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IN THE SUPREME COURT FOR THE STATE OF ALASKA

ROSLYN WETHERHORN, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	Supreme Court No. S-11939

Trial Court Case No. 3AN 05-459 PR

SUPPLEMENTAL MEMORANDUM: Re APPLICATION FOR FULL REASONABLE FEES

By Order, dated May 22, 2007, this Court requested supplemental briefing regarding the effect of *State v. Native Village of Nunapitchuk*,[1] on the pending request for full, reasonable attorney's fees, including whether appellant's counsel should be required to apportion his fees, as well as an accounting of the portion of full fees that is attributable to the successful constitutional claims.

In addition to discussing whether *Nunapitchuk* applies to Appellate Rule 508(e), Ms. Wetherhorn asserts there are other, independent, constitutionally, based grounds for granting her motion for full reasonable attorneys fees, to wit: (1) her constitutional right

[1] 156 P.3d 389 (Alaska 2007)

to counsel on appeal, (2) this Court's supervisory authority over the administration of justice in its courts, and (3) not restricting her access to the courts.

I. The Impact of *Nunapitchuk* on The Pending Attorney Fee Request

Ch. 86 SLA 2003,[2] added subsections (b)-(e) to AS 09.60.010 with the stated purpose being to overrule this Court's "public interest" exception to the attorney's fee rule in Civil Rule 82. AS 09.60.010(b), added by Ch86/HB 145 provides:

> (b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring the case, or any combination of these factors.

In *Nunapitchuk*, the question was whether this was a legislative enactment regarding practice or procedure, in which case a super majority was required for it to be valid under Article 4, §15 of the Alaska Constitution,[3] or whether it was an enactment of substantive law, which required a simple majority. This Court held:

> The purpose of section 2 of HB 145 is "to expressly overrule" the decisions of this court establishing the public interest litigant exception. We conclude that this purpose falls within the legislature's authority. HB 145 therefore is valid insofar as it abrogates the public interest litigant exception

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[2] Ch. 86 SLA 2003, was HB 145 in the Legislature and referred to as HB 145 in the *Nunapitchuk* decision. Here, it is being referred to as Ch86/HB145.

[3] Article 4, §15 of the Alaska Constitution provides:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

> developed by the decisions of this court.
>
> A potentially more difficult question is whether HB 145 could validly change provisions of Rule 82 either as written or as interpreted.[4]

In reaching this conclusion, this Court held that the public interest exception to Civil Rule 82 was a substantive policy-based nontextual exception to Civil Rule 82, rather than an interpretation of Civil Rule 82.[5]

A. Does *Nunapitchuk's* Holding Extend to Appellate Rule 508?[6]

That the State agreed Ch86/HB145 does not change Civil Rule 82 or Appellate Rule 508 was highly significant in this Court's conclusion that it validly abrogated the public interest exception to Civil Rule 82:

> On appeal the State takes the position that, although HB 145 changes the public interest litigant exception, it does not modify Rule 82. . . .
>
> The State makes the same point again in the paragraph that follows this statement: "HB 145 does not modify Rules 82 or 508, but rather a common law doctrine that limited where those rules would be applied." . . . Because it amounts to a binding concession made by a party litigant and is reasonable in light of the foregoing considerations, we accept the State's position that HB 145 should be interpreted as not modifying Rule 82.[7]

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[4] 156 P.3d at 404, footnote omitted.
[5] *See, e.g.*, 156 P.3d at 392.
[6] At n. 11 of *City of Kenai v. Friends of Recreation Ctr.*, 129 P.3d 452 (Alaska 2006), this Court indicated the legislative history "may inform the interpretation of the term 'appeal'" in Ch86/HB145, citing to testimony at the May 7, 2003, minutes of the House Judiciary Commmittee commenting on an April 21, 2003 letter from the Alaska Attorney General's office. This testimony and letter refer to HB 145 applying only to administrative appeals and lawsuits initiated in state court. However, HB 145 went through substantial change prior to enactment and it is difficult to see where the April 21, 2003, letter and May 7, 2003 testimony relate to the language of the bill, as enacted.
[7] 156 P.3d at 404-5.

