

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)

COPY
Original Received
Probate Division

OCT 28 2008

Case No. 3AN 08-1252PR

Clerk of the Trial Courts

**MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

Respondent, William Bigley, has filed a Motion for Summary Judgment (Motion) to deny the petition and order the Alaska Psychiatric Institute (API) to provide the following less intrusive alternative:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.¹ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.
4. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.
5. The foregoing may be contracted for from an outpatient provider.

The following affidavits and other competent written testimony has been submitted in support of the Motion:

1. Affidavit of Loren Mosher, dated March 5, 2003, originally filed in 3AN 03-277 CI.

¹ API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

2. Affidavit of Robert Whitaker, dated September 4, 2007, originally filed in 3AN 07-1064PR.
3. Affidavit of Ronald Bassman, PhD, dated September 4, 2007, originally filed in 3AN 07-1064PR.
4. Affidavit of Paul Cornils, dated September 12, 2007, originally filed in 3AN 07-1064PR.
5. Affidavit of Grace E. Jackson, MD, dated May 16, 2008, originally filed in 3AN 08-493PR.
6. Affidavit of Grace E. Jackson, MD, dated May 20, 2008, originally filed in Alaska Supreme Court case No. S-13116.
7. Transcript of the March 5, 2003, testimony of Loren Mosher, in 3AN 03-277 CI;
8. Transcript of the September 5, 2007, testimony of Sarah Porter in 3AN 07-1064 PR.
9. Transcript of the May 14, 2008, testimony of Grace E. Jackson, MD, in 3AN 08-493PR.

I. Legal Standards

(A) Best Interests

Under *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 254 (Alaska 2006), the Alaska Supreme Court held AS 47.30.839 was not a constitutionally permissible basis for forcing someone to take psychotropic drugs against their will except as follows:

[A] court may not permit a treatment facility to administer psychotropic drugs unless the court makes findings that comply with all applicable statutory requirements and, in addition, expressly finds by clear and convincing evidence that the proposed treatment is in the *patient's best interests* and that *no less intrusive alternative is available*.

(emphasis added).

The Supreme Court further held:

Evaluating whether a proposed course of psychotropic medication is in the best interests of a patient will inevitably be a fact-specific endeavor. At a minimum, we think that courts should consider the information that our statutes direct the treatment facility to give to its patients in order to ensure the patient's ability to make an informed treatment choice. As codified in AS 47.30.837(d)(2), these items include:

- (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
- (B) information about the proposed medication, its purpose, the method of its administration, the recommended ranges of dosages, possible side effects and benefits, ways to treat side effects, and risks of other conditions, such as tardive dyskinesia;
- (C) a review of the patient's history, including medication history and previous side effects from medication;
- (D) an explanation of interactions with other drugs, including over-the-counter drugs, street drugs, and alcohol; and
- (E) information about alternative treatments and their risks, side effects, and benefits, including the risks of nontreatment[.]²

The Alaska Supreme Court then cited with approval the Supreme Court of Minnesota's requirement of consideration of the following factors:

- (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment;
- (2) the risks of adverse side effects;
- (3) the experimental nature of the treatment;
- (4) its acceptance by the medical community of the state; and
- (5) the extent of intrusion into the patient's body and the pain connected with the treatment.³

Robert Whitaker's written testimony establishes that:

- (a) Neuroleptics, also called antipsychotics, increase the likelihood that a person will become chronically ill.
- (b) Long-term recovery rates are much higher for unmedicated patients than for those who are maintained on neuroleptic drugs.
- (c) Neuroleptics cause a host of debilitating physical, emotional and cognitive side effects, and lead to early death.
- (d) The new "atypical" neuroleptics are not better than the old ones in terms of their safety and tolerability, and quality of life may even be worse on the new drugs than on the old ones.
- (e) Non-medication approaches have been proven far more effective.

² 138 P.3d 252.

³ *Id.*

(B) Less Intrusive Alternative

With respect to *Myers'* requirement of a less intrusive alternative, API is constitutionally required to provide an available less intrusive alternative. *Wyatt v. Stickney*,⁴ ("no default can be justified by a want of operating funds."), affirmed, *Wyatt v. Anderholt*,⁵ (state legislature is not free to provide social service in a way that denies constitutional right). In *Wyatt* the federal courts required the State of Alabama to spend funds in specific ways to correct constitutionally deficient services.

Upon API invoking its awesome power to confine Appellant and seeking to exercise its similarly awesome power to forcibly drug him against his will, Appellant's constitutional right to a less intrusive alternative arises under *Myers*. Under *Wyatt* API may not avoid its obligation to do so by adopting a mission that denies Appellant's constitutional right to a less intrusive alternative.

