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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SCOT BERNSTEIN, Petitioner, v. THE SUPERIOR COURT OF VENTURA COUNTY, Respondent; ILYA BERNSTEIN, CONSERVATOR OF THE PERSON OF KARL BERNSTEIN, et al., Real Parties in Interest.	2d Civil No. B212067 (Super. Ct. No. P076953) (Ventura County) OPINION AND ORDER DENYING PETITION FOR WRIT OF MANDATE

This is a family dispute between a son (Scot Bernstein) and his half brothers (Ilya and Nicholas Bernstein) over the care and treatment of their father, Karl Bernstein, who is in the end stages of Alzheimer's disease. On October 24 and November 10, 2008, the trial court issued orders removing Scot as Karl's conservator, appointing Ilya as successor conservator, and denying Scot's request for a further hearing on the issue of whether Ilya may authorize the removal of hydration, nutrition and respiratory tubes. Scot appealed from these orders.

On November 19, 2008, we issued a temporary stay of those portions of the trial court's orders allowing Ilya, as conservator, to authorize the removal of nutrition, hydration, and respiratory care. Because of the exigency of the circumstances and need for a speedy resolution of the issues, we elected to treat this appeal as a petition for a writ of mandate and issued an order to show cause to permit the parties an opportunity for oral argument. (See *Bouvier v. Superior Court* (1986) 179 Cal.App.3d 1127, 1134-1135.) We also allowed the parties to submit formal briefing. We conclude that Scot has not demonstrated the trial court abused its discretion or erred. Accordingly, we deny his petition.

Factual and Procedural Background

The conservatee, Karl Bernstein, is 79 years old. He and Olga Bernstein have been married over 28 years and have two sons together, Ilya and Nicholas. Scot, an attorney, is Karl's son by a prior marriage. Karl has a Ph.D. in Engineering and worked as a nuclear engineer well into his sixties.

In April of 1999, Karl was formally diagnosed with Alzheimer's disease after several years of increasingly debilitating symptoms. He has an extensive family history of dementia and Alzheimer's disease, including his father, two aunts, two uncles, and his paternal grandfather. From 1999 through the fall of 2002, he was cared for at home by his wife, Olga, and their two sons, who were at that time teenagers. By the fall of 2002, Karl was unable to care for himself in any way, unable to eat food prepared for him, had become somewhat aggressive, and had experienced several falls.

In August of 2002, at the recommendation of Karl's physician, the family moved Karl to UCLA's Neuropsychiatric Institute for evaluation. Within days of arriving there, Karl experienced a marked decline. Upon his release from UCLA, Karl was transferred to Simi Valley Hospital due to pneumonia. Several weeks later, he was transferred to Los Robles Hospital. At this point, he could no longer swallow, thus necessitating a gastro-intestinal feeding tube. Karl was diagnosed with, among other things, advanced Dementia (Alzheimer's type), Parkinson's hypertension, and aspiration

pneumonia. Eventually, he was moved to Westlake Health Care Center, a skilled nursing facility for ongoing care.

In October of 2002, Karl again returned to Los Robles Hospital for possible aspiration pneumonia. Karl had no advance health care directive. A dispute arose between the family members regarding the level of appropriate care that should be provided to Karl concerning orders to or not to resuscitate (DNR). On October 25, 2002, a bioethics consultation was held at Los Robles. The primary issue discussed was whether a "full code" status was appropriate. The Bioethics committee found: "In view of absence of living will or power of attorney it is felt that the most appropriate response is to continue his care[,] and full code status is the appropriate diagnostic care."

In November of 2002, Scot filed an ex parte petition to be appointed as Karl's temporary conservator. Unable to assume the financial costs of opposing Scot's petition and cope with the stress of litigation and Karl's illness, Olga elected to compromise, allowing Scot to assume the duties of conservator on the express conditions that Karl remain in Thousand Oaks, that she and her sons be allowed "full and unfettered access and visitation rights" with Karl, and that Scot would adhere to physician recommendations. In April of 2003, the settlement agreement between Scot and Olga was entered as an order of the superior court.

Since January of 2003, Karl has been in a vegetative state, and has not spoken or communicated. Throughout 2003 and 2004, he was cared for at Westlake Health Care Center, with occasional visits to Los Robles Hospital for treatment of repeated pneumonia and infections. On January 25, 2005, he was admitted to Los Robles Hospital with acute renal failure, septic shock and dehydration. He has been treated in various units of Los Robles Hospital (either the intensive care unit or the definitive observation unit) since that time. During the last six years, while unable to consent to medical treatment, Karl has received a number of invasive procedures to keep him alive. He has suffered from aspiration pneumonia on several occasions, has tracheostomy, jejunostomy, and gastrostomy tubes, has had Botox injections, antibiotic injections, dialysis, and has been "coded" several

times. He is completely bedridden, non-communicative, fully contracted in a fetal position, incontinent, unable to eat or swallow, and is unable to undertake any volitional act.

