

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501
907-274-7686 phone
907-274-9493 fax

Attorney for Petitioner

IN THE SUPREME COURT FOR THE STATE OF ALASKA

W.B.)	
)	
Petitioner,)	Supreme Ct. No. S-12646
)	
vs.)	
)	
ALASKA PSYCHIATRIC INSTITUTE)	
Respondent)	
_____)	
Trial Court Case No. 3AN 07-247 PR)	

PETITION FOR REVIEW

COMES NOW, WB,¹ and petitions this Court for review of that certain Order, dated March 23, 2007 (Order) refusing to honor the entry of appearance of the Law Project for Psychiatric Rights (PsychRights),² reconsideration of which was sought³ and denied that same date.⁴

¹ Initials are being used because this will be in a public file and this petition arises from a confidential proceeding. A redacted cover sheet has been prepared for the public file and an unredacted one submitted for confidential treatment. Copies of documents submitted as appendices have been redacted to remove WB's name.

² Appendix A.

³ Appendix B.

⁴ Appendix C.

A. Statement of Facts⁵

On March 21, 2007, the Alaska Psychiatric Institute (API) filed petitions against WB for:

- (i) 90-day involuntary commitment under AS 37.40.740, and
- (ii) the involuntary administration of psychotropic medication under AS 37.40.839(h).⁶

The hearing on the petitions was set for 3:30 p.m., March 22, 2007.⁷

On March 22, 2007, the Law Project for Psychiatric Rights (PsychRights) filed an entry of appearance,⁸ and elections (1) for a jury trial, (2) to have the hearing in a real court room, and (3) to be free of the effects of medication for the trial.⁹

At the hearing, Elizabeth Russo of the Department of Law was present on behalf of API and James B. Gottstein of PsychRights on behalf of WB. WB was also present at counsel's table with Mr. Gottstein. No one from the Public Defender Agency (PDA) was present.¹⁰ During the hearing, the status of PsychRights' representation was discussed with the apparent resolution being the case would go forward with PsychRights

⁵ Since counsel has been prevented from reviewing the file and obtaining a copy, he is unable to append copies of documents he would otherwise.

⁶ Counsel was prevented from reviewing the court file of his client and obtaining copies of the petitions, but the Probate Master stated at the March 22, 2007, hearing that such petitions had been filed on March 21, 2007.

⁷ Because counsel has been prevented from reviewing the file and obtaining a copy of the notice of the hearing, it has not been appended.

⁸ Appendix D.

⁹ Appendix E.

¹⁰ The Probate Master was unable to reach the PDA, but presumably the PDA was not present because it had been served with the entry of appearance. *See*, Appendix F.

representing WB, and a motion for withdrawal and substitution forthcoming. The March 22, 2007, hearing was then adjourned for determination of when the jury trial would be held, recognizing that under AS 47.30.745(c) it must occur within ten days.

The next day, March 23, 2007, the Probate Master issued an Order stating in pertinent part:

In order for Mr. Gottstein to be recognized as the Respondent's attorney, and the Public Defender Agency not having any further responsibility in this case, a proper substitution of counsel motion and/or consent under Civil Rule 81(e) must be filed for the court's approval. Without such approval in this case, and other such cases, the attorney attempting to succeed as representative for a respondent in a mental commitment case will have no right of access to the court's confidential case records and may not be recognized by the court as representing the Respondent.

(Appendix A, emphasis added). WB filed a motion for reconsideration the same day¹¹ which was denied later in the day.¹² This Petition for Review followed.¹³

B. Statement of Question Presented

May the court deny AS 47.30 civil commitment/forced psychiatric drugging respondents their choice of counsel by refusing to honor an entry of appearance unless

¹¹ Appendix B.

¹² Appendix C.

¹³ The proceeding below was referred to the Probate Master. In his Motion for Reconsideration, n1, WB stated that if the Probate Master did not have authority to issue the Order without Superior Court review, the Motion for Reconsideration should be considered an objection to be referred to the Superior Court. *See*, Probate Rule 2. Since the Probate Master denied the Motion for Reconsideration without referral, he apparently concluded he had authority to issue it as an act of the Superior Court.

and until (1) the Public Defender Agency files a motion to withdraw and (2) the court approves the substitution?

