IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, et al. Plaintiffs and Appellants, vs. KAREN SMITH, MD., MPH, as Director of the California Department of Public Health, Defendants and Appellants.	Case No. A147987 Alameda County Superior Court, Case No. RG13700100

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

COUNTY OF ALAMEDA

Hon. Evelio M. Grillo, Presiding

ANSWER TO AMICUS CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF HEALTH FACILITIES

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I. *INTRODUCTION*

Amicus California Association of Health Facilities (CAHF) raises an array of unsupportable horrors. First, Amicus CAHF alleges that needy patients "cannot wait for judicial determinations to approve the care and treatment they need to have upon admission." CAHF Amicus Brief (CAB) at 4-5. This is an erroneous alarm for several reasons. First, this case is not about judicial decisions as to "care and treatment," unlike the authority granted to courts by Probate Code §3201, which permits a court to make such determinations. Petitioners are, in major part, seeking a decision as to decisional capacity, a legal status, not anything of a medical treatment nature. This is exactly the same as courts have ordered for the mentally ill (*Riese v. St. Mary's Hospital* (1987) 209 Cal. App. 3d 1303, for prisoners (*Keyhea v. Rushen* (1986) 178 Cal.App.3d 526), and for mentally disordered offenders (*In re Qawi* (2004) 32 Cal. 4th 1), each of which made no determinations as to care and treatment.

Second, as stated by Amicus CAHF, residents are generally transferred from hospitals (CAB at 4), so that they have existant hospital discharge orders for treatment needs upon admission, and thus nursing homes are quite aware of the necessary medical treatment for the resident at admission to the home. Thus, the orders for insulin and similar unquestionable medical needs upon admission (CAB at 4) will not result in "inevitable and unnecessary delay in treatment" (CAB at 4) in order to treat the resident.

Third, while Amicus CAHF paints a picture of waiting for months ("two to four months" (CAB at 10)) before being able to treat, and having to go to court and obtain guardianships or an order under Probate Code §3201 before treatment commences, this is not what happens, nor what is being sought in this case. A good example of what is sought is Welf. & Inst. Code §5334, which resulted from the *Riese* case. *Riese* required a judicial determination of decisional incapacity for the short term mentally ill. That section states:

"(a)Capacity hearings required by Section 5332 shall be heard within 24 hours of the filing of the petition whenever possible." Welf. & Inst. Code §5334. Further, the section states that: "(b)Capacity hearings shall be held in an appropriate location at the facility where the person is receiving treatment, and shall be held in a manner compatible with, and the least disruptive of, the treatment being provided to the person." Further, under Section (c), the capacity determination may be made by: … "a court-appointed commissioner or referee, or a court-appointed hearing officer," and therefore need not be made by a judge.

This case does not seek the relief permitted in Prob. Code §3201, where a judge authorizes treatment. In the event of a determination of incapacity, and the absence of a surrogate, the statutory process, as modified by *Rains v. Belshe* (1995) 32 Cal. App. 4th 157, would be used to make the treatment decision.[1] Amicus CAHF cites to no case where any person was denied medical treatment as a result of the Court Orders in *Riese*, *Keyhea*, or *Qawi*.

Amicus as well argues that, for the incapacitated resident whose "medical needs continue to change there would be the need for future judicial decrees just to be able to provide the necessary care and treatment." CAB at 5. That argument too is incorrect in that this case is not about care and treatment as set forth above. Further, to the extent an incapacitated resident claims regained capacity, the burden is on that individual to seek an administrative order as to such regained capacity.

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[1] Petitioners have appealed the involvement of the treating physician in what the statute calls the "review" (§ 1418.8(e)) but which in fact is the consent or authorization to commence the treatment itself. *Rains* modified the statutory process by requiring a patient representative, and further requiring that the representative make the treatment decision except in exigent circumstances. 32 Cal. App. 4th at 185-186.

In its argument as to the legislative history of §1418.8, Amicus CAHF cites at length to the evolution of the statute, in that it was amended several times (CAB at 11-28), as well as to regulations developed from the statute. What is absent from Amicus' history, as well as from the statute itself, is any discussion, and resultant statutory, or regulatory language, as to certain fundamental constitutional rights, such as notice, a meaningful opportunity to oppose the loss of decisional autonomy, or an advocate for an individual who is "ill and infirm" (CAB at 3 – 4), usually elderly, and claimed to be decisionally incapable. See §1418.8(a)-(l). Further, there is no discussion in the legislative history of the constitutionality as to the individuals involved in the medical, capacity and surrogacy recommendations, also being the decisionmakers as to those decisions. *Cf. Washington v. Harper* (1990) 494 US 210 (prohibiting such involvement). Lastly, there is no discussion in the legislation or its history as to the use of the statute to end lives, or, except in emergencies, the use of the statute to administer anti-psychotic drugs which, for the elderly, carry black box warnings of death.

