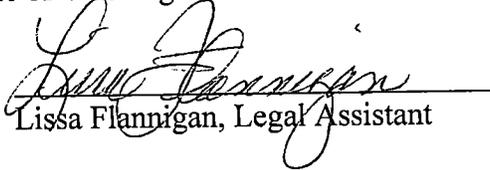
The undersigned certifies that on this day correct copies of this Appellant's Brief were delivered electronically to the following:

Derek Byrne, Clerk
Court of Appeals, Division II
950 Broadway St., STE 300
Tacoma, WA 98402
coa2@courts.wa.gov

Eric Nelson, Assistant Attorney General
EricN1@ATG.WA.GOV; shsappealnotification@atg.wa.gov

This statement is certified to be true and correct under penalty of perjury of the laws of the state of Washington.

DATED: 7-19-19


Lissa Flannigan, Legal Assistant

PIERCE COUNTY ASSIGNED COUNSEL

July 19, 2019 - 3:45 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53377-4
Appellate Court Case Title: Access to case information is limited
Superior Court Case Number: 17-6-00941-5

The following documents have been uploaded:

- 533774_Briefs_20190719153913D2273173_0471.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellant Brief FINAL.pdf
- 533774_Other_20190719153913D2273173_4119.pdf
This File Contains:
Other - Notice of Association of Counsel
The Original File Name was Notice of Association of Counsel Beges.pdf

A copy of the uploaded files will be sent to:

- ericn1@atg.wa.gov
- mary.benton@piercecountywa.gov
- nicole.beges@piercecountywa.gov
- shsappealnotification@atg.wa.gov

Comments:

Sender Name: Lissa Flannigan - Email: lissa.flannigan@piercecountywa.gov

Filing on Behalf of: Mary Katherine Young High - Email: mhigh@co.pierce.wa.us (Alternate Email:)

Address:
949 Market Street Suite 334
Tacoma, WA, 98402
Phone: (253) 798-6062

Note: The Filing Id is 20190719153913D2273173