

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 08-1252PR

COPY
Original Received
Probate Division

OCT 30 2008

Clerk of the Trial Courts

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS .838 COUNT

On October 27, 2008, the Alaska Psychiatric Institute (API) filed a new Petition for Court Approval of Administration of Psychotropic Medication (Forced Drugging Petition), which seeks authority to drug Respondent against his will on two separate counts, to wit:

- (1) pursuant to AS 47.30.839(a)(1), that there will be repeated crisis situations going beyond the limit imposed by AS 47.30.838(c) for emergency forced drugging under the State's police power authority without obtaining court authorization (.838 Count), and
- (2) Respondent is incapable of giving or withholding informed consent (*Parens Patriae* Count).

With respect to the *Parens Patriae* Count, there are motions to dismiss and for summary judgment currently pending. With respect to the putative emergency drugging of Respondent under AS 47.30.838 in the past, API has backed down when faced with the Respondent's challenge that API was flouting AS 47.30.838, but it appears it intends to move forward on such basis in this action.¹

¹ See, e.g., Exhibit A and Exhibit A-1.

Therefore Responding has filed the Motion to Dismiss .838 Count, which is supported by this memorandum. The grounds are essentially the same as for the motion to dismiss pertaining to the *Parens Patriae* Count, except the details of the legal insufficiency and lack of notice are different, although especially with respect to the Due Process defect, Respondent has had time to flesh the argument out some.² The motion to dismiss the *Parens Patriae* Count is informed by *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), while the .838 Count is a matter of first impression with no reported cases interpreting AS 47.30.838 and AS 47.30.839(a)(1).³

I. THE .838 COUNT IS LEGALLY INSUFFICIENT

The .838 Count is legally insufficient because it fails to allege sufficient facts that, if true, would justify granting the requested relief. The allegations in support of the .838 Count merely recite the statutory grounds in a conclusory fashion as follows:

There have been, or it appears that there will be, repeated crisis situations requiring the immediate use of medication to preserve the life of, or prevent significant physical harm to, the patient or another person. The facility wishes to use psychotropic medication in future crisis situations.

Reciting the statutory criteria in a conclusory manner is not legally sufficient to defeat this Motion to Dismiss .838 Count.

² With the Court's indulgence, Respondent respectfully requests the Court consider the additional analysis contained in the due process section here when deciding the pending motion to dismiss the *Parens Patriae* Count.

³ The Alaska Supreme Court, however, did distinguish the police power justification from the *parens patriae* justification in *Myers* at 138 P.3d at 248-249 and explicitly ruled its core holding applied to non-emergency situations, 138 P.3d at 254. The .838 Count directly presents the emergency situation not covered by *Myers*, which is presumably why API has resorted to it.

For starters, is it that "there have been" or is it that "it appears that there will be" repeated crisis situations? More critically, what has Respondent alleged to have done which threatens his or another's life, or threatens significant physical harm to himself or someone else? The petition must allege facts that can be tested for legal sufficiency against the statutory and constitutional requirements.

In addition, AS 47.30.838(a)(1) requires "alternative responses to the crisis that were considered or attempted by the staff and why those responses were not sufficient." What were those? Without any such factual allegations the .838 Count is legally insufficient and thus, under Civil Rule 12(b)(6), or otherwise, must be dismissed for failure to allege a sufficient basis on which the requested relief may be granted.

The necessity for the petition to allege sufficient facts justifying relief is starkly illustrated by the recent filing of API's witness list. On October 29, 2008, API served Respondent with a witness list containing 14 names. Exhibit B. It has thus become apparent any hearing on the Force Drugging Petition⁴ will likely run for days.⁵ If the facts API will attempt to prove do not even support granting the .838 Count, there is no need to expend all the effort on preparing for and conducting a lengthy hearing.

⁴ Respondent understood the November 5, 2008, hearing to be solely directed to the .838 Count, but it is not clear this understanding is shared by API.

