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2006-07 CUMULATIVE SUPPLEMENT

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PREFACE TO THE 2006-07 SUPPLEMENT

The 2006 calendar year was, again, a busy one in mental disability law, on just about every imaginable level. First, there were two Supreme Court decisions of significant interest: (1) *United States v. Georgia*,[1] holding that the Eleventh Immunity and the sovereign immunity doctrine did not bar a prisoner's claim under Title II of the Americans with Disabilities Act in which that prisoner alleged constitutional violations of the conditions of his+ confinement, and (2) *Clark v. Arizona*,[2] an insanity defense case holding that Arizona's restrictions on the consideration of defense evidence of mental illness and incapacity in its bearing on a claim of insanity did not violate due process. Second, the Alaska Supreme Court's right-to-refuse-treatment decision in *Myers v. Alaska Psychiatric Institute*,[3] finding a robust right to refuse, is the most important state Supreme Court decision on this topic in many years, perhaps the most important since *Rivers v. Katz*[4] some 20 years ago. Third, lower federal courts and state appellate courts began to more carefully and fully fill in some of the lacunae left after the Supreme Court's 2003 decision in *Sell v. United States*,[5] on the right of incompetent criminal defendants to refuse medication that would ostensibly make them competent to stand trial.[6] And fourth, decisions proliferated in many other areas of mental disability law, again, as in recent years, most notably in matters involving sex offender laws[7] and the Americans with Disabilities Act.[8]

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[1] 126 S. Ct. 877 (2006); *see infra* § 5A-2.4d.

[2] 126 S. Ct. 2709 (2006); *see infra* § 9A-3.8.

[3] 138 P. 3d 238 (Alaska 2006); *see infra* § 3B-7.2c.

[4] 495 N.E.2d 337, 341 (N.Y. 1986); *see infra* § 3B-7.2b.

[5] 539 U.S. 166 (2003); *see infra* § 8A-4.2c(1).

[6] *See generally infra* § 8A-4.2c(1).

[7] *See infra* §§ 2A-3.3 to 3.4. We have added a new section on "evidentiary questions" to this unit. *See infra* § 2A-3.5.

[8] *See infra* §§ 5A-2 to 2d.

Page 283. n. 990. Insert before *Bauer* case:

Steinkruger v. Miller, 612 N.W.2d 591 (S.D. 2000); Rabenberg v. Rigney, 597 N.W.2d 424 (S.D. 1999); *In re* Edward S., 298 Ill. App. 3d 162, 698 N.E.2d 186 (1998); *In re* Nancy M., 317 Ill. App. 3d 167, 739 N.E.2d 607 (2000), *appeal denied,* 193 Ill. 2d 587, 744 N.E.2d 285 (2001); People v. Elizabeth L., 316 Ill. App. 3d 598, 736 N.E.2d 1189 (2000).

Page 283. n. 990. Prior to third sentence of footnote, insert new sentence:

The consent decree in *J.L. v. Miller* was later superceded by statute, which was itself the subject of litigation. *See supra* § 3B -7.2a, note 863.

Page 283. n. 990. After cite to *Nancy M.*, insert:

, *partially overruled in In re* Mary Ann P., 202 Ill. 2d 393, 781 N.E. 2d 237 (2002) (ruling that statute governing involuntary treatment does not permit jury to selectively authorize administration of only those medications it deems appropriate);

Page 284. n. 990. Change period at end of footnote to semicolon, and add:

In the Best Interest of E.T., 137 S.W.3d 698 (Tex. Ct. App. 2004); Matter of Stephen P., 343 Ill. App. 3d 455, 797 N.E.2d 1071 (2003); *In re* Margaret S., 347 Ill. App. 3d 1091, 808 N.E.2d 1022 (Ill. App. Ct. 2004). Whitfield, *Capacity, Competency, and Courts: the Illinois Experience*, 14 WASH. U. J.L. & POL'Y 385 (2004).

Page 284. Add new text at the end of this section.

The most important recent state Supreme Court decision finding a robust right to refuse treatment for civil patients is *Myers v. Alaska Psychiatric Institute*.[992.1] Although *Myers*, at first blush, does not appear to add significant new law to the body of the law created by *Rogers*,[992.2] *Rivers*,[992.3] *Steele*,[992.4] and *Jarvis*,[992.5] a closer read suggests that it is significant for several reasons:

- One of the drugs that was prescribed for Myers was Zyprexa, an atypical antipsychotic. All of the prior civil cases in this line of the law involved the first-generation antipsychotic drugs, drugs that caused tardive dyskinesia and other neurological side effects.[992.6] Here, the Court quoted one of Myers' expert witnesses that Zyprexa was a "very dangerous" drug, and one of "dubious efficacy."[992.7] Although the remainder of the opinion focused on the side-effects associated with the first-generation drugs, the fact that the Court saw no reason to distinguish the first-from second-generation drugs *for purposes of legal analysis* is *not* insignificant. In *Sell v. United States*,[992.8] the Court avoided the "typicals vs. atypicals" debate, but commented that "The specific kinds of drugs at issue may matter here as elsewhere."[992.9] That comment did *not* apply to the *Myers* decision.

