

# Exploring Connecticut Law in

# TREATMENT WITHOUT CONSENT

## Cases

**T**HE CONCEPT OF INFORMED CONSENT to medical treatment is embedded at the intersection of law and medicine. A clinician can recommend a particular course of treatment, but is not allowed to proceed with it without the informed consent of the patient, after outlining the risks and benefits of proceeding with treatment, and the risks and benefits of not proceeding, as well as other available treatments. The patient then makes a choice whether or not to follow the clinician's recommendation. There are exceptions to this general rule for people who lack capacity to give informed consent. This article will examine Connecticut law regarding treatment without consent, specifically with regard to shock therapy and will provide suggestions to remedy two due process failures in current Connecticut law that undermine the integrity of forced treatment.

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BY GINA TEIXEIRA



## Treatment Without Consent

### ECT and Procedure

Shock, or Electroconvulsive Therapy (ECT), is a controversial treatment option offered to people with serious mental health conditions living in the community and on psychiatric inpatient units. Sometimes people agree to shock after other treatments have failed. In Connecticut, the general rule is that no shock can be administered without the patient's written informed consent.<sup>1</sup> If a physician concludes the person is capable of informed consent, the hospital has authority to administer shock for up to 30 days,<sup>2</sup> and the patient may revoke consent at any time. When the patient is capable of informed consent, the patient is assumed to have balanced the risks, benefits, and alternatives of the proposed treatment after consultation with their doctor, and then made a decision about whether to accept the shock procedure.

The immediate goal of the shock procedure is to have the patient experience a seizure.<sup>3</sup> This is accomplished by the passage of electric current to the brain through two electrode pads placed on the patient's head. Anesthesia like Succinylcholine and Methohexital are often used in shock procedures and warrant an additional informed consent discussion due to the serious nature of these medications. Side effects, and after effects of shock are short- and long-term memory loss and confusion. Somatics, LLC, the manufacturer of Thymatron, a machine that administers shock, has published the following disclosure on their website: "ECT may result in anterograde or retrograde amnesia. Such post-treatment amnesia typically dissipates over time; however, incomplete recovery is possible. In rare cases, patients may experience permanent memory loss or permanent brain damage."<sup>4</sup>

In *Riera v. Somatics, LLC*, the United States District Court for the Central District of California ruled that there was sufficient evidence for a reasonable jury to find that the prominent manufacturer of shock devices, Somatics, LLC, caused brain injury in the plaintiffs by failing to warn their treating physicians of the risk of brain injury associated with shock, and also through failure to investigate and report to the FDA complaints of brain damage and death resulting from shock.<sup>5</sup>

### Informed Consent

In cases where shock is voluntary, there is no need for a Probate hearing.<sup>6</sup> However, what happens when a person refuses consent, or lacks the capacity to consent? If a person resides in the community, shock does not take place. In Connecticut, shock can only be forced on people who are currently admitted to inpatient psychiatric facilities. Probate courts in Connecticut hear shock cases and determine whether a person will be forced to undergo this procedure.

In forced treatment cases involving shock, there is no informed consent requirement under Connecticut law when the head of the hospital and two physicians deem the patient to be incapable of informed consent. In such a case, a petition is filed in probate court, and a hearing is held.

If the probate judge finds that it is more likely than not that 1) the patient is not capable of informed consent and that it is more likely than not that 2) no other, less intrusive, beneficial treatment exists, the court may issue an order permitting shock treatment.<sup>7</sup> The court's order cannot exceed 45 days; however, a hospital may petition for repeated authority to shock over a patient's objection without limit and without a legal requirement to hold informed consent discussions with the patient or with anyone else.

Connecticut also permits treatment with psychiatric medication over objection of a patient in an inpatient psychiatric facility, but the legal standard is different. The forced medication statute provides that if doctors make a determination that the person (respondent in probate court) is not capable of informed consent, the probate court appoints a conservator to go through with the informed consent process and then inform the doctor of their decision about the proposed medication.<sup>8</sup> The informed consent process requires that "[t]he conservator shall meet with the patient and the physician, review the patient's written record and consider the risks and benefits from the medication, the likelihood and seriousness of adverse side effects, the preferences of the patient, the patient's religious views, and the prognosis with and without medication. After consideration of such information, the conservator shall either consent to the patient receiving medication for the treatment of the patient's psychiatric disabilities or refuse to consent to the patient receiving such medication."<sup>9</sup>

There is no informed consent requirement in forced shock cases.<sup>10</sup> Therefore, the hospital can proceed with the shock procedure without being legally required to have a discussion with anyone about the benefits, risks, and alternatives to shock.

In both forced medication and forced shock cases, the determination of whether a person is capable of informed consent is subjective, at best. Often, doctors will conclude a patient is capable of informed consent when the patient agrees with the physician's recommendations and not capable of informed consent when the patient disagrees. The subjective nature of capacity to provide informed consent is just one problem in shock cases. Another problem is that there is no legal requirement for an independent doctor or medical expert to testify. Although the statute requires the head of the hospital and two physicians to bring the petition to probate court, these three professionals work together and cannot be considered "independent." Also, there is no requirement for any of these doctors to be present at the hearing for cross-examination.

