Law Project for Psychiatric Rights
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the Necessity of the Hospitalization of N.B.	Supreme Court No. S-16467
Trial Court Case No. 3AN-16-01656PR	
In the Matter of the Necessity of the Hospitalization of L.M.	Supreme Court No. S-16467
Trial Court Case No. 3AN-16-01656PR	

APPELLANT L.M.'S SUPPLEMENTAL BRIEF
Re: THE MOOTNESS DOCTRINE IN
INVOLUNTARY COMMITMENT APPEALS

By Order dated July 26, 2017, this Court ordered supplemental briefs on four questions pertaining to revisiting and possibly overruling this Court's mootness holding in *Wetherhorn v. Alaska Psychiatric Institute*,[1] as interpreted by *In re Joan K.*[2] These questions will be addressed in order. But first, L.M. endorses and adopts the arguments on the subject by N.B., in her merits opening and reply briefs.

[1] 156 P.3d 371 (Alaska 2007).

[2] 273 P.3d 594 (Alaska 2012).

1. **Applying the standards employed by this court for overturning precedent, was Wetherhorn's mootness holding originally erroneous or is it no longer sound because of changed conditions, and, if so, will more harm than good result from overruling this holding? As part of this analysis, the parties are requested to address the time and effort spent litigating on appeal the application of the mootness doctrine and its various exceptions. See also *In re Reid K.*, 357 P.3d 776, 782-83 (Alaska 2015) (directing that in future appeals from involuntary commitments, the State should move to dismiss the appeal if it believes the appeal is moot and no exceptions to mootness apply).**

A. *Wetherhorn* as Interpreted by Joan K. Was Originally Erroneous.

Applying the standards employed by the Court for overturning precedent, *Wetherhorn's* mootness holding, as subsequently interpreted, was originally erroneous.

First, L.M. respectfully suggests the Court's description in *Joan K* of *Wetherhorn's* mootness holding is incomplete and misleading to the extent *Wetherhorn* has been interpreted to mean that involuntary commitment orders that are not reviewed on their merits because of mootness are to be left in place. This Court's original opinion in *Wetherhorn* affirmed the commitment after it declined to review her evidentiary challenges because they were moot. Ms. Wetherhorn petitioned for rehearing on the grounds that this Court had not found the state proved she was gravely disabled under the newly announced constitutional standard that she was "incapable of surviving safely in freedom," and therefore the commitment order should be vacated. On rehearing this Court did exactly that.

There is a longstanding principle of both Alaska and federal jurisprudence that when appeals become moot, the underlying judgment should be vacated. This Court adopted the federal rule vacating judgments when appeals become moot in *City of Valdez*

v. Gavora.[3] In *Peter A v. Alaska Dep't. of Health and Social Services,*[4] citing to *Gavora*, at footnote 25, this Court stated:

> We express no opinion about whether *Gavora's* seemingly broad assertion that a holding of mootness requires vacating the judgment below should be narrowed in light of the Supreme Court's discussion in *U.S. Bancorp.*[5]

The United States Supreme Court in *U.S. Bancorp* did not narrow the requirement very far. In *U.S. Bancorp*, mootness arose because the parties settled. In those circumstances, the United States Supreme Court held *vacatur* was not warranted because the settling party voluntarily relinquished the right to correct a wrongly issued judgment.[6]

The United States Supreme Court stated in *U.S. Bancorp* that in other circumstances *vacatur* was required:

> [T]he judgment below should not be permitted to stand when without any fault of the [petitioner] there is no power to review it upon the merits. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.[7]

The United States Supreme Court reiterated this federal vacatur policy in *Camreta v. Greene.*[8] In involuntary commitment and forced drugging cases, if the appeals become moot it is not through any fault of the respondents. As will be discussed below, however, it is respectfully suggested such appeals are not moot.

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[3] 692 P.2d 959, 960-961 (Alaska 1984).

[4] 146 P.3d 991 (Alaska 2006).

[5] *United States Bancorp Mortgage Co., v. Bonner Mall Partnership*, 513 U.S. 18, 115 S.Ct. 386 (US 1994).

[6] 513 US at 25, 115 S.Ct. at 392.

[7] 513 US at 25, 115 S.Ct. at 391, citations omitted.

[8] 563 U.S. 692, 712, 131 S.Ct. 2020, 2035 (2011).

In *In re: Mark V.*, 324 P.3d 840, 848 (Alaska 2014), this Court declined to vacate the commitment order against Mark V., saying that having concluded the theoretical possibility of collateral consequences does not justify review of the moot appeal, it was unconvinced there was any reason to vacate the commitment order. Counsel for L.M. does not know to what extent the above *vacatur* jurisprudence was briefed in *Mark V.*, but it is respectfully suggested that this misses the point.

