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IN THE SUPREME COURT OF THE STATE OF ALASKA

FAITH J. MYERS,	)	
Appellant,	)	
	)	
vs.	)	
	)	Supreme Court No. S-11021
ALASKA PSYCHIATRIC INSTITUTE,	)	
Appellee,	)	
	)	

Trial Court Case No. 3AN 03-00277 PR

OPPOSITION TO MOTION FOR STAY PENDING APPEAL

The Department of Health and Social Services, Alaska Psychiatric Institute (Appellee or "the hospital"), through the Attorney General's Office, hereby opposes Appellant's Motion for Stay Pending Appeal dated March 21, 2003. Appellee's opposition is supported by the attached affidavit of Dr. Nicholas Kletti, Medical Director, Alaska Psychiatric Institute, who attests to the hospital's continued inability to provide what no one contests is overwhelmingly recognized as the currently accepted standard of medical care in the United States today - the careful use of nueroleptic medications to treat schizophrenia. As stated by Dr. Kletti, continued delay in the administration of medication is contrary to Ms. Myers' welfare and not in her bests interests.

In opposition thereto, Appellee states as follows:

1. Appellant's Motion for Stay Pending Appeal does not comport with the procedures of Alaska Appellate Rule 205. This Court should remand the issue of a stay back to the Superior Court, pursuant to Appellate Rule 205, for a

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determination by the court as to whether entry of a stay pending the appeal is appropriate. If the superior court does not grant that request for a stay pending the appeal's duration, then appellant can motion this Court to consider the request.

On remand, the superior court may wish to hold an evidentiary hearing to obtain more evidence on the issue of the appropriateness of entering a stay pending the duration of the appeal - which will likely take months - including whether a delay in the administration of medications will harm appellant and/or is in Ms. Myers' bests interests. The superior court may also wish to appoint and hear from an individual - independent of this litigation - who is charged with looking out for the appellant's best interests, such as a court appointed guardian ad litem. Counsel understands that the family may have already initiated guardianship proceedings and the superior court may wish to accelerate that process. The court may also wish to consider the appointment of an expert psychiatrist who is independent of and not connected to these proceedings, similar to its prior appointment of the court visitor for examination of the issue of capacity.

The superior court may want to consider all of the above additional information before rendering a decision on whether to grant a stay of the effectiveness of the medication petition pending the duration of the appeal. If the superior court does not grant appellant's request for a stay pending the duration of the appeal, then appellant can properly proceed

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2 with a motion for stay in this Court pursuant to Appellate Rule  
3 205.

4 2. If the Court chooses to hear appellant's request  
5 for a stay pending the appeal now, then it should deny that  
6 request for, among others, those reasons stated in the attached  
7 affidavit of Dr. Nicholas Kletti, Medical Director, Alaska  
8 Psychiatric Institute dated April 1, 2003.

9 As reflected in his testimony at trial and in his  
10 attached affidavit, Dr. Kletti is of the expert opinion that  
11 delay in the administration of medication is contrary to Ms.  
12 Myers' welfare and is not in her best interests medically,  
13 based on what is overwhelmingly accepted as the current  
14 standard of psychiatric care in the United States today - which  
15 is practiced by the hospital. Appellant does not dispute that  
16 the position forwarded by her own experts offered at the trial  
17 fall outside what is currently accepted at the standard of care  
18 for psychiatry in the United States today (e.g. that  
19 neuroleptic medications should not be used to treat  
20 schizophrenia). Appellee respectfully asserts that it cannot  
21 be required to practice psychiatric medicine, as Appellant  
22 argues, outside the parameters of what is currently accepted as  
23 the standard of care for psychiatric medicine in the United  
24 States today. In fact, were Dr. Kletti and others to practice  
25 psychiatry as forwarded by appellant's experts, they would each  
26 be liable for malpractice and the hospital might lose its  
license as a psychiatric treatment facility.

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MOTION TO QUASH SUPOENA & NOTICE DEPOSITION  
ITMO: F.M.  
JK/MJ/API/MEYERS/ OPPOSITION TO MOTION TO STAY

CASE NO. 03-00277 PR  
PAGE 3 OF 5

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Appellee's response to Appellant's legal arguments will be addressed here. Appellant argues that the Superior Court "never explicitly addressed" the adequacy of the hospital's expert testimony on the issue of harm to Ms. Myers caused by continued delay in administration of medication under State v. Coon, 974 P.2d 386 and related authority. Appellee disagrees and cites to pages 1-4 of the superior court's order issued on March 21, 2003 (attached).