It is apparent this binding concession by the State applies to Appellate Rule 508, as well as Civil Rule 82.

This raises the question of whether awards of full attorney's fees to public interest litigants under Appellate Rule 508(e), arises from the text of the rule itself, rather than a non-textual exception. Unlike Civil Rule 82, which is very explicit as to how the trial courts are to determine attorney's fees, Appellate Rule 508(e) is completely discretionary: "Attorney's fees may be allowed in an amount to be determined by the court". The discretionary nature of Appellate Rule 508, as distinct and different from the specific criteria in Civil Rule 82, has been confirmed by this Court in *Agen v. Alaska Child Support Enforcement Division*, 945 P.2d 1215, 1221 (Alaska 1997):

> The State concedes that its request for attorney's fees should have been made under Appellate Rule 508, rather than Civil Rule 82. However, the State argues that "since there are no specific guidelines in Appellate Rule 508, an analogy to, and use of, Civil Rule 82 is appropriate." . . .
>
> We reverse the award of attorney's fees. As a general matter, a superior court acting as an intermediate appellate court has broad discretion to award costs and attorney's fees pursuant to Appellate Rule 508. Indeed, we have held that the superior court need not articulate its reasons for awarding attorney's fees. Such broad discretion notwithstanding, . . . we [have] held that it is error for a superior court acting as an intermediate appellate court to award fees under Civil Rule 82, rather than under Appellate Rule 508. [W]e focused on the different directives in the fee award provisions: "[A]ttorney's fees need not be awarded as a matter of course under (Appellate Rule 29(d), now Appellate Rule 508(e)). This differs from Civil Rule 82, which requires that some portion of attorney's fees be awarded to the prevailing party...." In this case, the superior court based its award on Civil Rule 82. Since the superior court based its award on an incorrect rule, the case must be remanded to the superior court for recalculation in accordance with the correct rule.

(citations and footnotes omitted).

In *Nunapitchuk*, this court acknowledged that "Appellate Rule 508 provides full discretionary powers to determine whether an award of fees should be ordered on appeal."[8] Thus, the award of full attorney's fees to public interest litigants under Appellate Rule 508, may derive from the text of the rule itself, rather than being a substantive, policy based, nontextual exception. In such case, Ch. 86/HB 145 validly abrogates the public interest exception to Civil Rule 82, but does not validly change the provision of Appellate Rule 508 allowing full attorney's fees to public interest litigants.

In *Thomas v. Bailey*, 611 P.2d 536, 539 (Alaska 1980), though, this Court held the same considerations for affording public interest status are applicable under then Appellate Rule 29(d)[9] as at the trial level under Civil Rule 82. Nonetheless, even though the same considerations might apply under Civil Rule 82 and Appellate Rule 508, the broad discretion contained in the text of Appellate Rule 508 can result in such considerations being textually based under Appellate Rule 508 even though they are not textually based under Civil Rule 82.

In order to so find, the following limitation contained in *Nunapitchuk* pertaining to the discretion under Civil Rule 82(b)(3)(K) for *equitable factors* must not be applicable to the broad grant of discretion found in the text of Appellate Rule 508:

> Specifically, although we recognize that subsection (b)(3)(K) gives courts discretion to consider a broad range of *equitable* factors in awarding fees, we believe that courts must take care to avoid using this equitable power as

[8] 156 P.3d at 394.

[9] The relevant language of former Appellate Rule 29(d) and current Appellate Rule 508(e) are very similar.

