

EMERGENCY

Law Project for Psychiatric Rights
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FILED
JUL 26 2016
APPELLATE COURTS
OF THE
STATE OF ALASKA

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the Necessity)
of the Hospitalization of) Supreme Court No. S-_____
)
L.M.)
_____)
Trial Court Case No. 3AN-16-01656PR

EMERGENCY MOTION FOR STAY OF FORCED DRUGGING

Appellant moves on an emergency basis for an Order staying the involuntary administration of psychotropic medication (Forced Drugging) to Appellant pending determination of this appeal.¹ In support of this motion are the following Exhibits:

- Exhibit A. Petition for Court Approval of Administration of Psychotropic Medication [AS 47.30.839], dated July 6, 2011 (Forced Drugging Petition).²
- Exhibit B. Motion for Stay of Forced Drugging Package, dated July 18, 2016.
- Exhibit C. Order (temporarily) Granting Motion for Stay of Forced Drugging, dated July 18, 2016
- Exhibit D. Objections to Magistrate Judge's Recommendations, dated July 22, 2016 (Objections).

¹ Appellant will not oppose a motion for expedited processing of this appeal.
² This was apparently not filed until some days later. See, Exhibit E, n.1.

Exhibit E. Order Approving Magistrate Judge's Recommendations, dated July 25, 2016.

1. Telephone Numbers and Addresses of Counsel

The telephone number of Appellant's counsel is 274-7686 and address 406 G Street, Suite 206, Anchorage, Alaska 99501.³

The telephone number of opposing counsel is 269-5140 and address 1031 W. 4th Avenue, Suite 200, Anchorage, Alaska 99501.

2. Facts Showing Nature of Emergency and Date and Hour Before Which a Decision is Needed

On July 13, 2016, Magistrate Judge McCrea orally recommended that the Forced Drugging Petition filed by Appellant Alaska Psychiatric Institute (API) be granted.⁴ Forced drugging thereupon commenced, but upon the motion of Appellant by new counsel on July 18, 2016,⁵ was stayed pending Superior Court consideration of the Magistrate Judge's recommendations.⁶ The July 25, 2016, Order Approving Magistrate Judge's Recommendations, denied Appellant's motion for stay pending appeal, but continued the existing stay for three days until July 29, 2016, to allow Appellant the

³ Appellant's counsel is scheduled to be out of state Thursday and Friday, July 28th and 29th, and while his e-mail will be spotty, he should have some access to it and also periodic access to his voice mail. In addition counsel will provide the clerk with his cell-phone number.

⁴ The transcript of the July 13, 2016, hearing before the Magistrate Judge is at Exhibit B, pages 20-44.

⁵ Exhibit B.

⁶ Exhibit C, and Exhibit E, page 4.

opportunity to seek a stay before this Court.⁷ Therefore, a stay from this Court is needed before midnight Thursday, June 28, 2016.

3. All Grounds In Support of the Motion Were Advanced to the Trial Court

All grounds in support of the motion were advanced in the trial court.⁸

4. Opposing Counsel Has Been Notified (and Served)

Appellant made it clear from her July 18, 2016, Motion for Stay of Forced Drugging as well as at the hearing held that same day on the stay motion that she intended to seek a stay from this Court if the Superior Court approved the Magistrate Judge's recommendation to grant the Forced Drugging Petition. A copy of this motion has been served on API.

5. Standards for Granting Stay

Attached as Exhibit 1, to Appellant's Motion for Stay of Forced Drugging,⁹ is this Court's Order in S-13116, which in Section 1, sets forth the standard for deciding whether a stay is appropriate in this type of case. If the movant faces a danger of irreparable harm and the opposing party is adequately protected, the movant must raise serious and substantial questions going to the merits of the case; that is the issues raised cannot be frivolous or obviously without merit. On the other hand, if the movant's threatened harm

⁷ Exhibit E, pages 9-10.

⁸ See, Exhibit B. Additional evidence supporting the stay was submitted as part of Appellant's Objections, Exhibit D.

