Law Project for Psychiatric Rights
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Attorney for Appellant

IN THE SUPREME COURT FOR THE STATE OF ALASKA

WILLIAM BIGLEY, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	) Supreme Court No. S-13353
	) Trial Court Case No. 3AN 08-1252 P/R

OPPOSITION TO MOTION TO STAY APPEAL

Appellant opposes the motion by the Public Defender Agency (PDA) for Stay of Appeal Pending Outcome of Representation Hearing in the Superior Court (Motion). The grounds for the Motion asserted by the PDA was this Court should wait for the Superior Court to determine the PDA's motion for a representation hearing and removal of the Law Project for Psychiatric Rights (PsychRights®) as counsel for Appellant below. The Superior Court has since denied the PDA's motion for a representation hearing[1] so the entire basis for its Motion has been obviated.

The Office of Public Advocacy has since filed a separate motion to remove PsychRights below, but (a) that was not a basis for the Motion and is thus not before this Court, and (b) a decision on that motion only would apply to the Superior Court action.

Even if the Superior Court had decided or subsequently decides that PsychRights should not represent Appellant below it does not seem to Respondent that would or even could apply to representation in this appeal. This is essentially acknowledged in the Superior Court's denial of the PDA's motion for a representation hearing when it said:

> The Court trusts that API and the Public Defender can explain to the Alaska Supreme Court their concerns about the breadth of Gottstein's representation and the notice of appeal. The Court appreciates that if Gottstein has overreached with his notice of appeal, then the other parties are inconvenienced. But they can and should take that up with the supreme court.[2]

The PDA is confused about the effect of the limited entry of appearance filed in the Superior Court on representation in this appeal. Because the Superior Court decided both the 90-day commitment petition and the 30-day forced drugging petition in the same order, PsychRights felt it had no choice but to include both in its points on appeal and did so. As a result, it is not limiting its representation in this appeal to approval of the forced drugging petition, even if there were an appellate rule similar to Civil Rule 81(d) permitting such a limited appearance.

That someone other than the PDA is representing Appellant in the appeal of a commitment order in which the PDA represented the Appellant below should not present any problem for the PDA. They are two separate cases. This is exactly what happened in *Wetherhorn v. Alaska Psychiatric Institute*,[3] in which PsychRights represented Ms.

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[1] Exhibit A, reconsideration denied, December 16, 2008, Exhibit B.
[2] Exhibit A, page 5-6.
[3] 156 P.3d 371 (Alaska 2007).

Wetherhorn on the appeal of the 30-day petitions for commitment and forced drugging the PDA lost in front of the Superior Court.

For the foregoing reasons, Appellant urges this Court to **DENY** the Public Defender Agency's Motion for Stay of Appeal Pending Outcome of Representation Hearing in the Superior Court.

Dated this 18th day of December, 2008.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
James B. Gottstein, Esq.
Alaska Bar No. 7811100

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

In the Matter of the Necessity for the Hospitalization of William Bigley,

Respondent.

CASE NO. 3AN-08-01252 PR

ORDER and SECOND CLARIFICATION OF STAY

Motion for an Order Requiring Service on PyschRights
Motion for Representation Hearing
Motion to Stay Police Power Forced Drugging Order

The Alaska Psychiatric Institute has filed three related petitions concerning William Bigley. It petitioned for a 30-day commitment of him, for authority to administer psychotropic medications to him, and then for a 90-day commitment. The Court originally appointed the Public Defender Agency to represent Bigley on the first two petitions. Then James Gottstein entered a limited appearance. He sought to represent Bigley only on the medication petition. Over the objections of API and the Public Defender the Court permitted Gottstein to represent Bigley in that limited capacity.

The Court held hearings on the medication petition over several days. It permitted the Public Defender to attend the hearings, but its attorneys chose not to attend after the first day. During the course of the hearings API filed its petition for the 90-day commitment. The Court appointed the Public Defender and its lawyers attended the hearing on that petition. Gottstein did not attend. At the outset of the 90-day commitment hearing the Court indicated that it would

consider the information that had just been presented concerning the medication petition when it decided the 90-day commitment request. The Public Defender objected.

On 24 November 2008, after the Court had issued its decision on the medication and 90-day commitment petitions, Gottstein moved for an order requiring API and the Public Defender to serve him with documents from the commitment proceedings. API opposed that request. On 8 December 2008 the Public Defender filed its opposition, re-expressing its dissatisfaction with the Court having allowed Gottstein to enter a limited appearance. The Public Defender has moved for a representation hearing. API has joined in that motion.

The Public Defender states that it has a policy that prohibits it from entering into a co-counsel relationship with private counsel. If this is a written policy no copy of it has been provided. If it is an unwritten policy, there appears to be no more content to it than that basic statement. The Court will assume there is a policy against co-counsel relationships. But the Court does not understand Gottstein and the Public Defender to be in a co-counsel relationship. Instead, Gottstein represents Bigley on the medication petition and the Public Defender represents him on the commitment petitions. Neither is co-counsel on either petition.