There is nothing in the legislative history as to requirements of judicial determinations of incapacity in instances involving parens patriae non-consensual medical treatment, and indeed nothing as to parens patriae considerations at all. CAB at 11- 28. The fact is that the court decisions as to such limitations did not develop until cases decided after the last amendment to §1418.8. *See Conservatorship of Wendland* (2001) 26 Cal.4th 519 and *In re Qawi, supra*.

Amicus CAHF as well cites to a Petition and Response filed in this court, but dismissed and never decided, implying that that case (*Doherty v. Lungren,* No. A0600100), was decided adversely to petitioners, which is incorrect. (Nevertheless, declarations filed in that case, particularly as to legislative intent, may have relevance.)

Amicus asserts that petitioners portray a world in which physicians are merely "self-interested and not to be trusted" (CAB at 6), but that was not the case in *Qawi,* or *Riese, Keyhea, Thor v Superior Court* (1993) 5 Cal. 4th 725, or the federal cases such as *Washington* or *Vitek v. Jones* (1980) 445 U.S. 480, and it is not the case here. Nursing home residents have constitutional rights. Physicians in nursing homes perform necessary medical services as they do in the cases cited above. Changes in the law do not evidence an absence of trust. For example, informed consent did not evidence an absence of trust in *Cobbs v. Grant* (1972) 8 Cal 3d 229, but instead recognized the autonomy of the patient.

This case is not about enforcement of a constitutional statute, but replacement of an unconstitutional one. It particularly concerns facial issues of determinations of incapacity which cause residents to lose autonomy, liberty to leave the facility, control over their property, and possibly their lives, all of which concern constitutional rights of privacy and due process.

After the negation of the alleged horrors, the matter may be reduced to the arguments on appeal, and positions as to those arguments, made by Amicus CAHF, and that §1418.8 facially does not deny nursing home residents due process and privacy, and further, as applied, does not deny constitutional rights as to the use of anti-psychotic drugs, and the nonconsensual ending of their lives. The remainder of this brief will respond to Amicus CAHF as to those points.

II. *THE EVIDENCE SUPPORTING THE PETITION IS BOTH COMPETENT AND SUFFICIENT*

To begin with, as to the claim of evidentiary incompetence made by CAHF (CAB at 51) it must be pointed out that Amicus CAHF has made many factual claims without support, citation, or any foundation whatsoever. Thus, as merely one example, CAHF states, with no foundation, references, or citations

whatsoever, that “16% of CAHF's members have indicated that they have declined new admissions for individuals without decision-makers based upon the Superior Court's June 2015 Order…” CAB at 3. This is the rankest form of unfounded hearsay, based merely upon the alleged 16% having "indicated" such results. And CAHF goes even further to assert that another 85% (making 101%) have "indicated" they would so decline if the statute were invalidated. CAB at 3. Such unsupported statements should be given no validity by this Court. Similarly, and without attribution, CAHF makes unsubstantiated claims as to the numbers of residents without capacity or surrogates "based on input from its members" (CAB at 3), reduction of use of antipsychotic drugs (CAB at 42), and that the majority of residents receiving end of life discontinuation of curative care are suffering from severe to profound dementia. CAB at 45. These factual statements are made without citation, facts in the record, or attribution, and as such, should not be given any weight.

As to the exhibits and declarations provided by petitioners to the superior court in this case, CAHF claims that the evidence provided by petitioners, some of which was cited by the superior court, is incompetent. CAB at 51. Respondent had ample opportunity to test the admissibility of the declarations as well as the exhibits, many of which came either from nursing home charts kept in the ordinary course of business, protocols, and processes created by the Department of Public Health. Respondent chose only to submit the declaration of a treating physician, much of which was hearsay, and that of another physician. However the evidence from both sides was set forth for the most part in support of or opposition to facial attacks on the statute itself, as to which the evidence served as examples as to the facial unconstitutionality of the statute, and thus the incidents depicted therein were not necessary to the argument as to the statute, but reflective of the unconstitutionality of the statute and of the potential for risk of error.

The result is that the evidence submitted by petitioners in either declaration or exhibit form, was received by the superior court, and was not stricken. As such, it is both competent and admissible and amicus has not shown otherwise.

III. *AMICUS FAILS TO SHOW THAT MEDICAL CARE WILL BE JEOPARDIZED BY THE OUTCOME OF THIS CASE*

At the outset of its Brief Amicus CAHF claims that medical treatment and "care will be jeopardized" by the potential outcome of this case. CAB at 2. It goes on to claim that "residents cannot wait for a judicial determination to approve the care and treatment that they need…." CAB at 5.

