

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the Hospitalization of:)
)
)
 Faith J. Myers,)
)
)
 Respondent.)
)
)
 _____)

LAW OFFICES
MAR 25 2003
JAMES B. GOTTSTEIN

3AN-03-277 PR

ORDER

On February 21, 2003, an Order was entered that allowed Ms. Myers to be delivered to the temporary custody of the Alaska Psychiatric Institute (API). At a hearing held on March 5, 2003, findings were entered on record that Ms. Myers had been shown by clear and convincing evidence to be mentally ill, that she presented a likelihood of serious harm to herself or others, and that she would therefore remain committed in the Alaska Psychiatric Institute (API) for a period of not more than 30 days. AS 47.30.735. On March 14, an Order was entered granting the State's Petition for Administration of Psychotropic Medication. At Petitioner's request, another Order was entered staying March 14 Order for a period of 7 days, so that the March 14 ruling could be appealed to the Alaska Supreme Court.

Prior to the March 5 hearing, counsel for Ms. Myers filed a Motion to Dismiss both the Petition for 30-Day Commitment and the Petition for Court Approval of Psychotropic Medication. That Motion is now ripe for review. As noted, both of the Petitions have been granted since Mr. Gottstein filed the Motion to Dismiss. However, there are certain arguments he raises in his Memorandum in

Support that, while considered by me in my previous rulings, I wish to address more fully in light of the serious questions presented in this case.

1. Application of Daubert Admissibility Standard

Respondent's counsel contended both in his Motion and at the evidentiary hearing held on March 5 that expert testimony proffered by the State on the question of Ms. Myers' future dangerousness or the appropriateness of the medication plan proposed by API should not be considered. Specifically, counsel argued that under the standard for admissibility of expert scientific testimony set forth in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and as adopted by the Alaska Supreme Court in State v. Coon, 974 P.2d 386 (Alaska 1999), the testimony of Dr. Hanowell and Dr. Kletti should not be considered. Respondent asserts that such testimony is not sufficiently reliable under the Daubert criteria for admission of scientific evidence on either the question of Ms. Myers' future dangerousness, or the proposed plan of administering psychotropic medication to treat her currently diagnosed mental condition.

The State's Opposition to Post-Hearing Motion to Delay Effectiveness of Any Forced Medication Order identifies that this testimony was not offered to justify the validity of the proposed treatment plan, but rather to show that the elements of the State's Petition had been established. Opposition, at 2. It was primarily for this latter purpose that I considered the testimony offered by the State's medical witnesses in this matter. Under Coon, when an area of scientific expertise is well known and has been fully considered by the court, a trial court may take judicial notice of its admissibility. Id. at 398. The State's experts were candid that the

current understanding of mental illness is such that, at this point, no one can testify as to what causes schizophrenia and/or why some medications work for some patients. They testified that their views were based upon clinical observations and research that is based largely upon observations of outcomes. This limitation does not cause me to conclude that the testimony is unreliable or untrustworthy. Regarding Ms. Myers' diagnosis, I read Coon to permit the consideration of the psychiatrists' testimony regarding clinical observations supporting the conclusion that Ms. Myers suffers from schizophrenia. Though Ms. Myers disputes that she is mentally ill, she did not dispute that she hears voices commanding her to do things, that she sees people she realizes can not be present and experiences other sensations and hallucinations she refers to as "special effects" that do not allow her to accurately perceive the world around her. Had there been a dispute about whether Ms. Myers actually hears voices that direct her to do things, this would be a closer question. As it is, given the undisputed factual testimony concerning the voices that command her, Coon allows psychiatrists to testify regarding Ms. Myers' diagnosis and the danger she presents to herself and/or others.

Ms. Myers' expert testimony did not address the questions of the dangers posed by Ms. Myers to herself or others in her current mental state. Indeed, Ms. Myers' experts have not examined her. The experts she offered addressed the advisability of treating a patient with her diagnosis with psychotropic medications. As I explained in my earlier Order, I considered the expert testimony offered by Ms. Myers to be of limited relevance for the purpose of ruling on her capacity and ability to provide informed consent, and not because I considered that the statutory scheme calls for the superior court to second guess the proposed treatment plan. I

found the testimony relevant because Myers testified that she was an activist for mentally ill patients in the past, that she has undergone treatment herself for mental illness and because she demonstrated to me an understanding and familiarity with the issues involved in treatment of the mentally ill. This included the nature of the general discussion and debate in the medical community regarding certain treatment approaches to mental illness. Had Ms. Myers refused medication against medical advice without being able to demonstrate that a valid debate exists among qualified experts in the psychiatric community, that would have been probative on the issue of her capacity.¹ For these reasons, I do not believe the Daubert factors preclude my consideration of either the State's experts or Ms. Myers' experts.

2. Vagueness of AS 47.30.730.

Respondent further argues in her Motion that the prescribed procedure in petitioning for a 30-day involuntary commitment under AS 47.30.730 is unconstitutionally vague, because the requirement for an allegation that she is "likely to cause harm to self or others or is gravely disabled" insufficiently describes the nature of conduct for which involuntary committal may be instituted. However, as the State correctly points out in its Opposition brief, Subsection (a)(7) of this statutory section further requires that the petition for commitment "list the facts and specific behavior of the respondent supporting the allegation" of the likelihood that the respondent may cause harm to herself or others, or is gravely disabled. I conclude that this requirement is sufficient to provide Ms. Myers with the

¹ As it is, I made a finding that a valid debate does exist among qualified experts regarding the use of psychotropic medications for schizophrenia.

opportunity both to identify and contest the allegations of her behavior and other pertinent facts which form the basis for the petition for commitment.