> an indirect means of accomplishing what HB 145 has now disallowed-using awards of attorney's fees to encourage litigation of claims that can be characterized as involving the public interest.[10]

This Court's holding that the discretion contained in Civil Rule 82(b)(3)(K) to consider *equitable* factors should not be used to circumvent Ch. 86/HB 145, does not apply to Appellate Rule 508 if awards of full fees to prevailing public interest litigants under Appellate Rule 508 are based on the text of Appellate Rule 508 or interpretation thereof.

However one gets there, if the award of full attorney's fees to public interest litigants under Appellate Rule 508 derives from the text of the rule, then Art. 4, §15 of the Alaska Constitution required a 2/3rds majority for the legislature to change it, which did not occur.

B. <u>There Are Non-Public Interest Litigant Status Grounds for Awarding Full Attorney's Fees Here.</u>

Even if *Nunapitchuk* applies, in general, to Appellate Rule 508, awarding full attorney's fees on bases not prohibited by AS 09.60.010(b) is permitted. Moreover, to the extent the United States or Alaska constitutions mandate full attorney's fees awards, AS 09.60.010(b) must fall. Here, full attorney's fees are required to vindicate Ms. Wetherhorn's right to effective representation by counsel on appeal. In addition *Nunapitchuk*, itself, suggests at least two additional bases upon which such fees could, or should, be granted. One is the right of access to the courts.[11] The other is this Court's

[10] 156 P.3d at 405, emphasis added.
[11] 156 P.3d at 405.

authority over the administration of justice.[12] All of these derive from the Alaska Constitution and are related to each other.

(1) Right to Representation on Appeal

In the Decision on the merits in this case, this Court held AS 47.30 involuntary commitment and forced psychiatric drugging respondents have a right to effective counsel under the Alaska Constitution.

> 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. As we noted in V.F. v. State, "whenever the right to counsel is constitutionally guaranteed in a particular proceeding, the effective assistance of counsel is also constitutionally required."[13]

This right to counsel is based on the fundamental rights to liberty and bodily integrity which is infringed when someone is locked up on the grounds the person is mentally ill and a danger to self or others, or gravely disabled, and forcibly drugged on the grounds it is in their best interests. In the merits decision in this case, this Court recognized that involuntary commitment is a "massive curtailment of liberty,"[14] citing to *Addington v. Texas.*[15]

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[12] 156 P.3d at 397, 398.
[13] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 383-4 (Alaska 2007), footnote omitted.
[14] 156 P.3d at 375.
[15] *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)

In *Myers v. Alaska Psychiatric Institute*[16], this Court held that the right to be free from unwanted psychiatric drugging was a fundamental constitutional right, describing the interests as follows:

> [T]he truly intrusive nature of psychotropic drugs may be best understood by appreciating that they are literally intended to alter the mind. Recognizing that purpose, many states have equated the intrusiveness of psychotropic medication with the intrusiveness of electroconvulsive therapy and psychosurgery.

In *Addington*, the question before the United States Supreme Court was what standard of proof is required by the Fourteenth Amendment to the U.S. Constitution in a civil proceeding brought under state law for involuntary commitment. There, the U.S. Supreme Court held the normal civil preponderance of the evidence standard insufficient, but the criminal beyond a reasonable doubt standard not constitutionally required. In reaching this conclusion the Court stated:

> We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.[17]

In *Allen v. Illinois*, 478 US 364, 373, 106 S.Ct. 2988, 2994 (1986), the United States Supreme Court recognized that *Addington* required some but not the entire range of criminal procedural protections in involuntary commitment proceedings. This raises the question of which such protections are constitutionally required.

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[16] 138 P.3d 238, 242 (Alaska 2006)
[17] 441 US at 427, 99 S. Ct. at 1810.

The *Addington* court made clear the purpose is to minimize the risk of an erroneous deprivation of the liberty interest in being free of confinement under a civil commitment.[18] In declining to require the beyond a reasonable doubt standard, the Court opined that the "layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."[19]

The U.S. Supreme Court's reliance in *Addington* on hospital personnel and family members to correct erroneous commitments is not supported by any data to suggest it is in any way effective. In fact, just the opposite is true. The psychiatric profession explicitly acknowledges psychiatrists and patients' family members regularly lie to the courts in order to obtain involuntary commitment orders.

