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Psychiatric Rights, Inc.

MEMORANDUM

(Revised)

TO: Probate Rules Subcommittee on Involuntary Commitments and the Involuntary Administration of Psychotropic Medication
FROM: Jim Gottstein
DATE: August 16, 2007
RE: Random Thoughts

It seemed like it might be useful for me to set forth some of the things I have thought about in terms of the rules. The following is certainly not meant to be exhaustive and I suspect others will arise as we go along. I understand the committee may conclude some of the issues are not a proper subject of court rules.

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1 Initial Screening Investigation (*Ex Parte* Petition & Order)

AS 47.30.700 provides:

> Sec. 47.30.700 Initiation of involuntary commitment procedures.
>
> (a) Upon petition of any adult, a judge shall immediately conduct a screening investigation or direct a local mental health professional employed by the department or by a local mental health program that receives money from the department under AS 47.30.520 - 47.30.620 or another mental health professional designated by the judge, to conduct a screening investigation of the person alleged to be mentally ill and, as a result of that condition, alleged to be gravely disabled or to present a likelihood of serious harm to self or others. Within 48 hours after the completion of the screening investigation, a judge may issue an ex parte order orally or in writing, stating that there is probable cause to believe the respondent is mentally ill and that condition causes the respondent to be gravely disabled or to present a likelihood of serious harm to self or others. The court shall provide findings on which the conclusion is based, appoint an attorney to represent the respondent, and may direct that a peace officer take the respondent into custody

> and deliver the respondent to the nearest appropriate facility for emergency examination or treatment. The ex parte order shall be provided to the respondent and made a part of the respondent's clinical record. The court shall confirm an oral order in writing within 24 hours after it is issued.
>
> (b) The petition required in (a) of this section must allege that the respondent is reasonably believed to present a likelihood of serious harm to self or others or is gravely disabled as a result of mental illness and must specify the factual information on which that belief is based including the names and addresses of all persons known to the petitioner who have knowledge of those facts through personal observation.

(emphasis added).

There are a number of ways in which this statute is violated as a matter of course which might be addressed in the rules.

1.1 Proper Issuance of *Ex Parte* Orders

While there may be individual circumstances justifying *ex parte* orders for someone to be taken into custody for an evaluation, AS 47.30.700 only provides that the court "may issue such an *ex parte* order." Unlike the search warrant situation, meaningful notice and an opportunity to be heard can not be constitutionally dispensed with as a class in these cases. In *Waiste v. State*, 10 P.3d 1141, 1145-6 (Alaska 2000) the Alaska Supreme Court held:

> [E]ven if the public interest in a class of cases will justify *ex parte* seizure in some of those cases, due process still requires that the State make a particularized showing, in each such case, that exigent circumstances warrant ex parte seizure in that case. Only if all or most cases in a class involve such exigency may the State always proceed *ex parte*.

Waiste involved a property interest, but the "massive curtailment of liberty" represented by psychiatric confinement deserves at least as much protection. This was explicitly recognized by the Washington Supreme Court in *In re: Harris*, 654 P.2d 109, 113 (Wash. 1982) ("The danger must be impending to justify detention without prior process").

1.2 Screening Investigation

The statute clearly requires a screening investigation prior to issuance of a custody order and I can not recall ever having seen that done. My experience is the court automatically issues *ex parte* orders for the respondent to be taken into custody. I believe the only fair reading of this statute is that the allegations in the petition may not be substituted for the screening investigation. Thus, even if it is a mental health professional who signs the petition, then either the judge or some other mental health professional must conduct the screening.

1.3 Findings

The statute also clearly requires the court set forth its "findings on which the conclusion [there is probable cause to believe respondent is a danger to self or others or gravely disabled] is

based." A copy of the non-confidential *Ex Parte* Order issued in the *Wetherhorn* case[1] is attached hereto as Exhibit A. My experience is this order is typical and I think demonstrates how these orders fail to comply with the requirement to set forth the "findings on which the conclusion is based."[2]

2 Appointment of Counsel

AS 47.30.700 provides the court is to appoint counsel in the *Ex Parte* Order, which is uniformly the Public Defender Agency. However, people who can pay or otherwise have counsel available to them are entitled to their choice of counsel. The Alaska Supreme 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*, 548 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.

Because of the extremely short time frames involved, any delay in the implementation of an AS 47.30 Respondent's right to counsel of choice works a denial of counsel because critical preparation time is lost.[3] I have had problems with this in the past and have two recommendations.