Throughout this period, Scot and Olga, along with her two sons, have continued to differ on the care that Karl should receive. Olga and her sons believe that Karl is suffering needlessly, that he is not being provided with necessary pain medication, and that Scot has unreasonably withheld medical information about his status.

In April of 2008, Ilya and Nicholas petitioned the trial court for an order compelling Scot to comply with medically recommended treatment for Karl or, alternatively, removing Scot as conservator. They contended that Scot had abused his authority as conservator by (1) demanding a series of painful and invasive treatments having no medical or therapeutic value for Karl; (2) instructing medical staff to withhold pain medications; and (3) withholding information about Karl's medical condition and care.

In a declaration attached to the petition, Ilya explained that his father has been in a vegetative state since April of 2003, has not communicated, and has been formally diagnosed as being in a "chronic vegetative state" by his neurologist, Dr. Murphy. Ilya states that he visits him regularly at Los Robles Hospital and has been told by the nursing staff that Karl appears to be in pain, but that Scot has prohibited the use of morphine or other pain medications. Ilya observed that Karl's legs are cramped and twisted under him, his body must be turned every two hours, resulting in no meaningful rest or sleep, and his body cannot process the nutrition provided through the feeding tube rendering him extremely thin and wasted. Ilya stated that as a result of using the tracheostomy tube, he develops frequent infections, such as pneumonia. To combat infection, Scot has ordered intramuscular injections of antibiotics, which are extremely painful. Ilya stated that the doctors have concluded that the injections are too painful to continue given their lack of therapeutic value. Ilya requested that Scot be ordered to comply with the doctor's recommendations. Ilya added that his father, a scientist, would have been philosophically opposed to the continuation and prolongation of his life in circumstances where there is no possible hope of improvement.

Further, Ilya noted that Karl spoke of his own death in his handwritten journal. Ilya attached a copy of a handwritten entry from Karl's journal, which provides: "Karl, are you really so afraid to die? No, not really – just determined not to accelerate the process, and determined to squeeze some pleasure and comfort out of life, as well as to add to the pleasure and comfort of others." Ilya stated that Karl's present condition was uncomfortable and painful, not pleasurable for him, and his suffering causes stress for all his family. Ilya noted that at the Bioethics Consultation held in April of 2008, at Los Robles Hospital, the Bioethics Committee concluded there was no treatment that had therapeutic value for Karl's condition.

Ilya and Nicholas further contended that Scot had breached the settlement agreement by failing to provide for Karl's best interests. They requested that the trial court order Scot to provide morphine or other appropriate medications for pain relief as needed, prohibit medical treatments that are painful and medically futile, such as intramuscular antibiotic injections, discontinue feeding methods that are painful and futile, and remove the tracheostomy tube. Alternatively, if Scot objected to the recommendations of medical and hospital staff, Ilya and Nicholas requested that the trial court remove Scot as conservator and appoint Olga as conservator.

In May of 2008, Scot filed a response to the petition, disputing assertions that medically appropriate care had not been provided to Karl and opposing the appointment of Olga as successor conservator.

On May 20, 2008, at the noticed hearing on the petition for relief brought by Ilya and Nicholas, the trial court found that it did not have admissible evidence to grant the requested relief. The court denied the petition, but requested counsel for Karl, Deputy Public Defender Mary Shea, to investigate the well being of Karl and the issues raised. Because Scot maintained that any release of medical records to Ilya and Nicholas would constitute a violation of Karl's Health Insurance Portability and Accountability Act rights (42 U.S.C. § 1320d-6,), the court ordered the status report to be filed as confidential and a copy provided only to the conservator, his counsel, and the court. The court set the matter

for a future status conference to allow Karl's counsel time to investigate and prepare a confidential report addressing any and all concerns affecting the best interests of Karl.

On September 4, 2008, Ms. Shea provided a comprehensive report entitled "Confidential Status Report Assessing Conservatee's Health and Best Interests."[1] Ms. Shea and Adela Ramos, Senior Investigator for the Office of the Public Defender, interviewed 39 people, including Karl's treating physicians, neurologist, surgeons, nurses, social workers, risk management personnel, family members, friends, and Karl's former colleagues. Ms. Shea and Ms. Ramos also visited Karl in the hospital and took photographs of Karl and his surrounding environment. The report included as exhibits transcripts of the interviews, letters, declarations referenced in the report, and copies of the photographs taken of Karl at the hospital.

Ms. Shea found that the doctors were unanimous in concluding that Karl is in a persistent vegetative state. On the issue of pain, most if not all of the medical staff believe that Karl experiences some amount of pain. A review of the medication list for the last year revealed that no pain medications were being administered. A standing order for morphine was only recently written on July 21, 2008. Dr. Kumar noted that Karl had an adverse reaction to a morphine patch, including vomiting. Scot expressed that his father should not be given pain medication, other than Tylenol, unless it is clear that he is in continuous pain. Scot expressed his belief that the temporary discomfort caused by suctioning and antibiotic injections ceased upon completion of the procedure and did not warrant the administration of heavy pain medication. Ms. Shea concluded that no one should interfere with the administration of pain medication recommended by the treating physicians.

