

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

APPEALS COURT
No. 2009

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)
In re Guardianship of)
)
John Smith)
)

MEMORANDUM IN SUPPORT OF APPELLANT/RESPONDENT'S
APPEAL OF DENIAL OF MOTION FOR FUNDS FOR
INDEPENDENT MEDICAL EVALUATION PURSUANT TO G. L.
C. 261 § 27D

SUMMARY OF THE ARGUMENT

Among such noncriminal proceedings are those in which highly restrictive or highly intrusive actions (e.g., commitment to a psychiatric facility; administration of antipsychotic medications) are sought to be imposed upon or to be taken against putatively mentally disabled persons.

This Court is called upon to determine whether an indigent putatively mentally ill person has a right to the services of an independent mental health clinician, at the

Commonwealth's expense in a judicial proceeding in which the continued administration of antipsychotic medication is sought (a so-called *Rogers* review).

Under the plain and unequivocal mandate of G.L. c. 261, § 27D, no indigent applicant's request for court funds to cover "normal fees and costs" shall be denied. The statute, which embodies in statutory form equal protection considerations protected under the Fourteenth Amendment and articles 1 and 10 of the Massachusetts Declaration of Rights, involves the protection of substantive rights: to due process and a fair trial, and to equal access to the courts. "A person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by the administration of antipsychotic drugs." *Rogers II*, 634 F.2d 653 (1ST Cir.1980). The source of this right according to *Rogers II*, supra, lies in the "Due Process clause of the Fourteenth

amendment...most likely the penumbral right to privacy, bodily integrity, or personal security." ...We ground this right firmly in the constitutional right to privacy, which we have previously described as "an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life." *Guardianship of Roe*, 383 Mass. 415, n.14 (1980) quoting *Rogers II* Id. and *Superintendent of Belchertown State Sch. V. Saikewicz*, 373 Mass. 742 (1977). Where substantive rights are involved, the word "shall" has "a mandatory or imperative obligation." *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983).

Costs and fees associated with the use of experts in a G. L. 190B, § 5-306A, *Rogers* proceeding should be considered "normal fees and costs" pursuant to G.L. c. 261, § 27C(4), because the medical/psychiatric issues are the gravamen of these proceedings. Where treatment of antipsychotic drugs is proposed there must be notice, a right to counsel, an opportunity to be heard in the trial court, and right to appeal.

"Opinions of experts [must be] gathered",
[*Rogers v. Commissioner of Mental Health*, 373
Mass. 489, 504 (1983), citing *Belchertown State
Sch. v. Saikewicz*, supra at 757 (1977), and *In
the Matter of Moe*, 385 Mass. 555, 567 (1982)],
"so that all viewpoints and alternatives will be
aggressively pursued and examined at the
hearing." (citing *Saikewicz*, supra at 757) "This
adversary posture will ensure that both sides of
each issue which the court must consider are
thoroughly aired before findings are made and a
decision rendered." (cites omitted) *Moe*, supra
at 567. *Rogers* at 504 specifically mentions
that "the opinions of experts" should be
"gathered" toward this end. Under the plain
language of the statute, the judge has no
discretion to disallow such a request, *Hashimi
v. Kalil*, 388 Mass at 609, and thus, the judge's
order in this case constitutes a plain error of
law.

Alternatively, where an applicant has made a
satisfactory showing that the services sought
are "reasonably necessary to assure the

applicant as effective a prosecution ... as he would have if he were financially able to pay[,]” G.L. c. 261, § 27C(4), the court “shall not” deny the request. As argued ante, (citing *Rogers, supra, Saikewicz, supra, and Matter of Moe, supra*) the nature of a *Rogers* proceeding is such that respondent’s procurement of expert opinion to effectively rebut the petitioner’s experts is reasonably necessary to the presentation of an adequate defense, and a course that an individual “financially able to pay” would undoubtedly take.

The Respondent is entitled under G.L. c. 190B 5-106(a) to the assistance of counsel, and in view of the fundamental liberty rights at stake in a *Rogers* proceeding that right would be virtually meaningless if it does not guarantee constitutionally effective counsel.¹

Finally, the denial of the Respondent’s

¹ “The guardians ad litem [now appointed counsel] is charged with the responsibility of zealously representing the ward, and must have full opportunity to meet the ward, present proof, and cross-examine witnesses at the hearing...In order to guarantee a thorough adversary exploration of the difficult questions posed, the guardian ad litem [now counsel] should present all reasonable arguments in favor of the court’s denial of the petition...” *Moe, Supra* 567.

motion for funds violated his right to equal protection under the law, as guaranteed by the Fourteenth Amendment to the United States Constitution, and articles 1 and 10 of the Massachusetts Declaration of Rights, because "cost cannot be allowed to deprive" the Respondent of a right recognized to be an essential component of due process.

