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

In the Matter of the Necessity)
for the Hospitalization of:)
)
WILLIAM BIGLEY,)
)
Respondent.)

Case No. 3AN-08-1252 PR

**OPPOSITION TO RESPONDENT’S MOTION FOR SUMMARY JUDGMENT,
MOTION TO VACATE AND MOTION TO DISMISS AND THE ADDENDUM
ATTACHED TO THE MOTION TO DISMISS**

William Bigley (Mr. Bigley) has filed

1. A Motion to Vacate the Order Setting an October 29 hearings;
 2. A Motion to Dismiss, and an addendum to that motion to Dismiss;
- and
3. A Motion for Summary Judgment.

The court should decline to grant any of these motions as set forth below.

I. STANDARD OF REVIEW

A. Alaska Rule of Civil Procedure 12(b)(6)

Alaska Rule of Civil Procedure 12(b)(6) provides that a party may, as a defense to a claim or claims, file a motion to dismiss for failure to state a claim upon which relief can be granted.¹ In considering a motion under Civil Rule 12(b)(6), the court tests the legal sufficiency of the complaint’s allegations,² and views those allegations in the light most favorable to the plaintiff.³ Dismissal is inappropriate in this instance under Civil Rule 12(b)(6).

¹ Alaska R. Civ. P. 12(b)(6).

² *Dworkin v. First National Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968).

³ *See, e.g., J & S Services, Inc. v. Tomter*, 139 P.3d 544, 550 (Alaska 2006).

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B. Alaska Rule Of Civil Procedure 56

Alaska Rule of Civil Procedure 56 provides that judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.”⁴ In deciding a motion for summary judgment, the court must make all reasonable inferences of fact in favor of the non-movant.⁵ Here, there are material issues of fact in dispute, which preclude summary judgment; accordingly, Mr. Bigley’s motion for summary judgment should not be granted.

II. FACTUAL BACKGROUND

In order to properly frame the issues presented in all of the motions before the court, API submits the following:

- Mr. Bigley was admitted to API on October 20, 2008, on an ex parte hold pursuant to AS 47.30.700.
- A petition was filed seeking a thirty day commitment and forced medication on October 20, 2008.
- A hearing was held on October 21, 2008, whereby Master Lack recommended commitment for up to 30 days, which was approved by Judge Morse on October 24, 2008.
- API withdrew its petition for forced medication on October 24, 2008.
- API refilled its petition for forced medication on October 27, 2008.
- On October 27, 2008, Mr. Bigley, through his attorney, filed a motion for summary judgment and a motion to dismiss, to which an addendum was filed on October 30, 2008.

⁴ Alaska R. Civ. P. 56(c).

⁵ See, e.g., *Sengupta v. University of Alaska*, 139 P.3d 572, 576 (Alaska 2006).

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- A hearing on the petition for forced medication was scheduled for October 29, 2008.
- Mr. Bigley, through counsel filed a motion to vacate that hearing on October 28, 2008.
- The court held a status conference and held that a hearing would go forward on November 5, 2008, but allowed Mr. Gottsein to file any motions that he deemed appropriate.

III. MR. BIGLEY’S MOTION TO VACATE HAS BEEN RULED ON – THE HEARING IS STILL SCHEDULED

This court stated emphatically on the record during the October 28, 2008 status conference that a hearing on the petition for forced medication would continue. As such, API submits that this motion has already been effectively denied. The extent it has not, API believes the motion to vacate the hearing that is scheduled for November 5, 2008 should be denied.

Mr. Bigley seeks to vacate the hearing due to the pending “stay” in another matter involving Mr. Bigley before the Alaska Supreme Court . As stated by this court, whether the stay in the other matter has preclusive effect in matter is not ripe for a judicial determination. While API believes, the stay does not apply and it is only effective as to that case, and not to a case that has been brought some six month later and predicated upon different factual issues, the court indicated it would address the issue of the stay, if he granted the petition for forced medication.

Secondly Mr. Bigley argues that the hearing violates the rules and procedures set forth in *Meyers v. Alaska Psychiatric Institute*, 138 P.2d 238, 254 (Alaska 2006), stating that court ordered medication should not be authorized when it is not in the patient’s best interest and that there are no less intrusive “means of protecting the patient.” Mr. Bigley argues that having a hearing on shortened time violates this premise. This argument is without merit because it fails to recognize that the court did not address this issue and did not indicate that the times that are clearly set forth in the statues governing these types of proceedings envision and actually require expedited

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2 hearings.⁶ The issue of whether the provision of medication in this case is in
3 Mr. Bigley's best interest and that are no other less intrusive means of protecting the
4 patient available, can be well established at the hearing that is set and in the periods
5 required by the statutes.

