

MEMORANDUM

ALASKA COURT SYSTEM

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TO: Probate Rules Committee

FROM: Doug Wooliver
Administrative Attorney

DATE: May 17, 2010

RE: Rule Recommendation to the Probate Rules Committee from the Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medications

In 2007 former Chief Justice Dana Fabe established the Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medications at the request of then superior court judge Morgan Christen. The purpose of the subcommittee was to establish court procedures for involuntary mental commitments under AS 47.30.700 and for the involuntary administration of psychotropic medications under AS 47.30.839.

The subcommittee debated and attempted to balance a respondent's competing desires to have his or her case resolved quickly but with adequate time to respond to a petition or to object to a recommendation. This balancing was particularly important in cases where the state petitions the court for the involuntary administration of psychotropic medications. The subcommittee discussed the role of standing masters in Anchorage and the timelines for hearings, recommendations, objections and final orders. The subcommittee also debated the appropriate level of superior court review of a standing master's recommendation when a party objects to that recommendation.

Subcommittee member James Gottstein maintained throughout the process that the primary source of delay in the current process is the use of standing masters. But the other committee members believed that the use of masters was appropriate in the high-volume Anchorage court and rather than eliminate them, they approved rule recommendations that establish procedures that they believe will result in the efficient use of resources as well as meet the twin goals of timeliness and due process.

Probate Rules 21 and 22

Proposed to the Probate Rules Committee by the Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medication.

PART IV. MENTAL COMMITMENTS

Rule 21. Involuntary Commitments

(a) **Hearing.** Within 72 hours after respondent arrives at a designated treatment facility the court shall hold an involuntary commitment hearing.

(b) **Distribution and Timing of Recommendation or Order.** If the hearing is before a master, the master's written findings and recommendation shall be distributed within 48 hours after the hearing to the parties and the superior court. If the hearing is before a judge, the court's order on the petition shall be issued within 48 hours of the hearing. Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile, or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.

(c) **Objections and Final Order.** Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation, or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. If an objection is filed and the court allows new evidence, the court shall schedule a hearing as soon as possible.

Rule 22. Involuntary Administration of Psychotropic Medication

(a) **Hearings.** Upon receipt of a petition for the involuntary administration of psychotropic medications, the court shall hold a hearing as soon as possible.

(b) **Hearing Before a Judge.** If the hearing is before a judge, the judge may enter a final order immediately but not later than 48 hours after the hearing. Once entered, the judge's order is effective.

(c) **Hearing Before a Standing Master.** If the hearing, or continued hearing, is held before a master, the master shall make a recommendation on the record and provide the non-prevailing party the following options:

- (1) object to the master's recommendation;
- (2) reserve the right to object to the master's recommendation;
- (3) not object to the master's recommendation.

(d) **Objections and Final Order.** If the respondent objects or reserves the right to object, the master's recommendation is not effective for 48 hours and no medication may be administered except as authorized by AS 47.30.838. The master's written findings and recommendations shall be distributed within 48 hours after the hearing if the respondent reserves the right to object or objects.

(e) **No Objection and Final Order.** If the respondent does not object, the master's recommendation shall take effect immediately and medications may be administered.

(f) **Distribution of Recommendation or Order.** Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.

(g) **Objections and Final Order.** Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation, or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. If an objection is filed and the court allows new evidence, the court shall schedule a hearing as soon as possible.

Involuntary Commitments

- (a) Within 72 hours after respondent arrives at a designated treatment facility the court shall hold an involuntary commitment hearing.
- (b) If the hearing is before a master, the master's written findings and recommendation shall be distributed within 48 hours after the hearing to the parties and the superior court. If the hearing is before a judge, the court's order on the petition shall be issued within 48 hours of the hearing.
- (c) Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile, or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.
- (d) Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation, or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. If an objection is filed and the court allows new evidence, the court shall schedule a hearing as soon as possible.

Comment [JG1]: I believe it is understood (1) I think this violates the Legislature's mandate that a hearing be held within 72 hours, in that (2) it is not possible to have these cases referred to masters and properly decided by a judge within the legislatively mandated time frame, and (3) I will have the opportunity to present these views with the transmittal of the proposed rule.