Ms. Shea reported that the doctors have determined a number of procedures and treatments are futile, such as any attempt at vascular access, intramuscular antibiotic injections, Botox injections, dialysis, and regular comprehensive metabolic panels. Dr. Measles indicated that essentially all of the treatments Karl is currently receiving are inappropriate and the family should withdraw support altogether. Every doctor interviewed concurred with the fact that Karl is in the end stage of Alzheimer's disease, there is minimal,

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[1] This report has been filed with this court under seal.

if anything, that can be done to change his condition, and he should be transferred to a sub-acute facility.

A number of hospital personnel have indicated that Scot's various demands, expectations that hospital rules do not apply to him, threats of law suits, and at times general demeanor of intimidation has affected the continuity of his father's care. Ms. Shea concluded, based on the information obtained in her investigation, that Scot was not following all of the recommendations of the doctors. In particular, the doctors uniformly state that Karl should be transferred to a sub-acute facility and Karl should be made a do not resuscitate (DNR) patient. Scot has instead opted for a partial DNR order. Of the family, friends, and colleagues interviewed, only one person, Scot, believed that Karl would want heroic measures to keep him alive at this point. All persons interviewed, except Scot, believed that Karl would want his wife and sons to have access to medical information regarding his care and treatment.

Ms. Shea recommended that the trial court allow Ilya and Nicholas to re-file the petition which initiated her investigation, set the matter for an evidentiary hearing to address the issues of life support and DNR orders, and determine who the conservator should be.

On September 8, 2008, Scot filed a response to the confidential status report, asserting that Karl was in stable medical condition and receiving appropriate medical care, and there was no evidence to establish good cause to remove him or interfere with the preservation of Karl's life. He disputed that he was not acting in concert with physician recommendations. In a declaration, Scot stated: "Notwithstanding the conclusion that [Karl] is in a vegetative state, he still opens his eyes when I speak to him, makes facial expressions, and assists in his care by relaxing his arms and legs when asked to do so."

On September 9, 2008, at a status hearing, the trial court set an evidentiary hearing on Ilya's and Nicholas's petition for October 14, 2008. Scot objected that he did not have adequate time to prepare and that the focus of the hearing seemed to have shifted away from medical treatment for Karl to "what the conservatee wanted for his person as it relates to his preservation of life." The trial court responded that "sequentially, first, we'll start

with the subject of whether or not Karl Bernstein's been receiving the kind of medical care he should receive. There's substantial evidence in the status report . . . that suggests that he has not."

On September 24, 2008, Scot filed an objection to the proposed order as to the scope of the upcoming evidentiary hearing. Over Scot's objection, on September 29, 2008, the trial court entered an order (1) allowing Ilya and Nicholas to proceed on their original petition filed on April 28, 2008, without the necessity of re-filing the petition; and (2) setting the matter for an evidentiary hearing on October 14, 2008, "to specifically address the issue of life support, 'DNR' orders, medically appropriate treatment and for a determination of who the conservator should be."

On October 3, 2008, Scot filed an ex parte application for a further order clarifying the scope of the October 14th hearing or continuing the hearing to allow him to prepare for "the new and different issues beyond the scope delineated" previously. The trial court denied his motion, reasoning that a prima facie case had been made sufficient to require that a hearing be held in a timely manner so that Karl does not languish in pain unnecessarily. The trial court stated: "I am satisfied [Scot] has had adequate advance knowledge with respect to the issues that are going to be taken up. And as I attempt to balance the needs of the conservatee and the needs of the conservator, I decline your request to continue the case."

Thereafter, on October 14, 2008, the trial court commenced an evidentiary hearing on the petition filed by Ilya and Nicholas that lasted five days. It heard testimony from 16 individuals, including Karl's treating physicians at Los Robles Hospital, social workers, nurses, Ilya, Olga, friends and family members, Karl's former colleagues, and Scot. Testimony during the five-day evidentiary hearing addressed (1) the appropriateness of Karl's care; (2) whether Karl is conscious; (3) whether Karl is in pain; (4) the vigilance of Scot as conservator; (5) the effects of removal of Karl's current care; and (6) Karl's wishes as to sustaining his life. The trial court also made a site visit to Karl's room at Los Robles.