In *Hootch v. Alaska State-Operated School System*,⁶ in considering an equal protection claim regarding the right to state funding of local schools, the Alaska Supreme Court held that resolution of the complex problems pertaining to the location and quality of secondary education are best determined by the legislative process, but went on to hold, "We shall not, however, hesitate to intervene if a violation of the constitutional rights to equal treatment under either the Alaska or United States Constitutions is established." Here, it is respectfully suggested, this Court should not hesitate to order the provision of

⁴ 344 F.Supp. 387 (M.D.Ala.1972).

⁵ 503 F.2d 1305, 1315 (5th Cir. 1974).

⁶ 536 P.2d 793, 808-09 (Alaska 1975).

the available less intrusive alternative to satisfy the constitutional due process right to a less intrusive alternative it required in *Myers*. Otherwise, the right is meaningless.⁷

II. Testimony In Support of Summary Judgment

(A) Best Interests

Dr. Jackson's May 16, 2008, affidavit confirms the Whitaker testimony, and describes in some detail the brain damage caused by neuroleptics, summarizing it as follows:

Evidence from neuroimaging studies reveals that *old and new* neuroleptics contribute to the progressive shrinkage and/or loss of brain tissue. Atrophy is especially prominent in the frontal lobes which control decision making, intention, and judgment. These changes are consistent with *cortical* dementia, such as Niemann-Pick's or Alzheimer's disease.

Evidence from postmortem analyses in lab animals reveals that *old and new* neuroleptics induce a significant reduction in total brain weight and volume, with prominent changes in the frontal and parietal lobes.

Evidence from biological measurements suggests that *old and new* neuroleptics increase the concentrations of tTG (a marker of programmed cell death) in the central nervous system of living humans.

Evidence from *in vitro* studies reveals that haloperidol reduces the viability of hippocampal neurons when cells are exposed to clinically relevant concentrations. (Other experiments have documented similar findings with the second-generation antipsychotics.)

Shortly after their introduction, neuroleptic drugs were identified as chemical lobotomizers. Although this terminology was originally metaphorical, subsequent technologies have demonstrated the scientific reality behind this designation.

Neuroleptics are associated with the destruction of brain tissue in humans, in animals, and in tissue cultures. Not surprisingly, this damage has been

⁷ There are likely limits to the right, such as unreasonable cost, but that is not the situation here.

found to contribute to the induction or worsening of psychiatric symptoms, and to the acceleration of cognitive and neurobehavioral decline.

(boldfacing in original, underlining added)

Dr. Jackson's May 14, 2008, testimony, among other things, establishes that if Petitioner is allowed to continue to drug Respondent as it desires he will likely die within five years. Dr. Jackson's May 14, 2008, testimony also discusses the reasons why typical clinicians do not receive reliable information.

Dr. Jackson's May 20, 2008, affidavit establishes, among other things, that Respondent's current symptoms are from Chemical Brain Injury caused by the long-term psychiatric drugging of Respondent against his will, and no psychiatric diagnoses should be attached to Respondent as a result.

(B) Less Intrusive Alternative

Mr. Whitaker's, Dr. Bassman's, Sarah Porter's and Paul Cornil's testimony establish there are less intrusive alternatives and the following less intrusive alternative should be ordered by this Court:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.⁸ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.

⁸ API may seek to obtain a housing subsidy from another source, but such source may not be Respondent's Social Security Disability income.

4. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.
5. The foregoing may be contracted for from an outpatient provider.

III. Conclusion

There being no genuine issue as to any material fact and Respondent being entitled to judgment as a matter of law, Respondent's Motion for Summary Judgment should be granted, denying the petition and ordering API to provide the following less intrusive alternative:

and Order petitioner to provide the following less intrusive alternative:

1. Mr. Bigley be allowed to come and go from API as he wishes, including being given, food, good sleeping conditions, laundry and toiletry items.
2. If involuntarily in a treatment facility in the future, Mr. Bigley be allowed out on passes at least once each day for four hours with escort by staff members who like him, or some other party willing and able to do so.
3. API shall procure and pay for a reasonably nice two bedroom apartment that is available to Mr. Bigley should he choose it.⁹ API shall first attempt to negotiate an acceptable abode, and failing that procure it and make it available to Mr. Bigley.
4. At API's expense, make sufficient staff available to be with Mr. Bigley to enable him to be successful in the community.
5. The foregoing may be contracted for from an outpatient provider.

DATED: October 27, 2008.

Law Project for Psychiatric Rights

By: _____

James B. Gottstein
ABA # 7811100

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