C. Reasons Why Review Should Be Granted

Review should be granted under Appellate rule 402(b)(4) because this is an issue that might otherwise evade review and a decision is needed for the guidance of the lower courts. It is also of public importance¹⁴

The serious problem created by the Order is due to the extremely short time frames involved in AS 47.30 proceedings and the extreme prejudice that results if an attorney can not quickly and smoothly enter such cases, including access to the file for preparation purposes.

The extreme prejudice involved is starkly illustrated in this case. WB, through PsychRights, requested a jury trial pursuant to AS 47.30.745(c),¹⁵ which must be made at least two judicial days before the hearing. In this case, it was an impossibility to make the jury trial request two judicial days before the hearing because the petitions were not filed nor the hearing set until the day before the scheduled hearing.¹⁶ The Probate Master recognized the impossibility of complying with the statute's requirement of requesting a jury trial two days before the hearing and indicated the jury request would be honored. In

¹⁴ In *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 244-5 (Alaska 2006), this Court noted AS 47.30 proceedings will almost always become moot by the time an appeal would be heard and applied the public interest exception to the mootness doctrine.

¹⁵ It is believed the PDA has not requested a jury trial in any commitment proceeding on behalf of any of its clients in a decade or more.

¹⁶ This violates AS 47.30.740(b), which requires notice be given to the respondent at least three judicial days before the hearing.

other circumstances, having to wait even one day to make such a request in order to obtain the signature of the PDA on a motion for withdrawal and substitution and have the court approve it, could result in the forfeiture of the right to a jury trial.

Other time deadlines are extremely short. AS 47.30.725(b) requires a hearing on a 30-day commitment petition within 72 hours of arrival at an evaluation facility.

Respondents are often not even notified they are going to have a commitment/forced drugging hearing until just before the hearing.¹⁷ It is extremely important for the lower courts to have guidance so AS 47.30 respondents will have their right to counsel of their choice honored in a timely manner and such counsel allowed sufficient time to prepare.

D. Reasons Why Decision is Erroneous

1. The Probate Master Confused the Requirements for Withdrawal of an Attorney with Those of Entry by an Attorney.

The Order¹⁸ and denial of reconsideration¹⁹ rely solely on Civil Rule 81(e), incorporated into probate proceedings by Probate Rule 4(b). However, Civil Rule 81(e) pertains to withdrawal, not entry. The primary concern of Civil Rule 81(e) is that a party become unrepresented by a withdrawal and therefore has specific requirements before an attorney may withdraw from a case. This is a completely separate issue from that of

¹⁷ In *Wetherhorn v. Alaska Psychiatric Institute*, ___ P.3d ___, 2007 WL 80490, Case No. S-11939 (Alaska January 12, 2007), *reh'g pending*, Ms. Wetherhorn was not notified until one hour before the time set for her hearing even though the petition had been filed 3 days before. WB believes this Court may take judicial notice of this, and for the convenience of the Court and the other parties, the relevant pages from the *Wetherhorn* Excerpt have been reproduced as Addendum 1 here.

¹⁸ Appendix A.

¹⁹ Appendix C.

entry by an attorney, which does not present any such problem.²⁰

In fact, Probate Rule 4(a) specifically provides that an attorney merely need file an entry of appearance. It is not uncommon for multiple attorneys to represent parties and upon the filing of an entry of appearance becoming co-counsel. PsychRights would be pleased to co-counsel with the PDA, but it appears the PDA can only represent those who can not obtain other counsel²¹ and must withdraw when another attorney enters a case.

2. AS 4730 Respondents Have the Right to Their Choice of Counsel

Where, as here, an AS 47.30 respondent has counsel willing to represent him, he has the right to counsel of his choice. This Court has long recognized this right under Article I, §11 of the Alaska Constitution for non-appointed counsel in the criminal context. *McKinnon v. State*, 526 P.3d 18, 21(Alaska 1974). The U.S. Supreme Court has recently addressed the fundamental nature of this right in the criminal context in *United States v. Gonzalez-Lopez*, ___ U.S. ___, 126 S.Ct. 2557, 2563 (2006):

Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.