### Illusory Rights to Appeal

If the probate court orders shock over the patient's objection, no real legal recourse exists for that person to challenge the probate court order before being forced to have the forced treatment they are seeking to avoid. Neither the probate appeal statute nor the forced treatment statutes currently include any provision for an

automatic stay of the probate court’s decision. Appellants have the right to request a stay of the probate order, but it may not be granted.<sup>11</sup> The hospital can schedule shock on the day the petition is granted, and may have administered dozens of treatments before an appeal is heard. This situation often leaves the patient fearful and experiencing what some have described as the anxiety and stress associated with an imminent assault. The effect of the lack of the automatic stay is to make the right to appeal a nullity.

Therefore, the reality in Connecticut today is that a person can be forced to undergo the shock procedure pursuant to a probate court order, after an informal hearing with no real right to appeal. If the appeal is pursued anyway and the probate court order is found to be legally deficient, the injustice to the person who has already experienced the assault is magnified. The right to appeal seems to exist as part of the statutory right to appeal a probate order.<sup>12</sup> However, that right is completely illusory without an automatic stay of the probate order.

Attorneys appointed by probate courts to represent indigent clients at shock hearings are not compensated for representation on an appeal even if the appeal has merit and serious liberty issues are at stake.<sup>13</sup> This leaves the patient, on a locked psychiatric unit, without legal representation. The already stressful situ-

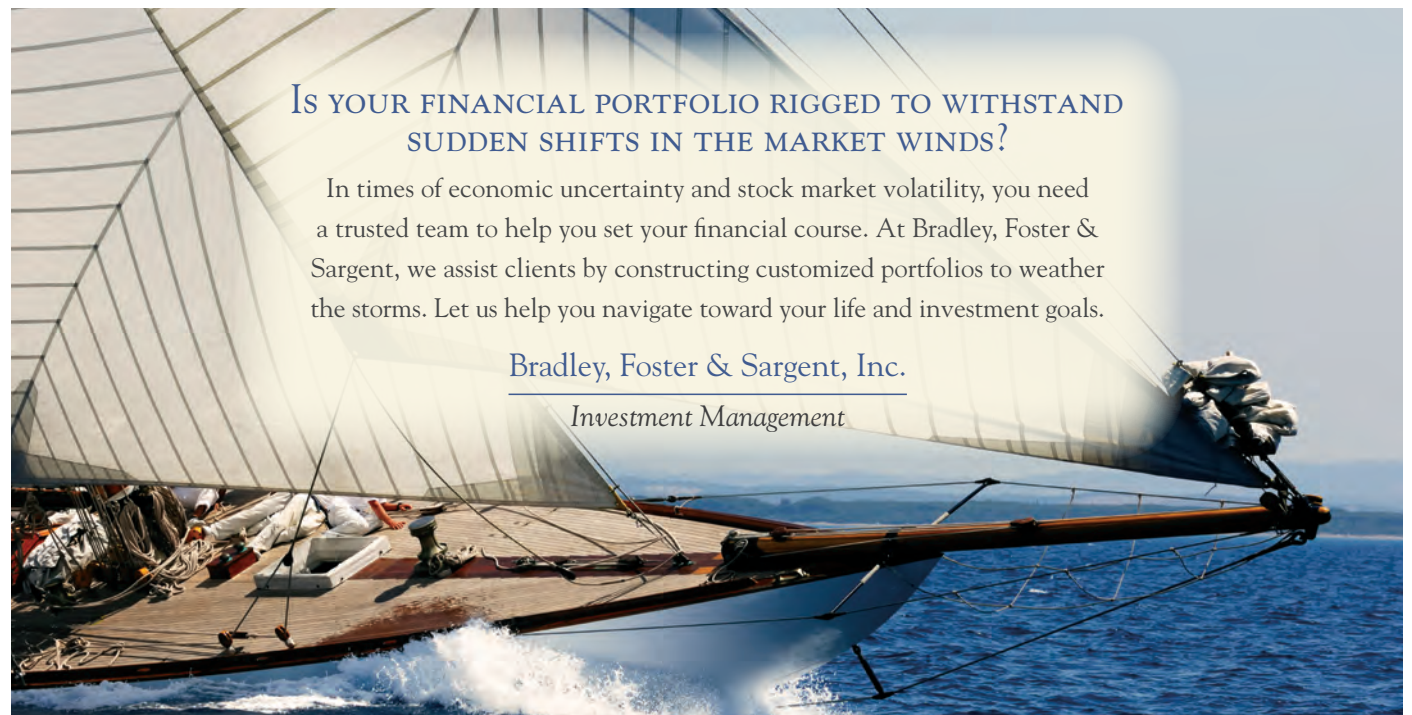
ation for the patient is exacerbated by the desperate need to find an attorney willing to file a motion for stay and a complaint in one day. At a minimum, Connecticut’s shock statute should be amended to provide for an automatic stay of the probate court order in cases of forced treatment to provide a meaningful opportunity for appeal.

