ILLINOIS STATE BAR ASSOCIATION

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# Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law



## Website Provides Free Mental Health Screening, Maps National Mental Health Needs

BY MARK HEYRMAN

Beginning in 2014, Mental Health America (MHA), the oldest nationwide mental health advocacy organization, began providing free, anonymous, evidence-based screening on its website: https://screening.mhanational.org/screening-tools/. There are screens for eleven mental health conditions: depression, anxiety, psychosis, PTSD, ADHD, postpartum depression, bipolar, addiction, eating disorders, youth mental health screen, and a self-injury survey. There is also a parental test for a child's mental health.

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## Elgin Mental Health Center Celebrates 150 Years of Recovery

BY SANDRA BLAKE

In June 2022, mental health providers, recipients and dignitaries gathered to celebrate 150 years of recovery at the Elgin Mental Health Center. Dr. Michelle Evans, hospital administrator, welcomed all attendees to the festivities.

Grace Hou, Secretary of the Illinois Department of Human Services (IDHS), and Dr. David Albert, director of the IDHS Division of Mental Health, were present to commemorate the hospital's anniversary and shared remarks with those in attendance.

A current consumer delighted guests with a reading of her own poetry, and William Briska, presented on the history of the Elgin Mental Health Center. His 1997 book on the subject was updated and expanded recently. This 280-page second edition was published in 2022 by the Elgin History Museum and features more than 100 pictures.

Members of a Motif Dance Studio

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## Website Provides Free Mental Health Screening, Maps National Mental Health Needs

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Two of the screens (depression and anxiety) have been translated into Spanish. In the early years of this resource, a few hundred thousand people took a screen every year. When COVID-19 hit, the number of screens increased dramatically so that now more than 16 million screens have been taken.

Persons taking a mental health screen were also asked to provide, on a voluntary basis, demographic information including: race, gender, age, state, zip code, and income. This information has enabled MHA to create a map of mental health needs in the United States. Much of this information is now available for free to the public at this website: https://mhanational.org/mhamapping/mha-state-county-data. This website allows anyone to look at the mental health needs of states and counties. It provides a color-coded map showing the prevalence of positive mental health screens for various conditions in each state and county. Because the screening website continues to attract a large number of people concerned about their mental health, the data website is updated every 90 days.

Who is taking a screen? Unsurprisingly, the majority of screeners are young–under 25, and a substantial percentage (43 percent) are under 18. More women (67 percent) than men are taking a screen. However, the race and income data show that screeners are representative of the US population on these parameters.

More than three-quarters (76 percent) of the screeners are found to have moderate or severe symptoms of one or more mental health conditions. Additionally, almost two thirds (64 percent) of those who test positive have never had any connection with a mental health provider of any kind. These data are meaningful in a number of ways. MHA does not advertise its screening website. Those who find this site do so simply through an online search. Thus, this data certainly under-counts the need for mental health services. Since a substantial majority have not gotten mental health services, the data suggest that there a many people who can get help before they get sicker. This is an opportunity for prevention.

MHA, in conjunction with Mental Health America of Illinois, is currently working on a special project concerning the data for Cook County. They are creating a special screening data map **by zip code** just for this county in order to help local public health departments and mental health providers to target those geographic areas and mental health conditions which are most in need of additional services.■

*Mark J. Heyrman is the chair of the Public Policy Committee, Mental Health America of Illinois. He can be contacted at markheyrman@outlook.com.*

Mental Health Matters

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**OFFICE**
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

**EDITOR**
Sandra M. Blake

**PUBLICATIONS MANAGER**
Sara Anderson
sanderson@isba.org

## Elgin Mental Health Center Celebrates 150 Years of Recovery

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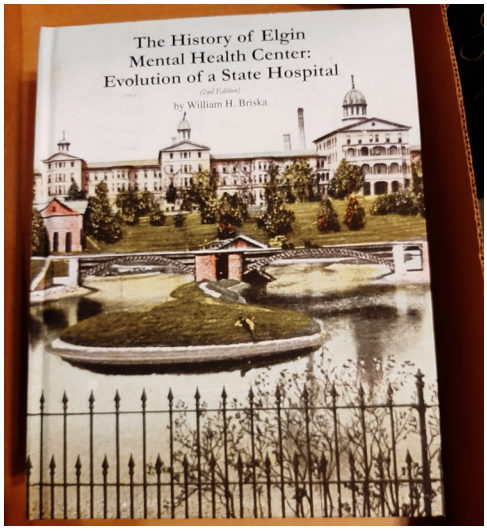
company from Aurora performed a celebratory dance. Guests then went outdoors on the beautiful early summer day for the dedication of Heritage Park, a project of the Elgin Mental Health Center Heritage Committee. The park is located in the field between the Goldman building and Assembly Hall on the hospital campus. Previous fundraisers have allowed for the purchase of trees for the park, and the current personalized brick program will help pay for the foundation for a pavilion, walkways, or both. Those interested in participating in the personalized brick program can investigate further at https://www.thatsmybrick.com/elginmhc. ■




