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

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Original Received
Probate Division

OCT 22 2008

Clerk of the Trial Courts

In The Matter of the Necessity for the Hospitalization of William Bigley,

Respondent

Case No. 3AN 08-1252PR

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Respondent has moved to dismiss the Petition for Court approval of Administration of Psychotropic Medication filed herein on October 20, 2008 (Forced Drugging Petition). In the alternative, Appellant has moved for an order requiring petitioner to file a legally sufficient petition which provides Appellant meaningful notice of the factual and legal bases upon which the requested relief is sought.

I. THE FORCED DRUGGING PETITION IS PREMATURE

In *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 382 (Alaska 2007), the Alaska Supreme Court ruled:

> Alaska requires a two-step process before psychotropic drugs may be administered involuntarily in a non-crisis situation: the State must first petition for the respondent's commitment to a treatment facility, and then petition the court to approve the medication it proposes to administer. The second step requires that the State prove by clear and convincing evidence that: (1) the committed patient is currently unable to give or withhold informed consent; . . .

(footnotes omitted).

The second-step requirement that the State must "then petition" for a forced drugging order applies to a "committed patient." Thus, a forced drugging petition under AS 47.30.839 can not be filed until an order for commitment has been signed by a Superior

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406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686 Phone ~ (907) 274-9493 Fax

Court Judge. The Forced Drugging Petition is therefore premature and should be dismissed on that ground.

II. THE FORCED DRUGGING PETITION IS LEGALLY INSUFFICIENT

In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), the Alaska Supreme Court held AS 47.30.839 was not a constitutionally permissible basis for forcing someone to take psychotropic drugs against their will except as follows:

> [A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*.

(emphasis added).

The Supreme Court further held:

> Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:
>
> > (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
> >
> > (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
> >
> > (C) a review of the patient's history, including medication history and previous side effects from medication;
> >
> > (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and

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(E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.][1]

The Alaska Supreme Court then cited with approval the Supreme Court of Minnesota's requirement of consideration of the following factors:

(1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;

(2) the risks of adverse side effects;

(3) the experimental nature of the treatment;

(4) its acceptance by the medical community of the state; and

(5) the extent of intrusion into the patient's body and the pain connected with the treatment.[2]

Over two years after *Myers* the Alaska Psychiatric Institute (API) is still using the "check box" form of forced drugging petition that only alleges in a conclusory fashion the statutory requirements. This is legally insufficient under *Myers* because there the Alaska Supreme Court required "in addition" to "comply[ing] with all applicable statutory requirements," the State must prove "the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*."[3]

Thus, under Civil Rule 12(b)(6), or otherwise, the Forced Drugging Petition is legally insufficient and must be dismissed for failure to allege a sufficient basis on which the requested relief may be granted.

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[1] 138 P.3d 252.
[2] *Id.*
[3] 138 P.3d at 254, emphasis added.

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III. THE FORCED DRUGGING PETITION DOES NOT SATISFY DUE PROCESS REQUIREMENTS

Neither does the Forced Drugging Petition satisfy due process requirements. Meaningful notice and a meaningful opportunity to be heard are the hallmarks of procedural due process.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 2648-9 (2004) ("a citizen-detainee . . . must receive notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.")

Respondent is similarly entitled to "receive notice of the factual basis . . . and a fair opportunity to rebut the Government's factual assertions." Therefore, after *Myers*, a petition requesting the court to authorize the forced drugging of an unwilling patient, must include the factual basis supporting the grant of the petition, including, "at a minimum," the factors required under *Myers*, as set forth in the previous section. The petition in this case failed to do so and should therefore be dismissed on that basis. Failing that, the Petitioner should be required to provide such factual basis and give Respondent a fair opportunity to prepare to rebut it prior to any hearing being held.

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IV. API HAS ADMITTED RESPONDENT IS COMPETENT TO MAKE MENTAL HEALTH TREATMENT DECISIONS

AS 47.30.837(c) provides in pertinent part:

> If the facility has reason to believe that the patient is not competent to make medical or mental health treatment decisions and the facility wishes to administer psychotropic medication to the patient, the facility shall follow the procedures of AS 47.30.839.

During the October 21, 2008, hearing on involuntary commitment, Dr. Maile testified that Respondent had been offered psychiatric medications and had declined. This constitutes an admission that API had determined Respondent is competent to make mental health treatment decisions, because, as AS 47.30.837 provides, if Respondent was not competent to decide to take the medication API is required to seek authorization under AS 47.30.839. Since Respondent is competent to decide to take the drug(s), he is also competent to decline them. AS 47.30.839 only allows the Court to order Respondent to be drugged against his will if he is incompetent to either accept or decline the medication petition, and the Forced Drugging Petition must therefore be dismissed because API has admitted Respondent is competent to make mental health treatment decisions.

V. CONCLUSION

For the foregoing reasons, the Forced Drugging Petition should be dismissed.

DATED: October 22, 2008.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein
ABA # 7811100

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686 Phone ~ (907) 274-9493 Fax