- In discussing the intrusivity of antipsychotic drugs, the Court specifically relied on *Riggins v. Nevada*,[992.10] for the proposition that such drugs "are literally intended to alter the mind."[992.11]
- Limiting its opinion to non-emergency situations,[992.12] the Court, relying on the Alaska Constitution, one that offers "more protection" of due process and privacy interests than does the US Constitution,[992.13] found the right to refuse to be "fundamental," a right that could be overridden only when the state showed a "compelling state interest" where "no less intrusive alternative" existed.[992.14]
- In endorsing a judicial review of a patient's best interests in a non-emergency situation, the Court stressed "the inherent risk of procedural unfairness that inevitably arises when a public treatment facility possesses unreviewable power to determine its own patients' best interests," and the "unavoidable tensions between institutional pressures and individual best interests that can arise in this setting."[992.15]
- In the judicial hearing to determine whether the right to refuse could be overridden, the Court endorsed the "clear and convincing" evidence standard.[992.16]
- And, perhaps, of greatest interest, the Court explicitly rejected the state's argument that cases such as *Sell*, *Riggins*, and *Washington v. Harper*,[992.17] should be the source of its decision. It stated, in what is probably the most comprehensive explication of why a state court might not apply the federal forensic cases to a civil matter:

  The federal cases cited by [the state] have little value here because prisoners' rights differ markedly from the rights of civilly committed mental patients. The prisoners involved in most of those cases had greatly diminished liberty interests because they had been convicted and incarcerated for criminal offenses, not because they were mentally ill. Further, in all of those prisoner cases—even *Sell v. United States*, which involved a mentally ill prisoner awaiting trial—the extraordinary security risks inherent in managing incarcerated criminal defendants greatly increased the strength of the government's administrative and institutional interests in providing mentally ill prisoners with medical treatment . . . Here, [the state] has never asserted that Myers posed an imminent threat of danger

to any of [the facility's] patients or staff, and it has never suggested that its institutional or administrative interests compelled it to treat her with psychotropic drugs.[992.18]

Given the detail with which *Myers* distinguishes *Sell* and the other cases involving forensic patients, and given the fact that it makes no distinction for the purposes of legal analysis between the first and second-generation antipsychotic drugs, it can reasonably be expected that it will be relied on by lawyers representing patients in state courts in other jurisdictions in the coming years.

[992.1] 138 P.3d 238 (Alaska 2006).

[992.2] Rogers v. Commissioner of Dep't of Mental Health, 458 N.E.2d 308, 311 (Mass. 1983).

[992.3] Rivers v. Katz, 495 N.E.2d 337, 341 (N.Y. 1986).

[992.4] Steele v. Hamilton County Cmty. Mental Health Bd., 736 N.E.2d 10, 21 (Ohio 2000).

[992.5] Jarvis v. Levine, 418 N.W.2d 139 (Minn. 1988).

[992.6] *See supra* § 3B-2.

[992.7] *Myers*, 138 P.3d at 240.

[992.8] 539 U.S. 166, 156 L. Ed. 2d 197, 123 S. Ct. 2174 (2003). *See infra* § 8A-4.2c(1).

[992.9] *Sell*, 539 U.S. at 181.

[992.10] 504 U.S. 127, 134, 118 L. Ed. 2d 479, 112 S. Ct. 1810 (1992). *See infra* § 3B-8.3.

[992.11] *Myers*, 138 P.3d at 242.

[992.12] *Myers*, 138 P.3d at 243.

[992.13] *Myers*, 138 P.3d at 245. *See supra* § 3B-7.2b, text accompanying nn.922–25.

[992.14] *Myers*, 138 P.3d at 248.

[992.15] *Myers*, 138 P.3d at 244.

[992.16] *Myers*, 138 P.3d at 250.

[992.17] 494 U.S. 210, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990). *See infra* § 3B-8.3.

[992.18] *Myers*, 138 P.3d at 246 n.56.

§ 3B-7.2e Narrow readings of the right to refuse treatment

Page 289. n. 1045. Insert after "construing C.E." in first sentence of second paragraph of footnote:

and the Illinois statute,

Page 290. n. 1045. Change period to semicolon before "Compare" in second paragraph of footnote, and insert:

In re R.K., 271 Ill. Dec. 954, 786 N.E.2d 212 (Ill. App. 2003) (state failed to present sufficient evidence that patient's condition necessitated involuntary administration of