

EMERGENCY

Law Project for Psychiatric Rights
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FILED

AUG 15 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-16393
)	
L.M.)	
)	
)	
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Trial Court Case No. 3AN-16-01656PR		

**EMERGENCY MOTION TO VACATE ORDER GRANTING
PETITION FOR COURT APPROVAL OF ADMINISTRATION OF
PSYCHOTROPIC MEDICATION [AS 47.30.839]**

Appellant moves on an emergency basis to vacate that part of the Superior Court's Order Approving Magistrate Judge's Recommendations granting the Petition for Court Approval of Administration of Psychotropic Medication [AS 47.30.839], attached as Exhibit A.

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.

The telephone number of opposing counsel is 269-5100 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

The nature of the emergency is the harm Appellant is suffering through the continued psychiatric drugging against her will. The general harms were detailed in Appellant's July 26, 2016, Emergency Motion to Stay Forced Drugging Order and Appellant has recently reported to counsel that she is now being prescribed benztropine (Cogentin).¹ Cogentin is used to

(1) mask the involuntary muscular movements, and

(2) reduce the muscle rigidity

caused by neuroleptics, such as are currently being forced on Appellant. The involuntary muscular movements, known as extrapyramidal symptoms, demonstrate that neurological harm is being caused by the drugs forced on Appellant. These harms are often irreversible and get worse the longer these drugs are administered.

Thus, relief is needed as soon as possible. If this Court remands this issue to the Superior Court for an initial decision, perhaps it could do that prior to the scheduling conference in the Superior Court calendared for 2:00 p.m. on Tuesday, August 16, 2016.

¹ Appellee, Alaska Psychiatric Institute (API), has refused to provide counsel with daily updates to her records with the last update being July 26, 2016. This was before the Cogentin was started as a result of the adverse effects of the drugs being forced on Appellant. Thus, counsel does not have those records for confirmation.

Otherwise, considering the realities of processing this motion, a decision is needed by the end of the court day, Thursday, August 18, 2016.²

3. The Grounds In Support of the Motion Were Not Advanced to the Trial Court

The grounds in support of this motion have not been advanced to the Superior Court because jurisdiction has been transferred to this Court pursuant to Appellate Rule 203.³ Under *Smallwood v. Central Peninsula General Hosp., Inc.*, 227 P.3d 457, 459-460 (Alaska 2010), the Superior Court does not have jurisdiction to entertain this motion because it is a matter directly involved in this appeal. More specifically, the validity of that part of the Order Approving Magistrate Judge's Recommendations granting the Petition for Court Approval of Administration of Psychotropic Medication is one of the points on appeal here. While this motion is to vacate the forced drugging part of the order because of the recently received Affidavit of Ben Saylor, it is not believed this is a "collateral matter," under *Smallwood* that would allow initial Superior Court consideration absent a remand from this Court.

Appellant does not object to remanding the issue to the Superior Court for initial decision, so long as the Superior Court is required to rule promptly. However, this Court

² Counsel for API has indicated there is the possibility that the current petitions for 90-day commitment and involuntary medication will be withdrawn and, if so, Appellant will immediately notify this Court that this motion is moot.

³ There is currently a petition to continue the forced drugging of Appellant pursuant to AS 47.30.839(h) and Appellant has filed a motion for summary judgment based on the same grounds as here in that motion. However, Under AS 47.30.839(h) Appellant continues to be drugged against her will under the extant order until the Superior Court rules on the continuation petition, which might be weeks.

might consider that retaining jurisdiction and deciding the issue on this motion now would prevent this issue from coming back to this Court. Time is of the essence to minimize additional harm.

4. Opposing Counsel Has Been Notified (and Served)

Opposing counsel was notified by e-mail on Sunday, August 14, 2016, that this motion would be coming, and has been served with a copy.

5. Appellant Is Entitled to The Requested Relief

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 . . . by clear and convincing evidence: . . . that the patient never previously made a statement while competent that reliably expressed a desire to refuse future treatment with psychotropic medication.

(footnotes omitted, emphasis added).

