IN THE SUPREME COURT OF THE STATE OF ALASKA

ITMO the Necessity of the Hospitalization of L.M., Appellant, v. Alaska Psychiatric Institute Appellee.	Supreme Court No.: **S-16393**

Trial Court Case # **3AN-16-01656 PR**

OPPOSITION TO MOTION FOR RECONSIDERATION

The Court should deny L.M.'s motion for reconsideration because the single-justice denial of her motion for stay was correct for the reasons explained in API's opposition to her motion for stay and in the stay denial order. Because L.M.'s appellate arguments are based on late-submitted, inadmissible, and unpersuasive evidence that is unlikely to convince this Court that the medication order was clearly erroneous, staying the order is unwarranted. The Court should allow API to give L.M. the treatment that is medically indicated in order to protect its patients and staff from her assaultive behavior and allow for her eventual recovery and release from confinement.

I. STANDARD OF REVIEW

When considering whether to grant a stay, a court considers criteria similar to the showing required for a preliminary injunction.[1] That showing depends on the nature of the threatened injuries to the moving and non-moving parties. If the moving party faces

[1] *Powell v. City of Anchorage*, 536 P.2d 1228, 1229 (Alaska 1995).

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the danger of "irreparable harm" and the opposing party is adequately protected, the moving party "must raise 'serious' and substantial questions going to the merits of the case."[2] If, however, the moving party's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then the moving party must meet the heightened standard of a "clear showing of probable success on the merits."[3]

II. ARGUMENT

A. Because API and the public cannot be adequately protected, L.M. must make a "clear showing of probable success on the merits" to obtain a stay.

As explained in API's opposition to L.M.'s motion for stay, API cannot be adequately protected if it cannot give her the treatment she needs for her condition under the accepted medical standard of care. [7/27/16 Opposition at 3-4] L.M. poses a risk to other patients and API staff while untreated. And if API cannot treat and discharge her, L.M. will remain there indefinitely, at a cost to her own personal freedom, to the State's limited resources, and to others who could benefit from treatment beds at API.

The Court's stay denial correctly observes that "the superior court found that without her psychotropic medication, it is likely that L.M. will continue to pose a danger to physically assault other patients and staff." [7/28/16 Stay Denial at 2] The superior court found that L.M. "is becoming increasingly aggressive," that she assaulted

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2 *See State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

3 *See id.*

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patients and staff, that "her condition was worsening," that not giving her medication "would effectively leave her untreated, and that her condition "is likely to worsen without medication." [7/25/16 Superior Court Order at 7, 4 n.4, 8] This continual and worsening danger to patients and staff alone is sufficient to show that API cannot be adequately protected if the Court stays the medication order. In her motion for reconsideration, L.M. does not contest that she poses this danger.

Instead, L.M. asserts that the danger she poses is not really a concern because API can invoke AS 47.30.838 to medicate her in a "crisis" situation. But a statute that requires API to await a "crisis" before it can act is not "adequate" protection for its patients and staff or its medical mission. Temporarily medicating L.M. to subdue her in crisis situations is not the proper, medically indicated treatment for her.

Not only is API not adequately protected because of the danger L.M. poses to patients and staff, but it is also not adequately protected from harm to its mission and to public resources from indefinitely housing a patient it cannot properly treat. [7/27/16 Opposition at 3-4] L.M.'s motion for reconsideration does not address these harms. In *Bigley v. Alaska Psychiatric Institute*,[4] this Court credited a finding that long-term housing of an untreated psychiatric patient would "conflict with API's mission as the state's only acute care psychiatric hospital."[5] Similarly here, if the court grants a stay,

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4 208 P.3d 168 (2009).

5 *Id.* at 186.

API and the public will suffer harm because API will have to indefinitely house a patient without proper treatment. This harm cannot be remedied after the fact.

Because API and the public cannot be adequately protected, L.M. must make a "clear showing of probable success on the merits" to obtain a stay.[6]

B. The Court correctly concluded that L.M. did not make a clear showing of probable success on the merits.

L.M.'s appellate arguments challenge the trial court's factual findings, and when this case proceeds to merits briefing, the standard of review for the trial court's factual findings will be clear error.[7] Thus, in order to justify a stay, she must show not just that the findings were clear error, but that they were so *clearly* clear error that she is likely to succeed on the merits and ultimately convince the Court to overturn the medication order. This she cannot do. The stay denial correctly concludes that the questions L.M. raises on appeal "are not likely to be successful." [7/28/16 Stay Denial at 2] The points L.M. makes in her motion for reconsideration do not disturb that conclusion.

1. The stay denial order correctly concluded that "L.M. has likely failed to preserve the two arguments she relies on for this appeal."

Part of the rationale for the Court's conclusion that L.M.'s appeal is unlikely to succeed was that she "has likely failed to preserve the two arguments she relies on"

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6 *See Metcalfe*, 110 P.3d at 978.

7 *Wetherhorn v. Alaska Psychiatric Inst.*, 156 P.3d 371, 375 (Alaska 2007) ("Factual findings in involuntary commitment or medication proceedings are reviewed for clear error, and we reverse only if our review of the record leaves us with a definite and firm conviction that a mistake has been made.").

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because she never presented the evidence for those arguments to the magistrate judge. [7/28/16 Stay Denial at 2] Instead of presenting that evidence to the magistrate, L.M. attached it to her objections to the magistrate's findings before the superior court. [*See* Exhibit D to Motion for Stay] L.M. challenges the idea that she "failed to preserve" her arguments, arguing that the superior court was free to consider her additional evidence and in fact did consider it. [8/1/15 Motion for Reconsideration at 1-2]

But L.M. misquotes Probate Rule 2(f)(1) in saying the rule allows the superior court to "permit . . . the taking of further evidence" when reviewing a magistrate's recommended findings. [8/1/15 Motion for Reconsideration at 1] The rule in fact allows the superior court to "*order* . . . the taking of further evidence" (emphasis added), which the superior court did not do in this case. If the superior court had ordered the taking of further evidence, L.M. could have—for example—called Dr. Saylor as a live witness and API could have cross-examined him and presented its own evidence in rebuttal. If that had happened, considering L.M.'s additional evidence would be appropriate.