Concerning Appellant's assertion that she has satisfied the criteria for obtaining a stay under Powell v. City of Anchorage, 536 P.2d 1228 (Alaska 1975), Appellee contests that she cannot demonstrate that she can meet any - let alone all - of the four criteria. Specifically, she has not demonstrated a likelihood of success on the merits. Second, although Appellant may have presented evidence in support of a finding that the medications may cause her harm, such testimony and evidence was elicited from sources of whom Appellant acknowledges fall outside what is currently accepted as the standard of psychiatric care in the United States today, and from experts who have never even examined Ms. Myers. Third, Appellant overlooks the substantial harm to other interested parties, such as members of Ms. Myers' family who love and care for her, and who will continue to suffer emotionally if her condition is not improved. Finally, Appellant overlooks the harm to the public interest if facilities like the Alaska Psychiatric Institute are not allowed to help patients like Ms.

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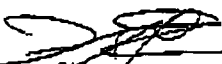
Myers because they are prohibited from using medications - previously proven to be effective - to treat schizophrenia.

Concerning Appellant's constitutional arguments, Appellee states that her arguments are misplaced in this motion. The issue before the Court concerning any proper motion for stay is whether stay is compatible with the welfare and best interests of Ms. Myers - not whether any rights to privacy have been violated. Presumably, the issues concerning privacy will be raised in her points on appeal and addressed in that context.

As provided by the Court Rules and in furtherance of the best interests of Ms. Myers, the matter of stay pending appeal should be decided by the superior court. For the above reasons, Appellant's Motion for Stay Pending Appeal should be DENIED.

DATED: 4.1.03

GREGG D. RENKES  
ATTORNEY GENERAL

By:   
Jeffrey T. Killip  
Assistant Attorney General  
Alaska Bar No. 9204005

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

DEPARTMENT OF LAW  
OFFICE OF ATTORNEY GENERAL  
3RD JUDICIAL DISTRICT  
ANCHORAGE, ALASKA

In the Matter of the Hospitalization of: )  
 )  
 )  
Faith J. Myers, )  
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Respondent. )  
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3AN-03-277 PR

**ORDER**

On February 21, 2003, an Order was entered that allowed Ms. Myers to be delivered to the temporary custody of the Alaska Psychiatric Institute (API). At a hearing held on March 5, 2003, findings were entered on record that Ms. Myers had been shown by clear and convincing evidence to be mentally ill, that she presented a likelihood of serious harm to herself or others, and that she would therefore remain committed in the Alaska Psychiatric Institute (API) for a period of not more than 30 days. AS 47.30.735. On March 14, an Order was entered granting the State's Petition for Administration of Psychotropic Medication. At Petitioner's request, another Order was entered staying March 14 Order for a period of 7 days, so that the March 14 ruling could be appealed to the Alaska Supreme Court.

Prior to the March 5 hearing, counsel for Ms. Myers filed a Motion to Dismiss both the Petition for 30-Day Commitment and the Petition for Court Approval of Psychotropic Medication. That Motion is now ripe for review. As noted, both of the Petitions have been granted since Mr. Gottstein filed the Motion to Dismiss. However, there are certain arguments he raises in his Memorandum in

Support that, while considered by me in my previous rulings, I wish to address more fully in light of the serious questions presented in this case.

1. Application of Daubert Admissibility Standard

Respondent's counsel contended both in his Motion and at the evidentiary hearing held on March 5 that expert testimony proffered by the State on the question of Ms. Myers' future dangerousness or the appropriateness of the medication plan proposed by API should not be considered. Specifically, counsel argued that under the standard for admissibility of expert scientific testimony set forth in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and as adopted by the Alaska Supreme Court in State v. Coon, 974 P.2d 386 (Alaska 1999), the testimony of Dr. Hanowell and Dr. Kletti should not be considered. Respondent asserts that such testimony is not sufficiently reliable under the Daubert criteria for admission of scientific evidence on either the question of Ms. Myers' future dangerousness, or the proposed plan of administering psychotropic medication to treat her currently diagnosed mental condition.

The State's Opposition to Post-Hearing Motion to Delay Effectiveness of Any Forced Medication Order identifies that this testimony was not offered to justify the validity of the proposed treatment plan, but rather to show that the elements of the State's Petition had been established. Opposition, at 2. It was primarily for this latter purpose that I considered the testimony offered by the State's medical witnesses in this matter. Under Coon, when an area of scientific expertise is well known and has been fully considered by the court, a trial court may take judicial notice of its admissibility. Id. at 398. The State's experts were candid that the

current understanding of mental illness is such that, at this point, no one can testify as to what causes schizophrenia and/or why some medications work for some patients. They testified that their views were based upon clinical observations and research that is based largely upon observations of outcomes. This limitation does not cause me to conclude that the testimony is unreliable or untrustworthy. Regarding Ms. Myers' diagnosis, I read Coon to permit the consideration of the psychiatrists' testimony regarding clinical observations supporting the conclusion that Ms. Myers suffers from schizophrenia. Though Ms. Myers disputes that she is mentally ill, she did not dispute that she hears voices commanding her to do things, that she sees people she realizes can not be present and experiences other sensations and hallucinations she refers to as "special effects" that do not allow her to accurately perceive the world around her. Had there been a dispute about whether Ms. Myers actually hears voices that direct her to do things, this would be a closer question. As it is, given the undisputed factual testimony concerning the voices that command her, Coon allows psychiatrists to testify regarding Ms. Myers' diagnosis and the danger she presents to herself and/or others.