Involuntary Administration of Psychotropic Medication

- ~~(a) Unless waived by respondent, a petition for the involuntary administration of medication shall not be accepted for filing unless and until the respondent is the subject of an order of involuntary commitment issued by a judge.~~
- ~~(b) Within 72 hours after a petition for the involuntary administration of psychotropic medication being filed, the court shall hold a competency hearing on the respondent's capacity to give or withhold informed consent and the patient's capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication.~~
- ~~(c) If upon the completion of the competency hearing the court finds the respondent has capacity to give or withhold informed consent or had capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication, the court shall issue an order directing that the respondent's decision about the use of psychotropic medication be honored.~~
- ~~(d) If upon the completion of the competency hearing the court finds the respondent does not have capacity to give or withhold informed consent and did not have capacity to give or withhold informed consent at the time of previously expressed wishes regarding medication, the court shall hold a hearing on whether the involuntary administration of psychotropic drugs is in the respondent's best interests and there is no less intrusive alternative. This hearing may immediately follow the competency hearing if such time frame is consistent with the respondent's due process rights, including an adequate time to prepare. In any event, the court shall hear and determine whether the involuntary administration of psychotropic medication is in the respondent's best interests and there is no less intrusive alternative available with as great promptness as the exigencies of~~

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Comment [JG2]: *Wetherhorn* is clear that the respondent has to be committed prior to a hearing on involuntary medication taking place. 156 P.3d at 382 ("The second step requires that the State prove by clear and convincing evidence that: (1) **the committed patient** . . .") (emphasis added) Since the capacity hearing has to be held within 72 hours of filing of an involuntary meds petition, this necessarily implies such petition can not be filed until the person has been committed. Thus, where the hospital wants to drug someone against their will in connection with a 30-day commitment petition, the med petition can not be filed until after the commitment has been ordered. This only applies to the initial 30-day commitment. Involuntary medication petitions may be filed concurrently with 90-day and 180-day commitment petitions under AS 47.30.839(h). I think this formulation accomplishes that, but if clarification is deemed necessary I would be happy to take a stab at it.

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the case will permit, including respondent's due process right of an adequate time to prepare.

(e) Following any hearing held before a judge, the judge may enter a final order immediately but not later than 48 hours after the hearing, which order shall be effective immediately.

(f) At the end of any hearing, or continued hearing, held before a master, the master shall make a recommendation on the record and provide the non-prevailing party the following options:

- (i) object to the master's recommendation;
- (ii) reserve the right to object to the master's recommendation;
- (iii) not object to the master's recommendation.

(g) If the respondent does not object, the master's recommendation shall take effect immediately.

(h) If the respondent reserves the right to object, or objects, the master's recommendation is not effective unless and until an order is entered by a judge. The master's written findings and recommendations shall be distributed within 48 hours after the hearing if the respondent reserves the right to object or objects.

(i) Parties may request distribution of the master's recommendation or the court's decision by first-class U.S. mail, facsimile, or email. Parties shall provide the court with the contact information necessary to complete distribution by the means requested.

(j) Parties may file objections to the master's recommendation in the superior court within 48 hours after distribution of the master's recommendation or within such additional time as the court may allow. A courtesy copy of the objection shall be delivered directly to the assigned superior court judge. If no objection is filed, the superior court shall review the master's recommendation and issue an order on the petition within 48 hours. If a notice of objection is filed and neither party makes application to submit new evidence, the superior court shall schedule a hearing to be held within 48 hours where the parties shall make oral argument based upon the existing record. If either party wishes to submit written briefing, it shall be filed by the time of the hearing. If an objection is filed and the court allows new evidence, the court shall schedule a hearing as soon as possible.

Comment [JG3]: The language "with as great promptness as the exigencies of the case will permit" is taken from *Bigley* at page

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Comment [JG4]: This assumes the recommendation is grant the petition.

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Comment [JG5]: I don't see how a 48 hour time frame can be accommodated when the recommendations are distributed by mail.