3. Adequate Listing of Facts in Petition

Respondent argued that the Petition for Commitment did not sufficiently list the facts and specific behavior required under AS 47.30.730(a)(7), because it only lists "conclusory allegations" regarding Ms. Myers' condition. Memorandum in Support, at 8. However, in addition to the allegations identified by Respondent in her brief, the Petition also stated that Ms. Myers "reportedly isn't eating well and reportedly may be sleeping in the crawl space under her apartment." The Petition included an additional assertion that Ms. Myers was "making reference to ghosts." In my March 14 Order granting the State's Petition for Administration of Psychotropic Medication, I specifically found that Ms. Myers' apparent occupation of the crawlspace of her apartment to sleep or read posed a danger to herself. At the hearing, the testimony was that the space is unheated. Only a sheet of plastic separates it from the ground under the building and Ms. Myers appears to have been there in January, when a drop in temperature would pose a risk of harm to her. I noted this testimony in my Order of March 14, 2003, at 10. However, the specifics of this risk of harm were not elaborated upon in the original petition. I concluded that the above-stated recitation of facts in the Petition for Commitment, while sparse, was sufficient to support the allegations of Ms. Myers mental illness and likelihood of causing harm to herself. This conclusion is based, in part, upon the fact that the statute requires that the Petitions be prepared in a very short timeframe.

4. **Undefined Limits for State Authority to Administer Medications**

Ms. Myers contends that the State cannot be given “carte blanche” authority by the court to administer medications to her, because AS 47.30.837 requires that a patient be given all information that is material to the patient’s decision to give or withhold consent.² Ms. Myers argues that the Petitioner failed to give this information to her as required by statute. The testimony at the hearing supported the finding that the State either actually provided, or attempted to provide, this information to Ms. Myers to the extent that she would allow it to be provided. She did not participate in at least some of the discussion.³

Beyond the requirement for informational disclosure, however, Ms. Myers challenges the limitation on a court’s authority to modify or restrict a treatment plan once the court has issued an order approving the facility’s petition under AS 47.30.839. AS 83.30.839(g) states in relevant part that if the court finds that the patient is not capable of providing informed consent, “the court shall approve the facility’s proposed use of psychotropic medication.” Treatment by use of a locked quiet room, electroconvulsive therapy, adverse conditioning, lobotomy, psychosurgery or other comparable form of treatment are addressed in AS 47.30.825(d)-(g). Experimental treatments are prohibited under AS 47.30.830, and the same statute provides that if a treatment “is experimental as applied to a particular patient or would involve a significant risk of mental or physical harm to the patient, the matter may be referred to the commissioner for a determination.”

²The statute also sets forth several specific items of information that the treatment facility is required to impart to the patient. See AS 47.30.837(d)(2)(A-F).

Referral to the commissioner triggers the facility's duty to provide copies of all documents to the patient, patient's attorney and guardian. The patient and/or representatives of the patient are also entitled to provide evidence to the commissioner on the question. AS 47.30.830. However, the initial determination that a treatment may be experimental as applied to a particular patient and/or the determination that a particular treatment may be harmful to a particular patient is a decision made by the personnel of the facility.

The state argues persuasively that this statutory scheme evidences a clear intent by the legislature to restrict the court from substituting its judgment on medical matters for those of the treating facility's physicians, but counsel for Ms. Myers raises a serious concern that approval of the State's Petition may subject her to a medication that she considers to have actually harmed her in the past, without providing the opportunity to present differing medical experts. She argues that standards within the medical community evolve as medical science advances and that some medications and/or medical procedures that were the accepted standards in the past are now looked upon with great disfavor and/or even recognition that they were indeed harmful. Where a patient, such as Ms. Myers, has a history of undergoing a medical treatment she found to be harmful, where she is found to lack capacity to make her own medical decisions and a valid debate exists in the medical/psychiatric community as to the safety and effectiveness of the proposed treatment plan, it is troubling that the statutory scheme apparently does not provide a mechanism for presenting scientific evidence challenging the proposed treatment plan. The decision to grant the State's Petitions was made based upon the express

³ I do not reach the question of whether API would be required to provide such information to a guardian

language in the statute, which I do not find to be ambiguous. The superior court's role appears to be limited to deciding whether Ms. Myers has sufficient capacity to give informed consent, as defined by AS 47.30.839.

CONCLUSION

I previously granted both the State's Petition for Involuntary Commitment and Petition for Administration of Psychotropic Medication. For the reasons stated in my prior rulings and as set forth above, Ms. Myers' Motion to Dismiss is denied.

DATED 3/21/03

Morgan Christen
MORGAN CHRISTEN
Superior Court Judge

I certify that on 3/24/03
a copy of the above was mailed/faxed to
each of the following at their addresses of record:
James Gottstein 274-9493
Jeffrey Killip 258-6872

HW
Hillary Williams
Administrative Assistant

authorized to make health decisions on behalf of Ms. Myers.