The first is that AS 47.30 Respondents be notified by the court of their right to counsel of choice if they can afford it, or counsel is otherwise available to them. The second is that filing an entry of appearance works a substitution of counsel when the Public Defender Agency has been appointed.

3 Referrals to the Probate Masters Should Be Eliminated

At least in Anchorage, there is a standing referral of involuntary commitment and forced drugging cases to the probate masters. The time frames involved do not permit these cases to be properly handled in this way. Current Probate Rules 2(b)3.C & D essentially recognize the timing problem by providing that involuntary commitments and forced drugging orders are effective pending Superior Court review. However, this is improper. Alaska Statutes require Superior Court determinations and these rules are end runs around it for expediency. Also, Civil Rule 54(d)(1) requires a transcript and the other evidence presented at these hearings to

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[1] *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371 (Alaska 2007).

[2] It also seems clear the court has the same "duty to make a searching inquiry as to the validity of the facts" in the *Ex Parte* Application as it does in the search warrant situation. *See*, e.g., *State v. Malkin*, 722 P.2d 943, 947 (Alaska 1986).

[3] The issue is not one of whether counsel could be "effective" even with the delay, but that the denial of immediate entry into the case constitutes a denial of the right to choice of counsel in light of the extremely short time frames. PsychRights filed a Petition for Review on this issue earlier this year, which was not granted. It became moot when the respondent won at trial, but if he had not, it would have been an appeal point.

accompany the masters reports, but my experience and understanding is this is never done.[4] The Superior Court can not properly discharge its duty to decide these cases without such a transcript and it does not seem feasible to provide a transcript within the required time frame. It just doesn't seem possible to me to have these cases properly handled by referrals to masters because of the time frames involved.

Another reason why these cases should not be referred to the Probate Masters is that AS 47.30 Respondents' attorneys should always be objecting to adverse Probate Master recommendations because the failure to do so, in my opinion, is a violation of the attorney's obligation to zealously assert their client's position.[5] In criminal defense cases, negotiating pleas or charges can be justified, but, with rare, if any, exceptions, there are no compromises in involuntary commitment or forced drugging cases. Therefore, in order to discharge their ethical obligations, attorneys representing respondents must object to adverse Probate Master recommendations.

4 Separation of Involuntary Commitment from Forced Drugging Proceedings

The involuntary commitment and forced drugging proceedings should be separated and the forced drugging hearing date set only if involuntary commitment is granted in order to allow better preparation for both proceedings. Two Superior Court Judges (both on this committee), in connection with jury trials, have recently held that the forced drugging issue is to be decided after the involuntary commitment. The same should be true in non-jury trials.

The Alaska Supreme Court has held that once a person is in custody in the hospital there is no exigency to conduct the forced drugging proceedings. *Wetherhorn v. Alaska Psychiatric Institute*, 156 P.3d 371, 381-2 (Alaska 2007):

> Unlike involuntary commitment petitions, there is no statutory requirement that a hearing be held on a petition for the involuntary administration of psychotropic drugs within seventy-two hours of a respondent's initial detention. The expedited process required for involuntary commitment proceedings is aimed at mitigating the infringement of the respondent's liberty rights that begins the moment the respondent is detained involuntarily. In contrast, so long as no drugs have been administered, the rights to liberty and privacy implicated by the right to refuse psychotropic medications remain intact. Therefore, in the absence of an emergency, there is no reason why the statutory protections should be neglected in the interests of speed.

(footnotes omitted).

Proceedings to determine (a) the "best interests" of the respondent and (b) whether there is a "less intrusive alternative," required under *Myers v. Alaska Psychiatric Institute*,[6] should be deferred pending the determination of the respondents capacity to decline the drugs under AS 47.30.839(e), which must be held within 72 hours of the filing of the forced drugging petition. Just as no forced drugging proceeding will be necessary if involuntary commitment is denied, no

[4] This issue is currently on appeal in *WSB v. Alaska Psychiatric Institute*, Case No. S-12677.
[5] *See*, *In re: K.G.F.*, 29 P.3d 485 (Mont. 2001) for a discussion of the types of things counsel must do to be effective.
[6] 138 P.2d 238 (Alaska 2006).

best interests and less intrusive alternative determination will be required if the court finds the respondent competent to decline the medication.

