

1
2 IN THE SUPREME COURT OF THE STATE OF ALASKA

3 Faith J. Myers,)

4 Appellant,)

5 v.)

6 ALASKA PSYCHIATRIC)
7 INSTITUTE,)

8 Appellee.)

Supreme Court No. S-11021

Trial Court No. 3AN-03-00277 PR

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DEC 16 2003
Law Project For
Psychiatric Rights

9
10 MOTION TO DISMISS APPEAL AS MOOT

11 The State of Alaska, by and through the Office of the Attorney General,
12 hereby requests the Court to dismiss this appeal because the order from which the appeal is
13 taken has no current force or effect, and the issues on appeal are moot. This motion is
14 brought pursuant to Appellate Rule 503 and the Court's order dated December 4, 2003, and
15 is supported by the attached memorandum in support of motion, with attachments, and
16 Affidavit of Counsel.
17

18 Dated December 16, 2003.

19
20 GREGG D. RENKES
21 ATTORNEY GENERAL

22
23 By: *Michael G. Hotchkin*

24 Michael G. Hotchkin
25 Assistant Attorney General
26 AK Bar No. 8408072

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10 MEMORANDUM IN SUPPORT OF
11 MOTION TO DISMISS APPEAL AS MOOT

12 Alaska Psychiatric Institute's (API) appellee's brief in this appeal included an
13 argument that the Court should not decide this case because the issues on appeal had
14 become moot. In support of this argument API moved to supplement the record on appeal
15 with an affidavit from the its director, Ronald M. Adler, demonstrating that after the appeal
16 was filed circumstances occurred that caused the appeal to become moot. The appellant
17 opposed API's motion to supplement the record and this Court denied the motion,
18 indicating that the appropriate vehicle for API's mootness argument is a motion to dismiss,
19 and that such a motion may be supported by materials that are not contained in the record on
20 appeal.¹

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23 Appellant appealed from the superior court's order that she receive
24 psychotropic medication during her 30-day period of involuntary commitment to API. The
25 superior court stayed its medication order while Ms. Myers sought appellate review in this
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¹ Order denying motion to supplement record on appeal, Attachment 1.

1 Court.² At the expiration of the 30-day commitment period the superior court ordered Ms.
2 Myers committed for an additional period of 90 days, and issued a 90-day medication order,
3 which was also stayed.³ Before either medication order was implemented Ms. Myers was
4 discharged from API.⁴ The medication orders issued during her commitment were never
5 implemented; they have no current or continuing effect and they will not be implemented in
6 the future.⁵

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9 The issues before this Court are limited to whether the superior court erred in
10 approving the medication petition filed by API, and whether the court applied an incorrect
11 evidentiary standard in issuing its medication order.⁶ Ms. Myers' subsequent discharge
12 from API has caused these issues to become moot, because any "judgment by this court
13 would be advisory only."⁷ Ordinarily this Court will not consider a moot case on appeal.⁸

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15 ² Attachment 2.

16 ³ Attachment 3.

17 ⁴ Affidavit of Ronald M. Adler, Attachment 4, and API Master Patient Index,
18 attached thereto; Dismissal With Prejudice, Attachment 5. This Court may take judicial
19 notice of the superior court's Dismissal With Prejudice. *See, Crawford & Company v.*
20 *Vienna*, 744 P.2d 1175, 1178 (Alaska 1987) (supreme court may take judicial notice of
21 unpublished trial court decisions); *Commercial Fisheries Entry Commission v. Apokedak*,
22 606 P. 2d 1255, 1259 (Alaska 1980) (unpublished superior court decision proper subject
for judicial notice by supreme court). Ms. Myers' appeal from the 90-day order was later
dismissed. See Supreme Court #S-11116.

23 ⁵ Affidavit of Ronald M. Adler, Attachment 4.

24 ⁶ See Amended Points on Appeal, Attachment 6.

25 ⁷ *Hayes v. Charney*, 693 P.2d 831, 834 (Alaska 1985).

26 ⁸ *Doe v. State*, 487 P.2d 47, 53 (Alaska 1971).

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2 The Court may, however, consider appeals from moot judgments when
3 application of the mootness doctrine would cause recurring issues to repeatedly
4 circumvent appellate review, if the issues are important enough to the public interest to
5 justify overriding the mootness doctrine.⁹ Determination whether to review a moot
6 question is left to the discretion of the court.¹⁰
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8 At first blush the present case might seem appropriate for application of the
9 public interest exception. Medication orders are time-critical, and it is unlikely that an
10 appeal from such an order would be completed during the order's period of effectiveness.
11 Courts in other jurisdictions have chosen to entertain appeals from similar orders, despite
12 the orders having become moot.¹¹ However, two factors weigh against the Court's
13 entertaining the present appeal. First, as discussed at section II(B) (pages 13-14) of API's
14 brief on appeal, the constitutional issues that Ms. Myers raises on appeal were never
15 briefed by the parties below, or considered by the trial court. Before considering these
16 important issues for the first time on appeal this Court should allow the parties and the
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23 ⁹ *Id.*

24 ¹⁰ *Hayes v. Charney*, 693 P.2d at 834.

25 ¹¹ *See, e.g., Washington v. Harper*, 494 U.S. 210, 218-219, 110 S.Ct. 1028,
26 1035 (1990); *Steele v. Hamilton County Community Mental Health Bd.*, 736 N.E.2d 10
(Ohio 2000).