6 Third, Mr. Bigley argues that the hearing would violate his due process
7 rights, because he cannot adequately litigate the allegations because the factual basis has
8 not been provided to Mr. Bigley as to why medication is necessary. This is a false
9 premise because in fact the petition includes all the factual reasons that administration
10 of medication is necessary and imperative in this case. Whether the factual basis meets
11 the legal standards can be vigorously disputed during hearing on November 5, 2008,
12 especially during the, witnesses testimony. . It is API's contention that Mr. Bigley's
13 due process rights are protected by the fact that a hearing is being held – and Mr. Bigley
14 has notice of the basis for the hearing. Particularly in this case, the court should not
15 entertain Mr. Bigley's allegation of due process violation since the court moved the
16 hearing one-week to give Mr. Bigley's counsel time to prepare which is not the ordinary
17 course of practice in these proceedings. Due process has been met this case and the
18 matter should not be vacated.

19 **IV. MR. BIGLEY'S MOTION TO DISMISS SHOULD BE DENIED**

20 Mr. Bigley's primary argument in his motion to dismiss is that his due
21 process rights are being violated because he has not been given the factual basis for the
22 petition. Such a claim is without merit. As stated above, Mr. Bigley's due process
23 rights have been adequately protected, because he has notice of the action that is being
24 taken; he has notice for the basis of the action being taken; and he will be provided with
25 the opportunity to vigorously oppose the petition during a contested hearing whereby he
26 can call his own witnesses and present his own testimony as well as cross-examine all
witnesses offered by the state.

26 ⁶ AS 47.30.839 (e)

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2 Mr. Bigley suggests, without any legal support, that something akin to
3 initial disclosures should occur in these cases. API strongly contests this argument
4 because there is no legal authority for Mr. Bigley to request initial disclosures or pursue
5 a normal litigation procedure in a medication proceedings. These proceedings are
6 governed by Alaska Rules of Probate Procedure.⁷ The Probate Rules are silent on the
7 issue of discovery in these types of hearings and they do not provide for parties to
8 conduct regular discovery in these type of cases. Similarly . the mental health statute
9 neither allows nor even refers the parties to conduct discovery prior to a hearing covered
10 under this section.⁸ In fact, the rules order both the parties and the court to act
11 expediently and have a hearing within 72 hours of filing the petition.⁹ In lieu of having
12 parties conduct extensive discovery in a 3 day span, the court assigns the court visitor to
13 investigate the allegations made in the petition and make recommendations to the court
14 and the parties.¹⁰

15 Given the specificity of the procedures laid out in the applicable statute
16 and the expedient nature of these proceedings as identified by the statute itself, it is clear
17 that extensive discovery process as argued by Mr. Bigley is not allowed and practical in
18 these proceedings. Additionally, extending the litigation process in these proceedings
19 will be against the best interest of the patient which is completely against the intent of
20 the mental health statutes.¹¹ ,

21 In his addendum to the motion to dismiss, Mr. Bigley contends that
22 because API offers medications, which the respondent refuses, API is admitting that
23 Mr. Bigley is capable of informed consent. This circular argument is unsupported by

24 ⁷ Rule 1 (b).

25 ⁸ AS 47.30.839.

26 ⁹ AS 47.30.839 (e).

¹⁰ AS 47.30.839 (d).

¹¹ See AS 47.30.655.

¹³ AS 47.30.837.

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2 statute and case law. It follows a logic based in the language of AS 47.30.838 and
3 AS 47.30.839 that administering medications without informed consent, implies that the
4 hospital try to explain the medications, and determine if the patient would refuse or
5 consent, thus the term “informed consent.” Were API to not ask Mr. Bigley to take his
6 medications, it would not be impossible for the staff to ever inform Mr. Bigley about the
7 medications, nor would they be able to determine refusal. API is following the law by
8 requesting that Mr. Bigley take the medications prescribed.¹³

9 It is important to note that in *Myers v. API*, the AK Supreme court
10 determined that court-ordered medications might be given as long as the patient is
11 unable to give or withhold informed consent and that the patient never previously made
12 a statement rejecting medications when competent.¹⁴ *Myers* does require that the
13 patient’s decision to forego medication be honored **IF** those wishes were made when the
14 patient was competent to express those wishes.¹⁵ Whether Mr. Bigley has made a prior
15 statement regarding the administration of court ordered medication while competent, is
16 a fact that is not known at this time, and it is highly unlikely that such a statement could
17 be confirmed based on the long history of Mr. Bigley. Despite the above, API’s
18 attempts at informing Mr. Bigley about treatment options is legally required.