There is no doubt that physicians, not lawyers nor judges, have the skills necessary to diagnose or treat medical conditions. However, as set forth in several recent cases, and unlike *Rains v. Belshe*, competence and the capacity to make decisions as to medical care and treatment are legal decisions, (*See, e.g. Qawi*, 32 Cal 4th at 17) and thus the capacity decision, and notice and representation as to that decision, are legal matters. Nor, as claimed by Amicus CAHF, will an administrative decision as to capacity result in untimely care and treatment. CAB at 5. Amicus CAHF relies only on the appointment of and petition for a conservator or public guardian, or alternatively a petition under Probate Code §3201, as to medical treatment as to petitioners' claims. However, a far less costly and time consuming process is constitutionally acceptable, and has been used in many similar instances to decide the non-medical issue of capacity, as with an administrative tribunal, and the time limitation regarding such use. *See, e.g.*, *In re Qawi*, *supra* (2001); Welf. & Inst. Code §§ 5332-5334.

As with the very nature of patient consent itself, as in *Cobbs v. Grant* (1972) 8 Cal. 3d 229, considerations of patient autonomy require physician time aside from treatment, and *Cobbs* was aware of the need for legal

determinations of patient competence by citing to a case (*Mitchell v. Robinson* (Mo. 1960) 334 S.W.2d 11) involving a patient who was "upset, agitated, depressed, crying, had marital problems and had been drinking" but nevertheless was legally competent. *Cobbs* at 242.

Ample law exists where patients had been deemed medically incompetent, but later determined legally competent. *See e.g. Bartling v. Superior Court* (1984) 163 Cal. App. 3d 186, and cases cited therein..

IV. *PETITIONERS ARE NOT SEEKING MANDATED JUDICIAL REVIEW; THEY SEEK AN ADMINISTRATIVE HEARING*

Amicus CAHF argues that the result of this action will be to deny needed medical treatment to elderly residents of nursing homes due to the delay and cost of going to court. It points to the statutory history as to the use of public guardians and conservators, and of Probate Code § 3201. CAB at 10. But these are not the alternatives sought in this case or used in similar cases as to determinations of incapacity and other similar losses.

As an example, in *Riese v. St. Mary's Hospital,* while ordering a judicial determination of incapacity, the Legislature responded with an administrative hearing. In *Keyhea v. Rushen* the same outcome occurred. In *Washington v. Harper,* the same, and in *Vitek v. Jones*, the same. An administrative process is both far less costly than the judicial process and can result in a determination in a matter of a day. *See* Welf. & Inst. Code §§5332-5334.

An administrative hearing is, as the cases above permitted, appropriate as this case is not about refusing medical care to the elderly; it is about giving the elderly the same constitutional protections as are granted to prisoners and the involuntarily mentally ill. Further, to the extent that this court determines that the statute is unconstitutional, changes that are required will undoubtedly not be required to occur overnight, but instead with all deliberate speed, and during periods within which elderly will receive needed medical care.

Amicus CAHF claims that the only alternatives to the §1418.8 process as to determination of incapacity would be to use either the public guardian or the process available under Probate Code §3201. CAB at 12. But such has not been the case as to the use of antipsychotic drugs in cases such as *Qawi, Riese, Keyhea,* and *People v. Petty* (2013) 213 Cal. App. 4th 1410. The issue in those cases, as here, concerned a presumably competent person's right to refuse antipsychotic drugs and the courts required an adjudication of incompetency. That is the issue here, as well as assuring due process in determining the absence of a surrogate. The result is that there is never a need for a public guardian nor use of Probate Code §3201, unless, as in *Rains*, highly intrusive treatment are involved, such as surgery, antipsychotic drugs, or end of life processes.

Similar considerations involve Amicus CAHF's claims of a two to four month wait (CAB at 9), and the need to go to court "every time consent for non-routine treatment is needed." (CAB at 11). Such apprehensions have not resulted from quasi-judicial determinations of incapacity as to the non-consensual use of anti-psychotic drugs, nor the determinations of incapacity resulting in the appointments of public guardians nor conservators.

V. *THE LEGISLATIVE HISTORY DOES NOT REQUIRE DENIAL OF THE RELIEF SOUGHT*

Amicus spends much of its brief citing to the legislative history of §1418.8 in justifying the constitutionality of the statute. CAB at 11-28. However, several lessons emerge from that history. The fact is that there is in the history, discussion and resultant statute, no requirement of notice, nor meaningful opportunity to oppose, no advocate for the ill, elderly resident about to lose fundamental rights, and a non-neutral physician who is primarily involved in treating the resident is permitted both to make initial legal decisions

as to autonomy and surrogacy, and then to review and approve her own previous decisions before treatment occurs.

As recognized by Amicus CAHF, quoting from the findings as to Section §1418.8 (CAB at 19), the Legislature determined that its intent was to provide treatment where there was no legal surrogate. Thus, the Legislature expressly found that, for those who lacked capacity, "there is a need to identify a surrogate decisionmaker…" but there are many who "lack [a] surrogate decisionmaker," so that for those who lack capacity, and "who also lack a surrogate decisionmaker":

> It is also the intent of the Legislature to ensure that the medical needs of nursing facility residents are met *even in the absence of a surrogate health care decisionmaker.*

CAB at 9 (quoting from legislative findings as to §1418.8 (emphasis added)).