⁵ It also makes it impossible for Respondent to conduct adequate discovery before the scheduled November 5, 2008, hearing. Unless the motion to dismiss is granted, this will result in time being taken up by the Court hearing that would not be necessary if the factual disputes were distilled as they usually are through discovery. The failure of the petition to allege any facts exacerbates this problem.

Alleging sufficient facts justifying requested relief is required in all other cases, both civil and even criminal⁶ and the same is true here. This, API has failed to do and the .838 Count should be dismissed for that reason.

II. THE .838 COUNT DOES NOT SATISFY DUE PROCESS REQUIREMENTS

Neither does the .838 Count 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, a petition requesting the court to authorize the forced drugging of an unwilling patient, which the Alaska Supreme Court has equated with the intrusiveness of electroshock and lobotomy,⁷ must

⁶ The mechanism for testing the legal sufficiency of allegations in civil proceedings is Civil Rule 12(b)(6). In criminal cases, before a warrant is issued the judge must first be satisfied the allegations constitute a crime. If a defendant is not arrested under warrant, a judicial officer must determine under Criminal Rule 5(d)(1) if the person was arrested with probable cause, as evidenced by the complaint, affidavits filed with the complaint, oral statements from the arresting officer, or oral statements by another person recorded by the judicial officer.

⁷ *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 242 (Alaska 2006), *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 375 Alaska 2007).

include the "factual basis" supporting the grant of the petition under AS 47.30.838 and AS 47.30.839(a)(1), or the required information otherwise be provided.

Due process does not require the petition, *per se*, to be the mechanism for providing the required "factual basis," but it does require Respondent be provided with the factual basis in a manner that gives him "a fair opportunity to rebut the Government's factual assertions." In other proceedings, mechanisms are in place to do this. Especially relevant here is Civil Rule 26(a)(1), which require the parties, without awaiting a discovery request to provide the other parties with certain information, including:

(A) the factual basis of each of its claims or defenses;

(B) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information and whether the attorney-client privilege applies;

(C) the name and, if known, the address and telephone number of each individual who has made a written or recorded statement and, unless the statement is privileged or otherwise protected from disclosure, either a copy of the statement or the name and, if known, the address and telephone number of the custodian;

(D) subject to the provisions of Civil Rule 26(b)(3), a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings;

(E) subject to the provisions of Civil Rule 26(b)(3), all photographs, diagrams, and videotapes of persons, objects, scenes and occurrences that are relevant to disputed facts alleged with particularity in the pleadings; . . .

Probate Rule 1(e) provides:

(e) Situations Not Covered by the Rules. Where no specific procedure is prescribed by these rules, the court may proceed in any lawful manner, including application of the Civil and Evidence Rules, applicable statutes,

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

IN THE SUPREME COURT FOR THE STATE OF ALASKA

1
2
3 WILLIAM S. BIGLEY,)
4 Applicant,) Case No. S-12851
5 vs.)
6 THE ALASKA PSYCHIATRIC)
7 INSTITUTE,)
8 Respondent.)
9 Trial Court Case No. 3AN-07-1064 PR¹

10 **OPPOSITION TO ORIGINAL APPLICATION FOR INJUNCTIVE RELIEF**

11 The State of Alaska, Department of Health and Social Services, Division of
12 Behavioral Health, Alaska Psychiatric Institute, by and through the Office of the Attorney
13 General, opposes the respondent's Motion for Injunctive Relief. There is no need for
14 such an injunction because, in compliance with AS 47.30.838 (c), the order for
15 emergency medication has been cancelled.

16 Alaska Statute 47.30.838 (c) states, "If the crisis situations as described in
17 (a)(1) of this section occur repeatedly, or if it appears that they may occur repeatedly, the
18 evaluation facility or designated treatment facility may administer psychotropic
19 medication during no more than three crisis periods without the patient's informed
20 consent only with court approval under AS 47.30.839."