> It would probably be difficult to find any American Psychiatrist working with the mentally ill who has not, at a minimum, exaggerated the dangerousness of a mentally ill person's behavior to obtain a judicial order for commitment.
>
> Families also exaggerate their family member's symptoms to get the person committed to a hospital. . . . In fact a number of local officials with the Alliance for the Mentally Ill (AMI),[20] a nationwide support group for families, say they privately counsel families to lie, if necessary, to get acutely ill relatives hospitalized.

Torrey, E. Fuller. 1997, *Out of the Shadows: Confronting America's Mental Illness Crisis*. New York: John Wiley and Sons, 152. Dr. Torrey also quotes Psychiatrist Paul

[18] 441 US at 425, 99 S.Ct at 1809.
[19] 441 US at 428-9, 99 S.Ct at 1811.

Applebaum as saying when "confronted with psychotic persons who might well benefit from treatment, and who would certainly suffer without it, mental health professionals and judges alike were reluctant to comply with the law," noting that in "'the dominance of the commonsense model,' the laws are sometimes simply disregarded." *Id*., at 151.

This corruption of the legal process has been aptly described by noted scholar Michael Perlin,[21] as follows:

> [C]ourts accept . . . testimonial dishonesty, . . . specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." . . .
>
> Experts frequently . . . and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment . . .
>
> This combination . . . helps define a system in which (1) dishonest testimony is often regularly (and unthinkingly) accepted; (2) statutory and case law standards are frequently subverted; and (3) insurmountable barriers are raised to insure that the allegedly "therapeutically correct" social end is met . . .. In short, the mental disability law system often deprives individuals of liberty disingenuously and upon bases that have no relationship to case law or to statutes.

M. Perlin, The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?, *Journal of Law and Health*, 1993/1994, 8 JLHEALTH 15, 33-34.

Ms. Wetherhorn suggests here, that rather than relying on

(i) the psychiatrists who obtain the involuntary commitment and forced drugging orders, or

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[20] This organization's name is now known as the National Alliance on Mental Illness, and commonly known as "NAMI."

(ii) family members who often want their family members committed even if they don't meet commitment criteria,

to correct erroneous determinations, adopting a rule allowing full reasonable attorney's fees on appeal is perhaps the only effective way "for an erroneous commitment [and forced drugging order] to be corrected." Certainly, the most direct way to correct an erroneous commitment is for it to be overturned on appeal.

Ms. Wetherhorn suggests here that state payment for representation in at least certain appeals is just such a requirement. In *Douglas v. California*, 372 US 353, 83 S.Ct. 814 (1963), the U.S. Supreme Court required the states to pay for representation in the first appeal of indigent criminal defendants. In doing so at n.2, citing to *Coppedge v. United States*, 369 U.S. 438, 449, 82 S.Ct. 917 (1962), the Court stated:

> When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.

The same must also be true for people subjected to being locked up and forcibly drugged "for their own good." In this regard, Justice Brandeis' observation in dissent in *Olmstead v. US*[22] almost 80 years ago, rings as true now as it did then:

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[21] *See, Martin v. Taft*, 222 F.Supp.2d 940, 965 (S.D. Ohio 2002), where the court referred to Prof. Perlin as such.
[22] 277 US 438, 479, 48 S.Ct. 564, 572-3 (1928).

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

With respect to appeals of civil commitments, in *In re Richard A*, 771 A.2d 572, 576 (NH 2001), the New Hampshire Supreme Court held the right to counsel on appeal is governed by due process and recognized that "the private interests at stake in civil commitment proceedings . . . are substantial and parallel those at risk in the criminal context."