Dr. Measles, a general surgeon, testified that he began treating Karl three years ago for infections. He does not believe that Karl's current medical treatment is in his

best interests. Dr. Measles stated that Karl has been in a contracted position for the last three years, which has made placement of an intravenous line difficult. He explained why it was no longer surgically or physically possible to give Karl intravenous antibiotics for infections, and that Karl must instead receive antibiotics through painful intramuscular injections. He stated that Karl has very little muscle tissue left and it must be "torture" for him to receive an intramuscular injection. He testified that the medical treatment Karl is receiving is futile and there is nothing that can be done to improve his medical status. He stated the only reason the doctors continue the current level of care is because Scot insists they do. He informed Scot that Karl should be in a subacute care facility where nature can take its course and that Karl does not need extreme efforts to prevent infection. He felt that Scot's understanding of the situation was "less than reality," and that Scot had an "obsessive, if not psychotic belief" that his father was actually communicating with him or was going to get better.

Dr. Vijay Kumar, an internist, lung and critical care specialist, has treated Karl since 2002. He testified that the Bioethics Committee unanimously concluded that resuscitation of Karl would be futile and he should be placed on a DNR. He stated that Scot has only recently removed the instruction for chest compressions if Karl goes into cardiac arrest, leaving instructions that chemical medications be employed to resuscitate him. For the last four months, Karl has been receiving short-acting morphine in liquid form which appears to be working.

Dr. Sujay Dutta, a specialist in infectious diseases, treated Karl for the past four years primarily for respiratory and urinary tract infections. He stated that Karl expresses pain through facial grimacing, wincing, and redness to his face. He does so when he is suctioned to remove secretions from the back of his throat and when he is turned in his bed. In April of 2008, at the Bioethics consultation, Dr. Dutta recommended that Karl be placed on a DNR order. He confirmed that Scot has refused that recommendation and requires chemical resuscitation.

When asked by Ms. Shea if any of the procedures or medical care currently provided to Karl are futile, Dr. Dutta responded: "It depends on how you define futile. If

your goal is to restore him to a previous level of functioning that he was at several years ago, in that sense it is futile. But if the goal is to restore him to and maintain some level of comfort, then it's not futile." Dr. Dutta testified that the care Karl is receiving now is to "maintain his life and to keep him comfortable." He testified that his state of health has "improved" in the sense that he has recovered from infections, but "his overall state of health in terms of his dementia and his overall being has not improved."

Dr. Alan Mintz, a general and vascular surgeon, is Chairman of the Bioethics Committee at Los Robles Hospital. He testified that the consensus of the treating doctors was that ongoing aggressive supportive care for Karl was futile, and that the majority of the providers of Karl's medical care think it is a "travesty." He defined ongoing aggressive care to include administration of antibiotics, any surgical procedures, and placement of central venous catheters. He believed that gastrostomy feedings for patients in a chronic vegetative state were unethical. He sated: "I do not see utility in continuing life for somebody in a chronic vegetative state. They have no quality of life. I consider maintaining that person on IV, antibiotics, artificial nutrition, and hydration to be extending the death process, not extending meaningful life."

Dr. Mintz testified that the nursing staff felt threatened by Scot and found his behavior disruptive in the nursing unit. He stated that Scot would come into the nursing station, contrary to hospital rules. He observed Scot at a Bioethics meeting insist that the committee not allow the other family members to attend. Scot brought a tape recorder to the consultation, which they asked him to remove or turn off. Scott refused and then relented after the committee threatened to call security.

Lisa Bennett, a registered nurse and director of risk management at Los Robles Hospital Medical Center, testified that she reviewed Karl's medication list for the past year and could not see a notation of any pain medication being given. She also testified that she had been contacted several times with complaints concerning Scot's interaction with nurses.

Susan White, a registered nurse employed by Los Robles Hospital, provides care for Karl and notices him grimacing when he is turned every two hours or his bed sore is

cleaned. She explained that Karl has a stage four bed sore which is down to the bone and packed twice daily. She has not given morphine to Karl out of fear that it would depress his respirations. She stated that Scot placed signs around Karl's bed instructing the nurses what to do. She stated that other nurses have refused to care for Karl because of Scot's behavior. She believes that Scot's behavior toward the nursing staff has hindered Karl's care.

Georgette Adang, a registered nurse employed at Los Robles Hospital in the capacity of case management, testified that she was Karl's case manager for two and one-half years. She was present at a meeting to establish guidelines for Scot in terms of his calling in and demanding information from the nursing staff at all hours. He was instructed not to call when the nursing shifts changed, but continued to do so. She participated in trying to find placement for Karl at a subacute care facility. Several facilities refused to take Karl because Scot was perceived to be too demanding.

Nina Priebe, lead clinical social worker at Los Robles Regional Medical Center, described interactions between Scot and the staff. In January of 2006, Scott reacted angrily with a nurse in the intensive care unit while requesting that visiting hours be extended for him. Ms. Priebe observed that he was loud, the tone of his voice was aggressive, and his behavior was threatening. Ms. Priebe intervened and Scot told her to "shut the fuck up." She called security and he calmed down. She testified that Scot's behavior during Bioethics Consultations made the meetings tense. In contrast, she observed that Ilya conducted himself as a gentleman, and Olga was calm and polite.