Thus, the legislature used the IDT as a substitute for surrogacy in the same manner as the appointment of a conservator or public guardian so as to review and consent, in limited treatment, day-to-day options and to be determinative and thus permit necessary treatment.

Section 1418.8 expressly recognizes that the IDT is not a surrogate. See legislative findings and §1418.8(c) as to the absence of a person with legal authority to make medical decisions. This is the very point made by the Supreme Court in *Conservatorship of Wendland*. Absent an adjudication of incapacity, constitutional autonomy rights of refusal may be exercised by either the competent individual, or someone whose rights derive through that individual, that is, a surrogate decision-maker. Absent such surrogate, as is the case where the state, through its parens patriae power, designates a non-surrogate such as a public guardian, a conservator, or an interdisciplinary team,

there is a requirement of an adjudication of incapacity which was the holding of *Wendland*, and was followed in *Qawi.*

The IDT cannot be a surrogate given that §1418.8 itself recognizes that the IDT only exercises power when there is no surrogate. Similarly, the adoption of 22 CCR §72527, referring to a patient representative,[2] defines such a representative to include "next of kin or other appropriate surrogate decisionmaker." This cannot be an IDT under §1418.8 as by the very language of the same statute, an IDT is appointed because there is no surrogate. This comports with *Conservatorship of Wendland* which distinguishes between surrogates, who are those deriving an interest through a close relationship with the person receiving medical care such as next of kin, unlike others appointed by legal decision such as a public guardian or a statutorily created IDT whose interests in the treatment of the patient do not coincide with the autonomy, privacy and consensual constructs of such autonomy.

The result is that it is inconsistent to conclude that a physician will both order treatment, and then exercise the right to refuse that very treatment. Yet that is the essence of what is being argued by Amicus CAHF and respondent. Again, as stated in *Wendland*, the durable power of attorney for health care permits the person who will receive care to designate a chosen representative or agent (Probate Code §4701) and that is not what occurs with an IDT. Indeed the individual is informed in the Form instructions for a Durable Power of

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[2] Although it was found by *Rains* (32 Cal App 4th at 182*)*, that ombudsmen might be the representatives at IDT meetings, CAHF recognizes that ombudsmen cannot legally fill that role because they are not advocates and are to "investigate and resolve reports of abuse" and are "not legally authorized to assume the role of health care decisionmakers." CAB at 28.
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Attorney for Health Care that their physician may not be their agent. Prob. Code §4701.

The clear results are several-fold: 1. an IDT is not a surrogate, but replaces the absence of one; 2. Section 1418.8 is a parens patriae statute whose purpose is to provide medical treatment for an incapacitated individual needing medical treatment and having no surrogate to consent; and 3.in California, as stated in *Wendland* and followed in *Qawi* and other cases, after *Rains,* including this court, an adjudication of incapacity is necessary in such parens patriae cases. This conclusion by the Supreme Court, and that of *Qawi*, subsequent to *Rains*, is in clear rejection of the holding in *Rains* that, referring to capacity: "These decisions are medical decisions."

Additionally, while Amicus CAHF claims that the legal rights of the resident granted through regulation (CAB at pp. 16-18) are available through the §1418.8 process, the fact is that there is no right of the resident to refuse, since the regulatory right has been superceded by statute in §1418.8 through the IDT. Indeed, residents don't know either that they now have lost their right to refuse, nor that they have been determined incompetent, nor that they can do anything about it as they are not told they may initiate a court proceeding, and in fact, as ill, elderly, unrepresented persons, they lack the means to so initiate.

By statute, under 1418.8, residents are granted, as to refusal, not the right to refuse, but only the right to have an interview with the IDT, and only the IDT decides whether to refuse. Further, the IDT includes the very physician who first decided to order the treatment.

A good example of this denial is the matter of Gloria A., who first tried to refuse anti-psychotics, but was told she had no right thereto. Earlier she had been refused her right of liberty resulting in her loss of the right to go to a picnic, and was never told she could go to court. This was the case although her ability to get a court hearing was far less than that of a mentally ill person since

all the mentally ill person needed to do, unlike the 1418.8 process, was to verbally request a writ of habeas corpus. Further, the mentally ill person was given notice of that right, unlike the resident of a nursing home. Nevertheless, the process as to the mentally ill person itself was found unconstitutional. *See Doe v. Gallinot* (9th Cir. 1981) 657 F.2d 1017.

The result is that, Amicus CAHF's lengthy review of the legislative history fails on several levels to afford elder residents affected by §1418.8, as amended, basic constitutional rights.