21 As Mr. Bigley has had the statutory allowance of emergency medication,
22 Dr. Worrall stopped the order this morning. See Attachment A. Until there is a final
23 decision on the Petition for the Administration of Psychotropic Medication, Mr. Bigley

24 ¹ The caption used by the respondent in his pleadings is incorrect and although this
25 has been pointed out in response to other pleadings, he continues to flaunt court rules and
26 practice to vent his personal frustrations. The correct form of the caption is as seen
above. Dr. Worrall has only ever acted within the scope of employment and Bigley has
not made any allegation to the contrary.

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2 will not receive any emergency medication. Thus, his Original Application for Injunctive
3 Relief and the underlying Emergency Motion for Injunctive Relief should be denied.

4 Moreover, the Alaska Psychiatric Institute (API) would object to the
5 automatic entry of any stays of an Order Approving the Administration of Psychotropic
6 Medication (order). API is an acute-care psychiatric hospital. It is not a home for the
7 mentally ill. One of the purposes of civil commitment is that the commitment has, “a
8 reasonable expectation of improving [the patient’s] mental condition.” AS 47.30.655(6).
9 API practices an evidence-based medical approach to treating psychiatric illness.
10 Housing someone at API is not treatment. The stays proposed by Bigley actually impede
11 his freedom and forces API into the untenable position of housing him without providing
12 treatment. Thus, any automatic stays of duly entered orders should be denied.² Should
13 the court grant such an order and Mr. Bigley chooses to appeal it, the matter can be taken
14 up at that time.

15 API also renews its objections to any pleadings submitted along with any of
16 Mr. Bigley’s pleadings that are not directly related to this case or that purport to
17 encapsulate “testimony.” Specifically, with regards to the pleadings filed on
18 September 10, 2007, that include: Appendix pp. 52-73; and 111- 129. API also objects
19 to Bigley’s version of the “facts” which were included in his pre-trial brief and are part of
20 the appendix. However, as this is clearly only one side’s proposed version of what may
21 possibly be entered into evidence, API is confident the court will be able to discriminate
22 the true facts. API moved to strike the entire appendix and the “affidavits” to Bigley’s
23 pre-trial brief both in writing and at the hearing on September 5, 2007. There has yet not
24 been any ruling made on the topic. The status of such pleadings and information is

25 ² API wishes to point out that any prospective order would have resulted after significant
26 testimony. That fact, taken with the known litigious nature of Mr. Bigley, make it highly
unlikely that any order written in this case—either granting or denying the medication
petition would be written without due consideration and careful thought.

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questionable and it is completely inappropriate to again include them in the pleadings filed today.

DATED: September 10, 2007

TALIS J. COLBERG
ATTORNEY GENERAL

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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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

Case No. 3AN 08-1252 PR

WITNESS LIST

The Department of Health and Social Services intends to call the following witnesses at the contested hearing currently scheduled for November 5, 2008.

1. Anne O'Brien
Alaska Psychiatric Institute
2800 Providence Drive
Anchorage, AK 99508
269-7100
2. Jonathan Hughes
Public Guardian
900 West 5th Avenue, Suite 525
Anchorage, AK 99501
(907) 269-3500
3. Steve Young
Public Guardian
900 West 5th Avenue, Suite 525
Anchorage, AK 99501
(907) 269-3500
4. Kahnaz Khari, M.D.
Alaska Psychiatric Institute
2800 Providence Drive
Anchorage, AK 99508
269-7100
5. Aaron Wolf, M.D.
Alaska Psychiatric Institute
2800 Providence Drive
Anchorage, AK 99508
269-7100

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

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6. Jenny Love, M.D.
Alaska Psychiatric Institute
2800 Providence Drive
Anchorage, AK 99508
269-7100
7. Lawrence Maile, Ph.D.
Alaska Psychiatric Institute
2800 Providence Drive
Anchorage, AK 99508
269-7100
8. Ron Adler
Chief Executive Officer
Alaska Psychiatric Institute
2800 Providence Drive
Anchorage, AK 99508
269-7100
9. Dr. Dwight Stallman
Forensic Psychiatrist
550 West 7th Avenue, Suite 601
Anchorage, AK 99501
269-7316
May testify regarding psychiatric treatment provided at Department
of Corrections.
10. Officer Wendi Shackelford
Anchorage Police Department
4501 Elmore Road
Anchorage, AK 99507
786-8500
May testify regarding the complaints APD has received and their
response.
11. Laura Brooks
Inmate Health Care
Department of Corrections
550 West 7th Avenue, Suite 601
Anchorage, AK 99501
269-7392
May testify about the mental health treatment and medications
administered by the Department of Corrections.