In *Wetherhorn, supra.*, at §IV.B.2, this Court held Alaska's Due Process Clause guarantees the right to counsel in AS 47.30 proceedings:

²⁰ The withdrawal of the PDA upon the entry of another attorney fully complies with Civil Rule 81(e) because the substitute counsel has already entered an appearance.

²¹ See, AS 18.85.100(a) and AS 18.85.170(4).

Because, as we have already noted, a respondent's fundamental rights to liberty and to privacy are infringed upon by involuntary commitment and involuntary administration of psychotropic medication proceedings, the right to counsel in civil proceedings is guaranteed by the due process clause of the Alaska Constitution.

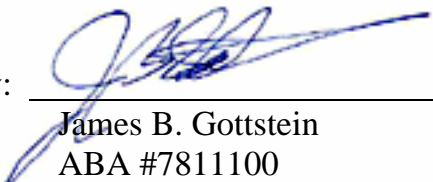
The same analysis as applied with respect to the right to choice of counsel in criminal proceedings under Article I, §11, of the Alaska Constitution and the Sixth Amendment of the United States Constitution should apply here where the right to counsel is guaranteed by the Due Process Clause of the Alaska Constitution. In light of the extreme prejudice occasioned by any delay in recognizing new counsel in AS 47.30 proceedings, such delay amounts to a denial of the right to choice of counsel.

E. Precise Relief Sought

WB seeks a ruling from this Court reversing the Superior Court's March 23, 2007, Order, and holding that an entry of appearance on behalf of an AS 47.30 respondent is effective upon filing.

DATED: March 27, 2007.

Law Project for Psychiatric Rights

By: 
James B. Gottstein
ABA #7811100

Appendices

- A.** Order (March 23, 2007)
- B.** Motion for Reconsideration (March 23, 2007)
- C.** Order denying reconsideration (March 23, 2007)
- D.** Entry of Appearance (March 22, 2007)
- E.** Elections (March 22, 2007)
- F.** Certificate of Service (March 22, 2007)

Addendum

1. Pages from Excerpt of Record in *Wetherhorn v. Alaska Psychiatric Institute*, ___ P.3d ___, 2007 WL 80490, Case No. S-11939 (Alaska January 12, 2007)

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the Necessity)
For the Hospitalization of:)
)
)
Respondent.)
_____) Case No. 3AN-07-247 P/S

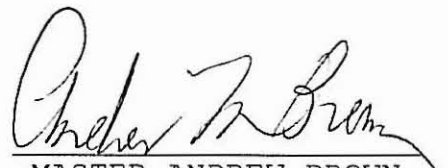
ORDER

The February 22, 2007 Ex Parte Order (Temporary Custody for Emergency Examination/Treatment) appointed the Public Defender Agency as the Respondent's attorney. On March 22, 2007 attorney James Gottstein filed an Entry of Appearance on behalf of the Respondent. However, that was not accompanied by a motion and/or consent to withdraw by him or the Public Defender Agency. To the extent that they apply, the Rules of Probate Procedure are applicable to mental commitment proceedings, and Rule of Probate Procedure 4(b) says "Civil Rule 81(e) governs the withdrawal of attorneys from cases under these rules. Civil Rule 81(e) specifies how attorneys may withdraw and a substitute attorney may enter the case.

In order for Mr. Gottstein to be recognized as the Respondent's attorney, and the Public Defender Agency not

having any further responsibility in this case, a proper substitution of counsel motion and/or consent under Civil Rule 81(e) must be filed for the court's approval. Without such approval in this case, and other such cases, the attorney attempting to succeed as representative for a respondent in a mental commitment case will have no right of access to the court's confidential case records and may not be recognized by the court as representing the Respondent.