VI. SECTION 1418.8 IS NOT RENDERED CONSTITUTIONAL BY OTHER STATUTES PERMITTING MEDICAL CAPACITY DETERMINATIONS

CAHF argues, without citation to *Wendland, Qawi*, or any of a number of Court of Appeal cases, including several from this court such as *People v. Petty* (2013) 213 Cal. App. 4th 1410, *Edward W. v. Lamkins* (2002) 99 Cal. App. 4th 516, and *K.G. v. Meredith* (2012) 204 Cal. App. 4th 164, that the Legislature has permitted physicians to make capacity decisions, citing, as an example, to Probate Code §4658. CAB 28-29. But §4658 is a statute involving not decisions as to parens patriae provisions of medical care, such as the cases cited above, but instead to situations where there are surrogate decision makers.

The Legislature has explicitly stated that §1418.8 concerns instances where there is no surrogate, and the IDT is to lose its power in the event a surrogate is found.

Further, as to Probate Code §4650 (c) cited by CAHF to the extent that courts should not be involved in medical decisions, petitioners are not asking a court to be involved in any medical decisions. This case is about legal decisions.

The statutes cited by CAHF permitting physicians to determine capacity, such as Probate Code §4658, are, unlike §1418.8, statutes where an individual

close to the patient constituted a surrogate, such as a parent or spouse, or a representative selected by the patient, as with a Durable Power of Attorney for Health Care given by the patient to an agent (who cannot be the treating physician or an employee of the health facility (Probate Code §4701)). The correct conclusion of the courts (see *Barber v. Superior Court* (1983) 147 Cal. App. 3d 102*)* is that such individual will either decide for the patient if a determination of incapacity is made, or object if an incorrect one is made.

This was thoroughly elucidated in *Conservatorship of Wendland* a California Supreme Court case decided after *Rains*, which CAHF has ignored. In cases where there is no surrogate, and the state thereafter provides for treatment based on the consent of the appointed person, such as a conservator, the law precludes such a result unless there has been an adjudication of the patient's incapacity to decide. These cases are considered parens patriae cases, as held in *Wendland*. This is the situation found in §1418.8 creating a process for consent where the state wants to provide treatment and there is no surrogate and which requires, for such individuals, an adjudication of incapacity.

VII. *SECTION 1418.8 FAILS TO PROVIDE DUE PROCESS AS TO NOTICE AND OPPORTUNITY TO OPPOSE*

CAHF claims statutory constitutionality as to notice, not because notice is required by §1418.8, but because other statutes and regulations supply the notice absent from §1418.8. CAB at 32. The fact is that notice, and a meaningful opportunity to oppose, are quite specific constitutional requirements under both the California and federal Constitutions, and require far more than is set forth in §1418.8 or unrelated statutes. *See Goldberg v. Kelly* (1970) 397 U.S. 263.

None of the statutes or regulations to which CAHF refers (CAB at 33-37) says anything about decisions made as to the absence of a surrogate or the presence of an Interdisciplinary Team, or the ability of an individual to oppose

any decision by initiating an action in superior court and obtaining a stay. In point of fact, none of the statutes or regulations say anything about the following, all of which are necessary to a resident whose capacity, absence of a surrogate and treatment are at stake under §1418.8 and who desires to oppose the determination:

- That the physician will decide capacity, presence of a surrogate and a medical intervention;
- That the physician will interview the resident to decide on capacity and the presence of a surrogate;
- That in the event the physician decides the resident is decisionally incapable, and without a surrogate, the medical interventions may include loss of liberty and loss of control over the resident's finances;
- The effects and side effects of the proposed treatment, and the possible alternative treatments;
- That the resident may choose a surrogate;
- That in the event the physician decides the resident is decisionally incapable, and without a surrogate, and that a medical intervention is necessary, the physician will recommend that an Interdisciplinary Team be constituted to review the resident's condition and the recommended intervention, as to whether to proceed with the intervention, and, in the process will interview the resident, but is not bound by the resident's decisions;
- That the resident is not entitled to the appointment of an advocate as to any of the above;

- That the resident will not be informed of the decision of the Interdisciplinary Team;
- That if the Interdisciplinary Team decides to proceed with the medical intervention the resident may initiate an action in Superior Court and seek to obtain a temporary restraining order to stop the intervention, but the intervention may commence at any time and occur without notice to the resident; and
- That the resident will be given no assistance with commencing an action in court, and, if having been determined confined to the nursing facility, will not be permitted to leave the facility to seek legal assistance unless with the permission of the Interdisciplinary Team.

Amicus CAHF cites to not one case supportive of its position that §1418.8 satisfies due process as to notice. Indeed, CAHF does not even state that due process is satisfied, instead relying on the requirement of a physician's interview which would "certainly provide the physician with the ability to share his or her findings…" CAB at 33-34. As well, it relies on an interview with the IDT which :"would almost certainly involve members of the IDT sharing the proposed intervention." CAB at 34. This does not meet the notice requirements of due process.