Commonwealth v. Possehl, 355 Mass. 575, 577 (1969) and cases cited (right to costs of blood test to establish or rule out paternity, where petitioner indigent).

For the forgoing reasons, the Respondent asks that this appeal be allowed, and that the trial court's order denying funds to the Respondent be reversed and vacated.

STATEMENT OF THE CASE

The Appellant/Respondent, John Smith, is a 44-year-old male (DOB xxxxx) allegedly suffering from Bipolar Disorder NOS. His first psychiatric symptoms appeared in 1998 following the death of

his mother. On May 12, 1999, the Probate Court approved a permanent guardianship of the person and estate and appointed his sister, Mary Smith, to serve as guardian. In 2006 a *Rogers* petition was filed seeking the authority to administer antipsychotic medication, and *Rogers* counsel, Sam Jones, was appointed. On February 27, 2007 a *Rogers* order authorizing the administration of antipsychotic medication was entered appointing Ms. Smith as the *Rogers* monitor. Since the entry of the original *Rogers* order there has been one "*Rogers* review" by the Probate Court on August 26, 2008.² The order dated August 26, 2008 states that the next review date is August 25, 2009. (See Affidavit of Atty. Sam Jones, attached.) No review occurred on that date. The current treatment order will expire on February 28, 2010.

In preparation for the review Respondent's

² This review was accomplished administratively via the "pilot program" wherein the parties agree to extend an uncontested antipsychotic medication order. The paperwork is submitted to a judge for allowance. An annual review is now required by G.L. 190B, s. 5-306A, "to determine whether the incapacitated person's condition and circumstances have substantially changed such that if competent, the incapacitated person would no longer consent to the treatment authorized therein."

counsel met with Mr. *Smith* and reviewed his medical and psychiatric records and met with his treating psychiatrist. The records indicate that Mr. *Smith* was psychiatrically hospitalized in July 2009, the first such hospitalization since 2003 and his medication was changed from Zyprexa to Risperdal, another atypical antipsychotic. He has had difficulty since the change to Risperdal including feelings of agitation and gastrointestinal problems. It is not clear that Risperdal is helping him. (See affidavit of attorney Sam Jones) Mr. *Smith* is 5'6" and weighs 267 pounds (his ideal body weight is approximately 180 pounds). He now has uncontrolled diabetes mellitus, hypertension, uncontrolled hyperlipidemia and constipation, all of which can be caused by or exacerbated by treatment with antipsychotics.³

At the time of the August 2008 review Mr. *Smith* diabetes and lipids were being

3. Mr. *Smith* has experienced a "substantial change" in his physical and psychiatric conditions since the last review in August 2008. He must be given the opportunity to present evidence, including expert evidence, in order for the court to determine his current substituted judgment. *Guardianship of Brandon* 424 Mass. 482 (1997).

satisfactorily managed. His glucose was in the 5.7 range (normal is less than 6.3) and his triglycerides were 152 (normal is less than 150.) In July of 2009 his glucose was 10.3 and his triglycerides were as high as 785.

The Findings of Fact for Order issued by the Probate court on October 28, 2009 are based on statements of counsel and the court at the hearing on the motion for Funds on October 20, 2009. Some of the facts are not correctly represented in the court's findings. The Respondent directs the Single Justice to the Affidavit of Susan Rous attached to this memorandum for Respondent's representations made at the hearing on the motion for funds.

An expert evaluation is necessary to determine whether treatment with an atypical antipsychotic is appropriate in light of the side effects associated with these medications, particularly given the uncontrolled diabetes and hyperlipidemia, and the questionable effectiveness of the treatment with Risperdal.⁴

⁴ The Respondent also requests the expert evaluation in order to determine his current competency to make

informed medical decisions. See, Affidavit of Attorney Sam Jones, p. 5, item 10. (i).

ARGUMENT

I. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND PART I, ARTICLE XII OF THE MASSACHUSETTS CONSTITUTION VEST IN AN INDIGENT PERSON THE RIGHT TO AN INDEPENDENT CLINICAL EXPERT WHERE AUTHORITY TO CONTINUE THE ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION IS SOUGHT IN A JUDICIAL PROCEEDING.