Lucille Chaney, a nurse in the intensive care unit (ICU) at Los Robles, testified that Scot would come into the ICU with his computer and use the phone line to access the internet. This would disable the phone line for the entire 10 bed side of the room. He would not unplug his computer from the phone line until security was called. She felt he was disruptive to the way in which the hospital needs to operate. In 2005, he also threatened to sue her if she did not do what he said. Her impression was that Scot caused a general atmosphere of intimidation through threats of possible litigation.

Ilya testified that he graduated from high school at the age of 16 so he could care for his father at home while his mother worked. He took evening courses at Moorpark Community College and then received his Bachelor's degree from the University of California at Berkeley after his father was placed in Westlake Health Center in 2002. Ilya testified to his observations of his father's physical reactions during medical procedures, the family's frustrations in not receiving information about Karl's medical care, his understanding that the treatment Karl was receiving was futile, and his belief that attempts to "chase" recovery are painful and uncomfortable for his father.

Olga testified that during their 28 year marriage, she and Karl never had direct discussions about end-of-life decisions, but she could infer how he felt based on what he told her about the death of his parents, the death of their family pets, and the health concerns of his paternal aunts and uncles. He prided himself on being logical and rational. She believed Karl had a realistic viewpoint that death was inevitable.

Karl's father and four siblings all developed symptoms of Alzheimer's. Karl mentioned to Olga after his father died from a heart attack, that it was a blessing he died before he lived through the horrors of Alzheimer's. While his mother was in a coma, Karl mentioned to Olga that it haunted him that his mother might be in pain. When she died, Karl commented to Olga that his mother's "nightmare" was over. Olga testified that her father also had Alzheimer's disease. Karl was supportive of her decision to authorize a DNR instruction for her father while he suffered from the disease and died from pneumonia.

Olga stated that Karl was very squeamish about pain. She expressed her preference that Karl be allowed to die with dignity and without pain. She believes that Scot, in his zeal to keep Karl alive, has subjected him to numerous torturous procedures that no human being should have to go through and has not followed the recommendations of the physicians. She believes Karl is in pain based on (1) his facial grimaces and the redness of his face when he chokes from the secretions in his mouth; (2) being in bed for four years and lying in a fetal or contracted position; (3) the nurses moving him every two hours from side to side and jostling his tubes; and (4) the nurses changing the dressing on his bedsore without pain medication. She testified that she would authorize a DNR order for Karl.

During the trial, on October 17, 2008, the trial court personally viewed Karl in his room at Los Robles. The judge observed that Karl opened and closed his eyelids while lying in bed, but his eyes were largely rolled up in the sockets. He did not see much of his pupils. The judge noted for the record that he did not discern from Karl that he understands or reacts in any way to what is said to him. He observed the nursing staff reposition Karl in bed and suction his throat. Prior to commencing these procedures, the judge observed that Karl's pulse rate was 75. As the nurses began suctioning fluid from Karl's mouth, Karl's skin color became darker pink, he exhibited body gestures the judge interpreted as discomfort, and his pulse rate increased to 84. When the suctioning device was removed from his tracheostomy tube, he became less pink and exhibited less distress. The judge was not able to perceive that Karl was able to move his body to accommodate the requests of the nurses or that he recognized or resisted them. He stated that Karl appeared to know he was being touched, and "have the sensation of intrusion into his body with the suctioning devices. I could discern that level of awareness. I couldn't go beyond that except to say that the gestures that I saw him make were gestures that I would associate with discomfort. He did not look pleased to be experiencing that intrusion. And as I watched what was inserted into his body, I didn't perceive that any human being would willingly accept such an intrusion."

Scot testified that he had a close relationship with his father and had many end-of-life discussions with Karl. He stated that his grandmother had inoperable lung cancer and Karl arranged for her to fly to New York for a further opinion and operation which extended her life by a year. After the surgery, his grandmother eventually went into a coma for approximately one year, during which time Karl made medical decisions for her and placed her on a ventilator. Scot testified that his father told him he thought advance directives were "ridiculous" and "insane" because it would cause one to be denied medical care. He stated his father, in seeing a television special about Dr. Kevorkian, said that a person who sought to be administered drugs to die in his sleep must have been "depressed," and should be treated for depression instead. He thought that seeking to die was "illogical," and analogized it to "jumping off a cliff because you're afraid you might fall."

Scot further testified that his father did not believe in putting the family pets to sleep and felt the dogs should die when it was their time and not have their death accelerated. He testified that Karl was very comforting to friends during their time of grief and would not have expressed any negative opinion about what their decisions were. Scot pointed to the excerpt from Karl's journal in which Karl stated that he was not afraid to die, but was "determined not to accelerate the process."