The Public Defender argues that its enabling statute prohibits it to play even this role vis-à-vis Gottstein. Alaska Statute 18.85.110(a) provides "If a

person having a right to representation under AS 18.85.100 is **not represented by an attorney**, the court shall, clearly inform the person of the right of an indigent person to be represented by an attorney at public expense."[1] The Court agrees with the Public Defender that the right to public representation is not triggered if the person has an attorney on the topic of the litigation. If a criminal defendant has a private lawyer who had entered an appearance on the felony charge, then the person no longer has a right to public counsel on the felony. But if the criminal defendant had a private attorney who was preparing a will for him, no one would say the defendant was not entitled to public counsel on the pending felony.

Because Bigley had an attorney on the medication petition, the Court would not and did not appoint the Public Defender to represent Bigley on the medication petition (although it permitted it to attend the medication hearings). The Court does not construe this statute to prohibit dual representation by subject matter, as permitted by Civil Rule 81(d)(2). Gottstein and the Public Defender represent Bigley on separate subject matters.

To be sure the medication and commitment petitions are far more similar than a felony and an unrelated will. There can be little dispute that the issues of the two petitions overlap in that both are concerned with Bigley's recent mental health and his need for and reaction to treatment and medication. But it is not difficult to separate the roles of the two sets of lawyers in these two

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1 Emphasis supplied by the Public Defender.

proceedings. In fact, the Public Defender had no problem deciding not to attend the medication hearing.

The Public Defender argues that it would have attended the medication hearing had the Court clearly stated that the evidence presented at the medication hearing would be considered on the issue of commitment if API were to seek to extend the commitment. It offers this as an example of the confusion rendered by the limited appearance.

Frankly, the Court cannot take this protest seriously. Bigley was known to the Public Defender. His history of 80 commitments at API was known. His then current severe delusional state was obvious. The need for, but delay in, administration of any but emergency (short term) psychotropic medications was the very point of the medication hearing. The expiration of the 30-day commitment was predictable and imminent. It cannot have been a surprise that the evidence about Bigley's mental health that allegedly warranted involuntary medication would be germane to the allegation that the same mental health warranted further commitment once the 30-day order had expired. It was nearly certain that API would soon be filing the second commitment petition. It was certain that much, if not all, of the evidence germane to medication would be germane to the extended commitment. The Public Defender should not have had

to here this from the Court although the Court should have stated that possibility explicitly.

It is difficult to understand the reluctance of API and the Public Defender to serving Gottstein with paperwork from the commitment proceedings. It is hardly a burden to make and transmit another copy of the documents. Gottstein's receipt of the documents does not expand the scope of his role. He has access to API's medical charts already, so he would not be provided otherwise confidential medical information.

The Public Defender alleges that Gottstein has filed a notice of appeal that addressed both the medication order and the 90-day commitment order. The Court is not sure that is what Gottstein has done, but perhaps it is. It may be that the notice only appears to cover the 90-day commitment order because the Court issued a single written order that addressed both petitions. Thus reference to the order may lead to an inference that the notice addresses both petitions, whereas in reality Gottstein is only addressing the medication aspects of the order.

But even if Gottstein has filed a notice of appeal directed at the 90-day commitment order this is hardly a crisis. The fact remains that Gottstein only represents Bigley on the medication issue. The Court trusts that API and the Public Defender can explain to the Alaska Supreme Court their concerns about the breadth of Gottstein's representation and the notice of appeal. The Court appreciates that if Gottstein has overreached with his notice of appeal, then the

other parties are inconvenienced. But they can and should take that up with the supreme court.

The Public Defender, joined by API, renew the request made at the beginning of the medication hearing, that the Court hold a hearing at which Bigley can be questioned about his desire to be represented by Gottstein and/or the Public Defender. Gottstein's response is not yet due. Nonetheless the Court will address this request now.

Bigley is currently profoundly psychotic. He cannot engage in meaningful small talk, much less a knowing discussion of his legal representation. Just as the Court found Bigley to be incompetent to make mental health or medical treatment decisions, pursuant to AS 47.30.837, he is not competent to make legal decisions now. Even if he were competent, the Court would be hesitant to subject him to questioning about his selection of an attorney. That questioning, although perhaps appropriate in some contexts, might itself interfere with his (or any patient's) selection of counsel or his willingness to stick with an attorney already selected. The Court is unwilling to engage in that exercise in the present context, merely to alleviate the irritation of the Public Defender and API at Gottstein's strategies and tactics.

On 8 December 2008 Gottstein moved for a stay of what he describes to be the "Police Power Forced Drugging Order." API's response is not yet due. The Court will address the motion without API's input because the

motion is so intimately related to the Court's original order and an earlier attempt it made to clarify that order. The Court prefers to issue this ruling quickly so that the parties may bring it to the attention of the Alaska Supreme Court promptly.

API has a limited authority to administer emergency psychotropic medications to a patient in a crisis situation without court approval.[2] API can use this emergency power for only short periods of time.[3] If API expects there will be repeated crisis situations warranting emergency medication, then it must seek court approval for that repeated administration.[4]

API sought authority to administer psychotropic medication to Bigley, pursuant to AS 47.30.839, for two reasons. First, it expected there to be repeated crisis situations and second, it alleged Bigley was incapable of giving informed consent to the administration of psychotropic medication in noncrisis situations.

