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PREFACE TO THE 2007 SUPPLEMENT

Two cases – one from the US Supreme Court and one from Alaska – dominated new developments in mental disability law this year. The Supreme Court case, *Panetti v. Quarterman,*[1] significantly clarified the Court's earlier decision in *Ford v. Wainwright,*[2] on the important question of when an individual is competent to be executed. Although the Court did not touch on the question that many had thought was at the heart of its decision to hear *Panetti* – whether the state could involuntarily medicate a death row defendant so as to make him competent to be executed[3] – its conclusion that a prisoner must possess a "rational understanding"[4] of the reasons forn his execution is a significant step beyond the muddled doctrine of the *Ford* case.

The Alaska case, *Wetherhorn v. Alaska Psychiatric Institute,*[5] considers the meaning of "grave disability" in an involuntary civil commitment context in a way that reflects how seriously that state's Supreme Court takes mental disability law issues. Last year, we characterized its decision in *Myers v. Alaska Psychiatric Institute,*[6] as "the most important State Supreme Court decision" on the question of the right to refuse treatment in, perhaps two decades. This year, again, the same court continues along the same path, in this case looking not only at the "grave disability issue," but also building on its *Myers* decision.[7]

As always, decisions proliferated in many other areas of mental disability law, mostly in matters involving sex offender laws[8] and the Americans with Disabilities Act.[9] But, in addition, there were multiple important decisions in other aspects of involuntary civil commitment law,[10] right to refuse treatment law,[11] and all aspects of the relationship between mental disability law and the criminal trial process.[12]

Heather Ellis Cucolo – now, I am happy to say, a colleague of mine as an adjunct professor at New York Law School – again shared in the preparation

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1 127 S. Ct. 2842; *see infra* § 12-4.1f.

2 477 U.S. 379 (1986); *see supra* § 12-4.1c.

3 *See infra* § 12-4.3.

4 *Panetti*, 127 S. Ct. at 2860.

5 156 P. 3d 371 (Alaska 2007); *see infra* § 2A-4.7.

6 138 P. 3d 238 (Alaska 2006); *see infra* § 3B-7.2c.

7 *See infra* § 3B-7.2b.

8 *See infra* §§ 2A-3.3 to 3.4

9 *See infra* §§ 5A-2 to 2d.

10 *See infra* Chapters 2A & 2C.

11 *See infra* Chapter 3B.

12 *See infra* Volume 4.

of this Supplement, and I am delighted to work with her. Our research assistant, Allison Morrissey, provided invaluable help, and my faculty assistants, Katrice Parker and Stan Schwartz, did a superb job. Both Heather and I are indebted once more to New York Law School Dean Richard A. Matasar and Associate Dean Stephen Ellmann for their ongoing support and encouragement of this entire project.

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Page 174. Add in text at end of section.

In *Wetherhorn v. Alaska Psychiatric Institute,*[812.1] the Alaska Supreme Court recently fleshed out the meaning of a "gravely disabled" statute so as to more clearly define this status. Under Alaska law, "gravely disabled" means:

> a condition in which a person as a result of mental illness
>
> (A) is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or
>
> (B) will, if not treated, suffer or continue to suffer severe and abnormal mental, emotional, or physical distress, and this distress is associated with significant impairment of judgment, reason, or behavior causing a substantial deterioration of the person's previous ability to function independently[.] [812.2]

In construing the statute, the Alaska court rejected the readings offered by both the patient and the hospital. Wetherhorn had argued that "only the level of harm described in [the statute] i.e., '*serious accident, illness, or death highly probable* if care by another is not taken,' is sufficient to justify the 'massive curtailment of liberty' which is involuntary commitment."[812.3] The hospital, on the other hand, relied on language in *Addington v. Texas,*[812.4] which stated that a person need only pose "*some* danger" to self or others to argue that the commitment standard has been properly expanded.[812.5]

First, it rejected the hospital's reliance on the phrase "some danger" from *Addington*, as that argument "ignores the United States Supreme Court's repeated admonition that, given the importance of the liberty right involved, a person may not be involuntarily committed if they 'are dangerous to no one and can live safely in freedom,.' "[812.6] a standard that was "certainly higher" than the requirement that a person merely present "some danger" to herself.[812.7] The court added that the addition of subsection B of the statute – nearly ten years after *O'Connor* was decided – "appear[ed] to respond to *O'Connor's* direction that the State "cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom." [812.8]