But because the superior court did not order the taking of further evidence, L.M.'s additional evidence was inadmissible hearsay. [7/27/16 Opposition at 2-3] Moreover, the superior court properly found "little value in evidence that was not before the Magistrate Judge, was not subject to cross-examination, and which suggests it to be appropriate to deviate from the medical standard of care without any analysis of [L.M.'s] history and circumstances." [7/25/16 Superior Court Order at 6]

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Because the superior court did not have to consider L.M.'s additional evidence at all, let alone credit it as persuasive, the single justice was correct in concluding that L.M. is unlikely to succeed in her appellate arguments because they rely on that additional evidence, particularly Dr. Saylor's affidavit. And regardless of whether L.M. has "preserved" her appellate arguments based on that evidence, those arguments fall short of showing that she is clearly likely to prevail in her appeal of the medication order, as explained below and in API's opposition to the motion for stay. [7/27/16 Opposition at 4-7] Indeed, her arguments do not even raise "serious" or "substantial" questions going to the merits of the case, as would be required for a stay if the Court were to conclude that L.M. faces irreparable harm and API is adequately protected.

2. The prior existence of a defunct treatment facility does not mean that L.M. is clearly likely to succeed on the merits.

First, L.M. is unlikely to convince this Court to overturn the medication order by arguing that the superior court should have found that Soteria-Alaska—a treatment facility *which no longer exists*—was a feasible less-restrictive alternative to medication.

In *Bigley*, the Court said that to be a less-intrusive alternative, "the alternative *must actually be available*, meaning that it is feasible and would actually satisfy the compelling state interests that justify the proposed state action."[8] L.M. does not dispute that the Soteria-Alaska facility closed a year ago. It is thus not actually "available" as a current treatment option for L.M. Even if Soteria-Alaska could be reopened, reopening

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[8] *Id.* at 185 (emphasis added).

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a closed facility would presumably take some time. It is indisputable that API cannot simply send L.M. to Soteria-Alaska right now instead of medicating her.

L.M. appears to blame the State for the shut-down of Soteria-Alaska and to assume that the State could easily reopen the facility by providing more funding, but she has provided no evidence for this. [8/1/15 Motion for Reconsideration at 2] The only evidence in the record about Soteria-Alaska at all is the hearsay affidavit of Dr. Saylor that was not even before the magistrate and that API had no adequate opportunity to rebut. Even ignoring the procedural and evidentiary problems with that affidavit, the affidavit falls far short of proving that the State could feasibly reopen Soteria-Alaska. [Exhibit D to Motion for Stay at 48] Under the circumstances, L.M. is unlikely to succeed in her appellate argument that the superior court clearly erred in not finding Soteria-Alaska to be a feasible less-restrictive alternative for her.

Even if the Court were open to entertaining L.M.'s argument that the State must either release her or somehow reopen a defunct facility, this argument would require briefing and is not "likely" to succeed. Indeed, it does not even raise a "serious" or "substantial" question going to the merits of the case.

a. Dr. Saylor's double-hearsay statements do not show that L.M. is clearly likely to succeed on the merits.

Second, L.M. is also unlikely to convince this Court to overturn the medication order by pointing to Dr. Saylor's double-hearsay assertion that L.M. previously expressed a desire to refuse psychiatric medication when she was competent.

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L.M. could have called Dr. Saylor as a witness at the hearing before the magistrate, but she did not. As explained in API's opposition to the stay motion, the statements in Dr. Saylor's affidavit, submitted after the hearing, are all hearsay. [7/27/16 Opposition at 2, 5] Indeed, they are double-hearsay, because they are out-of-court statements about the alleged out-of-court statements of other people.

Even assuming that Dr. Saylor's affidavit was admissible despite being double-hearsay, and even assuming the superior court had to consider it even though it was not presented to the magistrate, the stay denial order correctly observes that "Dr. Saylor's affidavit is not based on his personal knowledge" of L.M.'s previous wishes about medication. [7/28/16 Stay Denial at 2] In asserting that L.M. has previously expressed a desire to refuse psychotropic medication, the affidavit says "I believe she has made such statements to her mother Angelika, my daughter Amanda, and other friends." [Exhibit D to Motion for Stay at 48] It does not say that L.M. made such statements to Dr. Saylor. And Dr. Saylor does not explain how he knows, or could know, that L.M. was competent when she supposedly made these statements to other people.

L.M. is not clearly likely to succeed in convincing the Court to overturn the medication order as clear error due to this late-submitted, double-hearsay affidavit that is not based on Dr. Saylor's personal knowledge—indeed, the affidavit does not even raise a "serious" or "substantial" question going to the merits.

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III. CONCLUSION

For these reasons, as well as those expressed in API's opposition to L.M.'s motion for stay, the single-justice order is correct and the Court should deny L.M.'s motion for reconsideration.

DATED: August 5, 2016.

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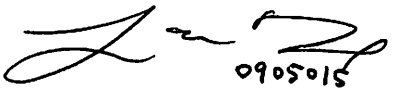
By:  for
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CERTIFICATE OF SERVICE

I hereby certify that I am a Law Office Assistant at the Department of Law, Office of the Attorney General and that on this date I served, by first class mail, a true and correct copy of the ***Opposition to Motion for Reconsideration*** and this ***Certificate of Service*** in this proceeding on the following:

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