During the course of the hearings on the medication petition Gottstein challenged API's ability to administer the medication in both situations. To be frank, at times during the hearings the Court did not fully understand Gottstein's challenges to the repeated crisis request because it did not adequately appreciate the relation of subsection .839(a)(1) to subsection .838(a)(1) as it was

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2 AS 47.30.838.

3 AS 47.30.838(a)(2)(B) and (C).

4 AS 47.30.839(a)(1).

too focused upon issue surrounding the capacity to give informed consent (subsection .839(a)(2)).

At the conclusion of the medication hearing it was the Court's intent to authorize noncrisis medication pursuant to subsection .839(a)(2). That would normally have eliminated the need to authorize repeated emergency administrations of short term medication because API would have administered longer term medication and hopefully there would be no future emergencies.[5] The Court should have more clearly considered and addressed API's separate request for authorization pursuant to subsection .838(a)(1) or, as Gottstein describes it, the police power authority.[6] Had it done so it would have also clearly authorized API to administer psychotropic medication pursuant to AS 47.30.838(c) and .839(a)(1).[7]

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[5] To be more precise, the Court understood that the longer term medication could be administered by injection, but that there would be some delay, perhaps two weeks, before the dosage became fully effective. In that startup period API might be giving Bigley some faster acting and shorter lasting pills as well. These would not be in response to a crisis. However, it could be that after the various dosages had been given but before they were fully effective there could develop a crisis that warranted the administration of emergency medication if there was not already authorization for the noncrisis medication.

[6] He is referring to the discussion of this subsection in *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 248-49 (Alaska 2006).

[7] On 3 December 2008 the Court granted API's motion for clairification. The Court stated, in part, "API may administer psychotropic medication on more than one occasions if there are future crisis situations as defined by §.838(a)(1) pursuant to §.838(c) and §.839(a)(1)."

But because the Court stayed API's noncrisis authorization there now exists the possibility that new emergencies will arise during the stay. There is some confusion about what API can do in this interim period. It has already, since the Court issued its decision on the petitions, administered a crisis dosage of psychotropic medication, presumably pursuant to subsection .838. But that authority is limited to three administrations of crisis medication.[8] API has administered three crisis dosages since early October 2008. Can it administer more crisis dosages during the stay?

The Court concludes that it is in Bigley's best interests to be administered crisis psychotropic medications during the stay of the subsection .839(a)(2) order if API determines that Bigley is in crisis as described in section .838. Furthermore, the limitation of three crisis dosages should be eliminated during this extraordinary period of stayed medication orders.

Bigley should not have to suffer during a mental health crisis without medication. API has done all that is required of it to obtain authority to exceed the three dosage limit. The statute does not address API's authority during stay of a section .839 order (whether an (a)(1) or an (a)(2) order). The Court concludes that the preference is for medication during a crisis situation and that the limitation of three uses of that authority assumes that API, as it has done,

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8 AS 47.30.838(c).

would seek further authority from the court. API has done that. While the court is willing to delay API's administration of long term medication until the Alaska Supreme Court may hear Gottstein's protests, it is not willing to have Bigley be deprived of psychotropic crisis medication if it is needed.

The Court authorizes API to administer in a crisis situation the same psychotropic medication that it has administered to Bigley in past crisis situations despite the stay of the section .839 order. API is not authorized to administer in a crisis situation the (type or dosage of) psychotropic medication that it would administer to Bigley in a noncrisis situation.

The Motion for an Order Requiring Service on PyschRights is GRANTED. The Motion for Representation Hearing is DENIED. The Motion to Stay Police Power Forced Drugging Order is DENIED.

DONE this 10th day of December 2008, at Anchorage, Alaska.

William F. Morse
Superior Court Judge

CERTIFICATE OF SERVICE

I certify that on 10 December 2008 a copy of the above was mailed to each of the following at their addresses of record:

J. Gottstein
AGO: L. Derry; E. Pohland
PDA: L. Beecher, L. Brennan
OPA:

Ellen Bozzini
Judicial Assistant

3AN-08-01252 PR
ITMO BIGLEY
Second Stay Clarification

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the Necessity For the Hospitalization of:

WILLIAM BIGLEY,

Respondent.

Case No. 3AN 08-1252 PR

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ORDER ~~GRANTING~~ DENYING RECONSIDERATION OF DECEMBER 11, 2008 ORDER

Having considered the guardian's Motion for Reconsideration, the Motion is ~~GRANTED~~ DENIED. ~~Any opposition thereto is due~~ _____.

DATE: 16 Dec 08

William F. Morse
Superior Court Judge

DEC 12 2008

I certify that on 16 DEC. 2008 a copy of the above was ~~mailed~~ faxed/hand delivered to each of the following at their address of record

Judicial Assistant

fq-Portland Vassar
PD-Portman OPA-Russo
Goldstein

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