Scot explained that he disagreed with Olga as to whether a DNR order was appropriate for Karl, which led him to seek to be appointed as conservator in 2002. He authorized the insertion of the jejunostomy and tracheostomy tubes as conservator at the recommendation of physicians. He denied that he had ever interfered with the administration of pain medication. He preferred that doctors use a nonnarcotic pain reliever if it would work, rather than a narcotic pain reliever like morphine because the latter caused nausea and vomiting. He denied his father was experiencing pain during suctioning or while being turned in bed. He acknowledged that his father does not like to be suctioned, but it only lasted for about ten seconds. He stated the doctors describe the grimacing facial gestures made by Karl while he is turned in bed as a "reaction" rather than an indication of pain. He maintained that pain was a driving force in evaluating the procedures he approves or disapproves for his father.

Scot denied behaving in a threatening manner with Nina Priebe, and testified that he only told her to "Stop it." He denied threatening to sue anyone.

Scot testified that when his father dies, he wants it to be as gentle as possible and he does not want to accelerate the process. He stated that he does not want him to drown or starve to death by removing the nutrition, hydration, and respiratory tubes. He considers these tubes "comfort care." When asked if he believed his father was "squeezing pleasure and comfort out of his life" at this point, Scot testified that he did not know what Karl was feeling.

Scot testified that if he could find an appropriate subacute facility for Karl where he could get care that is acceptable, he would move him there. He acknowledged declining four facilities in the Los Angeles area that had accepted Karl.

On cross-examination, Scot conceded that the doctors have recommended for some time that Karl be placed on a DNR, but he has not approved this recommendation. For example, in April of 2008, at the Bioethics consultation, the committee recommended a DNR instruction for Karl. Nevertheless, it took Scot until October of 2008 to authorize the removal of chest compressions to his code status.

In rebuttal, Ilya testified that if the court removed Scot as conservator, he would be willing to serve as conservator either by himself or with his brother, Nicholas. When asked if he believed that all types of assistance should be withdrawn and his father placed in hospice care, Ilya stated this was his position prior to the trial. He stated: "Scot has made it very difficult for me really [to] have any frank conversations with any of the physicians. After hearing their testimony in the courtroom, I'm less certain that that is the proper way to deal with this. And I would really appreciate the ability to have conversations with them candidly, outside of an intimidating courtroom environment where they are concerned about liability and other such things, to really get to the truth of the matter and . . . come to a decision with Nicholas as to what the best plan of care would be." He stated he intended to follow a plan of care that was in the best interests of Karl, but that he could not say definitively if he would authorize removal of the nutrition, hydration, and respiratory tubes.

On cross-examination, when asked if he had the life experience to make health decisions for Karl, Ilya responded, "I think the fact that I've taken care of my dad very closely since I was 15 and he began to exhibit signs of dementia since I was 14, and that we went through several other experiences with my mother's health, . . . yes, I definitely do have the life experience to deal with these decisions."

Trial Court Rulings

On October 20, 2008, the trial court granted the petition to remove Scot as conservator, but declined to appoint Olga as the new conservator due to the prior settlement agreement. The court appointed Ilya temporary conservator, and continued the matter to October 24 to allow Ilya time to file a petition for appointment as conservator and to review the court investigator's report concerning Ilya's suitability. The court found: (1) by a

preponderance of the evidence, that Scot's zealous and tenacious effort to look after his father resulted in bad judgment and conduct that impacted his ability to care for the best interests of Karl; (2) it was able to articulate a harm that befalls Karl as a result of Scot's behavior; (3) the medical evidence indicated that Karl was moving towards the end of his life and the tools of medicine and modern science have interceded to disrupt that which is happening; (4) Karl's end of life process is not accelerated by not intervening medically; and (5) Karl experiences unnecessary pain and discomfort, and the medical procedures administered to prolong his life are not medically necessary or in Karl's best interests.

On October 24, 2008, after reviewing the court investigator's report indicating that Ilya could adequately discharge the responsibilities as conservator, the court entered its formal order appointing Ilya as temporary conservator. Scot then filed an ex parte application for an order limiting Ilya's power to direct healthcare providers to discontinue the hydration, nutrition, and respiratory care pending a hearing or a final determination of Scot's appeal of the order removing him as conservator.

On October 29, 2008, Ilya filed a petition for appointment as successor conservator. He requested the power to change Karl's code status by executing a DNR order, terminate blood draws for laboratory testing, order the provision of a consistent level of pain medication through application of a medicinal patch, deny the use of any surgical procedure or intramuscular injections, move Karl to a subacute or nursing care facility in Southern California, provide Karl with hospice care, make all "healthcare decisions that the conservator in good faith based on medical advice determines to be medically necessary, including the decision to withhold nutrition and hydration."

On November 4, 2008, Scot filed an objection to Ilya's appointment as permanent conservator and a request for a hearing under Probate Code section 2359, subdivision (a), before the healthcare providers discontinued hydration, nutrition, and respiratory care.