VIII. THE LEGISLATIVE HISTORY, CASE LAW, AND THE DECISION BELOW SUPPORT THE CONCLUSION THAT SECTION 1418.8 IS NOT TO BE USED AS TO ANTIPSYCHOTIC DRUGS ABSENT AN EMERGENCY

Amicus CAHF bypasses the reasoning of the superior court, by asserting that the statute, although explicitly referring to "chemical restraints" in §1418.8(h), is intended to apply solely to the therapeutic use of such drugs as to the elderly, and permit their nonconsensual administration as approved after

review by the IDT. CAB at 24. However, this argument does not respond to the order of the superior court.

The superior court reviewed the decisions of the California courts in *Qawi*, *Keyhea* and *Rains*, and of the United States Supreme Court in *Washington v. Harper* (1990) 494 U.S. 210, concluding that the courts in California and the federal system had found such drugs to be highly intrusive, and thus to require significant procedural protections under their Constitutions before their nonconsensual use. In California, such use required an adjudication of incapacity, while in the federal courts their nonconsensual use required, under due process, prior notice, a meaningful opportunity to oppose in the form of an administrative hearing, with representation, and a neutral hearing officer under *Washington v, Harper*.

This, together with the language in *Rains*, that the statute is intended to cover only "relatively nonintrusive and routine" treatment (32 Cal App 4th at 186), and that there were no such procedural protections in the statute for the use of the drugs, whatever the purpose, as to elderly in nursing homes, drew the superior court to its conclusion that the Legislature did not intend to include such drugs within the power of the IDT, and thus prohibit them from use by the IDT.

Amicus CAHF has attempted to obtain a different legislative intent, without either language in the statute or citation, by distinguishing between the use of the drugs as chemical restraints as against therapeutic usage. CAB at 37. However, the statute speaks only to chemical restraints, and not to therapeutic use at all. Further, in none of the cases cited did the courts refer *solely* to the use as one of restraint but instead, as in *Qawi*, *Keyhea* and *Washington*, a claimed therapeutic use, although the *Keyhea* court referred to the ability of the drugs to make the prisoner-patient amenable to physician orders. (They "also

possess a remarkable potential for undermining individual will and self-direction, thereby producing a psychological state of unusual receptiveness to the directions of custodians." *Keyhea* at 531, quoting Mental Hospital Drugs, *supra*, at p. 1751.

Thus, there is no evidence whatsoever that the legislature intended to include the therapeutic use of such drugs as within the purview of the IDT.

Additionally, as reasoned by the superior court (JA 736), if the use of the drugs without consent was intended by the legislature to concern therapeutic use, the procedural protections granted by both the California and federal courts must be ordered as well to ill, elderly residents of nursing homes, which would include, notice, an administrative hearing, representation, and a neutral decisionmaker, none of which are present at this time.

This is particularly true in that, for the elderly, these drugs are even more intrusive than for prisoners in that they carry a warning of death (JA 160, 255), that they have not been approved by the FDA for therapeutic purposes for the elderly, and that the elderly, unlike the parties in *Washington v Harper* are not persons convicted of felonies and serving prison sentences, nor similar situated persons as in *Qawi* or *Keyhea*.

Amicus CAHF points to the 1996 statutory amendment, speaking to the emergency use of chemical restraints on a continued use after the emergency period should have expired as somehow recognizing that such chemical restraints were impliedly permitted under the original statute. CAB at 7-8. However, there are several reasons why that is not the case, nor can it be resolved within the statute.

To begin with the statute makes no explicit reference to any non-emergency type of restraint, not the least of which are chemical restraints. The statute was never intended for such activity, but instead for day-to-day curative treatment, such as Amicus CAHF points out in connection with diabetes and

similar diseases. CAB at 5. Nor does Amicus CAHF, in its lengthy review of the statutory history point to any such consideration. CAB at 11-27. Amicus CAHF's explanation for this is that the statute did not exclude it, and anything not excluded is included. But the Legislature knows how to assure inclusion. *Cf*. Prob. Code §2355 (end of life determinations).

Rains interpreted the statute to include only, by its words, minimally intrusive interventions, which certainly did not and does not include chemical restraints with their black box warnings of death and lack of approval by the FDA. JA 255. Amicus CAHF says that the drugs were useful as treatment, but it cannot be accidental that the legislature referred to their use as "chemical restraints" when used for the elderly.

Amicus CAHF attempts to negate the importance of the use of the term "chemical restraint" by the Legislature (CAB at 24), by claiming without citation, that "This was intended" to insure the use of the drugs for medical purposes. CAB at 24-25. But there is nothing in the legislative history as to that, and, indeed, Amicus CAHF recognizes that 'chemical restraint" means exactly what it says, that is a drug used to restrain. CAB at 24. To the extent that 22 CFR 72528 sought to limit the use to those required for medical purposes, they did not and do not change what was stated by the Legislature, nor that they are chemical and that, whatever the purpose, they restrain the elderly resident.