The extremely harmful effects of an erroneous involuntary commitment was acknowledged by this Court in *Wetherhorn*,[23] and described by the Montana Supreme Court in *Matter of KGF*:[24]

> Due to the potentially "socially debilitating" stigma that results from the "irrational fear of the mentally ill," the court posited that "[i]t is implausible that a person labeled by the state as so totally ill could go about, after his release, seeking employment, applying to schools, or meeting old acquaintances with his reputation fully intact." Thus, the "former mental patient is likely to be treated with distrust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination ... the experience may cause him to lose self-confidence and self-esteem."

In both *Wetherhorn* and *Myers*, as set forth above, this Court recognized that forced psychiatric drugging can be equated with forced lobotomy ("psychosurgery") and

[23] 156 P.3d at 379.
[24] 29 P.3d 485, 495 (2001), citing to *Conservatorship of Roulet* 425, 590 P.2d 1 (1979).

electroshock ("electroconvulsive therapy").[25] The extreme negative consequences of forcing people to take psychiatric drugs they do not want is also illustrated by a recent study concluding that the use of neuroleptics[26] reduces the recovery rate from 40% to 5%.[27] In Anatomy of an Epidemic: Psychiatric Drugs and the Astonishing Rise of Mental Illness in America,[28] Robert Whitaker summarizes his exhaustive review of the scientific literature:

> Over the past 50 years, there has been an astonishing increase in severe mental illness in the United States . The percentage of Americans disabled by mental illness has increased fivefold since 1955, when Thorazine-remembered today as psychiatry's first "wonder" drug-was introduced into the market . . . . A review of the scientific literature reveals that it is our drug-based paradigm of care that is fueling this epidemic . The drugs increase the likelihood that a person will become chronically ill, and induce new and more severe psychiatric symptoms in a significant percentage of patients.

Thus, the stakes for the victims of erroneous court ordered forced psychiatric drugging are extremely high; Ms. Wetherhorn respectfully suggests even higher than for erroneous criminal convictions.

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[25] 156 P.3d at 382; and 138 P.3d at 242, respectively.
[26] This is the class of drugs which are almost universally the subject of forced drugging petitions under AS 47.30.839.
[27] M. Harrow and T. Jobe, Factors Involved in Outcome and Recovery in Schizophrenia Patients Not on Antipsychotic Medications: A 15-Year Multifollow-Up Study, *Journal of Nervous and Mental Disease*, Vol 195, May, 2007, No. 5: 407-414, a copy of which is attached hereto as Exhibit A for the Court's convenience.
[28] *Ethical Human Psychology and Psychiatry*, Volume 7, Number I: 23-35 Spring 2005, a copy of which has been attached hereto as Exhibit B for the Court's convenience.

In *Douglas*, in which the United States Supreme Court required the states to provide representation to criminal appellants in their first appeal of rights under the United States Supreme Court it stated:

> The present case, where counsel was denied petitioners on appeal, shows that the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[29]

In *Nichols v. State*,[30] this Court discussed *Douglas* and held these same considerations required the provision of counsel beyond what the US Supreme Court had required:

> Although the United States Supreme Court has not held that constitutional standards require the appointment of counsel for an indigent prisoner at a hearing of his motion to vacate sentence, we believe that that Court's concern for the constitutional rights of indigent defendants, as exemplified by the cases we have discussed, points the way to that result. We say this because of the fact that the type of hearing a criminal defendant is afforded under Criminal Rule 35(b) depends to a large extent upon whether he can pay for the assistance of counsel. If he can, the trial court passes upon the merits of the motion to vacate only after having the full benefit of a trained lawyer's examination into the record, his research of law, his examination and cross-examination of witnesses, including the defendant, and his marshalling of arguments on the defendant's behalf. If the defendant cannot afford to hire counsel, then he must shift for himself,

[29] 372 US at 358, 83 S.Ct. at 817.
[30] 425 P.2d 247, 254 (Alaska 1967), footnote citation to *Douglas* omitted.

