IN THE SUPREME COURT OF THE STATE OF ALASKA

ITMO the Necessity of the Hospitalization of L.M.,	)	RECEIVED JUL 27 2016 BY:
Appellant	)	
v.	)	
	)	Supreme Court No.: **S-16393**
Alaska Psychiatric Institute	)	
Appellee	)	

Trial Court Case # **3AN-16-01656 PR**

OPPOSITION TO MOTION OF STAY OF MEDICATION

This Court should not grant Ms. [redacted] proposed stay. She is not at risk of irreparable harm. API cannot be adequately protected. The issues she raises are without merit. Ms. [redacted] is not going to be able to be released from API without medication; having her stay there indefinitely is not in anyone's best interests.

I. STANDARD OF REVIEW

When considering whether to grant a stay, this Court considers criteria similar to the showing required for a preliminary injunction, *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1975), which are:

> The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" *and* if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "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." If, however, the plaintiff's threatened harm is less than irreparable *or* if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits."

State, Division of Elections v. Metcalfe, 110 P.3d 976, 978 (Alaska 2005)(internal footnotes omitted)(emphasis added).

II. LEGAL ARGUMENT

A. There is no risk of irreparable harm

There is no showing of a risk of irreparable harm. The attempt to provide new evidence by way of affidavit or transcript must fail. None of this was presented at the hearing before the magistrate judge. Ms. [redacted] agreed that the superior court would review the record before the magistrate judge, not additional evidence. Order of July 20, 2016 ("In this case the court is being asked to review the decision of Magistrate Judge McCrae as stated on the record following the July 13, 2016 hearing."). Therefore, on that basis alone, this Court should not consider any new evidence.

Any new evidence should not be considered because it is all hearsay. Ms. [redacted] argues that the new evidence is admissible under Evidence Rule 804(b)(1). Emergency Motion for Stay at 10, footnote 44. That Evidence Rule does not apply to affidavits. As to prior testimony, the Evidence Rule requires that these witnesses be "unavailable" as that term is defined. Almost all of these witnesses are available. The exception is Mosher, who is dead, but, 13 years ago, the Alaska Psychiatric Institute did not have any motive to cross-examine Mosher as to Ms. [redacted] condition and Mosher's knowledge of Ms. [redacted] as Mosher, quite obviously, never met Ms. [redacted] Therefore, Mosher's prior testimony is not admissible. As all the new evidence is hearsay, this Court should not consider it.

Even if this Court were to consider any of the new evidence, this Court should come to the same conclusion that Superior Court Judge Rindner did: there is "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. [redacted] history and circumstances." Order Approving Magistrate Judge's Recommendations at 6.

There is no evidence that the proposed medication will cause irreparable harm. As was discussed at the July 14, 2016, status hearing, Ms. [redacted] can be (and was) taken off the lurasidone (Latuda) without tapering.

There was no evidence presented at the actual medication hearing that short-term medication would cause irreparable harm. The evidence at the medication hearing was that if there were to be an allergic reaction, steps could be taken. Respondent's Exhibit D at Page 40, transcript page 79. In general, API would monitor Ms. [redacted] for any negative effects of the medication. Respondent's Exhibit D at Page 37, transcript page 67. If the very rare neuroleptic malignant syndrome were to appear, steps could be taken to reverse it. Respondent's Exhibit D at Page 40, transcript page 79.

There was no evidence at the medication hearing that long-term medication would cause irreparable harm. Tardive dyskinesia was discussed as a possible side effect. Respondent's Exhibit D at Page 40, transcript page 79. The magistrate judge found this was rare. Respondent's Exhibit D at Page 42, transcript page 88. There was also testimony that steps could be taken if signs of tardive dyskinesia appeared: the medication would be immediately discontinued. Respondent's Exhibit D at Page 40, transcript page 80.

There was and is no admissible evidence that the proposed medication will cause irreparable harm, in a medical sense. What is left is the idea that the mere administration of any medication will cause harm because Ms. [redacted] does not want medication. This is not irreparable harm, as the medication can be stopped, and so any harm can be repaired.

For these reasons, there has been no showing of irreparable harm.

B. API's interests cannot be adequately protected

There are three reasons that API's interests cannot be adequately protected.

First, and most importantly, Ms. [redacted] has attempted to assault staff and other patients, even though she is monitored by trained staff. Ms. [redacted] discounts Mr. Martone's testimony as unpersuasive, but both the magistrate judge and the superior court were persuaded. Because of this demonstrated risk of physical harm, API's interests in the safety of its employees and patients cannot be protected.

