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Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

Editor's Note

BY SANDY BLAKE

This issue highlights recent appellate decisions addressing mental health issues, an important new law that takes aim at the deficiencies in mental health services for youth across Illinois, and an informal attorney general opinion on authority to prosecute a petition for involuntary admission (commitment). One of the appellate cases is an interesting discussion of confidentiality issues in mental health law. This is particularly timely in light of the January 15 webcast on that very issue that was presented by the ISBA Bench & Bar Section and the ISBA Privacy and Information Security Law Section and co-sponsored by this section. For those who missed the live presentation, the one-hour program is well worth the time!

Also, save the date of May 13 for our half-day live program during Mental Health Month. Details will be forthcoming.■

Governor Signs Children & Young Adult Mental Health Crisis Act

BY AMBER KIRCHHOFF

Early this past fall, Illinois Governor JB Pritzker signed the Children & Young Adult Mental Health Crisis Act into law. The legislation took aim at many of the deficiencies in mental health services for youth across Illinois.

Illinois will be the first state in the country to require private insurance coverage of treatment approaches that involve a multi-disciplinary team of mental health professionals to enable early recovery for psychosis, bipolar disorder, and other serious mental health conditions for children and young adults under the age of 26. These approaches historically have only been offered through public programs, but are proven through clinical research as some of the best-practice treatment models available to prevent future disability.

The legislation also makes it easier for a child with Medicaid coverage who is experiencing a mental health issue but who does not have a full-blown diagnosis of a mental health condition to get treatment. This is important for youth who may have experienced violence, trauma, or

Continued on next page

Governor Signs Children & Young Adult Mental Health Crisis Act

CONTINUED FROM PAGE 1

other circumstance that created a need for counseling or other mental health services but did not lead to a clinical diagnosis.

The bill also tackles a state-funded program, the Family Support Program, for children with serious mental health conditions. The legislation expands and streamlines eligibility, strengthens the services covered by the program, and improves the lines of communication about the program between in-patient psychiatric hospital units and families.

"Early treatment of mental health conditions in children and young people in their 20s is absolutely crucial for strong brain development and ensuring success in school, work, and life. We must tackle the barriers that get in the way of access to mental health treatment in our state head-on, and this bill takes a major step in that direction," says State Representative Sara Feigenholtz. "The bill does that by requiring insurance companies to do what they should be doing, while also leveraging federal funding for public programs."■

Amber Kirchhoff the former public policy manager at Thresholds and the current director of state public policy and governmental affairs at the Illinois Primary Health Care Association.

State's Attorneys Exclusively Authorized to Present Civil Commitment Petitions

BY KATHLEEN WATSON

According to an informal opinion sought by the Kane County State's Attorney's Office, the state's attorney is exclusively authorized by statute to present petitions for civil commitments proceedings on behalf of the people of Illinois. Therefore, private legal counsel for a hospital is precluded from doing so.

The Illinois Attorney General's opinion, dated September 27, 2019, was drafted by Lynn E. Patton, chief of the Public Access and Opinions Division. It interprets chapter 3 of the Mental Health and Developmental Disabilities Code, 405 ILCS 5/3-100 et seq. (West 2018). Section 3-701 expressly authorizes any person 18 years of age or older to "execute" a petition asserting that another person is subject to involuntary admission on an inpatient basis, which then "shall be filed" with the court. "Prior to the expiration of the initial involuntary commitment order, if the facility director believes that the recipient of an order continues to be subject to involuntary admission on an inpatient basis, a new petition may be filed." 405 ILCS 3-813. Relevant sections of the Act also state that "nothing herein contained shall prevent any party, including petitioner, from being represented by his own counsel," 405 ILCS 3-101(a) (West 2018). "Any community mental health provider or inpatient mental health facility …may be represented by counsel in court proceedings if they are providing services or funding for services to respondent," 405 ILCS 3-101(b) (West 2018). However, none of these provisions state who may present such petitions to the court.

Section 3-101(a) of the Mental Health Code states in plain and unambiguous language that the "State's Attorneys are to represent the interests of the people of the State of Illinois in all involuntary commitment proceedings," 405 ILCS 3-101(a). The Act further sets out the roles of state's attorney and private legal counsel in admission, transfer, and discharge

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proceedings. "The State's Attorney shall attend such proceedings either in person or by assistant, and shall ensure that petitions, reports and orders are properly prepared." The opinion notes that the Counties Code expressly provides that it is the "duty of each state's attorney to commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal … in which the people of the State or county may be concerned" 55 ILCS 5/3-900s(a)(1). The opinion states "State's Attorneys acting on behalf of the people of Illinois, are therefore dually charged with determining whether to proceed with petitions for civil commitment, and if they choose to do so, proving by clear and convincing evidence that the person at issue requires involuntary commitment for his or her own safety and that of all residents." The opinion concludes that "entrusting the presentation of civil commitment petitions to private legal counsel for other interested parties would be antithetical to the affirmative duty of the State to protect the interests of both the subjects of civil commitment proceedings and the public at large."■

Kathleen Watson is a Kane County assistant state's attorney.