> and because of his lack of knowledge and skill in the law is placed at a distinct disadvantage which may well result in his not being given a complete and meaningful hearing. Any real chance the defendant may have had of showing that his motion had hidden merit is effectively denied him because he must go without a champion in the proceedings. We believe that such a situation draws an unconstitutional line between the rich and the poor, and that when an indigent is forced to handle his own Rule 35(b) motion, the right to a hearing which is granted him does not comport with fair procedure.
>
> We hold that in such circumstances, an indigent defendant who is not afforded counsel to represent him, is denied 'equal rights, opportunities and protection under the law', to which he is entitled under article I, section 1 of the state constitution.

In *Grinols v. State*, 74 P.3d 889 (Alaska 2003), this Court confirmed that this right to the provision of counsel to indigents was constitutionally based; that the right to such counsel on appeal of the denial of a first petition for post conviction relief was also required under the Alaska Constitution; and extended it to the right to the provision of counsel to indigents challenging the effectiveness of representation during the first post conviction relief proceeding in a second petition for post conviction relief.

Ms. Wetherhorn respectfully suggests these cases hold that where the deprivation of liberty involves confinement, such as here, the right to provision of counsel attaches to proceedings of right to challenge the erroneous deprivation of the person's right to be free of confinement. Ms. Wetherhorn suggests that the deprivation of liberty involved in forced psychiatric drugging requires the same level of protection.

Appellate Rule 508(e) provides, "Attorney's fees may be allowed in an amount to be determined by the court." This certainly allows the grant of fees upon the basis suggested here and does not run afoul of Ch86/HB145 in any way. Such an award should

be based on Ms. Wetherhorn's right to representation on appeal, rather than her status as prevailing party.[31] It is respectfully suggested Alaska's Constitution so requires. Such an award does not involve either prevailing party or public interest status and Ch86/HB145 does not come into play.

(2) Administration of Justice

In *Nunapitchuk*, citing to *Leege v.Martin*, 379 P.2d 447, 450 (Alaska 1963), this Court reiterated that "The administration of justice is the day to day business of the courts" (rather than the Legislature).[32] In *Grinols*, *supra*., citing to Justice Rabinowitz's concurrence in *Nichols v. State*,[33] this Court held that this Court's *supervisory powers of the criminal justice system* require appointment of counsel to all indigent defendants in a hearing to set aside or vacate a sentence:

> First, the supervisory powers of this court over the criminal justice system require appointment of counsel to all indigent defendants in a hearing to set aside or vacate a sentence, thereby "giv[ing] recognition to the paramount importance of insuring the integrity and accuracy of [this court's] fact-finding processes." Alternatively, Justice Rabinowitz stated that denying appointment of counsel in this case was "fundamentally unfair and violative of the due process clause of article [I], section 7 of the Alaska Constitution."

AS 47.30 involuntary commitment and forced drugging respondents are not only subject to confinement like convicted criminals, they are also subjected to the additional extreme deprivation of liberty of being forcibly administered dangerous, mind-altering

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[31] Ms. Wetherhorn is indigent as recognized by this Court in granting her motions to appeal at public expense and to waive cost bond.
[32] 156 P.3d at 397.

drugs against their will.[34] Surely this Court's supervisory powers over its court system similarly extends to the administration of justice in *civil commitment and forced drugging* proceedings as much as it does to criminal proceedings.[35] This must just as surely be within the scope of Appellate Rule 508(e).

