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2 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

3 THIRD JUDICIAL DISTRICT AT ANCHORAGE

4 In the Matter of the Necessity)
for the Hospitalization of:)
5 ROSLYN WETHERHORN,)
6)
Respondent.)
7

RECEIVED

JUL 26 2005

Law Project For
Psychiatric Rights

Case No. 3AN 05-459 PR-S

8 **OPPOSITION TO MOTION FOR ATTORNEY'S FEES**

9 **I. INTRODUCTION**

10 Mr. Gottstein, on behalf of the Law Project on
11 Psychiatric Rights ("Law Project"), has moved for an award of
12 attorney's fees in the above matter under Civil Rule 82. Nothing
13 in Alaska case law, the civil rules, the probate rules, or the
14 statutes governing involuntary mental health commitments supports
15 any award of attorney's fees as contemplated by the Law Project's
16 motion. Accordingly, the court should deny the motion as a matter
17 of law.

18 **Iii. BACKGROUND**

19 In April of 2005, Ms. Wetherhorn was ex-parted to the
20 Alaska Psychiatric Institute (hereinafter "API") under
21 AS 47.30.705 and .710. A petition for a 30-day commitment was
22 filed, along with a motion for the administration of psychotropic
23 medication. Both petitions were granted on April 15, 2005. At
24 that time, Ms. Wetherhorn was represented by the Alaska Public
25 Defender's Agency. On April 26, 2005, the Law Project filed a
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1 substitution of counsel. On April 27, 2005, prior to the
2 expiration of the 30-day commitment, and as required by statute,
3 API filed a new petition for a 90-day commitment and another
4 petition for the administration of psychotropic medication. The
5 Law Project filed a notice with the court of the respondent's
6 desire for a jury trial on May 5, 2005. On May 9, 2005, the
7 respondent was discharged from API. On or about May 18, 2005, API
8 filed a motion to dismiss the petition for a 90-day commitment.
9 This motion was granted without prejudice by the court on June 16,
10 2005.

11 **III. ARGUMENT**

12 The Law Project argues only one point of law in
13 presenting its motion - that because the petitions for involuntary
14 commitment and forced medication were dismissed, the respondent is
15 the prevailing party and under Civil Rule 82 she is entitled to an
16 award of attorney's fees. Despite this argument, the respondent
17 fails to note controlling case law, other rules of procedure (e.g.
18 probate), and the statutes governing fees and expenses in judicial
19 proceedings under AS 47.30 which clearly indicate that an award
20 under Civil Rule 82 is not permissible in this action.

21 A civil commitment proceeding is a probate matter, which
22 are governed first by the probate rules.¹ If there is no
23 controlling law under the probate rules, or the statutes governing
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25 ¹ Probate Rule 1(b).

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2 the particular proceeding (here mental health commitments under
3 AS 47.30) then the civil rules could be applied.² In this case,
4 there is a statute directly on point that addresses the fees and
5 expenses for mental health commitment judicial proceedings -
6 AS 47.30.905, which provides in relevant part:

7 (b) An attorney appointed for a person under
8 AS 47.30.660 - 47.30.915 shall be compensated for
9 services as follows:

10 (1) the person for whom an attorney is appointed
11 shall, if the person is financially able
12 under standards as to financial capability
13 and indigency set by the court, pay the costs
14 of the legal services;

15 (2) if the person is indigent under those
16 standards, the costs of the services shall be
17 paid by the state.

18 This statutory provision is clear. If the Law Project was court
19 appointed to represent the respondent then they are entitled to
20 reimbursement either by the respondent or by the state. Thus,
21 because there is a controlling statute, Civil Rule 82 should not
22 apply under the reasoning of *Crittell v. Bingo*, 36 P.3d 634
23 (Alaska 2001), *aff'd*, 83 P.3d 532 (Alaska 2004).