# Appellate Update

BY ANDREAS LIEWALD

*In re John F.*, 2022 IL App (1st) 220851 (Opinion filed August 4, 2022)

The appellate court reviewed the trial court's order for the involuntary administration of electroconvulsive therapy (ECT). ¶1. Two doctors and John F.'s wife testified there was a sudden, but persistent, severe decline in John F.'s mental health. ¶1. John F.'s counsel argued that the trial court did not consider evidence which showed that at a time when John F. had capacity to make decisions about his mental health treatment (substituted judgment) within the past year, he expressly declined to consent to ECT. ¶57. The appellate court affirmed.

Background

On May 10, 2022, a petition seeking the authority to administer ECT to John F. was filed under section 2-107.1 of the Mental Health and Developmental Disabilities Code (Mental Health Code) (405 ILCS 5/2-107.1 (West 2020)), by Dr. Brandon Hamm, John F.'s attending psychiatrist at Northwestern Hospital. ¶3. The psychiatrist was seeking authorization to administer both unilateral and bilateral forms of ECT, up to three times per week, and other related tests and procedures. ¶4.

Prior to the filing of the petition for ECT, according to John F.'s wife, she had started noticing changes in her husband in late August or September of 2021, but that the "major differences" began in October of 2021. ¶33, 34. John F. had two prior psychiatric hospitalizations. ¶34. According to John F.'s wife, the first hospitalization occurred in November of 2021 at a local hospital, "but nothing was done then." ¶34. In December of 2021 to January of 2022, John F. was at Northwestern Hospital. ¶34. While at Northwestern, John F. was given medication and, although he had been refusing to eat, started to eat "a little bit" when he was threatened with a feeding tube. ¶34. During that time, according to Dr. Hamm, John F. stated to him that he did not want ECT because "he was intimidated by potential side effects of ECT". ¶24. According to John F.'s wife, when John F. was discharged, he declined therapy and medications.

John F.'s current hospitalization began on March 15, 2022, after he was in a bedridden state, unable to mobilize or eat, had lost about 50-60 pounds, and his wife was concerned that he may die. ¶3, 8, 36. According to Dr. Hamm, John F. was currently "cachectic", which is a starvation state, where the body loses its reserves of fat and is breaking down its muscle. ¶8. John F. was diagnosed by Dr. Hamm as having "psychotic disorder unspecified type." ¶10.

At the treatment hearing on June 8, 2022, two psychiatrists (Dr. Hamm and Dr. Danielle Anderson) and John F.'s wife testified on behalf of the State. ¶6.

Dr. Hamm testified that John F. was suffering because he reported feeling pain, he was having difficulty eating and defecating, and he was feeling hopeless. ¶11-12.

Dr. Hamm also opined that John F.'s mental illness had caused a deterioration

in his ability to function because he had become isolated, bedridden, unable to work, unable to ambulate, or do anything that interested him. ¶13.

Dr. Hamm testified that ECT was the preferred treatment over medication for John F. because the side effects were not as harmful. ¶14. Dr. Hamm opined that the benefits of ECT "far outweigh[ed] the risks" for him. ¶17. Dr. Hamm hoped that ECT would de-escalate John F.'s delusions, allow him to regain a relationship with his family, nourish himself sufficiently, and allow him to consent to necessary medical evaluations. ¶15. Dr. Hamm testified that common side effects of ECT included headaches and temporary memory impairment. ¶16.

Dr. Hamm did not believe that John F. had the capacity to make a reasoned judgment about ECT. ¶18. Dr. Hamm testified that he gave John F. written information about the risks and benefits of ECT, and John F. was "cautious" and "intimidated" by the idea of [ECT], and he had concerns about memory impairment. ¶18. Dr. Hamm testified that John F. was skeptical that he had delusions, and that he was more fixated on the idea that there was something medically wrong with him. ¶11, 12, 14. Dr. Hamm further explained that although John F. "[did] have a consistent choice that he does not want ECT," he was not able to appreciate the advantages and disadvantages of treatment". ¶18.