It appears the Alaska Public Defender Agency has never filed a single appeal of any involuntary commitment or medication order in the entire history of the State of Alaska. The only such appeals that have ever been filed have been by the Law Project for Psychiatric Rights (PsychRights®) after its formation in late 2002 to mount a strategic litigation campaign against unwarranted forced psychiatric drugging and electroshock around the country.[36]

The failure of the Alaska Public Defender Agency to file any appeals has led to a number of evils.[37] First, there can be no doubt that many people have been involuntarily committed and forcibly drugged in violation of their rights. Second, until PsychRights filed the appeal on behalf of Faith Myers in early 2003, there had been absolutely no appellate supervision of the Superior Court determinations, which have been delegated

(Cont.----------)
[33] 425 P.2d 247 (Alaska 1967).
[34] *See*, *Myers* and *Wetherhorn* and §I.B.(1), *supra*.
[35] The short shrift that the Superior Court and the Public Defender Agency give to the rights of AS 47.30 respondents to be free of involuntary commitment and forced psychiatric drugging is a significant contributor to the population of people who do not recover after being diagnosed with serious mental illness as described in *Factors Involved in Outcome and Recovery* and *Anatomy of an Epidemic*, Exhibits A & B, respectively.
[36] Forced electroshock is not allowed in Alaska, but is common in a number of other states.

to the Probate Masters in Anchorage for summary disposition. Third, these proceedings have become a travesty of justice, exemplifying the evil described by Professor Perlin in §I.B.(1), above.

The failure of procedural protections to be utilized has been a sufficient ground for the United States Supreme Court and other courts to find systemic problems. For example, in *Fuentes v. Shevin*[38] the United States Supreme Court cited to the fact that in none of the 442 cases of prejudgment replevin, did the defendant take advantage of the recovery provision in holding Florida's replevin procedures unconstitutional. In *Streicher v. Prescot,t*[39] involving the same type of interest as here, the United States District Court for the District of Columbia cited the fact that no patients had ever received any form of judicial review since they had been involuntary committed under constitutionally defective proceedings, in deciding to order judicial review for all such patients.

This Court should correct the pervasive failure of its court system to honor AS 47.30 involuntary commitment and forced drugging respondents' rights. Appellate Rule 508(e) allows complete discretion with respect to awarding attorney's fees on appeal, providing: "Attorney's fees may be allowed in an amount to be determined by the court." Full fees should be awarded here under Appellate Rule 508, or under this Court's inherent authority over the administration of justice (or both). In such case, neither prevailing

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[37] It may be that the Public Defender Agency believes it has no authority to file any such appeals, which increases the importance of granting full fees.
[38] 407 U.S. 67, 84, n.14, 92. S.Ct. 1983, 1996 (US 1971).
[39] 663 F.Supp. 335, 336 (D.D.C. 1987).

party or public interest status forms the basis of the award and Ch86/HB145 does not come into play.

(3) Infringing Access to the Courts

A closely related issue is that Appellate Rule 508 should be interpreted in a way that does not infringe upon AS 47.30 respondents' access to this Court. This Court has held that access to the courts is an important right deserving of close scrutiny.[40] Normally, the concept of not infringing access to the courts is invoked to limit, or prohibit attorney's fee awards *against* a party, but as can be seen from the previous section, here, it is necessary to award full fees to ensure access to this Court to vindicate AS 47.30 involuntary commitment and medication respondents constitutional appeal rights.

II. Apportionment

A. <u>Should Apportionment Be Required</u>?

In its Order, this Court asked whether Appellant's counsel should be required to apportion his fees . . . attributable to the successful constitutional claims." The relevant portions of AS 09.60.010 (c) & (d), which were added by Ch. 86/HB 145 are:

> (c) In a civil action or appeal concerning the establishment, protection, or enforcement of a right under the United States Constitution or the Constitution of the State of Alaska, the court
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> (1) shall award, subject to (d) and (e) of this section, full reasonable attorney fees and costs to a claimant, who, as plaintiff, counterclaimant,

[40] *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988), cited a n. 76 of *Nunapitchuk.*

> cross claimant, or third-party plaintiff in the action or on appeal, has prevailed in asserting the right; . . .
>
> (d) In calculating an award of attorney fees and costs under (c)(1) of this section,
>
> (1) the court shall include in the award only that portion of the services of claimant's attorney fees and associated costs that were devoted to claims concerning rights under the United States Constitution or the Constitution of the State of Alaska upon which the claimant ultimately prevailed; and . . .