24 Under AS 47.30.905, which governs in this case, the
25 first inquiry must be whether the Law Project was appointed to
26 represent the respondent. The state submits that a substitution
of counsel does not equate to a court appointment. Therefore, if
the Law Project was not appointed, the court could conceivably

² Probate Rule 1(e).

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2 look to Civil Rule 82, but under the reasoning in *Crittell v.*
3 *Bingo*, discussed *supra*, the court should not grant the motion for
4 fees. However, assuming for purposes of this motion, an
5 appointment has occurred, then the court must determine who pays
6 under AS 47.30.905. If and only if the respondent is indigent, as
7 determined by court rules, the fees are borne by the state. If
8 Ms. Wetherhorn is not indigent, then she bears the cost of her
9 representation.

10 If the state is to bear these costs, the next question
11 that must be answered is how the Law Project should be reimbursed.
12 In order to answer that question, the court must determine who in
13 the state, as referred to in the statute, pays and how the fees
14 are calculated. The Department of Health and Social Services
15 (hereinafter "DHSS") submits that the most analogous situation to
16 the one at bar is found in Administrative Rule 12. Administrative
17 Rule 12 specifically contemplates the court appointing counsel in
18 proceedings under AS 47.30.³ In addition, under Administrative
19 Rule 12, the rate of compensation is clearly set forth - an
20 attorney is not allowed to reimburse its "rate," rather the
21 attorney can submit invoices within 30 days at a rate of \$40.00
22 per hour.⁴ Applying this rate to the billing attached by

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24 ³ Administrative Rule 12(e)(1)(A)(vi).

25 ⁴ Administrative Rule 12(e)(5).
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2 Mr. Gottstein, he is entitled to a flat amount, regardless of his
3 billing rate, of \$464.00 (11.6 hours @ 40.00 per hour = \$464.00).⁵

4 The court should not use Civil Rule 82 to establish any
5 reimbursement rates because the only way Rule 82 could apply in
6 this case is under the reasoning of *Crittell v. Bingo*. That
7 decision states that Civil Rule 82 is available in probate
8 proceedings for a "fraud upon the court."⁶ In the above-captioned
9 matter, the proceeding consisted of a standard involuntary mental
10 health commitment proceeding. Petitions were filed and granted
11 authorizing a 30-day commitment and administration of psychotropic
12 medication. Prior to the expiration of the 30-day commitment, API
13 filed a petition for a 90-day commitment and the administration of
14 psychotropic medication as required by statute. The hearing was
15 postponed as API and the respondent tried to facilitate placement
16 in a less restrictive environment - which again, API is
17 statutorily mandated to do. The process worked as it should and
18 Ms. Whetherhorn was placed in the least restrictive environment
19 that met her needs. There is no allegation of fraud, nor can
20 there be, and under *Crittell v. Bingo*, Civil Rule 82 does not
21 apply.

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23 ⁵ It is important to note that the rule has a cap of \$500.00
24 absent extraordinary circumstances (See Administrative Rule
25 12(e)(5)(D)).

26 ⁶ *Crittell*, 83 P.3d at 535.

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2 **IV. CONCLUSION**

3 The respondent's motion is not supported by any case
4 law, rule of procedure, or statute. Civil Rule 82 may apply in
5 probate proceedings only if there is no other controlling
6 precedent, and then only if there has been a fraud upon the court.
7 At best, the respondent can seek reimbursement under AS 47.30.905,
8 which allows for counsel to be paid by the state only if the
9 respondent is indigent. If the court can make such a finding,
10 then reimbursement should be made pursuant to Administrative
11 Rule 12. The motion for attorney's fees under Civil Rule 82
12 should be denied.

13 DATED: 7/25/05

14 DAVID W. MÁRQUEZ
15 ATTORNEY GENERAL

16 By:

Holly Chaffter Chari

17 Holly Schaffter Chari
18 Assistant Attorney General
19 Alaska Bar No. 0405010

20 DATED: 7/25/05

21 DAVID W. MÁRQUEZ
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23 By:

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