DATE Mar 23, 2007


MASTER ANDREW BROWN

I certify that on 3/23/07
a copy of this document was faxed &
given/sent to: AG/PD/Gottstein/visator/
Deputy Clerk: K. Carbaugh Young

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501
907-274-7686 phone
907-274-9493 fax

COPY
Original Received
Probate Division

Attorney for Respondent

MAR 23 2007

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

In The Matter of the Necessity for the)
Hospitalization of of [REDACTED],)
)
Respondent)

Case No. 3AN 07-247PR

MOTION FOR RECONSIDERATION

Without any disrespect intended and recognizing the confidentiality concerns of the Court, the Respondent moves, pursuant to Civil Rule 77(k)(1)(ii) for reconsideration of the Order dated March 23, 2007 (Order), refusing to honor the entry of appearance of the Law Project for Psychiatric Rights (PsychRights) because it misconceives the applicable law. The Order recites that Probate Rule 4(b) makes Civil Rule 81(e) applicable.¹ However, Civil Rule 81(e) only applies to the withdrawal and, potential substitution, of counsel, it does not apply to the entry of counsel.

Probate Rule 4(a) provides that an attorney representing an interested person shall file an entry of appearance. That is precisely what was done. It is common for multiple attorneys to represent parties and upon the filing of the entry of appearance, the

¹ In the event the Master does not have the authority to issue the Order without further approval of a superior court judge, this pleading should be treated as objections to the Order.

Respondent became represented by PsychRights. The withdrawal of the Alaska Public Defender Agency (PDA) is a separate issue.

As Mr. Gottstein stated at the hearing on March 22, 2007, he believes upon PsychRights' entry, the PDA is required to withdraw. This is because the PDA is only authorized to represent people who do not have other counsel. However, the withdrawal of the PDA is a separate action from the entry of PsychRights as counsel.

The withdrawal of the PDA would fully comply with Civil Rule 81(e). Civil Rule 81(e) applies solely to when withdrawal is permitted. Under Civil Rule 81(e)(1)(B), withdrawal is permitted when "the party has other counsel ready to be substituted." Thus, Civil Rule 81(e) permits the PDA to withdraw upon the entry of PsychRights.

As also mentioned at the March 22, 2007, hearing, the Respondent has the right to be represented by the attorney of his choice if such an attorney is willing to represent him. The U.S. Supreme Court has recently addressed the fundamental nature of this right in the criminal context in *United States v. Gonzalez-Lopez*, ___ U.S. ___, 126 S.Ct. 2557 (2006). While civil commitment and forced drugging are not criminal proceedings, as in criminal cases, incarceration is involved, and as the Alaska Supreme Court has recently recognized, forced psychiatric drugging can be and have been equated with forced electroshock and lobotomy. *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 242 (Alaska 2006); *Wetherhorn v. Alaska Psychiatric Institute*, ___ P.3d ___, 2007 WL 80490, Case No. S-11939 (Alaska January 12, 2007).

Again, Respondent means no disrespect in filing this motion for reconsideration, and recognizes the Court's concern respecting the confidential nature of these proceedings

and needing to be careful with respect to who is being given access to them. However, Respondent respectfully submits that PsychRights became an attorney of record for him upon the filing of its entry of appearance and any withdrawal is a separate matter. Because of the extremely expedited time frame for these proceedings, Respondent also respectfully suggests this is the only practical way to deal with this situation because counsel's experience is that it can take far too long to just get the PDA to sign the paperwork. This can lead to serious and substantial prejudice to respondents.

DATED: March 23, 2007.

Law Project for Psychiatric Rights

By: 

James B. Gottstein
ABA # 7811100

Post-It® Fax Note	7671	Date	3/23	# of pages	1
To	Gottstein	From	Master Brown		
Co./Dept.		Co.	AK Court System		
Phone #	9	Phone #	264-0439		
Fax #	274-9493	Fax #			

IN THE SUPERIOR COURT FC

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the Necessity)
 For the Hospitalization of:)
)
)
 Respondent.)