Here, the Alaska Supreme Court cited with approval the Washington state Supreme Court decision in *In re Labelle,*[812.9]that "[i]t is not enough to show that care and treatment of an individual's mental

illness would be preferred or beneficial or even in his best interests."[812.10] It noted that the local law required "more than a best interests determination," pointing out the statute's requirement that a commitment petition"allege that the evaluation staff has considered but has not found that there are any less restrictive alternatives available" [812.11] and "allege with respect to a gravely disabled respondent that there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought."[812.12]

Ruled the court:

> We conclude that in order to be constitutional, AS 47.30.915(7)(B) must be construed so that the "distress" that justifies commitment refers to a level of incapacity that prevents the person in question from being able to live safely outside of a controlled environment. This construction of the statute is necessary not only to protect persons against the "massive curtailment of liberty" that involuntary commitment represents, but also to protect against a variety of dangers particular to those subject to civil commitment. For example, there is a danger that the mentally ill may be confined merely because they are "physically unattractive or socially eccentric" or otherwise exhibit "some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." A similar concern with the perils of imposing majoritarian values forbids civil commitment to be based on the justification that a person would thereby enjoy a higher standard of living because, as the *O'Connor* Court explained, mental illness, without more, "does not disqualify a person from preferring his home to the comforts of an institution." The level of incapacity represented by AS 47.30.915(7)(B) must be such so as to justify the social stigma that affects the social position and job prospects of persons who have been committed because of mental illness.[812.13]

On the other hand, the Court rejected plaintiff's argument that the statute was unconstitutional because it did not require that the danger be "imminent."[812.14] Noting that the United States Supreme Court had not yet made imminence a requirement, the court nonetheless ruled that – even under the criteria of those jurisdictions that *had* imposed such a standard – there was sufficient evidence before the court to meet that burden in the case before it.

Wetherhorn is significant because of the Alaska court's careful construction of that state's "grave disability" statute. By focusing on

a prospective patient's "*level* of incapacity that prevents [her] from being able to live safely outside of a controlled environment,"[812.15] the court clarifies that any statutory decision is a textured one, and one that can not be made bya simple dyadic yes-no decision. Its invocation of the "massive curtailment of liberty" language of earlier cases[812.16] underscores its ongoing commitment to the substantive due process values that permeate the involuntary civil commitment process.

[812.1] 156 P. 3d 371 (Alaska 2007).

[812.2] ALASKA STATUTE 47.30.915(7) .

[812.3] *Wetherhorn,* 156 P. 3d at 377.

[812.4] 441 U.S. 418 (1979); *see infra* § 2C-5.1a.

[812.5] *Wetherhorn,* 156 P. 3d at 377.

[812.6] *Id.* at 377, citing *O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975); *see supra* § 2A-4.4d.

[812.7] *Wetherhorn,* 156 P. 3d at 378.

[812.8] *Id.*, citing *O'Connor,* 422 U.S. at 576.

[812.9] 106 Wash. 2d 196, 728 P. 2d 138 (1986).

[812.10] *Wetherhorn,* 156 P. 3d at 378, quoting *LaBelle,* 728 P. 2d at 146.

[812.11] ALASKA STATUTE 47.30.730(a)(2).

[812.12] *Wetherhorn*, 156 P. 3d at 378, quoting ALASKA STATUTE 47.30.730(a)(3).

As further protection, the statute directs the court to make its findings by "clear and convincing" evidence. *Id..,* 47.30.735 (c),construed in *DeNuptiis v. Unocal,* 63 P. 3d 272, 278 (Alaska 2003).

[812.13] *Wetherhorn*, 156 P. 3d at 378, citing, inter alia, *O'Connor, supra; Addington, supra,* and *In re Harris,* 98 Wash.2d 276, 654 P.2d 109, 111 (1982).

[812.14] *Wetherhorn*, 156 P. 3d at 378–79.

[812.15] *Wetherhorn,* 156 P. 3d at 378 (emphasis added).

[812.16] *See e.g.,* Humphrey v. Cady, 406 U.S. 504, 509 (1972).

Page 174. n. 813. Change period at end of footnote to semicolon, and add:

B. Arrigo, *supra* note 0.1, at 86, 89 (citing Treatise).

§ 2A-5 Statutory developments

Page 176. n. 825. Change period at end of footnote to semicolon, and add:

Johns, *supra* note 1, at 57 n.211 (citing Treatise § 2.16, first edition).

Page 177. n. 833. Change period to semicolon at end of first paragraph, and add:

Datlof, *The Law of Civil Commitment in Pennsylvania: Towards a Consistent Interpretation of the Mental Health Procedures Act,* 38 DUQ. L. REV. 1 (1999).