Second, API has an interest in fulfilling its duty to provide medical care, which it cannot do without providing medication. Mr. Martone testified that no less intrusive alternative other than the medication would address Ms. [redacted] problems.

Respondent's Exhibit D at Page 39, transcript page 74. API's interests in carrying out its mission cannot be protected.

Third, API has limited resources. If API cannot provide medication, then, as the superior court found, [redacted] is likely to be indefinitely institutionalized. This would clearly be against [redacted] best interests, but it would also be detrimental to API – and, more importantly, other patients. This Court has previously held that if an injunction would interfere with the access to a public resource by other citizens other than the party moving for the injunction, the court must consider that consequence when considering if the State is adequately protected. *State v. Kluti Kaah Native Village of Copper Center*, 831 P.2d 1270, 1274, (Alaska 1992). In *Kluti Kaah*, the resource was the moose population of Game Management Unit 13; Kluti Kaah had obtained an injunction which allowed its residents to have additional access to moose hunting. *Id.* This Court agreed that the interests of the State as the protector of the resource and the interests of other subsistence hunters were inadequately protected. *Id.* The limited resource here is not moose, but beds at API. If Ms. [redacted] medication stay is granted, API's interest as the provider of beds at API cannot be protected. Ms. [redacted] would remain at API indefinitely, untreated, while the court considered her appeal. The interests of other possible patients, who would be able to use Ms. [redacted] bed at API if Ms. [redacted] could be successfully treated and discharged, also cannot be protected. (API, as part of the State of Alaska, can assert the interests of these patients under the doctrine of *parens patriae.*)

For all these reasons, the interests of API cannot be adequately protected.

C. The issues raised are without merit and are not probably likely to succeed.

Ms. [redacted] threatened harm is less than irreparable and API cannot be adequately protected. Therefore, the court should require that Ms. [redacted] make a clear showing of probable success on the merits. Ms. [redacted] raises three issues, all of which are without substantial merit.

First, there is no admissible evidence that [redacted] previously expressed a desire to refuse future treatment.

No previous statements regarding possible future treatment were introduced into evidence before the magistrate judge. Ms. [redacted] agreed at the status hearing on July 14 that the superior court would review the record before the magistrate judge, not additional evidence. Order of July 20. Therefore, Ms. [redacted] will not succeed on appeal with an argument that the magistrate judge or superior court failed to consider a previous statement regarding possible future treatment.

Ms. [redacted] argues that Saylor can say that she, while competent, made statements that she did not want psychotropic medication. Emergency Motion for Stay at 8. This claim is without merit. Saylor's assertion is hearsay: he did not testify. Saylor's assertion is itself *based* on hearsay: he asserts not that he heard Ms. [redacted] say what she supposedly said, but that "Angelika," "Amanda," and "other friends" heard her say that. It is remarkable that Saylor does not know who the "other friends" are. Saylor does not explain how he knows, or could know, that Ms. [redacted] was competent when she supposedly made these statements. He provides no description of the circumstances under which Ms. [redacted] supposedly made these statements. *Cf.* AS 47.30.839(g)("oral statements of the patient should be accompanied by a description of the circumstances under which the patient made the statements, if possible."). This issue is unsupported by admissible evidence. Therefore, Ms. [redacted] will not succeed on appeal with this issue.

Second, there is not a feasible less intrusive alternative. Whether there is a feasible less intrusive alternative is a mixed question of fact and law. *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 185 (Alaska 2009). The "fact-intensive inquiry" portion of this question will be reviewed for clear error. *Id.* As in the *Bigley* case, Ms. [redacted] proposes a specific less intrusive alternative: here, a closed-down program known as Soteria-Alaska that no longer exists. Emergency Motion for Stay at 9. Evidence of this closed-down program was not presented to the magistrate judge. Ms. [redacted] agreed at the status hearing on July 14 that the superior court would review the record before the magistrate judge, not additional evidence. Order of July 20. Therefore, this claim of error must fail. Just as importantly, this program does not exist, and therefore cannot be "feasible." A

"feasible" alternative must "actually be available." *Bigley* at 185. Therefore, Ms. [redacted] will not succeed on appeal on this issue.

Ms. [redacted] baldly states that "the State of Alaska" insufficiently funded Soteria-Alaska, causing it to be shut down. Emergency Motion for Stay at 9. She does not provide any evidence that this is true, but, in any event, in *Bigley*, this Court held that even if a proposed medication plan was constitutionally barred, that would not mean that the State of Alaska had to provide a respondent's particular proposed less intrusive alternative. *Bigley*, 208 P.3d at 187-88. Therefore, Ms. [redacted] will not succeed on appeal on this issue.