Attached hereto as Exhibit B is a copy of the August 11, 2016, Affidavit of Ben Saylor, which states:

1. I am over 18 years of age and have personal knowledge of the statements contained in this affidavit.

2. I have known Respondent [L.M.] since she was a little baby; her parents and my parents being friends at the time she was born.

3. [L.] has quite a bit of experience with psychotropic drugs, having been on and off them at various times since she was a teenager.

4. For the last few years, including when she was competent to make such a decision, she has been very clear and very consistent in numerous statements to me that she did not wish to be treated with psychotropic medication.

It is respectfully suggested that Ben Saylor's Affidavit conclusively establishes the State cannot drug Appellant against her will under *Myers* because the State cannot prove in the face of this affidavit by clear and convincing evidence that Appellant "never previously made a statement while competent that reliably expressed a desire to refuse future treatment with psychotropic medication."⁴ Ben Saylor's Affidavit establishes that Appellant has made such a statement, precluding involuntary administration of psychotropic medication under AS 47.30.839 as it seems impossible for API to prove by clear and convincing evidence that she never made such a statement.

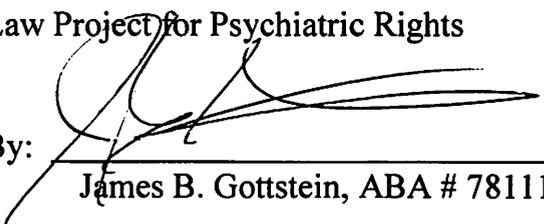
6. Conclusion

For the foregoing reasons, it is respectfully suggested that Appellant's Motion To Vacate Order Granting Petition For Court Approval Of Administration Of Psychotropic Medication [AS 47.30.839] be GRANTED.

DATED August 15, 2016.

Law Project for Psychiatric Rights

By:


James B. Gottstein, ABA # 7811100

⁴ This Court denied Appellant's Emergency Motion for Stay of Forced Drugging on the basis that the affidavit of Brian L. Saylor, PhD, MPH affieing to similar facts was not based on his personal knowledge and was never presented to the master who conducted the medication hearing. Ben Saylor's Affidavit is based on his personal knowledge and because this Court has jurisdiction this motion must be filed here first. Thus, these reasons for denying the stay motion do not exist here.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the Necessity of
the Hospitalization of:

██████████

Respondent.

Case No. 3AN-16-1656 PR

ORDER APPROVING MAGISTRATE JUDGE'S RECOMMENDATIONS

This case is before this court on the objections of Respondent ██████████ to the recommendations by Magistrate Judge Kari McCrea that Respondent be committed to API for not more than 30 days and that API be authorized to administer certain medications without Respondent's consent.

On June 6, 2016 Respondent was delivered to API on a Title 12 Commitment for Competency Restoration. When Respondent refused to take any medication a Petition for Order Authorizing Hospitalization for Evaluation was filed on July 6, 2016. This was the fifth such petition regarding Respondent in the past year. See 3AN-15-1648 PR; 3AN-15-1831 PR; 3AN-15-2445 PR; and 3AN-16-1315 PR. An order authorizing hospitalization for evaluation was issued on July 7, 2016. The order found probable cause to believe Respondent had a diagnosis of schizophrenia and was at API for competency restoration. Symptoms included delusions, paranoia, disorganized/pressured speech and illogical/irrational thought. The order also found Respondent was likely to cause serious harm to others because she had threatened to harm people once

discharged from API and had pending criminal charges of assault and harassment. Respondent was also alleged to be gravely disabled because of her symptoms, her belief that her food was poisoned and because she was unable to meaningfully participate in treatment.

Thereafter,¹ a Petition for 30-Day Commitment was filed along with a Petition for Court Approval of Administration of Psychotropic Medication. Both of these petitions were signed by Michael Alexander, M.D. A hearing was scheduled for July 11, 2016 but was continued at the request of the Public Defender who had been appointed to represent Respondent.