Amicus CAHF asserts that §1418.8 is not unconstitutional since both antipsychotic drugs and end of life denial of therapeutic care were authorized in the statute. CAB at 36. However, even if both were authorized statutorily, which they were not, that fact would not assure constitutionality.

As to the use of antipsychotic drugs, absent an emergency, the superior court recognized the constitutional requirements governing their nonconsensual use. These drugs have significant side effects as set forth in the

Qawi case as well as *Keyhea v. Rushen* and *Washington v. Harper.* In fact, as to the elderly, the drugs are far more invasive as they carry a black box notice of possible death. Given their side effects, the courts in *Qawi, Keyhea* and *Washington* have required significant procedural safeguards not given by §1418.8. As a result, the superior court concluded, unlike Amicus CAHF, that the Legislature could not have included such drugs, since it did not provide for such protections.

Amicus CAHF does not refer at length to the superior court's considerations, nor at all to the cases cited in that court's decision. Instead, Amicus CAHF refers to letters and similar documents purporting to indicate that, for example, the statute permits highly intrusive treatments such as surgery (CAB at 41-44), which, as in *Rains*, it does not.

Amicus CAHF's major concern is that the result of the lower court's ruling will be the end of the use of such drugs for therapeutic purposes, and that there has been a significant drop in their use in nursing homes. CAB at 42. The fact is that, since these drugs are still in use, their highly intrusive nature requires even more protection for the ill, elderly than for convicted prisoners. Further, the procedural protections are not a death knell to their use, but merely provide greater assurances their consensual use in the event the user has capacity or a surrogate through requirements of such statutes as Probate Code §3200.

Indeed, if the Legislature had included anti-psychotic drugs in the statute, it would have had to give the same protections as in *Qawi* and *Washington*, without which the statute would be unconstitutional as depriving both privacy and due process rights. Thus, the superior court was correct in concluding that the Legislature did not so include, and that if it had, the statute is unconstitutional as applied.

IX. THE LEGISLATIVE HISTORY SUPPORTS THE CONCLUSION THAT SECTION 1418.8 IS NOT TO BE USED TO END LIVES

Amicus CAHF cites to the legislative history of §1418.8, as to which respondent has submitted a declaration for judicial notice, which had been submitted in opposition to an original writ petition that was never resolved by any court. *See Doherty v. Lungren*, Case No. A060010. In that proceeding, the Department of Health Services submitted the declaration of Carol Gallegos (Request for Judicial Notice, Exh. P (amended), an "associate governmental program analyst" for the Department who was "involved in the development of Assembly Bill 3209." The declaration explained the declarant's view of the legislative intent and stated that that the purpose "adopted by the legislature*"* was to: "*provide care* until decision maker found or patient regains capacity." *Id*. at ¶12 (emphasis added). In paragraph 7, Ms. Gallegos recognized that Probate Code §3200 is used mainly for major decisions such as surgery "or circumstances where the patient's life would be in danger if the treatment was not given."

In conjunction with this purpose, and the legislative introduction to §1418.8, the statute was intended to deal with the day to day treatment needs of residents, *Rains* concluded that the statute was limited to such minimal intrusions, of which ending life is certainly not one. Thus §1418.8 would still require an order under §3201 for those intrusions, as with causing death, that were not minimal. As well, *Wendland* recognized the significant need for thorough and correct findings of fact so as to eliminate error particularly given the conclusive nature of death. *Conservatorship of Wendland*, 26 Cal.4th at 435.

As to ending lives, the declaration submitted an example of the option selected by the Legislature, regarding the *provision* of treatment, declaring in para 12 of the declaration, as an example of a patient who should not be

allowed to deteriorate until there is a need for hospitalization, and then, once stabilized, returned to the facility. Instead should be *provided* treatment at the facility: "this situation can be applied to the use of naso-gastric tubes for feeding when the resident is incapable of receiving food by mouth."Thus, the only example as to ending lives was as to the provision, not withdrawal, of treatment. The declaration refers several times to the legislative intent to assure care. In Paragraph 11, Ms. Gallegos said that there were only three options as to providing for residents who were found to be incapable and without a surrogate, and option three was chosen so as to: "*provide* care until decision maker found or patient regains capacity." (Emphasis added.)

The entirety of the legislative purpose was to provide treatment, not to end it. Section 1418.8 and the declaration indicate no legislative purpose to permit ending lives. The result is not only no such purpose, but its antithesis, that the sole purpose of §1418.8 was to provide, not end, treatment, until such time as a surrogate could be located, or the resident regained capacity.

Given the absence of any explanation that ending lives might have curative and rehabilitative purposes, the highly intrusive nature of the activity would have to be, but was not, accompanied by both explicit legislative authority and significant procedural protections in the absence of informed consent and the absence of a surrogate.