⁹ Exhibit B, page 11.

is less than irreparable or if the opposing party cannot be adequately protected, the movant must demonstrate a clear showing of probable success on the merits.¹⁰

6. Appellant Faces the Danger of Irreparable Harm

The Affidavit of Peter C. Gøtzsche, MD, details irreparable harm Appellant will face if the stay is not granted. These include:

These drugs cause serious physical harm, including the often fatal Neuroleptic Malignant Syndrome and akathisia, which increases the risk of both suicide and homicide.¹¹

People in the mental health system in the western world diagnosed with serious mental illness like schizophrenia now have about a 20 year reduced life expectancy compared to the general population, most of which is attributable to neuroleptic and other psychiatric drug use.¹²

Psychiatric drugs are the third biggest cause of death after heart disease and cancer. These deaths are usually "invisible" for the doctors because people may die from heart problems, suicide and falls even without taking psychiatric drugs.¹³

Neuroleptics cripple people. They cause irreversible brain damage in a dose related fashion and dramatically decrease people's prospects of getting back to a normal life; they create dependency, abstinence symptoms if people try to stop and supersensitivity psychosis. They are some of the most toxic drugs ever made apart from chemotherapy for cancer.¹⁴

Neuroleptics have killed hundreds of thousands of people and have crippled tens of millions.¹⁵

¹⁰ Exhibit B, pages 11 & 12.

¹¹ Exhibit B, page 20, Paragraph 22

¹² Exhibit B, page 22, Paragraph 28.

¹³ Exhibit B, page 23, Paragraph 29.

¹⁴ Exhibit B, page 23, Paragraph 30.

¹⁵ Exhibit B, page 23, Paragraph 31.

Dr. Gøtzsche's Affidavit also demonstrates that psychiatric drugs in general, and particularly the neuroleptics,¹⁶ dramatically reduce the Respondent's chances for recovery.¹⁷

This is irreparable harm.

To say that Dr. Gøtzsche's credentials are impressive is a gross understatement.¹⁸

Dr. Gøtzsche founded the medical department at Astra-Syntex, a predecessor of drug-giant AstraZeneca, co-founded the Cochrane Collaboration and founded the Nordic Cochrane Centre and has headed it ever since,¹⁹ published more than 70 papers in "the big five" (British Medical Journal, Lancet, Journal of the American Medical Association, Annals of Internal Medicine, and the New England Journal of Medicine) which have been cited over 15,000 times.²⁰ A large part of Dr. Gøtzsche's career has involved statistics and research methodology, including being a member of several groups publishing guidelines for good reporting of research and he is considered an expert on medical research methodology and on evaluating the trustworthiness of research results.²¹

¹⁶ The Forced Drugging Petition requests authorization to forcibly administer two neuroleptics, Thorazine (chlorpromazine) and Latuda (lurasidone).

¹⁷ Exhibit B, pages 21-22, Paragraphs 25-27.

¹⁸ Dr. Gøtzsche summarizes his qualifications at Exhibit D, pages 87-89, and his *Curriculum Vitae* is at Exhibit D, pages 97-145.

¹⁹ Cochrane is free from financial conflicts of interest and is internationally recognized for its objective analysis of medicines, medical devices and other interventions in healthcare. Exhibit B, page 17, ¶7.

²⁰ Exhibit B, pages 16-18.

²¹ Exhibit B, page 17, ¶8 and page 18, ¶14.

In 2015 Dr. Gøtzsche published a book on psychiatric drugs, "Deadly Psychiatry and Organised Denial," detailing the lack of solid evidence for clinically meaningful benefits of psychiatric treatments, and the immense harm they cause, including many unreported suicides and other deaths.²²

Additional evidence on irreparable harm was presented in Appellant's Objections including, (1) prior testimony of Loren Mosher, M.D., the former chief for the Center for Studies of Schizophrenia, at the National Institute of Mental Health,²³ (2) the Affidavit of Robert Whitaker,²⁴ and (3) the Affidavit of Ronald Bassman, PhD.²⁵

The Superior Court never addressed whether Appellant faced the danger of Irreparable harm if the stay is not granted. She does.

7. API Is Adequately Protected

Nor did the Superior Court address whether API is adequately protected. API is adequately protected. Appellant is in an extremely controlled environment, the Taku Unit of API, which is where most of the "forensic" patients are held, meaning those who are in the custody of the Department of Corrections, but are being imprisoned at API for various purposes. While there was disputed testimony that Appellant attempted to strike Mr. Martone and hearsay testimony allowed with respect to other alleged, but disputed,

²² Exhibit B, page 18, ¶13.

²³ Exhibit B, pages 168-185.

²⁴ Exhibit B, pages 146-159.

²⁵ Exhibit B, pages 163-167.

acts of minor violence by Appellant,²⁶ even if true, they do not rise to the level of granting a forced drugging petition on the basis that it is in Appellant's best interests under AS 47.30.839. They also probably don't rise to the level of permitting API to drug her under the police power justification of AS 47.30.838, but if API truly feels it needs to drug Appellant for safety reasons, there is the AS 47.30.838 process for "crisis situations." API is adequately protected.