### Lower Standard of Proof

In comparing forced shock to forced medication cases, the legal standard is more relaxed in shock cases. The standard of proof for finding someone incapable and allowing a substituted decision maker for forced medication is “clear and convincing evidence.”<sup>14</sup> This is a high standard, exceeded only by “beyond a reasonable doubt” which is only used in the criminal context. There is no standard articulated in the statute for finding someone incapable and ordering shock, so the presumption is that the standard is a preponderance of the evidence (more likely than not).

### Proposed Remedies

Ideally, forced treatment cases would be heard in Superior Court rather than probate court and judges would have no involvement with the appointment of counsel for indigent parties. New York already has a system where forced treatment cases are heard in the trial courts instead of the probate system. In Connecticut,



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## Treatment Without Consent

probate court judges directly appoint attorneys who appear before them to represent respondents. This inherent conflict is not present in juvenile or criminal cases where judges in Superior Court have no role in the appointment of attorneys.

The right to appeal is also more robust in criminal and juvenile matters than it is for people facing forced treatment in probate court. In juvenile cases, for example, if the court-appointed attorney believes there is no legal basis for appeal, that attorney must not only take steps to preserve the appeal, but must also request the appointment of an appellate review attorney to consider whether there is any merit to the appeal.<sup>15</sup> If there is merit, the appellate review attorney will file the appeal.<sup>16</sup> If the appellate review attorney concludes there is no merit to an appeal, that attorney must notify the party in writing of the time left to appeal pro se or with other counsel and a copy of that letter must be sent to the clerk for juvenile matters.<sup>17</sup> These provisions are entirely absent in probate court and help to explain why so few forced treatment cases are appealed even though probate courts hear these cases on a regular basis.<sup>18</sup>

Due process exists, in part, to provide protections for people against government error and overreach. Although forced shock is controversial, there should be broad agreement that the due process issues and the serious constitutional implications that come with having no real right to appeal in Connecticut is some-

thing that needs to be addressed either through litigation or the legislative process, or both. Due process requires more than access to an elected judge, a probate court-appointed lawyer who wishes to continue getting appointments, and a hearing with minimal standards of proof.

Many people think of probate court as the court that handles trusts and estates. *However, probate courts also have the power to take away a person's liberty with an order of commitment, to take away property through conservatorship and to subject people to forced treatment.* At a minimum, forced treatment statutes should include a provision for an automatic stay of the probate court order in the event the decision is appealed so that people facing forced shock have a real opportunity to appeal, just as most aggrieved litigants in Superior Court do when they file an appeal in appellate court. In Connecticut today, a person has no real legal recourse even when a probate court order is made on unlawful procedure, and even when basic due process protections that already exist were ignored. By the time any appeal could get in front of a superior court judge, the forced shock is over. An automatic stay of the probate court order and an informed consent requirement are fundamental aspects of a safe and fair process. It is unconscionable for people to receive forced shock pursuant to probate court orders that are found to be legally invalid on appeal.<sup>19</sup> The need for an automatic stay cannot be overstated. ■

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### NOTES

1. Conn. Gen. Stat. § 17a-543(c)
2. Shock is a series of repeated treatments, usually two or three times a week.
3. "Consensus Conference. Electroconvulsive Therapy," *The Journal of the American Medical Association (JAMA)*, 254, no. 15 (October 1985): 1
4. [www.thymatron.com/catalog\\_cautions.asp](http://www.thymatron.com/catalog_cautions.asp)
5. 2018 WL 6242154 at pp. 4, 11
6. Conn. Gen. Stat. § 17a-543(c)
7. Conn. Gen. Stat. § 17a-543(c)
8. Conn. Gen. Stat. § 17a-543(e)(1)(A)
9. Conn. Gen. Stat. § 17a-543(e)(1)(B)
10. Conn. Gen. Stat. § 17a-543(c)
11. Conn. Gen. Stat. § 45a-186(g): "The filing of an appeal under this section shall not, of itself, stay enforcement of the order, denial or decree from which the appeal is taken. A motion for a stay may be made to the Probate Court or the Superior Court. The filing of a motion with the Probate Court shall not preclude action by the Superior Court."
12. Conn. Gen. Stat. § 45a-186
13. Conn. Gen. Stat. § 45a-649a(c)
14. Conn. Gen. Stat. § 17a-543(e)(1)(A)
15. Conn. Practice Book § 79a-3(b)
16. Conn. Practice Book § 79a-3(c)(1)
17. Conn. Practice Book § 79a-3(c)(2)
18. [www.ctprobate.gov/Documents/2016%20-%202017%20Biennial%20Report.pdf](http://www.ctprobate.gov/Documents/2016%20-%202017%20Biennial%20Report.pdf), pp. 7-9
19. <http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=17075911>, <http://civilinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=17068768>

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