Dr. Hamm believed that John F. had the capacity to accept psychotropic medication earlier during his current hospitalization, when he accepted the medications. ¶19. However, the medications were then stopped on April 30, 2022, because it did not improve his psychiatric symptoms. ¶19. John F. was also currently declining medications. ¶19. Dr. Hamm testified that John F.'s treatment team had explored less restrictive treatment options before recommending ECT. ¶19.

Dr. Hamm opined that John F.'s prognosis without ECT would be "grim", and that he would probably die within three to six months. ¶21.

Dr. Hamm testified that he did not pursue involuntary ECT during John F.'s hospitalization three months prior because he was less cachectic and lost less weight, he started participating a little more in physical and occupational therapies, and he seemed to be eating more. ¶22. On cross examination, Dr. Hamm agreed that he when he presented information regarding ECT during John F.'s hospitalization in January, John F. declined the treatment, and Dr. Hamm respected his wishes at that time. ¶23. Dr. Hamm further acknowledged that during the prior hospitalization, John F. did not want ECT because he was "intimidated by potential for memory impairment". ¶24. Dr. Hamm testified that temporary memory impairment was a potential side effect of ECT, and that John F.'s concern was not delusional, but a legitimate one. ¶24. Dr. Hamm also acknowledged that John F.'s stated reason for declining ECT during his current admission was based on the same concern about memory loss. ¶24.

Dr. Anderson, a psychiatrist, who would administer ECT to John F. if the petition was granted, testified about the general procedure for administering ECT. ¶26. She agreed with Dr. Hamm's recommendation of ECT and believed that the benefits of ECT outweighed the harm. ¶26-29. Dr. Anderson acknowledged that there were a lot of potential side effects during a procedure of ECT, which included the patient biting his tongue, bone fractures, increase of heart rate and pulse, and a small risk of heart attack or stroke. ¶29. Dr. Anderson testified as to what steps would be taken to mitigate those risks. ¶29. Dr. Anderson further testified that upon waking, the patient may also have nausea, some muscle aches, headaches, and some heart arrhythmias. ¶29.

Dr. Anderson believed that ECT was the best treatment for John F. because they had "been struggling for quite a while" for him to get treatment, and because he had "failed multiple trials of medications." ¶30. Dr. Anderson did not believe that John F. had the capacity to decide whether to agree to ECT as treatment, since he did not have an "appreciation" for his illness. ¶31. Dr. Anderson testified that her team was seeking authorization for both unilateral and bilateral ECT, for up to five treatments per week. ¶27. She explained that although bilateral ECT is more effective, it is associated with more "memory deficits." ¶28.

John F.'s wife testified that she discussed ECT with him when he was hospitalized in December, and he declined ECT at that time because "[h]e was afraid. He was afraid of it. He was told he would lose his memory for two weeks after [the treatment], and wouldn't learn new things, and he was afraid of that." ¶37.

In closing argument, counsel for John F. argued that the State had failed to meet its burden regarding capacity and that John F. had made his wishes clear in December of 2021 and January of 2022, a consideration under the doctrine of 'substituted judgment.' ¶39. Counsel further pointed out that John F. had declined ECT at a time when Dr. Hamm deemed him to have capacity, that both Dr. Hamm and John F.'s wife testified that he had not wavered from that decision, and that Dr. Hamm had said that John F.'s concern about memory loss was reasonable. ¶39.

The trial court stated, "with respect to capacity, this is a nuanced case, and I have to look at the different points in time. And so what I'm going to focus on here is the April 30th time frame, because that's specifically where I had testimony from Dr. Hamm saying basically he recognized that there wasn't capacity then." The court found John F. did not have capacity at the time of the hearing based on Dr. Hamm's testimony as to John F.'s "evasive behavior" and that his decision-making was driven by delusional behavior. ¶42. The court then found that the State had met its burden of proof by clear and convincing evidence that he had a mental illness, that he had exhibited threatening behavior, had experienced deterioration, that he was suffering, that the illness had existed for a period of time marked by the continuing presence of his symptoms, and that the benefits of treatment outweighed the harm. ¶43-44. On the same day of June 8, 2022, the trial court granted the petition, authorizing ECT treatments, both bilateral and unilateral, up to five times per week for a maximum of 30 treatments, along with related tests and procedures. ¶45.

On June 9, 2022, counsel for John F. filed both a notice of appeal and an emergency motion for a stay pending that appeal. ¶47. A hearing at trial court on the motion to stay was held on June 15, 2022. ¶48. John F.'s

argument in support of the stay centered on the trial court's failure to consider the 'substituted judgment' doctrine and the fact that the appeal would be moot if the stay was not granted. ¶49. The trial court denied the stay. ¶49

On June 16, 2022, John F. filed a motion to stay enforcement of the trial court's judgment with the appellate court pending the appeal. ¶51. On June 17, 2022, the appellate court granted the motion and set an expedited briefing schedule. ¶51.