Case Summary: *In re L.K.*, 2019 IL App (1st) 163156 (Opinion Filed November 27, 2019)

BY ANN KRASUSKI

This case concerns the state's failure to bring evidence of the sole allegation in its petition, the judge nevertheless committing L.K. to a state facility, collateral legal consequences of mental health orders, and the right to confidentiality in court documents.

In *L.K.*, the appellate court reversed a commitment order where the respondent represented himself *pro se* and elicited the state's expert's opinion that he did not meet the criteria for commitment that was alleged in the petition. ¶¶ 12, 30. The state's petition alleged that L.K. had a mental illness and that because of his illness he was unable to provide for his basic physical needs so as to guard himself from serious harm without the assistance from family or others, unless treated on an inpatient basis. ¶ 1. At trial, however, the state's expert testified only that L.K. should be involuntarily committed because he was reasonably expected to engage in conduct placing himself or another in physical harm or a reasonable expectation of physical harm unless the respondent was treated on an inpatient basis, though the petition did not state this as a basis for commitment. ¶ 9.

Despite the petition's assertion that L.K. could not care for his basic physical needs, the state's expert, Dr. Valdes, thought L.K. *could* care for his basic needs, as L.K. elicited during his *pro se* cross-examination. ¶¶ 12, 30. L.K. asked Dr. Valdes whether he was lacking as far as providing for his own basic needs. ¶ 12. Dr. Valdes testified "'*I'm not sure that that's necessarily one of the things that we are trying to imply here.* It's more of a threat to others.'" ¶ 12, emphasis in original. L.K. then asked, "'Oh, okay. So you don't think that I have a problem providing my basic needs?" Dr. Valdes answered, "*I think you can probably manage on your own, yes.*'" ¶ 12, emphasis in original. The trial court found L.K. subject to commitment on both bases – harm (not alleged in the petition) and needs (alleged in the petition but contrary to Dr. Valdes's opinion). ¶ 14.

On appeal, the state conceded that the trial court erred in committing L.K. to a mental health facility on theories not alleged in the petition, but argued that there was enough evidence in the record to support commitment based on L.K.'s purported inability to care for his needs. ¶ 28. The appellate court disagreed, finding that a commitment order must be supported by an expert medical opinion based on clear and convincing facts. ¶ 29. As there was no expert opinion that L.K. could not care for his basic physical needs, and only the contrary expert opinion that he could care for his needs, the appellate court reversed the order. ¶ 30.

As there are two previous opinions about whether the state's proof matched its pleadings, (*In re Moore*, 292 Ill. App. 3d 1069 (1st Dist. 1997)*; In re Joseph S.*, 339 Ill. App. 3d 599 (1st Dist. 2003)), this case is perhaps more noteworthy for the way it addresses the collateral consequences exception to the mootness doctrine, and because it takes care to protect L.K.'s privacy after the state appended a document containing L.K.'s full name in the appendix to its appellate brief.

The appellate court applied the collateral-consequences exception to L.K.'s appeal, as L.K. argued that a commitment order would adversely affect him in seeking employment and "pointed to specific concerns related to licensure in professions, which the record supports finding the respondent has pursued." ¶¶ 21-26. The state had argued against application of the collateral-consequences exception, contending that the same restrictions on L.K.'s ability to pursue professional careers stemming from a commitment order would also result from a subsequent order for involuntary medication that L.K. did not appeal. ¶ 22. The state attached to its brief this unredacted court order for medication that included L.K.'s full name. ¶¶ 22, 24.

L.K. moved to strike the medication order from the state's brief. ¶ 22. The appellate court granted his motion and additionally

placed the state's brief under seal, relying on Supreme Court Rules 341 and 364 that require briefs to identify a recipient of mental health services in appeals under the Mental Health Code by their first name and last initial or, by initials only when the recipient has an unusual first name or spelling. ¶¶ 22-24. The court also reiterated that the record on appeal cannot be supplemented by attaching documents to the appendix of a brief. ¶ 24.