8. Appellant Has Demonstrated Probable Success on the Merits

While Appellant believes she only has to raise serious and substantial questions going to the merits, meaning they are not frivolous or not without obvious merit,²⁷ it seems most helpful to show that Appellant has demonstrated probable success on the merits. Even if this Court does not conclude that Appellant has shown probable success on the merits, it demonstrates Appellant has raised serious and substantial questions going to the merits.

A. Appellant Previously Expressed a Desire While Competent to Refuse Future Treatment

In *Myers v. Alaska Psychiatric Association*, 138 P.3d 238, 242-243, this Court held that under AS 47.30.838:

To treat an unwilling and involuntarily committed mental patient with psychotropic medication . . .the state must prove two propositions by clear and convincing evidence: (1) that the committed patient is currently unable to give or withhold informed consent regarding an appropriate course of

²⁶ Counsel has been in regular contact with Appellant and she reports she is no longer engaging in even these types of aggressive acts.

²⁷ See, Exhibit B, page 12, the previous Order by this Court stating the standard.

treatment; (2) that the patient never previously made a statement while competent that reliably expressed a desire to refuse future treatment with psychotropic medication.

(footnotes omitted).

Submitted with the Objections was the Affidavit of Brian L. Saylor, PhD, MPH, a former director of API and Deputy Commissioner of the Alaska Department of Health and Social Services.²⁸ Dr. Saylor knows Appellant quite well, being a friend of her family since she was a baby²⁹ and affied that:

14. [Appellant] has become familiar with psychiatric drugs, including neuroleptics, marketed as "antipsychotics," found them to be unhelpful and the negative effects unacceptable. As a result [Appellant] previously and consistently has made statements while I would consider her competent that expressed a desire to refuse future treatment with psychotropic medication.³⁰

Under *Myers*, this precludes granting the Forced Drugging Petition. This was raised to the Superior Court,³¹ but not addressed by the Superior Court.³²

B. There Is a Feasible Less Intrusive Alternative

In *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 185 (Alaska 2009), this Court held that a less intrusive alternative is available within the meaning of *Myers*, if it is "feasible and would actually satisfy the compelling state interests that justify the proposed state action." This Court then went on to hold:

²⁸ Exhibit D, page 45.

²⁹ Exhibit D, page 47, ¶9.

³⁰ Exhibit D, page 48, ¶14.

³¹ Exhibit D, page 8.

³² Exhibit E.

[T]he best interests and least intrusive alternative inquiries under Myers are parts of a constitutional test of the validity of API's proposed treatment. If that Myers inquiry had lead us to conclude that API's proposed treatment was constitutionally barred, that would not give rise to a legal obligation on API's part to provide Bigley's less intrusive alternative. API could attempt to offer some other form of treatment that was not constitutionally invalid, or could simply release Bigley without treatment (which is what happened in this case).

208 P. 3d at 187-188.

In his Affidavit, Dr. Saylor, the family friend of Appellant who has known her since she was a baby, affied:

17. In my opinion, Soteria-Alaska would have been ideal for [REDACTED], dramatically improving her long-term prospect of recovering from her current mental problems and resuming her life.³³

Dr. Saylor is a former director of API³⁴ and Deputy Commissioner of the Alaska Department of Health and Social Services,³⁵ who was very familiar with Soteria-Alaska from writing an evaluation of it.³⁶ Soteria-Alaska was closed in the summer of 2015 due to insufficient funding.³⁷

The Superior Court apparently believed that it was constitutionally permissible for the State of Alaska to avoid the less intrusive alternative requirement by insufficiently funding a program, resulting in its closure. As set forth above, however, *Bigley* held to

³³ Exhibit D, page 48, ¶17.

³⁴ Exhibit D, page 45, ¶2, and Exhibit D, pages 48-49.

³⁵ Exhibit D, page 45, ¶s 2 & 3, and Exhibit D, page 49.

³⁶ Exhibit D, page s 46-47, ¶s 4-8, and Exhibit D, pages 60-118.

³⁷ Exhibit D, page 48, ¶18.

the contrary that, "API could attempt to offer some other form of treatment that was not constitutionally invalid, or could simply release Bigley without treatment."³⁸

The Affidavits of Dr. Gøtzsche,³⁹ Dr. Bassman,⁴⁰ and Whitaker,⁴¹ and the prior testimony of Dr. Loren Mosher,⁴² and Sarah Porter⁴³ all also demonstrate there are less intrusive alternatives to drugging a person against their will with neuroleptics, marketed as "antipsychotics."⁴⁴

There are less intrusive alternatives for Appellant and therefore the proposed forced drugging is constitutionally impermissible.

9. The Proposed Treatment Is Not in Appellant's Best Interests

In *Myers*, this Court stated:

Psychotropic drugs "affect the mind, behavior, intellectual functions, perception, moods, and emotions" and are known to cause a number of potentially devastating side effects. . . .