The hearing was held on July 13, 2016 before Magistrate Judge Kari McCrea. Magistrate Judge McCrea first took up the petition for a 30 day commitment. Gerald Martone, a psychiatric nurse practitioner testified and was qualified without objection as an expert in the field of psychiatry. Ms. [REDACTED] testified in her own behalf. Following this testimony the Magistrate Judge found, by clear and convincing evidence that Ms. [REDACTED] was suffering from a mental illness. The Magistrate Judge also found that as a result of that mental illness Ms. [REDACTED] was a danger to others. The Magistrate Judge found there were no less restrictive alternative to treatment at API and granted a 30 day commitment.

The Court Visitor, Colleen Brady-Dragner next testified. She indicated that Respondent did not recognize that she had a mental illness and objected to

¹ Neither of these petitions are file stamped. They are dated July 6, 2016. The log notes of July 11, 2016 indicate these petitions were filed July 11, 2016, but this cannot be accurate as a hearing on these petitions was noticed on July 8, 2016. By the time these petitions were filed Ms. [REDACTED] had been at API for over a month on the Title 12 competency restoration.

medication. Respondent believed that medication would make her permanently disabled. The Court Visitor indicated Respondent was unable to meaningfully engage in treatment because she did not recognize she needed treatment. Respondent did not have an advanced health directive. It was the conclusion of the Court Visitor that Ms. [REDACTED] did not have the capacity to give informed consent regarding medication. Ultimately the Magistrate Judge found by clear and convincing evidence that Ms. [REDACTED] lacked the capacity to give informed consent.

Ms. [REDACTED] continually interrupted the proceedings and was admonished by the Magistrate Judge although the Magistrate Judge gave Ms. [REDACTED] considerable opportunity to speak. Eventually Ms. [REDACTED] asked that the Public Defender be fired. The Magistrate Judge held a representation hearing. Ultimately the Magistrate Judge noted that she had just made a finding by clear and convincing evidence that Ms. [REDACTED] was suffering from a mental illness. Ms. [REDACTED] was at API under a Title 12 competency evaluation. The request to fire the Public Defender was denied² and the medication petition was next considered.

Mr. Martone again testified on this issue. He was the only witness on this subject. Following his testimony the Magistrate Judge authorized the use of the requested medication finding there was no other treatment alternatives that would be effective, that the use of the proposed medication was in Ms. Merritt's

² That ruling does not appear to be before this court.
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JTMO: L.M.
Order Approving Magistrate Judge's Recommendation

best interest and that the benefits of the medications outweighed any proposed risk to her.

The following day, July 14, 2016, a Stipulation for Substitution of Counsel was filed. Attorney James B. Gottstein of the Law Project for Psychiatric Rights appeared for Ms. [REDACTED]. On July 18, 2016 Mr. Gottstein filed a Motion for Stay of Forced Drugging and a Motion that that motion be determined on an expedited basis. The Motion for Stay requested that medication not be administered until the order allowing administration was reviewed and ruled on by a Superior Court Judge. Although the Magistrate Judge's ruling was considered to be a recommendation, that recommendation was effective immediately under Probate Rule 2(b)(3)(D).³ A hearing was held that same day before this court, thus effectively granting the Motion for Expedited Consideration.

At this hearing the court noted that the Magistrate Judge had not yet issued written findings due to her unavailability to do so, but indicated that the court believed it could adequately review the oral findings made by the Magistrate Judge. See Probate Rule 2(e). The court also considered the possibility of holding a de novo hearing but rejected that procedure.⁴ Instead

³ Respondent argues this Rule only makes the Finding of a patient's competency to give informed consent effective immediately and not the Finding to administer medication. This would effectively make the Rule meaningless and this court rejects that reading of the Rule.

⁴ The court's calendar allowed for such a hearing to be held in two or three days but there was insufficient time for the parties to prepare. In light of the court and counsel's calendar it appeared that such a hearing could not be held for a month or two. Ms. [REDACTED] was asking that no medication be administered pending Superior Court Review. The evidence indicated that this would effectively leave her untreated, her condition was worsening and she was acting

the court placed the parties on an expedited schedule to file objections to the Magistrate Judge's recommendations and a response to these objections. The parties have now done so and those objections and responses have been reviewed by this court. The court has also reviewed the written transcript of the July 13, 2016 hearing before the Magistrate Judge and has also listened to the entire hearing.