19 Determining if Mr. Bigley who was committed to API on October 21,
20 2008, should be medicated by court order is a genuine issue of material fact. Since his
21 hospitalization on October 20, 2008, there have been repeated crisis situations requiring
22 API to emergency medicate Mr. Bigley.¹⁶ Testimony from the 30-day commitment
23 proceeding offered by Mr. Bigley’s guardian, Jonathan Hughes, discussed Mr. Bigley’s
24 rapidly deteriorating health and social network within the last five months. Testimony
25 was also offered by Mr. Hughes that respondent has been jailed several times in the last
26 five months, and counsel for API intends to call witnesses regarding all of these facts,

14 Id.

15 *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 242-243 (2006).

16 See attached exhibits 1 and 2.

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2 which are material, and essential in determining if the respondent would benefit from
3 medication, and whether or not the respondent is legally capable of informed consent.¹⁷

4 **V. MR. BIGLEY'S MOTION FOR SUMMARY JUDGMENT SHOULD BE**
5 **DENIED**

6 Mr. Bigley filed a motion for summary judgment asking the court to order
7 API to provide a litany of opportunities to Mr. Bigley under the theory that they are a
8 "less intrusive alternative." This motion should be denied because the relief that
9 Mr. Bigley cannot be provided by API as a matter of law and the relief sought is not
10 related to petition for court ordered medication. The present case is not about the
11 underlying question of the effects of psychotropic medication, nor is a Constitutional
12 question raised.

13 Mr. Bigley has raised similar arguments in previous cases, all of which
14 were denied outright by the superior court.¹⁸ Mr. Bigley demanded identical goods and
15 services in his Motion for Permanent Mandatory Injunction dated September 12, 2007.
16 This motion and the state's request to deny it were determined to be moot by the
17 superior court judge presiding.¹⁹ As in previous motions of the Respondent, There is no
18 authority in case law or statute that suggests the Court can even entertain such a motion.
19 The relief Mr. Bigley requests is unrelated to the claims presented to the Court in this
20 case. This case was initiated by a petition for initiation of involuntary commitment, and
21 thus the case is only about whether or not Mr. Bigley should be committed to API.
22 AS 47.30.700; AS 47.30.735; AS 47.30.839. The case therefore necessarily revolved
23 around the facts concerning Mr. Bigley's current mental status. The case is not about
24 the actions of API over the last 27 years, and procedurally it cannot produce the kind of

22 ¹⁷ AS 47.30.839

23 ¹⁸ In the Matter of the Necessity for Hospitalization of: William S. Bigley,
24 Respondent. Case no. 3AN-07-1064 PR. See attached exhibit 1, Respondent's Motion
25 for Permanent Injunctive Relief, as it was copied from the superior court file October
26 30, 2008.

¹⁹ See attached exhibit from as copied from Superior Court file on October 30,
2008, "Order" beta stamped 000026. Case no. 3AN-07-1064 PR.

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relief that Mr. Bigley requests in his motion. If Mr. Bigley believes that the state must permanently provide him with the list of goods and services he requests, he will have to file a separate legal action and establish his legal entitlement to receive this relief.

If this Court were to actually entertain this motion, it should have a hearing on its merits. The motion cannot be viewed as a motion for summary judgment, as genuine issues of material fact exist as to Mr. Bigley's needs, in addition to the legal questions of his entitlement to the relief requested.²⁰

VI. CONCLUSION

All of the pending motions filed by Mr. Bigley should be denied. The motion to vacate has already been effectively denied by the court in the status hearing of October 28, 2008. The claims related to a violation of due process do not resonate with the additional time that has been given and his ability to vigorously defend the petition through his own witness and through cross-examination of API's witness. Finally, the list of requests under the guise of a least restrictive alternative are not remedies this court can order in the context of a court ordered medication petition, nor are they services that are legally authorized by API though their statutory grants of authority.

DATED: 10/31/2008

TALIS J. COLBERG
ATTORNEY GENERAL

By: 

Laura J. Derry
Assistant Attorney General
Alaska Bar No. NA14011

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²⁰ Alaska Rules of Civil Procedure, Rule 56.

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

In the Matter of the Necessity for)
the Hospitalization of:)
WILLIAM S. BIGLEY,)
Respondent.)