As held in *U.S. Bancorp*, a party ought not in fairness be forced to acquiesce in a judgment that won't be reviewed because of mootness. It is respectfully suggested that if neither the public interest nor the collateral consequences exceptions to the mootness doctrine apply it doesn't change this principle. Frankly, while unintended, this Court's mootness jurisprudence with respect to involuntary commitment and forced drugging orders discriminates against people who have been found to experience mental illness. It is hard for such people to avoid the feeling this Court finds them unworthy of appellate review, even though their most fundamental rights to physical freedom and from being injected with drugs against their will have been infringed. They ought to at least have the chance for this Court to review whether such infringements on their rights were legally warranted.

It is also respectfully suggested these cases are not moot. In *Washington v. Harper*[9] the United States Supreme Court held that an appeal of an involuntary medication order was not moot even though it was no longer in effect because of the

[9] 494 U.S. 210, 219, 110 S.Ct. 1028, 1035 (1990).

possibility that another such order would be sought in the future. The same is true for involuntary commitments. Without appellate review on the merits, the person can be subjected to multiple erroneous confinements, all of which are refused review on mootness grounds.

Finally, AS 47.30.765 provides that respondents have the right to an appeal from an order of involuntary commitment and directs the court to inform the respondent of this right. As N.B., pointed out in her opening merits brief, the Alaska Legislature was aware that an appeal of involuntary commitment orders could not normally be concluded during the pendency of the commitment, but nonetheless included the right to appeal.[10] This Court's determination in *Mark V.* that AS 47.30.765 does not supersede the mootness doctrine[11] is thus a rejection by this Court of the legislature's judgment that all involuntary commitment orders are appealable, even if moot.

In *Mark V.*,[12] this Court cited *Peter A. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*,[13] and *Fairbanks Fire Fighters Ass'n, Local 1324 v. City of Fairbanks*,[14] as examples of statutes conferring the right to appeal that have not compelled this Court to review otherwise moot appeals and *Sweezey v. State*,[15] and *Allen*

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[10] Pages 31-34.

[11] 324 P.3d at 847-848.

[12] 324 P.3 at 848, n. 39.

[13] 146 P.3d 991, 996 (Alaska 2006).

[14] 48 P.3d 1165, 1168 (Alaska 2002).

[15] 167 P.3d 79, 80 (Alaska App.2007).

v. State,[16] as sufficiently analogous to lend support to that proposition. However, in *Peter A.* this Court vacated the order adjudicating Peter's children as in need of aid, citing the *vacatur* principle discussed above. In *Fairbanks Fire Fighters*, the union had already been given the remedy it sought and this Court could not give it any further relief. That is in stark relief to L.M.'s appeal here, where the commitment order can (and should) be vacated if review is not granted. Moreover, in *Fairbanks Fire Fighters* this Court went ahead and decided the merits under the public interest exception to the mootness doctrine.

In *Sweezy* the Court of Appeals held Sweezy's appeal point that the trial court judge erroneously rejected a proposed mitigating factor moot because the resulting sentence could have been the same regardless of the mitigating factor. This is another example where the appellant had already achieved the result sought or to which he would have been entitled if he had won the appeal. *Allen* is to the same effect, but there the Court of Appeals also held that mitigating circumstances under AS 12.55.155(c) wasn't even applicable to the crime for which Mr. Allen was convicted and the trial court had, in fact, rejected the proposed mitigating factors.

B. Far More Good Than Harm Will Result in Overruling *Wetherhorn* as Interpreted by *Joan K.*

Far more good than harm will result in overruling *Wetherhorn* as interpreted by *Joan K.* If the Court determines that *Wetherhorn* as interpreted by *Joan K.* was wrongly decided, it will be good to correct that. It will be good for respondents not to feel discriminated against by having their appeals refused consideration by this Court. It is

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[16] 56 P.3d 683, 685 (Alaska App.2002).

hard to over-emphasize the importance of giving involuntary committees the right to seek appellate correction of potentially erroneous involuntary commitment and medication orders. In fact, the dissent stated in *Mark V.* that "the most onerous consequence of an involuntary civil commitment order may in fact be the absence of a meaningful appeal."[17] Whether this is so or not, refusing to hear appeals on the sufficiency of evidence is certainly cause for respondents to feel they are not being treated fairly. Another benefit from overruling *Wetherhorn* is that the parties and this Court will no longer have to spend time and effort on the mootness issue.

Frankly, it is hard to discern much, if any, harm from overruling *Wetherhorn*. One might assert that the additional use of this Court's resources by avoiding decisions on the merits is a harm, but it is not clear the current regime has resulted in an overall reduction in the demand on this Court's resources. In fact, Justice Stowers, in his dissent from *In re: Mark V.*, joined by Justice Maassen, agreed with the State's position at oral argument that it takes more of the State's and the Court's resources to adjudicate the collateral consequences issues than to just decide the merits.[18]

C. The Time and Effort Spent Litigating Application of the Mootness Doctrine.

The Law Project for Psychiatric Rights (PsychRights), L.M.'s counsel here, is a public interest law firm whose mission is to mount a strategic litigation campaign

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[17] 324 P.3d at 850.