Respondent objects to the recommendations of the Magistrate Judge to grant (a) the Petition for 30-Day Commitment (Commitment Petition) and (b) the Petition for Court Approval of Administration of Psychotropic Medication (Drug Administration Petition). Supporting these objections are several affidavits or transcripts nearly all of which predate this matter and, with one exception discussed below, lack any specifics as to the circumstances of Respondent or to the evidence before the Magistrate Judge. None of these documents were introduced into evidence at the July 13, 2016 hearing and thus none of these documents were considered by the Magistrate Judge.

These documents include: (a) A transcript of a September 5, 2007 hearing before Master Andrew Brown in 3AN-07-1064 PR; (b) a transcript of hearings held March 5, 2003 and March 10, 2003 before Judge Morgan Christen in 3AN-02-277 PR; (c) an Affidavit from Dr. Peter Gotzsche dated June 1, 2016 (prior to the petition in this case) with no reference to Respondent; (d) an Affidavit from Robert Whitaker dated September 14, 2007 filed in Case No. 3AN-

aggressively towards staff and other patients. The court has balanced the needs of both Ms. [REDACTED] and API in determining that de novo review is not an appropriate way to proceed.

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ITMO: L.M.

Order Approving Magistrate Judge's Recommendation

07-1064 PR; (e) an Affidavit of Ronald Bassman dated September 4, 2007 also filed in 3AN-07-1064 PR; (f) a transcript of hearing held November 5, 2008 before Judge William Morse in Case No. 3AN-08-1252 PR; and finally (g) an Affidavit of Brian Saylor dated July 21, 2016 and filed in this case. Dr. Saylor, who admits to being a friend of Ms. [REDACTED] suggests that a program identified as the Sateria-Alaska program and which is described as an alternative to psychiatric hospitalization for people who did not want to take neuroleptics or other psychiatric drugs would have been ideal for Ms. [REDACTED] But this program closed in the summer of 2015.

The general thrust of all these affidavits is to oppose as a general matter the use of psychotropic medications to treat serious mental illnesses such as schizophrenia. But as noted in several of these documents the medical standard of care in treating such illnesses is to use such medications. This court finds little value in evidence that was not before the Magistrate Judge, was not subject to cross-examination and which suggests it to be appropriate to deviate from the medical standard of care without any analysis of Ms. Merritt's history and circumstances.

This court also finds without merit her counsel's suggestions that Ms. Merritt's statements about being raped by staff or her own attorney⁵ are metaphorical or that her reference to being poisoned is merely a reference to API

⁵ The court did not hear this statement when listening to the hearing. But it is clear the Magistrate/Judge overheard this accusation and it does not appear to be disputed that this accusation was made.

not providing a gluten free diet. These arguments that suggest that Ms. [REDACTED] uses metaphorical language to describe actual events, rather than suffering from a mental illness that leads her perception of reality to be skewed, are unpersuasive.

Commitment Petition

The court has reviewed the Magistrate Judge's Findings as to the 30-day commitment and accepts and adopts these recommendations as being supported by the evidence and the law as set forth in AS 47.30.730 and 736. There is clear and convincing evidence based on Gerald Martone's testimony that Respondent suffers from a mental illness. Ms. Merritt's own delusional statements and behavior during the hearing is confirmatory of disordered thought process and delusions. There is also clear and convincing evidence that as a result of this mental illness the Respondent is likely to cause harm to herself or others. The court does not find there to be clear and convincing evidence that Respondent is gravely disabled. The testimony indicates that Ms. [REDACTED] is becoming increasingly aggressive. Mr. Martone indicated that Ms. [REDACTED] swung at him with a closed fist, has threatened to harm others, threw a basketball at another patient's face, possibly kicked another patient and threatened to kill Mr. Martone.⁶ To the extent Ms. [REDACTED] asserts this did not happen and that Mr.