Case No. 3AN-07-1064 PR

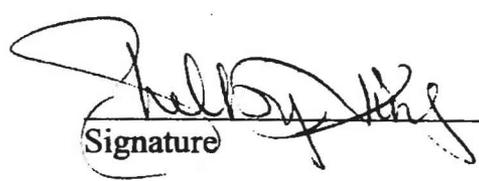
CERTIFICATE OF SERVICE

I hereby certify that on this day, a correct copy of the **OPPOSITION TO MOTION FOR PERMANENT INJUNCTIVE RELIEF** and proposed **ORDER** in this proceeding was mailed to:

Law Project for Psychiatric Rights, Inc.
James B. Gottstein, Esq.
406 G Street, Suite 206
Anchorage, AK 99501

Deborah Taylor
2914 Leighton Street
Anchorage, AK 99517

Alaska Psychiatric Institute
2900 Providence Drive
Anchorage, AK 99508


Signature 9/24/07
Date

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

In the Matter of the Necessity for)
the Hospitalization of:)
WILLIAM S. BIGLEY,)
Respondent.)

Case No. 3AN-07-1064 PR

**OPPOSITION TO MOTION FOR
PERMANENT MANDATORY INJUNCTION**

The State of Alaska, Department of Health and Social Services, Division of Behavioral Health, Alaska Psychiatric Institute (API), opposes Mr. Bigley's Motion for Permanent Mandatory Injunction.

There is no authority in case law or statute that suggests the Court can even entertain such a motion. The relief Mr. Bigley requests is unrelated to the claims presented to the Court in this case. This case was initiated by a petition for initiation of involuntary commitment, and thus the case is only about whether or not Mr. Bigley should be committed to API. AS 47.30.700; AS 47.30.735; AS 47.30.839. The case therefore necessarily revolved around the facts concerning Mr. Bigley's current mental status. The case is not about the actions of API over the last 27 years, and procedurally it cannot produce the kind of relief that Mr. Bigley requests in his motion. If Mr. Bigley believes that the state must permanently provide him with the list of goods and services he requests, he will have to file a separate legal action and establish his legal entitlement to receive this relief.

API also asks the Court to strike the affidavit of Paul Cornils from the record. Aside from the fact that this affidavit is in support of a legally unsound motion, API has not had a chance to cross-examine Mr. Cornils. If this Court were to actually entertain this motion, it should have a hearing on its merits. The motion cannot be viewed as a motion for summary judgment, as genuine issues of material fact exist as to Mr. Bigley's needs, in addition to the legal questions of his entitlement to the relief

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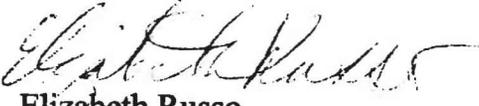
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requested. See Civil Rule 56. Thus, any "affidavit" would be redundant as Mr. Cornils would have to testify for the Court to judge his credibility and allow for API to cross-examine him.

For the foregoing reasons, API is not addressing the "merits" of each claim in this opposition. If the Court wishes to entertain the motion, API requests additional time to file a response.

DATED: September 24, 2007

TALIS J. COLBERG
ATTORNEY GENERAL

By: 
Elizabeth Russo
Assistant Attorney General
Alaska Bar No. 0311064

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

In the Matter of the Necessity for)
the Hospitalization of:)
WILLIAM S. BIGLEY,)
Respondent.)

Case No. 3AN-07-1064 PR

ORDER

Having considered API's Opposition to Motion for Permanent Mandatory Injunction, the respondent's motion is DENIED. The affidavit of Paul Cornils is stricken from the record.

DATED: _____

Paul Cornils

SUPERIOR COURT JUDGE

Recommended for approval:

Standing Master
Dated: _____

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000026

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

In The Matter of the Necessity for the)
Hospitalization of William S. Bigley,)
Respondent)
William Worrall, MD)
Petitioner)

Case No. 3AN 07-1064 P/S

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2007, I, James B. Gottstein, served the following documents as indicated on the following:

1. Motion for Permanent Mandatory Injunction;
2. Memorandum in Support of Motion For Permanent Mandatory Injunction;
3. form of Order Granting Motion For Permanent Mandatory Injunction;
4. Affidavit of Paul A. Cornils; and
5. this Certificate of Service

on:

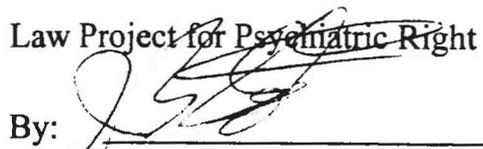
Elizabeth Russo (hand)
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501