Ms. Myers' expert testimony did not address the questions of the dangers posed by Ms. Myers to herself or others in her current mental state. Indeed, Ms. Myers' experts have not examined her. The experts she offered addressed the advisability of treating a patient with her diagnosis with psychotropic medications. As I explained in my earlier Order, I considered the expert testimony offered by Ms. Myers to be of limited relevance for the purpose of ruling on her capacity and ability to provide informed consent, and not because I considered that the statutory scheme calls for the superior court to second guess the proposed treatment plan. I



found the testimony relevant because Myers testified that she was an activist for mentally ill patients in the past, that she has undergone treatment herself for mental illness and because she demonstrated to me an understanding and familiarity with the issues involved in treatment of the mentally ill. This included the nature of the general discussion and debate in the medical community regarding certain treatment approaches to mental illness. Had Ms. Myers refused medication against medical advice without being able to demonstrate that a valid debate exists among qualified experts in the psychiatric community, that would have been probative on the issue of her capacity.<sup>1</sup> For these reasons, I do not believe the Daubert factors preclude my consideration of either the State's experts or Ms. Myers' experts.

2. Vagueness of AS 47.30.730.

Respondent further argues in her Motion that the prescribed procedure in petitioning for a 30-day involuntary commitment under AS 47.30.730 is unconstitutionally vague, because the requirement for an allegation that she is "likely to cause harm to self or others or is gravely disabled" insufficiently describes the nature of conduct for which involuntary committal may be instituted. However, as the State correctly points out in its Opposition brief, Subsection (a)(7) of this statutory section further requires that the petition for commitment "list the facts and specific behavior of the respondent supporting the allegation" of the likelihood that the respondent may cause harm to herself or others, or is gravely disabled. I conclude that this requirement is sufficient to provide Ms. Myers with the

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<sup>1</sup> As it is, I made a finding that a valid debate does exist among qualified experts regarding the use of psychotropic medications for schizophrenia.

opportunity both to identify and contest the allegations of her behavior and other pertinent facts which form the basis for the petition for commitment.

3. Adequate Listing of Facts in Petition

Respondent argued that the Petition for Commitment did not sufficiently list the facts and specific behavior required under AS 47.30.730(a)(7), because it only lists "conclusory allegations" regarding Ms. Myers' condition. Memorandum in Support, at 8. However, in addition to the allegations identified by Respondent in her brief, the Petition also stated that Ms. Myers "reportedly isn't eating well and reportedly may be sleeping in the crawl space under her apartment." The Petition included an additional assertion that Ms. Myers was "making reference to ghosts." In my March 14 Order granting the State's Petition for Administration of Psychotropic Medication, I specifically found that Ms. Myers' apparent occupation of the crawlspace of her apartment to sleep or read posed a danger to herself. At the hearing, the testimony was that the space is unheated. Only a sheet of plastic separates it from the ground under the building and Ms. Myers appears to have been there in January, when a drop in temperature would pose a risk of harm to her. I noted this testimony in my Order of March 14, 2003, at 10. However, the specifics of this risk of harm were not elaborated upon in the original petition. I concluded that the above-stated recitation of facts in the Petition for Commitment, while sparse, was sufficient to support the allegations of Ms. Myers mental illness and likelihood of causing harm to herself. This conclusion is based, in part, upon the fact that the statute requires that the Petitions be prepared in a very short timeframe.

4. **Undefined Limits for State Authority to Administer Medications**

Ms. Myers contends that the State cannot be given "carte blanche" authority by the court to administer medications to her, because AS 47.30.837 requires that a patient be given all information that is material to the patient's decision to give or withhold consent.<sup>2</sup> Ms. Myers argues that the Petitioner failed to give this information to her as required by statute. The testimony at the hearing supported the finding that the State either actually provided, or attempted to provide, this information to Ms. Myers to the extent that she would allow it to be provided. She did not participate in at least some of the discussion.<sup>3</sup>

Beyond the requirement for informational disclosure, however, Ms. Myers challenges the limitation on a court's authority to modify or restrict a treatment plan once the court has issued an order approving the facility's petition under AS 47.30.839. AS 83.30.839(g) states in relevant part that if the court finds that the patient is not capable of providing informed consent, "the court shall approve the facility's proposed use of psychotropic medication." Treatment by use of a locked quiet room, electroconvulsive therapy, adverse conditioning, lobotomy, psychosurgery or other comparable form of treatment are addressed in AS 47.30.825(d)-(g). Experimental treatments are prohibited under AS 47.30.830, and the same statute provides that if a treatment "is experimental as applied to a particular patient or would involve a significant risk of mental or physical harm to the patient, the matter may be referred to the commissioner for a determination."