[18] 324 P.3d at 850.

against forced psychiatric drugging and electroshock.[19] As such, appeals it takes tend to naturally fit into the Public Interest Exception to the Mootness Doctrine and the briefing tends to be similar from case to case. However, it still takes time and effort to tailor the argument to the circumstances of the appeal and review any possible new decisions by this Court.

Of potentially more significance is the amount of space that may have to be devoted to briefing mootness, normally in the appellant's reply brief. In *In Reid K.*,[20] this Court directed that if the State believes an appeal of a commitment order is moot, it should move to dismiss the appeal for mootness prior to briefing. This is the first appeal PsychRights has taken since *Reid K.*, and this procedure was not followed by the State. The State instead asserted mootness for the first time in its appellee's brief and L.M., devoted 6 pages of her reply brief to the issue. Luckily, L.M., was not pressed for space in her reply brief, but if she had been, having to address mootness within the 20 page reply brief limit would have presented a problem. It certainly can present a problem for future appellants.[21]

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[19] *See*, http://psychrights.org, accessed September 12, 2017. No involuntary electroshock is currently occurring in Alaska to PsychRights' knowledge.

[20] 357 P.3d 776, 782-83 (Alaska 2015).

[21] It is recognized that an overlimit brief could be requested, but PsychRights is reluctant to do so and a motion to file an overlimit brief, in itself, would be the occasion for additional work.

2. **Does this court's mootness jurisprudence in involuntary commitment cases deprive the trial courts of significant precedent and guidance in their decision- making?**

This Court's mootness jurisprudence does deprive the trial courts of significant precedent and guidance. This is starkly illustrated in *In re Gabriel C.*[22] in which this Court noted:

> We conclude that we should not review the involuntary medication order because it has now expired. But we note that there is a serious issue concerning whether the superior court made adequate findings regarding the respondent's best interests.

Whether forcing someone to take psychiatric drugs against their will is in their best interests is constitutionally central to the State's right to do so.[23] In this Court's 2006 *Myers*[24] Opinion, the Superior Court was directed to consider the following factors:

> (A) an explanation of the patient's diagnosis and prognosis, or their predominant symptoms, with and without the medication;
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> (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;
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> (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[.]

and the following "Minnesota factors" were described as potentially helpful:

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[22] 324 P.3d 835 (2014)

[23] *Myers*, 138 P.3d at 251-252.

[24] *Id.* at 252.

(1) the extent and duration of changes in behavior patterns and mental activity caused 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 associated with the treatment.[25]

This is a pretty extensive, nuanced set of factors for which there is virtually no appellate oversight. While PsychRights has not handled a large number of these cases, what it has and what it knows about reveals that these factors are normally not adequately addressed by the trial court. Involuntary commitments also require careful weighing of the evidence. The trial courts are not getting the guidance they need.

3. **Does the public interest exception, as formulated and applied in *Wetherhorn* and subsequent involuntary commitment and involuntary medication cases, meaningfully protect a respondent's right to appellate review of involuntary commitment and involuntary medication orders?**

Frankly, it is hard to see how appeals dismissed for mootness meaningfully protect that respondent's right to appellate review. The only way to meaningfully protect a respondent's right to appellate review is to allow appellate review. Even where review of other issues is allowed under the public interest exception, under this Court's current mootness jurisprudence, review will be denied of an insufficiency of the evidence issue in the same appeal. Only if the collateral consequences exception applies will this Court consider the sufficiency of the evidence. There is a paucity of such decisions.

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[25] In *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 181 (Alaska 2009), this Court held these "Minnesota factors" favored, but not mandatory.

4. **Does the collateral consequences exception, as formulated and applied in *Joan K.* and subsequent involuntary commitment and involuntary medication cases, meaningfully protect a respondent's right to appellate review of involuntary commitment and involuntary medication orders?**

Again, a respondent's right to appellate review is not meaningfully protected when an appeal is dismissed for mootness. Denial of review because of previous commitments is particularly pernicious. This means that a respondent can be repeatedly committed and subjected to forced drugging on quite similar evidence, none of which may have withstood appellate review if it had been allowed. In fact, as set forth above, the United States Supreme Court held in *Washington v. Harper* that an appeal of a forced drugging order is not moot because of the possibility that another such order would be sought in the future.[26] Ironically, it is quite possible that review of the sufficiency of the evidence will be denied because of mootness while a respondent is being locked up under a subsequent involuntary commitment order, and possibly drugged against their will, based on similar evidence, that very well might not be sufficient, which erroneous commitment will also be denied review because it will have also become moot during the time the respondent seeks appellate review.

[26] 494 U.S. at 219, 110 S.Ct. at 1035.

CONCLUSION

For the foregoing reasons, L.M. respectfully suggests this Court's mootness holding in *Wetherhorn v. Alaska Psychiatric Institute*, as interpreted by *In re Joan K.* be overruled.

Dated this 12th day of September, 2017.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

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Certificate of Service

I mailed a copy of the foregoing a to Rachel Cella and Laura Fox on September 12, 2017.

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Jim Gottstein