Deborah Taylor, R.G. (mail)
Court Visitor
2914 Leighton Street
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LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.
406 G Street, Suite 206
Anchorage, Alaska 99501
(907) 274-7686 Phone ~ (907) 274-9493 Fax

Law Project for Psychiatric Right

By:


James B. Gottstein

000027

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

In The Matter of the Necessity for the)
Hospitalization of William S. Bigley,) Case No. 3AN 07-1064 P/S
Respondent,)
_____)

ORDER GRANTING
MOTION FOR PERMANENT MANDATORY INJUNCTION

Upon motion, and after consideration of response, if any, Respondent William S. Bigley's motion for a permanent mandatory injunction is hereby **GRANTED**.

It is hereby **ORDERED** that:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. Only the Medical Director of API may authorize the administration of psychotropic medication pursuant to AS 47.30.838 (or any other justification for involuntary administration of medication, other than under AS 47.30.839), after consultation with James B. Gottstein, Esq., or his successor.
4. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.¹ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.
5. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.
6. The foregoing may be contracted for from an outpatient provider.

DATED _____

SUPERIOR COURT JUDGE

¹ API may seek to obtain a housing subsidy from another source, but such source may not be his Social Security Disability income.

D. Mr. Bigley is so angry at being put under a guardianship that he takes extreme measures to try to get rid of his guardianship. As a result, he is mostly refusing to cooperate in virtually any way with the Guardian.

E. For example, Mr. Bigley rips up checks from the Guardian made out to Vendors on his behalf, trying to force the Guardian to give him his money directly and as part of his effort to eliminate the guardianship.

F. Mr. Bigley has also refused various offers of "help" from the Guardian, such as grocery shopping in a similar attempt to get out from under the guardianship.

G. He exhibits the same types of behavior to me, but I have a different approach, which involves negotiation and discussion, does not involve coercion and where the natural consequences of Mr. Bigley's actions are allowed to occur.

H. This is very important because after people are labeled with a mental illness everything is attributed to the mental illness and the person no longer takes responsibility for his or her actions.

I. Taking responsibility for one's actions is a core tenet of CHOICES' approach.

J. Another tenet of the CHOICES' approach is what is known as a "Relapse Plan." In fact, there is a whole curriculum called the "WRAP," developed by Mary Ellen Copeland, used around the world, which stands for Wellness Recovery Action Plan, of which a Relapse Plan is a part. Other aspects are learning how to deal with one's difficulties in ways that do not create as many problems. I am a trained WRAP Facilitator.

K. With Mr. Bigley, however, I have used Anger Management, Moral Reconciliation Therapy (MRT) and elements of Peer Support, all of which I have taken training in and have received certification as the most beneficial techniques for Mr. Bigley at this time.

L. It is my belief that if the CHOICES approach were consistently used with Mr. Bigley and there are sufficient community support resources there is a good chance he will be able to live successfully in the community.

M. I understand Mr. Bigley, through his attorney Jim Gottstein, has moved for an injunction as follows:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily at a treatment facility in the future, be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. Only the Medical Director of API may authorize the administration of psychotropic medication pursuant to AS 47.30.838 (or any other justification for involuntary administration of medication, other than under AS 47.30.839), after consultation with James B. Gottstein, Esq., or his successor.
4. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.¹ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.
5. At API's expense, make sufficient staff available to be with Mr. Bigley to try keep him out of trouble.
6. The foregoing may be contracted for from an outpatient provider.

¹ API may seek to obtain a housing subsidy from another source, but such source may not be his Social Security Disability income.

N. It makes perfect sense. With respect to Number 1, Mr. Bigley's problems in the community revolve around the expression of his extreme anger, and has caused the loss of housing options. Currently, it is my understanding even the Brother Francis Shelter is not available to him. There needs to be a safe and comfortable place for Mr. Bigley to sleep when he doesn't have any other option. Even though he is never actually violent, there is no other option in Anchorage of which I am aware that is in a position to deal with his yelling and screaming.

O. Frankly, it is unlikely that Mr. Bigley would avail himself of the option because of the way he has been locked up and treated there so much in his life, but the option should be available to him.

P. Number 2, is more likely unless and until Mr. Bigley gets his behavior within a socially acceptable range. Mr. Bigley seems to always be okay on pass when he is there so he should be given such passes.