Ms. [redacted] argues that the affidavits of Gøtzsche, Bassman, and Whitaker, and the transcripts of the testimony of Mosher and Porter show that there is a less intrusive alternative to medication. Emergency Motion for Stay at 11-12. Again, this is all inadmissible hearsay. Again, this evidence was not presented to the magistrate judge. Ms. [redacted] agreed at the status hearing on July 14 that the superior court would review the record before the magistrate judge, not additional evidence. Order of July 20. Therefore, this claim of error must fail.

This claim of error is really a claim of credibility – that Ms. [redacted] medical authorities are right, and the medical community that has adopted psychotropic medication as the standard of care is wrong. This claim has to fail. These people did not examine Ms. [redacted] or any of her records and they know nothing about her. They have no credibility regarding Ms. [redacted] And decisions about credibility are the province of the trial court. *Stephanie W. v. Maxwell V.*, 274 P.3d 1185, 1190 (Alaska 2012). Judge Rindner's conclusion that this evidence was of "little value" is sound. This issue is without merit.

Third, the issue regarding best interests is another argument about credibility. Ms. [redacted] begins her argument by stating that Gøtzsche and Whitaker are correct that psychotropic medication is always the wrong choice for all patients, and therefore, medication cannot be in her best interests. Emergency Motion for Stay at 11. Then, acknowledging that medication is the medical standard of care, she states that the best

interests determination is *not* a medical decision and so the court should not pay attention to the medical standard of care. Emergency Motion for Stay at 13. But this is really a credibility argument: Ms. [redacted] wants the court to credit her proposed experts Gøtzsche and Whitaker, and to not credit Mr. Martone and the general medical community. Decisions about credibility are left to the sound discretion of the trial court. *Stephanie W.*, *supra*. Judge Rindner correctly determined that Gøtzsche's and Whitaker's statements have "little value." To the extent that this issue is about credibility judgments, it is without merit.

Even more importantly, however, the superior court concluded that because the evidence was that Ms. [redacted] is likely to be indefinitely institutionalized without medication, the medication plan was in her best interests. Ms. [redacted] fails to account for this finding at all. The best interests determination balances many factors. *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 252 (Alaska 2006)(best interests analysis should include "at a minimum" factors listed in AS 47.30.837(d)(2) and factors listed by Supreme Court of Minnesota). "Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor." *Myers* at 252. Ms. [redacted] failure to address this part of the determination means that she cannot claim that the superior court clearly erred in balancing all of the facts. This claim of error must fail.

III. CONCLUSION

To grant Ms. [redacted] motion for stay is to require Ms. [redacted] to remain at API indefinitely, with limited liberty, while API staff and patients bear the risk of her assaulting them. Ms. [redacted] has not shown a risk of irreparable harm. API's interests cannot be adequately protected. The issues Ms. [redacted] raises are insubstantial. The medication stay should not be granted.

Dated: July 27, 2016.

JAMES E. CANTOR
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the Necessity for the Hospitalization of: Lea [redacted] Respondent.	Case No. 3AN-16-01656 PR

ORDER

Respondent's Motion for Expedited Consideration of her Motion to Compel API to Produce its Letters to court is granted. The Motion to Compel API to Produce its Letters is denied. In this case the court is being asked to review the decision of Magistrate Judge McCrae as stated on the record following the July 13, 2016 hearing. There is no indication that any such letters were admitted or otherwise considered by the magistrate judge. Thus the letters are not relevant.

DATED at Anchorage, Alaska, this 20th day of July 2016.

MARK RINDNER
Superior Court Judge

I certify that on 07/20/2016 a true and correct copy of this order was mailed to:

Gottstein/Bookman

Administrative Assistant

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Appellant	)	
v.	)	
Alaska Psychiatric Institute	)	Supreme Court No.: **S-16393**
Appellee	)	

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CERTIFICATE OF SERVICE AND TYPEFACE

I certify that on July 27, 2016 a true and correct copy of the Opposition To Motion Of Stay Of Medication and this Certificate of Service were served by U.S. Mail to the following:

Alaska Psychiatric Institute
3700 Piper Street
Anchorage, AK 99508

Hand Delivery:

James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501

I further certify, pursuant to App. R. 513.5, that the aforementioned document(s) were prepared in 13 point proportionately spaced Times New Roman typeface.

Teresa Eastman
Legal Office Assistant