In her original motion, Ms. Wetherhorn addressed the issue of apportionment under AS 09.60.010, by citing to *Danserau v. Ulmer*, 955 P.2d 916, 920 (Alaska 1998), where this Court held that "attorney's fees for prevailing public interest litigants . . . may be apportioned only in exceptional circumstances." However, §1(b) of Ch86/HB145 expressly states it is the intent of the Legislature to overrule *Danserau*, among other decisions of this Court, so the question is whether or not it has constitutionally done so and if so, what the effect is on the pending fee motion.

It should be emphasized that apportionment is not required for an award of full attorney's fees not based on the prohibited AS 09.60.010(b) factors identified in §1.B above. More than that, because these are rooted in AS 47.30 involuntary commitment and forced drugging respondents' constitutional right to counsel on appeal, this court's supervisory power of its court system and their constitutional right to access to the courts, apportionment is not appropriate.

In determining whether AS 09.60.010(d)(1)'s direction that the court may award only that portion of attorney fees devoted to constitutional claims upon which the

claimant ultimately prevailed, it seems to Ms. Wetherhorn the key question is whether the apportionment "creates, defines and regulates rights" or is a "method of enforcing the rights."[41] If the former, it is in the province of the Legislature; if the latter, this Court's. Ms. Wetherhorn suggests it is the latter; the Legislature created, defined and regulated the right to full attorney's fees to prevailing constitutional claimants, but whether the fees should be apportioned by issue is a method of enforcing the right.

B. Portion of Full Fees Attributable to the Successful Constitutional Claims.

In its Order, this Court also asked for an accounting of the portion of full fees attributable to the successful constitutional claims. The successful constitutional claim is that involuntarily committing someone as "gravely disabled" under the definition contained in AS 47.30.915(7)(B) is constitutional only if construed to require a level of incapacity so substantial that the alleged mentally ill person could not survive safely in freedom (Gravely Disabled Issue). Frankly, the most important issue in the appeal to PsychRights was establishing standards for the effective assistance of counsel, which this Court declined to rule upon. The arguments pertaining to the Gravely Disabled Issue had been raised at the trial court in a number of cases, including *Myers*, but was not the basis for an appeal by PsychRights before this one. The result of this is the argument before this Court had been fairly well developed prior to taking this appeal. Thus, the largest amount of time on the issue was in working on the Reply Brief in developing the

[41] *Nunapitchuk*, 156 P.3d at 397.

responses to the State's arguments against it. Out of the almost $40,000 in attorney's fees requested, counsel estimates that one eighth or $5,000 is attributable to the Gravely Disabled Issue if one counts only the work done during this appeal. If one counts the work done prior to filing the notice of appeal here, it is probably one quarter or $10,000.[42]

III. Conclusion

For the foregoing reasons, Appellant respectfully requests the Court to grant her motion for full, reasonable attorney's fees.

Dated this 8th day of June, 2007, at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

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[42] In both *Cook Inlet Pipeline v. APUC*, 836 P.2d 343, 354 (Alaska 1992); and *Aloha Lumber Corp. v. Univ. of Alaska*, 994 P.2d 991, 1003 (Alaska 1999), this Court allowed an award of fees occurring before or outside of the specific appeal if closely related and necessary to the appeal. The Law Project for Psychiatric Rights' mission is to mount a strategic litigation campaign against unwarranted forced psychiatric drugging. Pursuing appeals is the primary legal mechanism for achieving this mission. As mentioned, the argument on the Gravely Disabled Issue was presented to the trial court in *Myers*, however, for strategic reasons, it was not appealed in *Myers*. In the end, however, this work became the core successful constitutional argument here. In this sense it was closely related to this appeal.