³⁸ In this case, Appellant is still in Department of Corrections custody at API, Exhibit D, page 17, n.37, so failure to provide a less intrusive alternative would not result in her immediate release.

³⁹ Exhibit D, pages 90-94.

⁴⁰ Exhibit D, pages 163-167.

⁴¹ Exhibit D, pages 148-159.

⁴² Exhibit D, pages 158-174.

⁴³ Exhibit D, pages 175-185. Ms. Porter was qualified as an expert in alternative treatments. Exhibit D, page 183 (Transcript page 92, lines 14-16).

⁴⁴ All of these witnesses, except Dr. Mosher, were potentially available for cross-examination if requested by API. Exhibit D, pages 2-4. All of these witnesses, including Dr. Mosher, had been cross-examined on this testimony by API where it had a similar motive, except for Dr. Bassman, whom API declined to cross-examine. *Id.* Thus, these affidavits and testimony are admissible under Evidence Rule 804(b)(1).

Side effects aside, the truly intrusive nature of psychotropic drugs may be best understood by appreciating that they are literally intended to alter the mind. Recognizing that purpose, many states have equated the intrusiveness of psychotropic medication with the intrusiveness of electroconvulsive therapy and psychosurgery.⁴⁵

For these and other reasons, this Court held that a forced drugging order is a deprivation of fundamental constitutional rights to liberty and privacy,⁴⁶ leading to its holding that the State must prove by clear and convincing evidence that the proposed forced drugging is in the person's best interests and there are no less intrusive alternatives available.

The quoted portions Dr. Dr. Gøtzsche's affidavit set forth above pertaining to the irreparable harm Appellant faces if the stay is not granted are also applicable to the best interests determination. Dr. Gøtzsche's Affidavit also sets forth additional reasons why neuroleptics, marked as "antipsychotics," are not in patients' best interests.⁴⁷

The Whitaker Affidavit summarizes the research literature as follows:

21. In summary, the research literature reveals the following:

- a) Antipsychotics increase the likelihood that a person will become chronically ill.
- b) Long-term recovery rates are much higher for unmedicated patients than for those who are maintained on antipsychotic drugs.
- c) Antipsychotics cause a host of debilitating physical, emotional and cognitive side effects, and lead to early death.

⁴⁵ 138 P.3d at 241, footnotes omitted.

⁴⁶ 128 P.3d at 246.

⁴⁷ Exhibit D, pages 4-8.

d) The new "atypical" antipsychotics are not better than the old ones in terms of their safety and tolerability, and quality of life may even be worse on the new drugs than on the old ones.⁴⁸

The Whitaker Affidavit is completely consistent with Dr. Gøtzsche's, citing even more research. Dr. Mosher's testimony,⁴⁹ and Dr. Bassman's Affidavit⁵⁰ also detail why the proposed forced drugging of Appellant is not in her best interest.

The Superior Court approved the Forced Drugging Petition because the proposed forced drugging was within the medical standard of care:

The medications are all within the standard of care as are the proposed dosages. The Petition for Court Approval of the Medications listed in that Petition are approved.⁵¹

This is not the proper criterion however.

In *Myers*, this Court held the question of forcing someone to take drugs against their will, while informed by medical expertise, is not a medical decision:

But the issue is not one of medical competence or expertise. As we have already seen, the right at stake here—the right to choose or reject medical treatment—finds its source in the fundamental constitutional guarantees of liberty and privacy. The constitution itself requires courts, not physicians, to protect and enforce these guarantees. Ultimately, then, whether *Myers*'s best interests will be served by allowing the state to make a vital choice that is properly hers presents a constitutional question; and though the answer certainly must be fully informed by medical advice received with appropriate deference, in the final analysis the answer must take the form of

⁴⁸ Exhibit D, pages 158 & 159.

⁴⁹ Exhibit D, pages 170-174.

⁵⁰ Exhibit D, pages 163-167.

⁵¹ Exhibit E, page 9.

a legal judgment that hinges not on medical expertise but on constitutional principles aimed at protecting individual choice.⁵²

Simply put, the medical standard of care is not the legal standard for granting a petition to drug someone against their will. The Superior Court erred in relying on the standard of care in approving the Forced Drugging Petition.

Under the standard enunciated in *Myers*, the proposed forced drugging is not in Appellant's best interest.

10. Conclusion

For the foregoing reasons, it is respectfully suggested that Appellant's Motion for Stay Pending Appeal be granted.

DATED July 26, 2015.

Law Project for Psychiatric Rights

By: 

James B. Gottstein, ABA # 7811100

⁵² 138 P.3d at 250.