Q. With respect to Number 4, housing is a huge issue for Mr. Bigley. He demands a relatively nice apartment and will choose homelessness over one that does not meet his requirements. Currently, under his Guardianship regime, he is only given about \$60 per week for food and \$50 per week for spending money. That is an unreasonably small amount. I don't know if the State should be required to support Mr. Bigley's housing to the extent requested by Mr. Gottstein, but it should in a reasonable amount as necessary.

R. With respect to Number 5, right now, it would be very beneficial to have someone with Mr. Bigley for an extended period of time during the day to help him meet his needs and stay out of trouble.

S. Currently, it would probably take more than Medicaid allows to provide what is needed.

T. Using CHOICES' approach, it is my opinion there is a reasonable prospect that within a year to eighteen months Mr. Bigley could get by with far less services and be within the normal Medicaid range.

U. There is also a reasonable prospect that this will never be achieved.

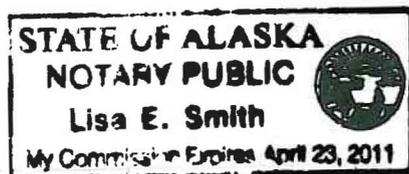
V. With respect to Number 6, CHOICES could be such an outpatient provider, but would need to increase its staffing level in order to be able to do so properly, which would take at least a little bit of time.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED September 12, 2007.

By: Paul A. Cornils
Paul A. Cornils

SUBSCRIBED AND SWORN TO before me this 12th day of September, 2007.



Lisa E. Smith
Notary Public in and for Alaska
My Commission Expires: 4/23/2011

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

In The Matter of the Necessity for the)
Hospitalization of William S. Bigley,)
Respondent,)
William Worrall, MD,)
Petitioner)

Case No. 3AN 07-1064 P/S

**MEMORANDUM IN SUPPORT OF
MOTION FOR PERMANENT MANDATORY INJUNCTION**

Respondent William S. Bigley (Mr. Bigley) has moved for a permanent mandatory injunction granting the following relief:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If committed in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. Only the Medical Director of API may authorize the administration of psychotropic medication pursuant to AS 47.30.838 (or any other justification for involuntary administration of medication, other than under AS 47.30.839), after consultation with James B. Gottstein, Esq., or his successor.
4. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.¹ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.
5. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.
6. The foregoing may be contracted for from an outpatient provider.²

¹ API may seek to obtain a housing subsidy from another source, but such source may not be Mr. Bigley's Social Security Disability income.

² Substantially similar relief was originally requested in Mr. Bigley's Opposition To Motion To Strike All Attachments To Pre-Hearing Brief Of Respondent and Presentation

With respect to commitment, Mr. Bigley is entitled to the least restrictive alternative³ and with respect to forced drugging, the least intrusive alternative.⁴

In support of this motion factually, are:

- (1) the written testimony of Paul A Cornils of CHOICES, Inc., filed contemporaneously herewith⁵;
- (2) the written testimony of Ron Bassman, previously filed,⁶
- (3) the September 5, 2007, oral testimony of Sarah Porter, who was qualified as an expert in the area of alternative treatments, and
- (4) §VI. & IX. of Mr. Bigley's Pre-Hearing Brief, filed September 4, 2007

The expert testimony of Ronald Bassman, PhD, and Sarah Porter described a less intrusive alternative approach to coercion and drugs that has enjoyed much more favorable outcomes for people, including those who have been subjected to force and coercion, including forced drugging for a very long time, such as has been experienced by Mr. Bigley. The Affidavit of Paul A Cornils states that CHOICES, Inc., could provide such types of services if it could increase its staffing levels.

In light of Mr. Bigley's current situation, largely created by the actions of API over 27 years,⁷ API should be ordered to provide the requested mandatory injunction as a less restrictive/intrusive alternative, applicable in the community as well as any time he might be involuntarily at API, or similar facility, in the future.

Of Other Matters, filed September 10, 2007 (incorrectly dated August 31, 2007). Mr. Bigley has now files it as a separate motion and includes additional analysis.

³ *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 378 (Alaska 2007).

⁴ *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006).

⁵ See, Affidavit of Paul A. Cornils.

⁶ See, Affidavit of Ronald Bassman, PhD.

⁷ See, § VI., of Pre-Hearing Brief.

Because it has determined not to continuing seeking court approval to forcibly drug Mr. Bigley, API currently plans to discharge Mr. Bigley into exactly the same situation which he has been, and which Dr. Worrall testified is very likely to land Mr. Bigley in jail. API should not be allowed to do so. API should be ordered to provide the type of reasonably available community supports that can be provided him at reasonable cost, which he voluntarily accepts, to give him a real chance at success in the community.