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

WITNESS LIST

ITMO: W.B.

LD/KV/TO/DERRYL/API/BIGLEY (3A) Exhibit B

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- 12. Theresa O'Neel
Starbucks Manager
601 West 5th Avenue
Anchorage, AK 99501
277-2477
May testify regarding an incident that occurred at Starbucks on 9/27/2008 that resulted in respondents arrest.
- 13. Mark Behnen
Starbucks employee
601 West 5th Avenue
Anchorage, AK 99501
277-2477
May testify regarding an incident that occurred at Starbucks on 8/10/2008 that resulted in respondents arrest.
- 14. Young Lee
Motel Guest
3001 Spenard Road, #212
Anchorage, Alaska 99503
727-6034
May testify about respondent's behavior at Paradise Motel.
- 15. Any social worker, guardian ad litem, court visitor, or court appointed special advocate who has been assigned to this matter.
- 16. Any police officer that has had contact with *.
- 17. Any therapist that has provided treatment to *.
- 18. Any direct mental healthcare staff, including psychiatric nurses' assistants (PNAs) or other care assistants.
- 19. Any party to these proceedings.
- 20. Any witness listed on other parties' witness lists.
- 21. Any witness determined to exist through discovery.

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DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100

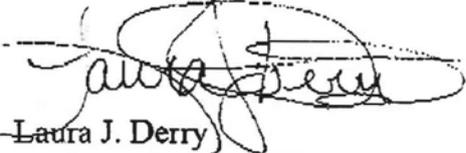
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22. Any rebuttal witnesses.

DATED: ~~Jan~~ 10/29/2008

TALIS J. COLBERG
ATTORNEY GENERAL

By:



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

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-6100

WITNESS LIST

ITMO: W.B.

LD/KV/TO/DERRYL/API/BIGLEY (3A) ~~Exhibit B~~ WITNESS LIST-FINAL.DOC Page 4 of 4

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the Alaska and United States Constitutions or common law. Such a procedure may not be inconsistent with these rules and may not unduly delay or otherwise interfere with the unique character and purpose of probate proceedings.

In *Wayne B. v. Alaska Psychiatric Institute*, 192 P.3d 989 (Alaska 2008), the Alaska Supreme Court, held Civil Rule 53(d)(1)'s requirement that a transcript accompany a master's report must be strictly followed, with the *proviso* that the Superior Court listening to the recording of the hearing was an acceptable substitute.

It is suggested here that something similar must be fashioned with respect to required initial disclosures in a way that is not inconsistent with the Probate Rules and does not unduly delay or otherwise interfere with this proceeding.

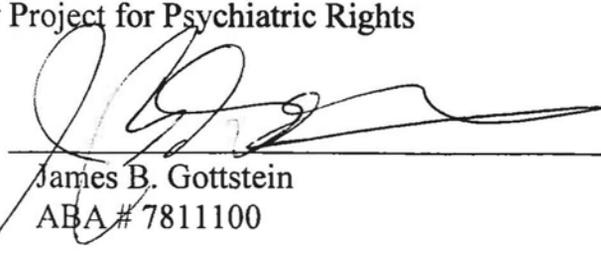
Here, API is the party seeking to rush to judgment in this matter and it is incumbent upon API to provide the "factual basis" of its claims either as part of its petition, or otherwise, sufficiently in advance of a hearing in order to allow Respondent a meaningful opportunity to be rebut the factual basis. Since this has not been done, the petition should be dismissed.

III. CONCLUSION

For the foregoing reasons, the .838 Count should be dismissed.

DATED: October 22, 2008.

Law Project for Psychiatric Rights

By: 

James B. Gottstein
ABA # 7811100