) Case No. 3AN-07-247 P/S

ORDER

The Motion for Reconsideration is denied. Civil Rule 81(e)(1)(B) uses the language "... other counsel ready to be substituted **for the attorney who wishes to withdraw.**" (My emphasis). That means that the attorney who already has been in the case as the Respondent's attorney, namely, the Public Defender Agency in this instance, must take an affirmative action to indicate that she wishes to withdraw. That is done by either a motion by her or her signing off on a consent to withdraw document.

DATE: March 23, 2007


 MASTER ANDREW BROWN

I certify that on 3/23/07
 a copy of this document was faxed
~~given~~ sent to: AG/PD/Gottstein/Young/
 Deputy Clerk: K. Carbaugh Taylor

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501
907-274-7686 phone
907-274-9493 fax

Attorney for Respondent

COPY
Original Received
Probate Division

MAR 23 2007

Clerk of the Trial Courts

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

In The Matter of the Necessity for the)
Hospitalization of of [REDACTED],)
)
Respondent)

Case No. 3AN 07-247PR

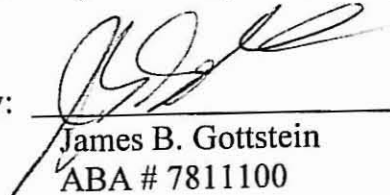
ENTRY OF APPEARANCE

The Law Project for Psychiatric Rights (PsychRights) hereby enters its appearance
on behalf of, [REDACTED], the Respondent in this matter.

DATED: March 22, 2007.

Law Project for Psychiatric Rights

By: _____


James B. Gottstein
ABA # 7811100

COPY
Original Received
Probate Division

MAR 23 2007
Clerk of the Trial Courts

Law Project for Psychiatric Rights
406 G Street, Suite 206
Anchorage, AK 99501
907-274-7686 phone
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Attorney for Respondent

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

In The Matter of the Necessity for the)
Hospitalization [REDACTED],)
)
Respondent)

Case No. 3AN 07-247 PR

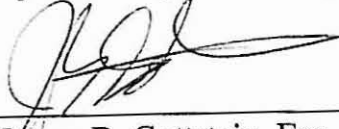
Elections

In the event a 90-day Commitment Petition is or has been filed against Respondent in this matter, the following elections are being made:

1. A jury trial pursuant to AS 47.30.770(b), which incorporates AS 47.30.745(c);
2. To have the hearing in a real court room pursuant to AS 47.30.735(b), and
3. To be free of the effects of medication pursuant to AS 47.30725(e), as incorporated into this proceeding through AS 47.30.745(a).

DATED: March 22, 2007.

Law Project for Psychiatric Rights

By: 
James B. Gottstein, Esq.
ABA # 7811100

LAW PROJECT FOR PSYCHIATRIC RIGHTS, INC.
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COPY
Original Received
Probate Division

MAR 23 2007
Clerk of the Trial Courts

Attorney for [REDACTED], Respondent

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In The Matter of the Necessity for the)
Hospitalization of [REDACTED])
Respondent)
Case No. 3AN 07-247PR)

Case No. 3AN 07-247PR

CERTIFICATE OF SERVICE

I hereby certify that on this date, true and correct copies of:

- 1.) Entry of Appearance;
- 2.) Elections; and
- 3.) this Certificate of Service (not emailed)

were served via email, fax and mail on:

Elizabeth D. Brennan
Alaska Public Defender Agency
900 W. 5th Ave., Suite 200
Anchorage, Alaska 99501
907-269-5476 Fax

Elizabeth Russo
Assistant Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
907-258-6872 Fax

Dated: March 22, 2007

Lisa E. Smith
Lisa E. Smith

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
AT Anchorage

Filed in the Trial Court's
State of Alaska, Third District
APR 5 2005
Clerk of the Trial Courts
By _____; Deputy

In the Matter of the Necessity)
for the Hospitalization of:)
Wetherhorn Roslyn)
Respondent.)
WETHERHORN)

Case No. 3AN05 459 PR

PETITION FOR 30-DAY
COMMITMENT

As mental health professionals who have examined the respondent, the petitioners allege that:

- The respondent is mentally ill and as a result is
 - likely to cause harm to himself/herself or others.
 - gravely disabled and there is reason to believe that the respondent's mental condition could be improved by the course of treatment sought.
- The evaluation staff has considered, but has not found, any less restrictive alternatives available that would adequately protect the respondent or others.
- APL is an appropriate treatment facility for the respondent's condition and has agreed to accept the respondent.
- The respondent has been advised of the need for, but has not accepted, voluntary treatment.

