

In the Supreme Court of the State of Alaska

William S. Bigley,

Appellant,

v.

Alaska Psychiatric Institute,

Appellee.

Supreme Court No. S-13116

Order RECEIVED

MAY 27 2008

Date of Order: 5/23/08

Trial Court Case # **3AN-08-00493PR**

By motion of 5/20/08 (updated 5/21/08), appellant has moved on an emergency basis for a stay of the superior court's findings and order of 5/19/08 granting API's petition to administer psychotropic medication during appellant's period of commitment. The order limits the medication to Risperadone in an amount not to exceed fifty milligrams per two weeks. On 5/19/08 12:30 p.m. the superior court also entered a forty-eight hour stay to allow appellant to seek a stay in this court. API has opposed appellant's stay motion. API has also moved to strike an affidavit executed 5/20/08 by Grace E. Jackson, MD and submitted with appellant's 5/20 stay motion. Appellant has responded, at the court's request, to the motion to strike, and has requested alternative stay relief. Upon consideration of the stay motion and opposition, and the motion to strike and the response to that motion,

IT IS ORDERED:

1. It is first necessary to identify the standard for deciding whether a stay is appropriate. The standard depends on the nature of the threatened injury and the adequacy of protection for the opposing party. Thus, if the movant faces a danger of

irreparable harm and the opposing party is adequately protected, the "balance of hardships" approach applies. Under that approach, 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.' " *State, Div. of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005). On the other hand, if the movant's threatened harm 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." *Id.* The latter standard is proposed here by API. Appellant has not clearly identified the standard he thinks controls. He does, however, assert that he will suffer irreparable harm if he must undergo involuntary medication.

There is at least implicit disagreement in this case about whether administration of psychotropic medication causes medical health problems that are potentially grave or whether it may even contribute to mental illness. At least by implication, the involuntary administration of medication against appellant's fervent wishes may cause psychic harm. Whether long-term administration of such medication causes irreparable harm is an issue that implicates the merits of this appeal. The evidence appellant produced at the mid-May hearing permits a conclusion long-term medication will cause him irreparable harm. It also appears to imply that even the administration of a single dose, or an additional dose, intravenously may contribute to irreparable harm. The 5/20 affidavit of Dr. Jackson does not seem to expressly address the harm that might result from a single fifty-milligram intravenous injection of Risperadone. But it also appears that the likelihood the medication will end with the proposed injection authorized 5/19/08 by the superior court is small. Appellant has been admitted seventy-five times to API. It is

likely that if he is released with or without medication (his thirty-day commitment order was entered 5/5/08), he will be readmitted to API in the future and that API staff will again seek a medication order. Thus, if the medication is administered as presently authorized, it seems likely that he will sooner or later following return to the community decline to voluntarily accept medication and that API will seek permission to administer additional doses. In other words, whether irreparable harm will result from the medication authorized by the 5/19 order necessarily raises longer-term questions.

API asserts that its interests cannot be adequately protected. It certainly has an important interest in fulfilling its duty to patients and in satisfying its charter obligations to the public. But the evidence to date does not establish that medication is necessary to protect appellant from self-inflicted harm or from retaliatory harm in response to his behavior, threatening as it may seem to others. Nor has API identified any need to protect others from him, including API staff during his commitment or the public upon his release. This is not to minimize API's interest both in doing what it believes best for appellant and in carrying out its responsibilities. But it does not appear that API cannot adequately protect those interests. API's interest in protecting appellant does not dramatically outweigh his desire to make treatment decisions for himself. It therefore appears that the appropriate standard for a stay pending appeal is whether appellant has raised serious and substantial questions going to the merits of the case. He does not have to demonstrate a clear showing of probable success on the merits.

2. Applying that standard, the court concludes that a stay of the 5/19 order is appropriate. The evidence presented at the mid-May hearing supports appellant's contentions, but does not necessarily foreclose API's contentions. Because the findings

of fact of the superior court are reviewed under a clearly erroneous standard, and because necessary conclusions of law are considered de novo, this court cannot now conclude on the basis of the evidence review conducted in context of the stay motion that appellant's appellate issues are all frivolous or obviously without merit. The court cannot say that appellant has clearly demonstrated probable success on the merits. But he is not required to do so in this case to obtain a stay. His motion for stay is therefore **GRANTED**.

3. API's motion to strike the 5/20 affidavit of Dr. Jackson is **DENIED**. The affidavit appears to largely summarize other evidence offered at the May hearing. But the only alternative to striking or accepting the affidavit would be remand to the superior court for reconsideration of appellant's stay motion. The superior court, as a fact-finding court, is in a superior position to weigh Dr. Jackson's most recent statements and determine whether appellant has demonstrated irreparable harm. But doing so will simply delay the ultimate resolution of the medication issue. Unless a stay were granted in the superior court, it is probable appellant would renew his stay motion in this court, and then, if that motion were denied, seek full-court reconsideration. In the meantime, the thirty-day commitment period is running. In any event, the 5/20/08 affidavit is not the evidentiary basis for this stay order.

4. This appeal was filed 5/20/08, and the appellant characterized it as a Rule 204 appeal in his notice of appeal and docketing statement. Even if appellate briefing is expedited, it is highly likely the present commitment order will have expired before briefing is complete, and therefore before this court can rule on the merits. The possibility of technical mootness is substantial. The parties should anticipate this issue

Supreme Case No. S-13116

Bigley v. API

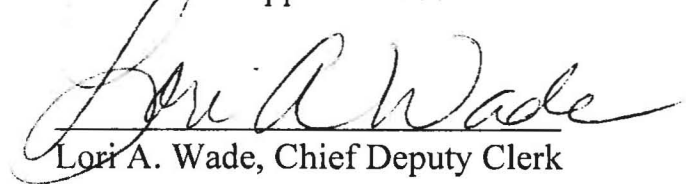
Order of 5/23/08

Page 5

in their briefing and discuss whether the court should nonetheless reach the merits of the 5/19/08 order permitting administration of Risperadone.

Entered at the direction of an individual justice.

Clerk of the Appellate Courts



Lori A. Wade, Chief Deputy Clerk

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Judge Gleason by fax
Trial Court Clerk by fax

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JUN 26 2008

In the Supreme Court of the State of Alaska

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Supreme Court No. S-13116

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Date of Order: 6/25/08

Trial Court Case # 3AN-08-00493PR

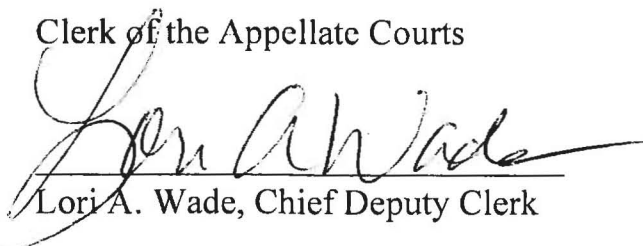
Before: Fabe, Chief Justice, and Matthews, Eastaugh, Carpeneti, and Winfree, Justices.

On consideration of appellee's 5/28/08 motion to reconsider the 5/23/08 individual justice order granting appellant's emergency motion to stay the 5/19/08 superior court order granting API's petition to administer psychotropic medication during appellant's period of commitment, and the 6/9/08 opposition,

IT IS ORDERED: the motion is **DENIED**.

Entered by direction of the court.

Clerk of the Appellate Courts



Lori A. Wade, Chief Deputy Clerk

cc: Supreme Court Justices