It is well established that the involuntary administration of antipsychotic medication to a putatively mentally incompetent person implicates a substantial liberty interest. Where continued treatment is sought, therefore, both the Fourteenth Amendment to the United States Constitution and Part I, Article XII of the Massachusetts Constitution require that the person be afforded the full panoply of due process protections.

In determining the process that is due an indigent person whose liberty is in jeopardy, courts have traditionally demanded that judicial proceedings be fundamentally fair. Such fairness is lacking where, "simply as a result of his poverty, a (person) is denied the

opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

The Court's analysis and ruling in *Ake* are applicable to, if not dispositive of, the instant matter. Asked to determine, *inter alia*, whether an indigent criminal defendant must be afforded access to an independent expert where an insanity defense has been raised, the Court framed the issue concisely. It must, it wrote, determine

whether, and under what conditions, the participation of a psychiatrist is important enough to (the) preparation of a defense to require the state to provide an indigent defendant with access to competent psychiatric assistance ...

470 U.S. at 77.

After a lengthy review of traditional due process analysis, the Court held that

when a defendant demonstrates ... that his sanity ... is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an

appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83.

Although denoted "civil" in nature, the procedural requisites applicable in a *Rogers* proceeding are analogous to those in criminal proceedings. For example, *Rogers* hearings are to be full evidentiary, adversarial proceedings, with a heightened standard of proof. See, *Rogers supra* 504, *Roe supra* 448, *Moe supra* 567, and *Saikewicz supra* 757. Counsel must be appointed to represent indigent respondents. G.L. c. 190B, § 5-306A.

Given the gravity of what is at stake in a *Rogers* hearing and the clear correlation between a *Rogers* proceeding and a criminal proceeding, the applicability of the standard established in *Ake, supra* at page 5, cannot reasonably be denied. Thus, an indigent respondent in a *Rogers* proceeding is to be afforded access to a clinical expert whenever his sanity (*i.e.*, his mental status) is to be a "significant factor at trial." *Ake*, 470 U.S. at 83.

That the person's mental status is a "significant factor" at a *Rogers* hearing is obvious. Indeed, it is the very gravamen of the action. Equally obvious is that a person in jeopardy of losing his liberty as a result of his mental status must have access to an independent clinician to assist in the "evaluation, preparation, and presentation of his defense." *Ake*, 470 U.S. at 83.

Therefore, where the continued involuntary administration of antipsychotic medication of an indigent person is sought in a judicial proceeding, both the Fourteenth Amendment to the United States Constitution and Part I, Article XII of the Massachusetts Constitution vest in such person the right to the services of an independent clinical expert, at the Commonwealth's expense.

II. ACCESS TO AN INDEPENDENT CLINICAL EXPERT IS MANDATED UNDER G.L. c. 123, § 5.

The Probate court relies on G. L. c. 123, s.

5 (fn.5) to deny the requested funds. A comprehensive reading of the statute demonstrates that the Probate court's reliance is clearly misplaced. G.L. c. 123, § 5 provides, in pertinent part, that "(t)he court may provide an independent medical examination for (an) indigent person upon request of his counsel or upon his request if he is not represented by counsel." Thus, while access to an independent expert under § 5 appears to be discretionary, closer scrutiny leads to a different conclusion.

Section 5 further provides that a person against whom a commitment petition or petition for treatment with antipsychotic medication is filed has "the right to present independent testimony" at hearing. This right is, of course, meaningless to an indigent person unless access to a clinical expert is available to him at the Commonwealth's expense. "The purpose of

5 G.L. c. 123 relates specifically to involuntary psychiatric commitment and treatment with antipsychotics in the context of commitment. Respondent declines to agree with the Probate court in this case that G.L. C. 123 controls in a *Rogers* proceeding, however, the SJC has held that legislative recognition of principals embodied in G.L. c. 123, s. 8B(f) must be applied to *Rogers* proceedings. *Guardianship of Weedon*, 409 Mass. 196, 200(1991).

this provision is to afford indigent persons the same benefits of an independent medical examination that are available to wealthier persons." *Thompson v. Commonwealth*, 386 Mass. at 819.

Thus, access to an independent clinical expert is statutorily mandated where the commitment or treatment with antipsychotic medication of an indigent person is sought. In 1991 the SJC acknowledged the need for periodic reviews of *Rogers* orders to determine if the ward's condition has substantially changed. By comparing G.L. c. 123, s.8B to the guardianship statute the court said: "We note that a termination date lessens the disparity in treatment between patients subject to an order under C. 201 and those subject to an order under G.L. c. 123, s. 8B." *Weedon*, supra at 201.