Dr. Worrall testified that API considers forced drugging the only treatment option for Mr. Bigley. That has been shown to be untrue. What is true is that the State is not offering or paying for an alternative to the involuntary commitment and forced drugging it sought. However, the State may not evade its constitutional obligation to provide less restrictive/intrusive alternatives by choosing not to provide them. *Wyatt v. Stickney*, 344 F.Supp. 387, 392 (M.D.Ala.1972) ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974)(state legislature is not free to provide social service in a way that denies constitutional right).

The rationale for each of numbered item of requested relief will now be discussed.

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.

Mr. Bigley periodically loses his housing; there is currently no housing in the community that will tolerate his episodic non-violent, but extreme, verbal expressions. API certainly can, however. The loss of housing typically precipitates an escalation of type of behavior that brings Mr. Bigley to API. As set forth in AS 47.30.655(1), Mr. Bigley should be given the opportunity for voluntary involvement with the system.

However, when asked if API would accept Mr. Bigley voluntarily coming to API when he might want or need to, Dr. Worrall testified that API is not a dormitory or boarding house and that if it can not force Mr. Bigley to take the drugs he insists should be forced on him, API won't accept him. This is contrary to the very first "principle of modern mental health care that guided the development" of Alaska's current statutory approach "that persons be given every reasonable opportunity to accept voluntary treatment before involvement with the judicial system."⁸ The Court should order API to do so.

- 2. If committed in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.**

Mr. Bigley is fine when out on pass with an escort. He should be allowed at least four hours each day of such less restrictive alternative to being locked up all day if he is ever, or whenever he might be involuntary at API or another such facility. He suggests this is his constitutional right. Dr. Worrall testified there were members of API staff who like Mr. Bigley. Mr. Bigley should have the opportunity to go out on pass with such individuals or other parties willing and able to escort him on pass.

- 3. Only the Medical Director of API may authorize the administration of psychotropic medication pursuant to AS 47.30.838 (or any other justification for involuntary administration of medication, other than under AS 47.30.839), after consultation with James B. Gottstein, Esq., or his successor.**

There are many troubling aspects of Alaska's mental health system revealed in the record here. It is clear the Alaska Legislature's mandate that the system be as voluntary as possible has been turned on its head. It is also clear, at least in this case, that API will not

⁸ AS 47.30.655.

consider any treatment other than drugs, even though the Alaska Supreme Court held over a year ago in *Myers* that people have a constitutional right to a less intrusive alternative.

However the most egregious demonstration of willful and deliberate violation of Mr. Bigley's rights was the continued forced drugging without authorization to do so.⁹ When Mr. Bigley won a slight continuance of consideration of the forced drugging petition,¹⁰ API, through Dr. Worrall, continued to forcibly inject him with Haldol and other drugs, purportedly under the emergency police power provision of AS 47.30.838, in spite of there being no justification for doing so.¹¹

It is apparent that as to forced drugging, at least, API's psychiatrists have (1) not been trained with respect to patient rights, or (2) allowed to violate patient rights at their discretion, or (3) both. Mr. Bigley's statutory and constitutional rights were grossly violated because of this with a procedure the Alaska Supreme Court has acknowledged to be equated with the intrusiveness of Electroshock and Lobotomy. Mr. Bigley merely requests the injunction provide that any such forcible drugging be reviewed and approved

⁹ This is probably criminal assault.

¹⁰ *Myers* and *Wetherhorn* make clear that the forced drugging petition should be considered separately from the involuntary commitment and the Probate Master's insistence on completing it rapidly was in error.

¹¹ At the September 10, 2007, hearing, API's counsel asserted there had been no violation of AS 47.30.838. However AS 47.30.838(a)(1) requires that:

"the behavior or condition of the patient giving rise to a crisis under this paragraph and the staff's response to the behavior or condition must be documented in the patient's medical record; the documentation must include an explanation of alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient.

Counsel has looked at a copy of Mr. Bigley's medical records, which API provided saying they were complete, and failed to find any such documentation.

by the Medical Director, and Mr. Bigley's counsel be consulted, prior to its administration. This is more than reasonable, especially since API has assured this Court that no forced drugging will occur at all absent a final court order approving forced drugging under AS 47.30.839.¹² However, it is not clear API intended to honor that beyond its unilateral dismissal of its petition and thereby discharge itself from responsibility for Mr. Bigley.

4. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.¹³ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.