⁶ The court notes Ms. [REDACTED] was originally sent to API for a Title 12 Competency Restoration as a result of criminal charges involving assault (3AN-16-4715 CR) and reckless driving (3AN-15-6898 CR). The complaint in 3AN-16-4715 CR alleges Ms. [REDACTED] assaulted her mother and police officers. The Complaint in 3AN-15-6898 CR alleges Ms. [REDACTED] ran a red light, hit another car and then yelled obscenities and gave the finger to Christians. These cases remain open. Other 3AN-16-1656 PR

Martone is lying, the court finds she is not credible due to her mental illness. The court finds Mr. Martone to be credible. The court also finds based on Mr. Martone's testimony that there are no less restrictive alternatives available. The only alternative identified by Respondent is in Dr. Saylor's affidavit regarding a treatment alternative that no longer exists. Nor is there any indication Ms. [REDACTED] would accept such an alternative as she appears to believe she is not mentally ill and does not need treatment.

Drug Administration Petition

The court also accepts and adopts the Magistrate Judge's recommendations regarding the Drug Administration Petition and finds those recommendations to be supported by the evidence and the law as set forth in AS 47.30.839. The Court Visitor met with Respondent and attempted to administer a capacity assessment instrument. This may not have been completed due to Respondent's lack of cooperation. Ms. Brady-Dragner's testimony is accepted by the court and establishes by clear and convincing evidence that Ms. [REDACTED] while clearly opposing medication, does not have the capacity to give or withhold informal consent. There is no written directive of Ms. Merritt's wishes. The court notes again that Ms. [REDACTED] does not believe she suffers from a mental illness and does not appear to believe she needs treatment. Her condition is unlikely to improve and is likely to worsen without medication.

than what is stated in the criminal complaints the court lacks information about these charges and does not rely on these accusations in deciding this case.

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JTMO: L.M.

Order Approving Magistrate Judge's Recommendation

The court also accepts Mr. Martone's testimony regarding the type of medication and dosage that API requests to administer, the benefits of such medication and the possible side effects. The court notes that medications previously administered to Ms. [REDACTED] that caused side effects (Clotiapine, Risperadone, Olanzepine) are not being requested. Low dosages are proposed. The court has weighed the benefits and risks of the proposed medication and finds that administration of the proposed medications are in Ms. Merritt's best interest and are the least restrictive alternative at this time. 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.

In reviewing this matter this court has also reviewed the decisions of the Alaska Supreme Court in Meyers v. API, 138 P.3d 238 (Alaska 2006); Wetherhorn v. API, 156 P.3d 371 (Alaska 2007); Bigley v. API, 208 P.3d 168 (Alaska 2007) and finds that the Magistrate Judge's recommendations comply with those decisions.

Stay Pending Appeal

Respondent has indicated that if this court upheld the recommendation of the Magistrate Judge as to the 30-Day Commitment Petition and the Drug Administration Petition, Respondent would ask that the order for Administration of Drugs be stayed pending review by the Alaska Supreme Court. That motion is DENIED. Respondent has been found to be a danger to herself or others and incidents involving staff or other patients with Respondent appear to be

worsening. She is at API due to criminal charges alleging assault on her mother and a police officer. Without the administration of medication Respondent is likely to be indefinitely institutionalized with additional petitions and hearings needed. As the Magistrate Judge noted (Transcript at 89-90) this is hardly in Ms. Merritt's best interest. Considering the time an appeal is likely to take and weighing the interests of API for the safety of their staff and patients against those of Respondent the court denies the request for a stay of the administration of medication. However, the court will keep its previously issued stay in effect for three days from the date of this order so as to allow Respondent the opportunity to seek a stay from the Alaska Supreme Court. Absent the granting of such a stay, API may begin administration of medication on July 29, 2016.

DATED at Anchorage, Alaska, this 25th day of July 2016.