On November 10, 2008, the trial court held a hearing on Ilya's petition and Scot's objection. Scot objected to language in the proposed order granting Ilya power to make a decision to withhold nutrition and hydration without a further hearing under the

clear and convincing evidentiary standard required by *Conservatorship of Wendland* (2001) 26 Cal.4th 519. Ms. Shea responded that the original petition filed by Ilya and Nicholas specifically requested permission to discontinue feeding methods and remove the tracheostomy, and no further hearing was necessary. The trial court appointed Ilya as conservator and denied Scot's request for a further hearing. The court rejected the "clear and convincing standard," stating that the "preponderance test" applied in this case.

Discussion

I. Removal of Petitioner as Conservator

Scot contends that the trial court abused its discretion in removing him as conservator. He argues the trial court confused the issue of removing him with the issue of whether Karl's life should be terminated. He argues the only "harm" articulated by the trial court was Scot's actions in keeping Karl alive. He contends the record reflects that through his diligence, Karl has received excellent care. He adds there is no evidence that his behavior negatively impacted Karl's care.

Pursuant to Probate Code section 2355, if the conservatee has been has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator, in good faith based on medical advice, determines to be necessary.

Probate Code section 2650, subdivision (i) provides that the trial court may remove a conservator in any case in which the court in its discretion determines that removal is in the best interests of the conservatee. Whether sufficient cause exists to remove a conservator is a question of fact to be determined in the broad discretion of the trial judge, whose determination will not be disturbed except upon a showing of manifest abuse of discretion. (See, e.g., *In re Estate and Guardianship of Davis* (1967) 253 Cal.App.2d 754, 761; see also *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449 [abuse of discretion standard on appeal].)

Because no other burden of proof is provided by law, the burden of proof required to prove that removal is in the best interests of the conservatee is by the preponderance of the evidence. (Evid. Code, § 115.) The trial court applied the proper

burden of proof and properly found that Scot was not acting in good faith or in Karl's best interests because Scot's judgment and objectivity were impaired. The court properly found that Scot had not based his health care decisions on medical advice. The treating physicians all agree that Karl has been in a persistent or chronic vegetative state for several years with no hope of recovery, the painful and futile medical procedures should be terminated, he should be placed on a DNR, and he should be moved to a sub-acute care facility. The trial court's findings are supported by the evidence. There was no abuse of discretion.

2. The Trial Court's Rejection of the Clear and Convincing Standard

Scot next contends the trial court erred by failing to apply the clear and convincing standard required by *Conservatorship of Wendland, supra,* 26 Cal.4th 519, in determining whether to allow removal of nutrition, hydration, and respiratory care. He argues that Karl falls within the category of conscious conservatees to whom *Wendland's* clear and convincing standard must apply. Indeed, he argues, the real parties in interest agree that Karl can perceive pain. Scot contends that Karl's ability to perceive discomfort mandates that his constitutional rights be protected under the clear and convincing evidence standard. He adds that the weight of the evidence is that Karl does not wish to die. Scot's contentions are without merit.

In *Wendland*, 26 Cal.4th 519, a traffic accident left the conservatee conscious, yet severely disabled, both mentally and physically. The conservatee was able to throw and catch a ball, operate a wheelchair with assistance, and open and close his eyes on command. He suffered recurrent medical illnesses, was paralyzed, and was dependent upon tube feeding for nutrition and hydration. (*Id*. at p. 525.) Two years later, his wife, the conservator, petitioned for permission to withhold artificial hydration and nutrition. Family members testified that the conservatee would not want to live like a "vegetable." The conservatee's mother and sister opposed the petition. The Supreme Court held that a conservator may not withhold artificial nutrition and hydration from a *conscious* conservatee who is not terminally ill, comatose, or in a persistent vegetative state, and who has not left formal instructions for health care or appointed an agent or surrogate for health care decisions, *absent clear and convincing evidence* that the conservator's decision is in

accordance with either the conservatee's own wishes or his best interests. Because the conservator's showing had not met that standard of proof, the Supreme Court affirmed the trial court's order denying her petition. (*Id*. at p. 554.)

The Supreme Court emphasized, however, "the clear and convincing evidence standard does not apply to the vast majority of health care decisions made by conservators under [Probate Code] section 2355. Only the decision to withdraw life-sustaining treatment, because of its effect on a *conscious* conservatee's fundamental rights, justifies imposing that high standard of proof. Therefore, our decision today affects only a narrow class of persons: *conscious conservatees* who have not left formal directions for health care and whose conservators propose to withhold life-sustaining treatment for the purpose of causing their conservatees' deaths. Our conclusion does not affect permanently *unconscious* patients, including those who are comatose or in a persistent vegetative state, . . . or conservatees for whom conservators have made medical decisions other than those intended to bring about the death of a conscious conservatee." (*Conservatorship of Wendland*, 26 Cal.4th at p. 555, italics added.)