API's "plan" for Mr. Bigley is, or at least was, repeated hospitalizations, currently costing over \$1,000 per day. API would clearly be money ahead by paying a little bit of money for housing, in comparison, if it keeps Mr. Bigley in the community. Mr. Bigley's being put in jail would also be very costly in comparison. However, saved cost is not the basis for this request. The government of the State of Alaska, through API, having invoked its awesome power to imprison someone for the safety of the individual or the community, has also caused Mr. Bigley's statutory and constitutional right to the least restrictive alternative to arise. In light of the 27 year history of over 70 hospitalizations, and the likelihood of additional traumatic hospitalizations if Mr. Bigley is not kept safely in the community, this constitutional right must extend beyond the dismissal of this particular case.

¹² There is a pretty good argument that no "emergency" drugging should occur for anyone at API without the Medical Director's review for compliance with statutory requirements, but Mr. Bigley is not seeking such an order here.

¹³ API may seek to obtain a housing subsidy from another source, but such source may not be his Social Security Disability income.

5. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.

For the same reason, Mr. Bigley is entitled to sufficient services in the community.

As it turns out, in his guardianship proceeding, Case No., 3AN 04-545 P/G, a Settlement Agreement¹⁴ pertaining to a then pending petition by Mr. Bigley, was recently entered into in which API is a party in which it agreed Mr. Bigley should receive extended services.¹⁵

This Settlement Agreement provides in pertinent part:

6. Mental Health Services. Respondent has largely been unwilling to accept mental health services. Some services that Respondent may hereafter, from time to time, desire are identified in the subsections that follow. Others may be identified later. To the extent Respondent, from time to time, desires such services, the Guardian and API will support the provision of such services, including taking such steps as may be required of them to facilitate the acquisition thereof to the best of their ability.²

6.1. Extended Services. Extended services, such as Case Management, Rehabilitation, Socialization, Chores, etc., beyond the standard limits for such services.

6.2. Other Services. Additional "wrap-around" or other types of services Respondent, from time to time, desires.

² By agreeing to this stipulation API is not making any judgment regarding eligibility standards under Medicaid regulations.

Mr. Bigley is not saying that API has agreed to pay for the services, but he is saying API has formally agreed they are very desirable and necessary to keep him safely in the community.

¹⁴ The Settlement Agreement is designated confidential and only that portion necessary here is being set forth. The Court can take judicial notice of the Settlement Agreement or, if it desires, Mr. Bigley could file a copy under seal herein.

¹⁵ As set forth in Mr. Bigley's Pre-Hearing Brief, API was the original petitioner in his guardianship case. It insisted it be allowed to participate formally in that proceeding as an "Interested Party," was allowed to file pleadings, and as indicated, is a party to this settlement agreement.

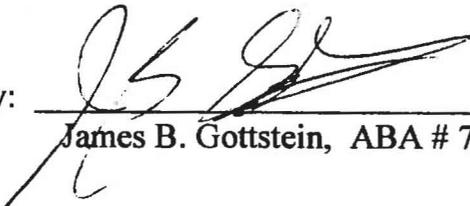
6. The foregoing may be contracted for from an outpatient provider.

Once having invoked the State's awesome power to lock someone up for the safety of the person or community, or both, API is required to provide the least restrictive/intrusive alternative. However, this can be done, all or in part, through contract or other arrangement with an outpatient provider and to the extent there are other potential payors, such as Medicaid and the Indian Health Service, they may be utilized.

For the foregoing reasons, Mr. Bigley respectfully requests his Motion for Permanent Mandatory Injunction be granted.¹⁶

DATED September 12, 2007.

Law Project for Psychiatric Rights, Inc.

By: 
James B. Gottstein, ABA # 7811100

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¹⁶ Some other form of order besides an injunction may also be appropriate.

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Hospitalization of William S. Bigley,) Case No. 3AN 07-1064 P/S
Respondent,)
William Worrall, MD,)
Petitioner)

MOTION FOR PERMANENT MANDATORY INJUNCTION

COMES NOW, Respondent William S. Bigley (Mr. Bigley) and moves for a permanent mandatory injunction granting the following relief:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. Only the Medical Director of API may authorize the administration of psychotropic medication pursuant to AS 47.30.838 (or any other justification for involuntary administration of medication, other than under AS 47.30.839), after consultation with James B. Gottstein, Esq., or his successor.
4. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.¹ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.
5. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.

¹ API may seek to obtain a housing subsidy from another source, but such source may not be his Social Security Disability income.

6. The foregoing may be contracted for from an outpatient provider.

This motion is accompanied by a memorandum in support.

DATED September 12, 2007.

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