MARK RINDNER
Superior Court Judge

*I certify that on July 25, 2016 a copy
was mailed to:*

AGO

J. Gottstein

MJ McCrea


Administrative Assistant

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

In the Matter of the Necessity)
of the Hospitalization of)
L ■ M ■)
Respondent)
)

Case No. 3AN-16-01656PR

COPY
Original Received
Probate Division
AUG 12 2016
Clerk of the Trial Courts

AFFIDAVIT OF BEN SAYLOR

ALAMEDA COUNTY)
)ss
STATE OF CALIFORNIA)

BEN SAYLOR, being first sworn on oath hereby deposes and states as follows:

1. I am over 18 years of age and have personal knowledge of the statements contained in this affidavit.
2. I have known Respondent L ■ M ■ since she was a little baby; her parents and my parents being friends at the time she was born.
3. L ■ has quite a bit of experience with psychotropic drugs, having been on and off them at various times since she was a teenager.
4. For the last few years, including when she was competent to make such a decision, she has been very clear and very consistent in numerous statements to me that she did not wish to be treated with psychotropic medication.

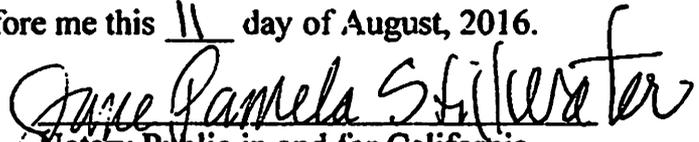
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 11 day of August 2016.

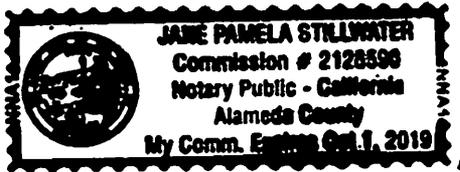


Ben Saylor

SUBSCRIBED AND SWORN TO before me this 11 day of August, 2016.



Notary Public in and for California
My Commission Expires: OCT. 1, 2019



CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA }

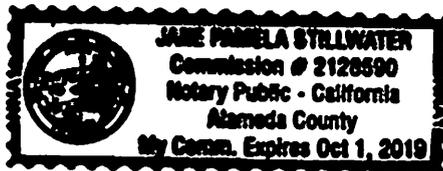
On Aug 11, 2016, before me, Jane Pamela Stillwater, Notary Public, personally appeared

Benjamin Saylor

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:



Signature: Jane Pamela Stillwater

Jane Pamela Stillwater

OPTIONAL

Description of Attached Document:

Title or Type of Document: Affidavit of Ben Saylor

Number of Pages: 2

Document Date: 8-11-16

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the Necessity)
of the Hospitalization of)
)
L.M.)

Trial Court Case No. 3AN-16-01656PR

Supreme Court No. S-16393
FILED

AUG 15 2016

APPELLATE COURTS
OF THE
STATE OF ALASKA

**ORDER GRANTING
MOTION TO VACATE ORDER GRANTING PETITION FOR
COURT APPROVAL OF ADMINISTRATION OF PSYCHOTROPIC
MEDICATION [AS 47.30.839]**

Upon consideration of Appellant's motion to vacate that part of the Superior Court's July 25, 2016, Order Approving Magistrate Judge's Recommendations granting the Petition for Court Approval of Administration of Psychotropic Medication [AS 47.30.839], it is hereby **ORDERED** the motion is **GRANTED**.

IT IS FURTHER ORDERED that no further psychotropic medication shall be administered to Appellant under authority of the July 25, 2016, Order Approving Magistrate Judge's Recommendations.

Dated _____, 2016 _____

Law Project for Psychiatric Rights
James B. Gottstein, Esq.
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Anchorage, Alaska 99501
(907) 274-7686
Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the Necessity)
of the Hospitalization of)
)
L.M.)
_____)

Supreme Court No. S- 16399

Trial Court Case No. 3AN-16-01656PR

CERTIFICATE OF SERVICE and TYPEFACE

The undersigned hereby certifies that on this date he hand delivered

- 1. Motion To Vacate Order Granting Petition For Court Approval Of Administration Of Psychotropic Medication [As 47.30.839];
- 2. (proposed) Order Granting Motion To Vacate Order Granting Petition For Court Approval Of Administration Of Psychotropic Medication [As 47.30.839]; and
- 3. this Certificate of Service

to

Joanne M. Grace
Department of Law
1031 W 4th Ave #200
Anchorage, AK 99501.

DATED August 15, 2016.



Jim Gottstein