## Analysis

John F. asked the appellate court to reverse the trial court because the court refused to consider evidence which showed at a time when he had capacity to make a reasoned decisions about his mental health treatment, he expressly declined to consent to ECT. ¶57. According to John F., the doctrine of 'substituted judgment' is a required part of the analysis under section 2-107.1 of the Mental Health Code. ¶57.

The appellees responded that 'substituted judgment' is not a required part of the analysis; rather, the court only needs to look to the specific statutory requirements listed in section 2-107.1 of the Mental Health Code. ¶58. The appellees further argued that even if 'substituted judgment' was part of the analysis, there was no clear showing that John F. had capacity to decline ECT at any specific point in time and that such a showing was a prerequisite to the trial court considering 'substituted judgment.' ¶58. In addition, appellees contend that John F.'s declination of ECT when he claimed he had capacity to make such a decision did not extend to the circumstances that were before the trial court at the time the petition was granted. ¶58.

Regarding the standard of review, the appellate court viewed that it was appropriate to begin with the legal question of the role of 'substituted judgment' in ordering mental health treatment under section 2-107.1, and consequently reviewed it de novo. ¶60. Citing In re Clinton S., 2016 IL App (2d) 151138, ¶21.

The appellate court analyzed prior case law in forming the basis of its opinion regarding the interplay of the doctrine of 'substituted judgement' and section 2-107.1 of the Mental Health Code. The appellate court agreed with both parties that its determination of 'substituted judgment' is guided by the Illinois Supreme Court's decision in In re C.E., 161 Ill. 2d 200 (1994). ¶62. The supreme court considered the role of 'substituted judgment' in mental health proceedings under section 2-107.1 of the Mental Health Code when it found the section constitutional. ¶62.

The appellate court noted that the 'substituted judgment' test was endorsed by the Illinois Supreme Court in In re Estate of Longeway, 133 Ill. 2d 33, 49 (1989). ¶63. There, the issue before the supreme court was the power of a guardian to refuse artificial nutrition and hydration on behalf of his ward. Id. at 37. ¶63. The supreme court found the 'substituted judgment' standard to be the appropriate approach. Id. at 49-51. ¶63. In doing so, the supreme court noted that other courts had applied a 'best interests' analysis to similar situations. Id. at 48. ¶63. However, the court in Longeway rejected the 'best interests' analysis in the situation before it because "the record demonstrate[d] the relevancy of the substituted-judgment theory," and because the 'substituted judgment' doctrine appeared to have been "implicitly adopted" by the legislature in the Powers of Attorney for Health Care Law. Id. at 49 (citing Ill. Rev. Stat. 1987, ch. 110 ½ par. 804-10). ¶63.

The appellate court further cited Longeway, "[u]nder substituted judgment, a surrogate decisionmaker attempts to establish, with as much accuracy as possible, what decision the patient would make if he were competent to do so." Id. ¶64. "This should begin with a determination of whether "the patient had expressed explicit intent regarding this type of medical treatment." Id. ¶64. Where there is no evidence of such an expression of intent, "the patient's personal value system must guide the surrogate." Id. ¶64.

The appellate court then cited to In re Estate of Greenspan, 137 Ill. 2d 1, 18 (1980), where the Illinois Supreme Court again considered the interaction between the 'best-interests' test and the 'substituted-judgment' theory, as those frameworks applied to "deciding whether to discontinue an incompetent and terminally ill patient's artificial life support." ¶65. The Greenspan court explained that if it was "clearly and convincingly shown" that the incompetent person would wish to have artificial nutrition and hydration withdrawn, that person's "imputed choice cannot be governed by a determination of 'best interests' by the public guardian *** or anyone else." Id. at 18. The court in Greenspan continued in part "Otherwise, the substituted-judgment procedure would be vitiated by a best-interests guardianship standard, elevating other parties' assessments of the meaning and value of life – or, at least, their assessments of what a reasonable individual would choose – over the affected individual's own common law right to refuse medical treatment." Id. ¶65.