1 superior court to define the issues and refine the arguments.¹²

2
3 Second, while the circumstances presented in this case may theoretically be
4 capable of evading review upon repetition, it is notable that this case apparently presents
5 the first challenge to the state's psychotropic medication statutes in the eleven years in
6 which those statutes have existed in their present form.¹³ The likelihood that a
7 controversy that is capable of repetition will actually be repeated is a factor the Court
8 should consider in determining whether to override the mootness doctrine. In deciding to
9 apply the public interest exception this Court has often noted that a particular issue is not
10 only capable of repetition, but that its track record of repetition justifies its consideration
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17 ^{- 12} The superior court struggled to define the issues before it, due in part to Ms.
18 Myers' failure to suggest an alternative treatment option to medication and in part to Ms.
19 Myers' expert witnesses' lack of knowledge concerning treatment options available at
20 Alaska's state-operated hospitals. See Order on Motion for Reconsideration, Attachment
21 7. (The Court may take judicial notice of this order, which related to the 90-day
22 commitment and medication proceeding. See footnote 4, *supra*). The court's struggles to
23 come to grips with the issues involving this single patient should caution this Court
24 against issuing an advisory opinion of general applicability in the absence of a fully
25 thought-out and developed record below.

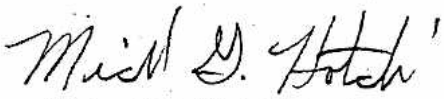
26 ¹³ Affidavit of Ronald M. Adler, Attachment 4. The statutes at issue in this
appeal, AS 47.30.836-.839, were enacted in 1992, following the recommendation of an
"Involuntary Medication Task Force," which was made up of representatives of state
agencies and patients' advocacy organizations. See: Task Force Report on Use of
Involuntary Medication; "SB 153, 'An Act relating to mental health,' Senator Pat
Pourchot;" and Memorandum from Senator Pat Pourchot to Senator Rick Halford; see
Attachments 8, 9, and 10. A review of Alaska caselaw reveals no appellate decisions
construing these statutes.

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2 by this Court.¹⁴ In the present case, the paucity of past litigation over the challenged
3 statutes weighs against the Court issuing an advisory opinion in a moot appeal from
4 application of the statutes.

5 Because the issues on appeal are moot, because the superior court did not
6 rule on the issues raised on appeal, and because it is by no means clear that the issues
7 presented by this case are likely to repeatedly evade appellate review, API respectfully
8 requests the Court to dismiss this appeal.
9

10 Dated December 16, 2003.

11 GREGG D. RENKES
12 ATTORNEY GENERAL

13 By: 
14 Michael G. Hotchkin
15 Assistant Attorney General
16 AK Bar No. 8408072
17
18

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20 ¹⁴ See, e.g., *Alaska General Alarm, Inc. v. Grinnell*, 1 P.3d 98, 100 n.2
21 (Alaska 2000) (“The issue has generated much litigation, which may be avoided in the
22 future with an advisory opinion from this court.”); *Municipality Of Anchorage v.*
23 *Anchorage Daily News*, 794 P.2d 584, 588 (Alaska 1990) (“Indeed, a history of ongoing
24 document request disputes between the municipality and the Daily News is reflected in
25 the record before us.”); *State of Alaska, Dep’t of Revenue v. A.H.*, 880 P.2d 1048, 1049-
26 50 (Alaska 1994) (“We conclude that each requirement of the public interest exception
test has been met. The record indicates that this scenario – married women seeking to
establish paternity in persons other than their husbands – is repeated regularly. The issue
frequently evades review because trial courts prefer not to leave the question of a child’s
paternity unsettled pending appeal.”). See also, *Doe v. State*, 487 P.2d at 53 (“There is
little question that preadjudication detention of children is a matter of public concern, and
that *it is likely to recur.*”) (emphasis added).

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9
10 AFFIDAVIT OF COUNSEL

11 STATE OF ALASKA)

) ss.

12 THIRD JUDICIAL DISTRICT)

13
14 Michael Hotchkin, being first duly sworn upon oath, deposes and says:

15 1. I am the assistant attorney general representing Alaska Psychiatric
16 Institute in the above-captioned appeal.

17 2. On December 5th, I received the Court's order denying API's motion
18 to supplement the record in this appeal, and the Court's notice that API's brief was
19 accepted for printing, conditioned on removal of references to the Adler affidavit.

20 3. I contacted Marilyn May, the Clerk of the Appellate Courts, to
21 confirm that, in order to comply with the Court's notice to print brief, API's brief should
22 be printed with the argument concerning mootness intact, even though references to the
23 affidavit supporting the argument were to be removed and the argument was to be
24 presented to the Court through a Motion to Dismiss.

25 4. Attached to this affidavit of counsel is a true and correct print-out of
26 an e-mail exchange I had with Ronald M. Adler's secretary, Barbara Russell, which bears
on Mr. Adler's statement in his affidavit in support of the present motion that his

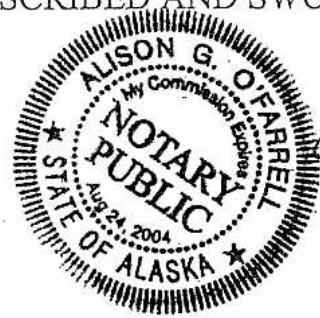
1 reference to an incorrect date in his affidavit of November 28, 2003 was the result of a
2 typographical error.

3
4 FURTHER AFFIANT SAYETH NAUGHT.

5
6 Michael G. Hotchkin

7 Michael G. Hotchkin
8 Alaska Bar No. 8408072

9 SUBSCRIBED AND SWORN to before me this 16th day of
10 December, 2003.



11 Alison G. O'Farrell
12 Notary Public in and for Alaska
13 My commission expires: 8/24/04

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17
18 DEPARTMENT OF LAW
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