III. AN INDIGENT PERSON'S MOTION FOR THE APPOINTMENT OF AN INDEPENDENT EXPERT AT THE COMMONWEALTH'S EXPENSE, PURSUANT TO G.L. c. 261, § 27C, MUST ALWAYS BE ALLOWED.

A. The Expenses Incurred for the Services of a Clinical Expert in *Rogers* Proceedings

Are "Normal Fees and Costs" for Purposes of G.L. c. 261.

Upon a finding of indigency, [the Probate Court in the instant case has determined that Mr. *Smith* is indigent] a court may not deny the indigent person's request for the payment of expenses normally associated with the proceeding. G.L. c. 261, § 27C, ¶ (4). Such "normal fees and costs" are defined as those a party "normally is required to pay in order to ... defend the particular type of proceeding in which he is involved." G.L. c. 261, § 27A.⁶

Where the involuntary administration of antipsychotic medication is sought, clinical evidence is essential to the person's defense. Indeed, without such evidence no defense is typically available. Thus, the costs incurred in securing such evidence must be seen as necessary to the defense of such proceedings and, therefore, a court lacks the discretion to

⁶ The expenses associated with "expert assistance" are among those denoted as "extra fees and costs" in G.L. c. 261, § 27A. However, in the unique circumstances of *Rogers* proceedings, and given the mandate of G.L. c. 123, § 5, as discussed above, such costs must be seen as "normal fees and costs" as the term is defined in said section.

deny a request for such expenses brought under G.L. c. 261, § 27C.

B. If Not "Normal Fees and Costs" for Purposes of G.L. c. 261, Such Expenses Are Always Reasonably Necessary to Assure an Indigent Person As Effective a Defense As Would Be Available to a Person of Means.

Even was this Court to find that expenses incurred for the services of a clinical expert in *Rogers* proceedings are not "normal fees costs" as defined in G.L. c. 261, § 27A, the Court should nevertheless find that such expenditures must always be permitted under G.L. c.261, §. 27C.

A court must grant a request for "extra fees and costs" whenever the service sought is "reasonably necessary to assure (an indigent person) as effective a ... defense ... as he would have if he were financially able to pay." G.L. c. 261, § 27C, ¶ (4). In determining whether to grant such a request

(the) standard is one of reasonableness, and looks to whether a (litigant) who was able to pay ... would consider the ... service ...

sufficiently important that he would choose to obtain it in preparation for his trial. ... The test is whether the item is reasonably necessary to prevent the (litigant) from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires. ... In making this determination ... the judge may look at such factors as the cost of the item requested, the uses to which it may be put at trial, the potential value of the item to the litigant(,) ... and to such other factors as the judge may deem relevant

Commonwealth v. Lockley, 381 Mass. 156, 161 (1980).

The potential value of an independent clinical expert to a person facing continued involuntary administration of antipsychotic medication is obvious, particularly where there has been a substantial change in his condition. Indeed, it cannot be reasonably argued that a person of means, facing such a possibility, would ever knowingly choose not to expend his funds to secure the assistance of an independent clinical expert. See, e.g., *Ake*, 470 U.S. at 80 (when a state has made a person's mental

condition relevant to his liberty interest, "the assistance of a psychiatrist may well be crucial to the (person's) ability to marshal his defense." (emphasis added). *Accord*, *Commonwealth v. Bolduc*, 10 Mass. App. Ct. 634, 638 (1980), aff'd on this point at 383 Mass. 744, 749 (1981).

As to the cost involved in providing access to an independent clinical expert, Ake is again instructive. Where a person's mental condition is likely to be a significant factor in her defense, "the need for the assistance of a psychiatrist is readily apparent. ... In such a circumstance, ... the state's interest in its fisc must yield." 470 U.S. at 83.

In the instant case the Probate court denied funds on the ground that the request was frivolous. The Probate Court cites *Underwood v. Massachusetts Appeals Court*, 427 Mass. 1012, 1013 (1998). *Underwood* however addresses the issue of the reasonableness of a reduced filing fee: \$6.00 filing fee was reasonable given that the defendant had \$60.00 in his personal

account. There is no such issue in this case. The Probate Court's findings suggest that Respondent should rely on the opinions of his treating psychiatrist and primary care nurse practitioner. Such a suggestion is contrary to the adversarial substituted judgment proceeding set forth in *Rogers, Roe, Moe and Saikewicz*.

In 1985, a Single Justice of the Massachusetts Appeals Court had occasion to review a Probate Court's denial of a request for extra costs for expert assistance in a proceeding in which the authority to administer antipsychotic medication to an incompetent person was sought. *Guardianship of a Mentally Ill Person*, Mass. App. Ct. No. 85-0018 Civ. (Dreben, J.- 1/28/85). Applying the standards established in *Lockley, supra*, and considering "the nature and purpose of the proceedings," the Single Justice found the Probate Court's denial to be in error.