Amicus CAHF's primary concern appears to be that the preclusion of use of the statute as to ending lives will translate to a need for hospitalization in such situations. Thus, Amicus CAHF speaks to denial and revocation of hospice rights and of "forcing them into acute hospital admissions." CAB at 49-50. But that is not the necessary result. *Rains* recognized, in such intrusive situations as surgery, that Probate Code §3200 was the alternative, and *Wendland* recognized that the conservatorship process under Probate Code §2355 was one in which the Legislature had explicitly permitted ending lives.

The fact is that §1418.8 has few procedural protections against error in ending lives, given its extraordinarily intrusive end, and constitutionally there is a significant need for greater protections against that error.

X. THIS CASE WAS BROUGHT FOR MORE THAN MERE ENFORCEMENT OF A CONSTITUTIONAL STATUTE

In its last contention, Amicus CAHF contends that this action is merely one to enforce §1418.8, and should not be viewed as a mechanism to test its constitutionality, claiming that all of the facts provided by petitioners merely show a failure of compliance with the statute. However, both as to the facial claims and those regarding application of the statue, the evidence illustrates the unconstitutionality of the statute.

Indeed, as to the facial claims, those claims demonstrate the unconstitutionality of the statute *on their own*, and the factual evidence is *indicia* of the statute's *facial* unconstitutionality. Thus, the facial claims are that the statute denies prior notice and the absence of a meaningful opportunity to oppose which is not satisfied by permitting an ill, elderly nursing home resident an opportunity to bring a separate law suit. Such a claim would valid without any supportive facts. However, pleading and proving facts as to the result of such unconstitutionality, as with Gloria A., Mark H., and the similar declarations from ombudsmen and others, demonstrates the human and legal harm attached to such unconstitutionality. The result is that petitioners are not merely seeking to have respondent enforce the statute since enforcement of the statute would provide no prior notice and no meaningful opportunity to oppose.

The same is true as to the other facial claims, such as the need for an advocate for an ill, elderly person who cannot represent themselves, the need for an adjudication of incapacity, and the need for a neutral decision maker. Again, the facts alleged amplify the legal and human loss attached to this unconstitutional statute, as with Gloria A., where permitting the treating

physician to make a legal determination of incapacity resulted in a denial of her autonomy, property and liberty with little meaningful opportunity to rectify, results all permitted by this unconstitutional statute. A decision of this Court saying merely that she was denied her rights would do nothing to prohibit the use of this statute in the other cases arising under and using §1418.8. The fact is, that, with a statute similar to Welf. & Inst. Code §§ 5332 and 5334, with representation, notice, a meaningful opportunity for a hearing, an adjudication and a neutral decisionmaker, examples such as Gloria A.'s would not occur.

As to the applied instances, again exemplified by Gloria A., Mark H. , and the declarations submitted, California law requires that there be some showing of such instances in order to prove the unconstitutional application and obtain a writ of mandate finding the statute unconstitutional and granting an injunction. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069.

As to neither Gloria A., nor Mark H., are petitioners seeking to enforce the statute as to them, nor to enforce the statute as to others, but instead to find that the use of antipsychotic drugs without consent absent an emergency cannot occur without adequate process including an adjudication of incapacity in order to protect the fundamental right of autonomy and to refuse treatment. Similarly, as to ending lives, petitioners are not seeking enforcement of a statute which permits ending lives, but to find the statute unconstitutional as to its use in ending lives since it gives no constitutional privacy protections and insufficient due process protections including an adjudication of incapacity by a neutral decisionmaker with adequate representation as to that adjudication. Further, to the extent that an interested physician and other employees of the nursing home may make such decision through a review and without consent of a surrogate or a court, the statute again is violative of the California Constitution.

Quite simply, this case is not about failure to enforce, or violations of, a constitutional statute, but the unconstitutionality of the statute itself.

CONCLUSION

The court should affirm the Judgment of the Superior Court in part, and reverse it in part, as requested in Appellants' Opening Brief.

Dated: September 14, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing brief consists of 7,315 words as counted by the Corel WordPerfect X8 word-processing program used to generate the brief.

Dated: September 15, 2017

/s/ Amitai Schwartz
Amitai Schwartz
Attorney for Plaintiffs and Appellants

PROOF OF SERVICE BY MAIL

Re: California Advocates for Nursing Home Reform v. Smith
California Court of Appeal, First Appellate District
Case No. A147987

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the

ANSWER TO AMICI CURIAE BRIEF OF CALIFORNIA ASSOCIATION OF HEALTH FACILITIES

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1225 Fallon Street
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 15, 2017

/s/ Amitai Schwartz
Amitai Schwartz

STATE OF CALIFORNIA
Court of Appeal, First Appellate District

PROOF OF SERVICE

(Court of Appeal)

Case Name: **California Advocates For Nursing Home Reform(CANHR) v. Chapman**
Court of Appeal Case Number: **A147987**
Superior Court Case Number: **RG13700100**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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Date

/s/Amitai Schwartz

Signature

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