The petitioners respectfully request the court to commit the respondent to the above-named treatment facility for not more than 30 days.

The facts and specific behavior of the respondent supporting the above allegations are:

*Mom's state homeless & no insight
and won med complaint & 3 months*

000012 5

WDM nm

Case No. 3AN05459 PR

The following persons are prospective witnesses, some or all of whom will be asked to testify in favor of the commitment of the respondent at the hearing:

4-5-05
Date

[Signature]
Signature
John Melton
Printed Name

Title

4-5-05
Date

[Signature]
Signature
Laurel Silberschmitt
Printed Name
LCRW
Title

Note: This petition must be signed by two mental health professionals who have examined the respondent, one of whom is a physician. AS 47.30.730(a).

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

In the Matter of the Necessity
for the Hospitalization of:

Roslyn Wetherhorn

Respondent.

Case No. 3AN-05-00459PR

NOTICE OF 30-DAY
COMMITMENT HEARING

To: Respondent

Respondent's Attorney: PD

State's Attorney: Attorney General's Office

Petitioner/Facility: API

The court has received a petition requesting examination and evaluation of the respondent to determine if the respondent is mentally ill and as a result of that condition is gravely disabled or presents a likelihood of causing serious harm to himself/herself or others. The court has also received a petition for commitment of the respondent for up to 30 days pursuant to AS 47.30.730 (copy attached).

A hearing to decide whether commitment of respondent is necessary will take place in the Superior Court at Anchorage, Alaska, in API Anchorage on April 08, 2005 at 1:30 pm before the Honorable John E Duggan.

The court has appointed as counsel for the respondent in this matter.

At the hearing, the respondent has the following rights:

1. Representation by counsel
2. To be present at the hearing
3. To view and copy all petitions and reports in the court file on respondent's case.
4. To have the hearing open or closed to the public as the respondent elects.
5. To have the rules of evidence and civil procedure applied so as to provide for the informal but efficient presentation of evidence.
6. To have an interpreter if the respondent does not understand English.

7. To present evidence on his/her own behalf.
8. To cross-examine witnesses who testify against him/her.
9. To remain silent.
10. To call experts and other witnesses to testify on the respondent's behalf.
11. To appeal any involuntary commitment.

If commitment or other involuntary treatment beyond the 30 days is sought, the respondent shall have the right to a full hearing or jury trial.

Before the court can order the respondent committed, the court must find by clear and convincing evidence that respondent is mentally ill and as a result of that condition is gravely disabled or presents a likelihood that he/she will cause harm to himself/herself or others.

4/8/2005
Date

SHarris
Judge/Clerk

I certify that on 4/8/2005
A copy of this notice and the Petition for
30-Day Commitment were sent to the persons
listed on page one.

Clerk: SHarris

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

AT Anchorage

In the Matter of the Necessity)
for the Hospitalization of:)
Roslyn Wetherborn,)
Respondent.)

Case No. 3AN05 459 PR

AFFIDAVIT OF SERVICE
OF DOCUMENTS

I state on oath or affirm that on 4/8/05, ~~is~~,
at 1230 .m., I served a copy of POA/ Pet 30/ Notice

Ex Parte/ Pet 30/ Notice
(title of document)

on respondent and API
(institution)

by hand delivery
(manner in which service was accomplished)

4/8/05
Date

[Signature]
Signature

Print Name

Title

Subscribed and sworn to or affirmed before me at _____,
Alaska, on _____, 19____.

(SEAL)

Notary Public for Alaska
My commission expires: _____