Here, the evidence is undisputed that Karl is in a persistent vegetative state with no hope of recovery. *Wendland*, thus, is not applicable. We reject Scot's contention that Karl is "conscious." The trial court did comment, after its site visit to Karl's room, that, unlike someone anesthetized during surgery, Karl has "awareness. He's not unconscious in the way in which I use that language. He has an awareness." Nevertheless, these comments were addressed to the discomfort Karl exhibited in response to certain medical treatments, i.e., the turning, suctioning every two hours, tube feeding, and bathing. This showing of discomfort does not render Karl "conscious" within the meaning of *Wendland*. There is no evidence in the record to support a finding that the ability to have a reflexive response to painful stimuli is the equivalent of being conscious. Karl has no awareness of

himself or his environment, no capacity for volitional acts, and no ability to communicate or receive communication.[2]

Even assuming, arguendo, that the clear and convincing standard applies in this case, we have closely scrutinized the record and are satisfied that the heightened standard was met.

3. Denial of the Request for a Further Hearing

Scot contends the trial court erred by denying his request for a further hearing on the issue of whether the successor conservator may authorize the removal of hydration, nutrition, and respiratory care, under the *Wendland* standard. We disagree.

As the trial court observed, Probate Code section 2355 does not require a further hearing for the court to give its approval of a conservator's decision to withdraw medical treatment, or guarantee an interested party the right to have a hearing should the interested party take issue with a decision of the conservator. (*Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, 196-197, 200, 202-203.) We adopt the trial court's reasoning:

"The Legislature provided trial courts with the authority to address concerns expressed by interested [parties] where the trial court believes a further hearing is necessary. Probate Code § 2359(a) states, 'Upon petition of the . . . conservator or . . . conservatee or other interested person, the court <u>may</u> authorize and instruct the guardian or conservator or approve and confirm the acts of the guardian or conservator.'

"The Legislature granted the trial court the authority to use its discretion in holding a hearing. This court uses its discretion and declines to provide Scot Bernstein a further hearing on the subject of terminating life sustaining treatment. The court has just completed a lengthy trial concerning the removal of Scot Bernstein as conservator. The evidence is without controversy that Karl . . . has been in a persistent vegetative state for years and that he will not improve.

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[2] At oral argument, Scot claimed that a person could be both in a persistent vegetative state and conscious at the same time. We reject this theory. The terms are mutually exclusive.

"The Court has found that Scot . . . is not capable of acting in the best interest of the conservatee. The Court has considered the evidence of Karl Bernstein's wishes as expressed in his autobiography. The evidence presented at trial, as well as the report of the court investigator, confirms that Ilya Bernstein is seriously and in good faith considering the advice of the medical professionals at Los Robles Hospital before making any decision about removing life sustaining treatment.

"Contrary to the assertion of Scot . . . , the standard to be applied in this case is the preponderance test and not [the] clear and convincing standard. The clear and convincing standard articulated in *Wendland* applies in cases where the conservatee is conscious not where the conservatee is in a persistent vegetative state.

"Not only is there no useful purpose in having a further hearing on the subject of the removal of life sustaining treatment, this court finds that such a hearing would only compound the damage done to [Karl] and this family . . . by [Scot]. Scot Bernstein was given every opportunity to present this court with any evidence he wanted considered. [Scot's] demand for an additional hearing is an effort to impose his will at any cost upon Karl . . . and the remainder of [Karl's] family.

"This family has suffered enough. The Chairman of the hospital's bioethics committee has testified that sustaining life in [Karl's] case is a travesty. Neither the published case law nor the statutes require this court to hold a further hearing. This court exercises the discretion the Legislature granted in adopting Probate Code § 2359(a) and declines to take further evidence on the subject of terminating life sustaining treatment."

Courts have held that judicial intervention in "right to die" cases should be minimal. " 'Courts are not the proper place to resolve the agonizing personal problems that underlie these cases. Our legal system cannot replace the more intimate struggle that must be borne by the patient, those caring for the patient, and those who care about the patient.' " (*Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 312.) "[W]hen a conservator desires removal of life-sustaining treatment, courts should intervene only if there is disagreement among the interested parties, and the court's role is confined to ensuring the conservator has complied with Probate Code section 2355 by making a good faith decision

based on medical advice." (*Id*. at pp. 312; *Conservatorship of Drabick*, (1988) 200 Cal.App.3d 185, 200, 204.)

Here, the successor conservator has not yet made a decision to withhold life-sustaining treatment. The undisputed and overwhelming evidence presented at the evidentiary hearing demonstrated, however, that such a decision could be made in good faith based on the medical advice of the treating physicians. Scot made no offer of proof below that would warrant a further hearing on the issue or a contrary finding.

Conclusion

The petition for an extraordinary writ is denied. This opinion is final as to this court immediately. (Cal. Rules of Court, rule 8.490 (formerly rule 8.264(b)(3).) Our order to show cause, having served its purpose, is discharged. Our temporary stay order of November 19, 2008, is vacated and the request made at oral argument, for a stay while review is sought in the California Supreme Court, is denied.

Costs are awarded to the real parties in interest.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Kent Kellegrew, Judge

Superior Court County of Ventura

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