The appellate court stated that the Illinois Supreme Court In re C.E., 161 Ill. 2d at 222-23, acknowledged the reasoning from Greenspan in considering how the 'substituted judgment' doctrine relates to the requirements of section 2-107.1 of the Mental Health Code. ¶66. In C.E., the supreme court held:

"[W]e conclude that a mental health recipient's wishes, when competent, will often be very relevant to a determination of whether psychotropic substances should be administered under section 2-107.1. In those instances where there is no proof of the mental health recipient's views when the recipient was competent, the court should be guided by the best interests of the patient." ¶66, Id at 223-24.

The appellate court found that 'substituted judgment' "will often be very relevant." ¶66. However, it disagreed with John's F. counsel that 'substituted judgment' is always required. ¶66. The appellate court also disagreed with the appellees that the 'substituted judgment' standard must be disregarded in these proceedings. ¶67.

The appellate court noted that appellate opinions that have considered the interplay between C.E. and 2-107.1 have concluded that "the supreme court has indicated that the trial court can consider the 'substituted judgment' of the patient and should, in fact, respect the competent wishes expressed by the mental health patient." Citing In re Israel, 278 Ill. App.3d 24, 34 (2d Dist. 1996); In re Denetra P., 382 Ill. App. 3d 538, 545

(4th Dist. 2008) ("According to the supreme court's interpretation of section 2-107.1(a-5)(4) ([citation]), the trial court if possible, must apply the substituted-judgment test before resorting to the best-interest test.") In re Jones, 285 Ill. App. 3d 8, 12 (3rd Dist. 1996) ("in the present case, our inquiry is whether [the respondent] clearly proved that her desire to refuse psychotropic medication was competently made"). ¶68.

In short, the appellate court agreed with John F. that where there is evidence, especially through direct statements of the patient, made at a time that the patient was competent to make decisions, of the choice the patient would have made regarding mental health treatment at issue, that evidence will generally be "very relevant" to a section 2-107.1 inquiry. Citing In re Jennice L., 2021 IL App (1st) 200407. ¶70. "Thus, we must decide whether the trial court erred in its refusal to consider such evidence in this case." ¶70.

The appellate court again cited to C.E., which made it clear that evidence of the patient's choice is only relevant if expressed by the patient at a time when he or she had the capacity to make that choice. C.E., 161 Ill. 2d at 223-24 ("the recipient's wishes, when competent, will often be very relevant"). ¶71. However, the appellate court held that it did not need to decide whether the evidence presented at trial was sufficient to demonstrate that John F. had capacity in January, or where the burden on that issue should lie, since even if John F. had capacity when he expressed his views and choices at that time, the facts had changed in significant ways by the present time the petition was filed on May 10, 2022. ¶72. The appellate court noted that as Dr. Hamm testified, in January 2022, John F. agreed to take medications, had seemingly started to eat more, and had started to participate more in physical and occupational therapy. ¶72. The doctor said, at that time, he wanted to give John F. the chance to use less invasive options. ¶72. However, by April 30, 2022, Dr. Hamm had learned that John F. was hiding his medications, that he was throwing away his food, that he was saying he was unable to move despite evidence to the contrary, that his participating with occupational and physical therapy "fluctuated," and that his health had significantly deteriorated. ¶72. Thus, as of April 30, 2022, and the time that Dr. Hamm testified that John F. lacked capacity, other options had been tried and failed. ¶72. John F.'s refusal of ECT in January, when other options such as physical therapy and medication remained viable, did not equate with a refusal of ECT when all other options had failed. ¶72. The appellate court concluded that the trial court simply did not have the relevant evidence with which to apply the 'substituted judgment' test. ¶72.

The appellate court agreed with John F. and with the dissent that guidance from the Illinois Supreme Court in C.E. and the due process concerns addressed there, require that a trial court consider a patient's wishes that were expressed at a time of capacity, where they are relevant to the involuntary treatment that is being sought. ¶73. But in this case, the appellate court found that there was no evidence before the trial court that John F., at the time he had capacity, expressed the view that he would refuse ECT if it were the only option. ¶73. The appellate court rejected John F.'s argument that the trial court failed to expressly consider 'substituted judgment' and affirmed the judgment of the trial court. ¶74-77.

The dissent expressed concern that "[t]o simply declare a patient's expressed wishes 'irrelevant' runs contrary to a century of jurisprudence related to informed consent, individual autonomy, and bodily integrity" and he would have reversed and remanded for further proceedings. ¶85-86. ■

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*Andreas Liewald is a staff attorney with the Illinois Guardianship and Advocacy Commission, West Suburban (Hines) Office. He is also the 2022-23 secretary of the ISBA Mental Health Law Section Council.*

The Supreme Court of Illinois Judicial College
& Illinois Mental Health Task Force

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Noon – 1:30pm

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Tuesday, May 9, 2023
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