The Single Justice noted that three of the six factors to be considered in determining a person's "substituted judgment" in a "Rogers"

proceeding involve "medical questions." Thus, she wrote, "(w)ithout an expert, the patient is certainly at a disadvantage in countering medical evidence on these factors."

One ground for the Probate Court's denial of the request for costs was that the person's counsel would have access to the person's medical record and would have the opportunity to examine petitioner's experts at trial. In finding this ground to be untenable, the Single Justice wrote,

(w)e know ... that these persons are the ones who are proposing the ... drugs. Not only will these persons be unlikely to present the opposing viewpoint, but unless counsel for the applicant has the assistance of a competent expert, counsel will not be able to examine effectively the ... experts who are recommending ... the drugs and may even be unable to understand the medical terms these experts use.

She went on to conclude that

"The judge does not appear to have considered the likelihood that a solvent [patient], able to finance his own defense, would prefer to select and employ a competent expert of demonstrated credibility rather than rely on the testimony" and cross-examination of (petitioner's) clinicians "who might well be ...

hostile witness[es]."

Quoting from *Commonwealth v. Bolduc*, 10 Mass. App. Ct. at 638.

Despite a cautionary note to the contrary,⁷ the Single Justice's analysis and conclusion must be read as virtually mandating the allowance of a request for extra costs for expert assistance in *Rogers* cases.

That the proceeding for which expert opinion is necessary is a review does not alter the Respondent's standing to request and receive funds for that purpose. An existing *Rogers* order must be reviewed "at least annually". G.L. c. 190B, s. 5-306A (c) "Because these factors justifying intervention are likely to change with time, we have made clear that any substituted judgment order 'should provide for periodic review to determine if the ward's

⁷ "It is not here implied that the costs of such experts will always have to be supplied in a case of this kind. Conceivably, there may be circumstances where credible expert testimony opposed to the administration of the drugs is already available to the patient or where other factors may make such testimony not required within the principles expressed in ... *Lockley* ..." (emphasis added). Order, page 5, note 2. While such circumstances may be "conceivable" in "*Rogers*" cases, there is **no** "expert opposed to the administration of the drugs" already available in the instant case.

condition and circumstances have substantially changed' " *Guardianship of Weedon*, Id. at 200, quoting *Guardianship of Roe*, supra at 448 n. 19. *Rogers* supra at 507.

Judge Abrams in *Weedon* said that a substituted judgment order is valid because it is based on the demands of a patient's **current** circumstances. Id.

Any of the factors to be weighed before authorizing forcible medication, such as the patient's mental condition, physical reaction to the drugs...may change significantly with the passage of time, thus rendering the substituted judgment determination inaccurate. Periodic review provides some insurance that a patient will not continue to be forcibly medicated pursuant to substituted judgment order that no longer represents an accurate determination of the patient's preference were the patient competent. Thus, after the date of this opinion, all substituted judgment treatment orders must provide for periodic review of the treatment plan and of the patient's circumstances in order to ensure the appropriateness of the plan and the careful protection of the patient's rights. Id. at 201.

The court concluded that *Rogers* orders must not only be reviewed periodically, but also must have a termination date because "(1) there are few legitimate medical procedures which are more intrusive than the forcible injection of

antipsychotic medication [*Roe, supra*] at 436; and (2) the side effects of antipsychotic drugs are frequently devastating and often irreversible. [*Roe supra*] at 438," *Rogers, supra* at 501 n. 16. *Weedon* at 201.

A review of a *Rogers* order without the opportunity to consult with an expert and present expert testimony renders the review process meaningless and leaves the respondent no opportunity to present evidence.

CONCLUSION

For the reasons set forth above, the Respondent urges this Court to:

1. Find that an indigent, mentally disabled person has a right to the services, at the Commonwealth's expense, of an independent clinical "expert" in a judicial proceeding in which continued involuntary administration of medication is sought.
2. Find that the expenses incurred in securing the services of an independent clinical expert are among the normal costs

of a person's defense in such a proceeding.

3. Find that, in the alternative, such expenses are always reasonably necessary to assure an indigent person as effective a defense as would be available to a person of means.

4. Find that an indigent person's request for funds to secure the services of an independent expert, pursuant to G.L. c. 261, § 27C, must always be granted.

xxxxxxx, 2009

Respectfully submitted,
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