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<sup>2</sup>The statute also sets forth several specific items of information that the treatment facility is required to impart to the patient. See AS 47.30.837(d)(2)(A-F).

Referral to the commissioner triggers the facility's duty to provide copies of all documents to the patient, patient's attorney and guardian. The patient and/or representatives of the patient are also entitled to provide evidence to the commissioner on the question. AS 47.30.830. However, the initial determination that a treatment may be experimental as applied to a particular patient and/or the determination that a particular treatment may be harmful to a particular patient is a decision made by the personnel of the facility.

The state argues persuasively that this statutory scheme evidences a clear intent by the legislature to restrict the court from substituting its judgment on medical matters for those of the treating facility's physicians, but counsel for Ms. Myers raises a serious concern that approval of the State's Petition may subject her to a medication that she considers to have actually harmed her in the past, without providing the opportunity to present differing medical experts. She argues that standards within the medical community evolve as medical science advances and that some medications and/or medical procedures that were the accepted standards in the past are now looked upon with great disfavor and/or even recognition that they were indeed harmful. Where a patient, such as Ms. Myers, has a history of undergoing a medical treatment she found to be harmful, where she is found to lack capacity to make her own medical decisions and a valid debate exists in the medical/psychiatric community as to the safety and effectiveness of the proposed treatment plan, it is troubling that the statutory scheme apparently does not provide a mechanism for presenting scientific evidence challenging the proposed treatment plan. The decision to grant the State's Petitions was made based upon the express

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<sup>3</sup> I do not reach the question of whether API would be required to provide such information to a guardian

language in the statute, which I do not find to be ambiguous. The superior court's role appears to be limited to deciding whether Ms. Myers has sufficient capacity to give informed consent, as defined by AS 47.30.839.

CONCLUSION

I previously granted both the State's Petition for Involuntary Commitment and Petition for Administration of Psychotropic Medication. For the reasons stated in my prior rulings and as set forth above, Ms. Myers' Motion to Dismiss is denied.

DATED 3/21/03

Morgan Christen  
MORGAN CHRISTEN  
Superior Court Judge

I certify that on 3/24/03  
a copy of the above was mailed/faxed to  
each of the following at their addresses of record:  
James Gottstein 274-9493  
Jeffrey Killip 258-6872

EW  
Eilary Williams  
Administrative Assistant

authorized to make health decisions on behalf of Ms. Myers.

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IN THE SUPREME COURT OF THE STATE OF ALASKA

FAITH J. MYERS, )  
Appellant, )  
vs. )  
ALASKA PSYCHIATRIC INSTITUTE, )  
Appellee, )

Supreme Court No. S-11021

Trial Court Case No. 3AN 03-00277 PR

CERTIFICATE OF SERVICE

I hereby certify that on this date, a correct copy of the OPPOSITION TO MOTION FOR STAY PENDING APPEAL in this proceeding were faxed to the following:

James Gottstein, Esq.  
Fax: 274-9493

Dr. Nicholas Kletti  
Fax: 269-7128

*Monica Jih* 4/1/03  
Signature Date

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IN THE SUPREME COURT OF THE STATE OF ALASKA

FAITH J. MYERS, )  
Appellant, )  
vs. )  
ALASKA PSYCHIATRIC INSTITUTE, )  
Appellee, )

Supreme Court No. S-11021


Trial Court Case No. 3AN 03-00277 PR

NOTICE OF FILING COPY OF AFFIDAVIT OF DR. NICHOLAS KLETTI

The Department of Health and Social Services, Alaska Psychiatric Institute (Appellee or "the hospital"), through the Attorney General's Office, hereby gives notice of filing a copy of the signed affidavit of Dr. Nicholas Kletti dated April 1, 2003, Medical Director, Alaska Psychiatric Institute, given the substantial demands of this case and other matters. Counsel will file the signed original affidavit upon receipt by his office.

DATED: 4-1-03

GREGG D. RENKES  
ATTORNEY GENERAL

By:   
Jeffrey T. Killip  
Assistant Attorney General  
Alaska Bar No. 9204005

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