Another reason for conducting the forced drugging proceeding after the involuntary commitment proceeding is that AS 47.30.839(c) explicitly only allows the Public Defender Agency to be appointed if the respondent is indigent. Thus, the court must make an indigency determination before appointment of the Public Defender Agency.[7]

Most importantly, involuntary commitment proceedings are about safety, while forced drugging proceedings are, after *Myers*, about the person's best interests and whether there are any less intrusive alternatives. Prior to *Myers* when the court only considered the person's competence to decline the medication and if found incompetent, "the court shall approve the facility's proposed use of psychotropic medication,"[8] there was, perhaps, a rationale for holding them together. *Myers*, however, made clear these are entirely different proceedings, with different interests involved for both the government and the AS 47.30 respondents. Speedy resolution of involuntary commitment petitions is required to protect the respondents liberty interests there.[9] A more deliberate consideration of best interests and less intrusive alternatives is required to protect people's liberty interests in forced drugging proceedings.

5 Notice of Rights and Filing Petitions

AS 47.30.725(a), provides in part, "When a respondent is detained for evaluation under AS 47.30.660 - 47.30.915, the respondent shall be immediately notified orally and in writing of the rights under this section." (emphasis added). AS 47.30.730(b), provides, " A copy of the petition shall be served on the respondent, the respondent's attorney, and the respondent's guardian, if any, before the 30-day commitment hearing."

It is not uncommon, if not standard practice, for the hospital in Anchorage to wait until just before the involuntary commitment hearing to serve the respondent with either of these notices. Attached hereto as Exhibit B are the non-confidential documents pertaining to this in the *Wetherhorn* case. There, Ms. Wetherhorn was brought to the hospital on or before April 5, 2005, and a petition was filed on April 5th. However, neither the notice of rights required to be given "immediately" when brought to the hospital, nor the petition were served on Ms. Wetherhorn until an hour before the hearing.

The rules regarding filing petitions for involuntary commitments should require a certificate of service that (a) the notice of rights was served on the respondent immediately upon detention and the respondent was orally notified of their rights at that time as well, and (b) the petition(s) have been served on the respondent prior to filing.[10]

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[7] In the interest of full disclosure, it is not unlikely that in the future I will enter an appearance solely with respect to a forced drugging proceeding(s).

[8] AS. 47.30.839(g).

[9] It is imperative to note, however, that having these proceedings so expedited that adequate preparation and trial is impossible does just the opposite.

[10] This is a situation where the service really needs to have occurred prior to the filing of the certificate of service.

6 State-paid Expert Witnesses

For those who can not afford one, an independent expert witness selected by the Respondent should be paid for by the State. Without this, these proceedings mostly only pretend to protect people's rights.

7 Elections.

AS 47.30 respondents have the right to make a number of elections of which they have rarely been advised. The court should therefore ask the respondent in court about them. These include:

(a) To have the hearing open or closed to the public pursuant to AS 47.30.735(b)(3), AS 47.30.745(a) and AS 47.20.770(b);

(b) To have the hearing in a real courtroom pursuant to AS 47.30.735(b);

(c) To be free of the effects of medication pursuant to AS 47.30725(e), AS 47.30.745(a) and AS 47.20.770(b); and

(d) To have a jury trial pursuant to AS 47.30.745(c) and AS 47.30.770(b) for 90 and 180 day commitments.

8 Notice of Right to State-paid Attorney for Appeal and *Habeas Corpus* or Civil Rule 60(b) Proceedings

In connection with briefing before the Alaska Supreme Court regarding the right to full attorney's fees for prevailing on appeal because AS 47.30 respondents were entitled to state-paid representation just as much as criminal defendants, the State defended on the grounds that the State was obligated to pay for such appeals by the Public Defender Agency and therefore PsychRights should not be awarded full fees.[11] The State is bound by this and it necessarily extends to challenges to the effectiveness of representation through *habeas corpus* or Civil Rule 60(b) motions the Supreme Court held were the proper routes to challenge the effectiveness of representation in *Wetherhorn.*[12]

The court should advise non-prevailing AS 47.30 respondents of the right to have the State pay for an appeal and a challenge to the effectiveness of their representation.

[11] The relevant pages of this brief is attached hereto as Exhibit C. The entire briefing is available on the Internet at http://psychrights.org/States/Alaska/CaseFour.htm#Wetherhorn_I.
[12] 156 P.3d at 384.