Regarding the effect of a subsequent medication order on the question of the collateral consequences of a commitment order, L.K. argued that a medication order does not carry the same implications as a commitment order: A commitment order stems in part from the state's police authority to protect society from dangerous persons while a medication order stems solely from the state's *parens patriae* power to care for its residents. ¶ 25. L.K. also argued that a reversal of a commitment order invalidates a medication order. ¶ 25. In the *John N.* case, the respondent appealed both a commitment order and a medication order. ¶ 25 *citing John N.*, 364 Ill. App. 3d 996 (2006). After reversing the commitment order, the *John N.* appellate court reversed the medication order as well, reasoning that the medication order was dependent on the respondent receiving treatment on an inpatient basis at a mental health facility. ¶ 25. Thus, because the court "'reversed the order concerning the respondent's involuntary admission, he will no longer be receiving *** treatment at the mental health facility and therefore no longer qualifies as a 'recipient of services' for involuntary administration of medication.'" ¶ 25, *citing John N.*, 364 Ill. App. at 997; *In re Carol B.*, 2017 IL App (4th) 160604, ¶ 67. The L.K. appellate court similarly found, "Despite the lack of a current appeal, respondent could seek to invalidate the order for medication based on an order invalidating the order for involuntary admission." ¶ 26. And, "to the extent respondent's 'consequences' arise from the order from medication, as the state argues, respondent is 'threatened with an actual injury' traceable to the order for admission that is 'likely to be redressed by a favorable decision' in this case." ¶ 26, *quoting Alfred H.H.*, 233 Ill. 2d at 361. Based on the above reasoning and on the consequences from the commitment order on licensure in professions L.K. has pursued, the court applied the collateral consequences to review (and reverse) L.K.'s commitment order. ¶ 26.

This case also underscores that one should not underestimate the abilities of a person because of their diagnosis of mental illness. Despite Dr. Valdes's description and opinion of L.K., L.K. did well representing himself. Dr. Valdes had described L.K. as showing "a lot" of negative symptoms of schizophrenia such as social withdrawal, catatonic behavior, and selective mutism. ¶ 8. Dr. Valdes testified that L.K. spent most of the day in bed in a fetal position covered from head to toe with a blanket and that he covered his face while eating meals. ¶ 8. L.K. had never talked to or responded to Dr. Valdes's questions. ¶ 8. In contrast to Dr. Valdes's depiction of L.K., the court had permitted L.K. to represent himself, and he skillfully did so. L.K. not only elicited Dr. Valdes's opinion that he could indeed care for himself, leading to the reversal of the commitment order, but asked questions forcing Dr. Valdes to admit L.K. was not "not showing necessarily acute abnormal behavior." ¶ 11, 12.

On cross-examination, L.K. asked Dr. Valdes "if he would say that [L.K.] was 'normal right now or would you say I'm symptomatic.'" ¶ 11. Dr. Valdes replied that at that point L.K. was symptomatic because he was not able to acknowledge his behavior before and during his hospitalization and "'that you are not able to address that as having been abnormal.'" ¶ 11. L.K. asked if 'his "behavior was 'abnormal right now?'" ¶ 11 "Dr. Valdes answered, 'As we are speaking right now, you're saying? No, at this point [you] are not showing necessarily acute abnormal behavior.'" ¶ 11. During L.K.'s cross-examination, Dr. Valdes also conceded that L.K. was not conducting himself in a way that was acutely disorganized. ¶ 11.

In sum, the appellate court reversed the commitment order the trial court had entered despite the state's failure to prove the sole basis alleged in the petition. ¶ 30.■

Ann Krasuski is a staff attorney with the Illinois Guardianship and Advocacy Commission, West Suburban (Hines) Office.

Case Summary: *In re H.P.*, 2019 IL App (5th) 150302 (Opinion Filed July 1, 2019)

BY BARBARA GOEBEN

In this 5th district case, the court reversed an involuntary medication order, specifying for the first time that pursuant to the Mental Health Code (405 ILCS 5/2-107.1(a-5)(4)(D) (West 2014)) the "State must present evidence of known interactions between multiple medications in order to satisfy its statutory burden of demonstrating that the benefits of the proposed treatment outweigh the harm." ¶¶ 1-2.

Randolph County had entered an involuntary treatment order authorizing the Chester Mental Health Center to administer twelve medications (six primary medications, as well as six alternatives) on H.P., a Chester patient. ¶ 5. In his appeal, H.P. argued that 1) the state failed to prove by clear and convincing evidence that benefits of the proposed treatment outweighed its potential risks because the doctor failed to testify about the benefits of using more than one antipsychotic medication, and that he did not present any testimony concerning potential drug interactions; 2) the state failed to prove that testing also ordered with the medication was essential for the safe treatment; 3) the order did not conform to the evidence presented concerning the medication dosage and the treatment administrators; and 4) that he was provided with ineffective assistance of counsel. ¶¶ 2, 27.

Mootness

Since the 90-day order expired, the court initially addressed mootness, finding that the "public interest" exception to mootness applied. ¶16-20. To support this qualification, it noted that the issue of the risks of drug interactions appears to be of first impression. ¶18. The court also held that this case is not a sufficiency of evidence appeal, noting "H.P.'s claims relate to the type of evidence the state must present to meet its statutory burden, rather than the weight of the evidence presented. This court has recognized that such questions have 'broader implications than most sufficiency-of-the-evidence claims.' " ¶17.

Principles of Law Concerning Involuntary Medication and Standard of Review

As a preliminary matter, the court noted that "Courts [have] recognized that any involuntary mental health treatment involves "a 'massive curtailment of liberty.' The involuntary administration of psychotropic medications is particularly intrusive. This is so for three reasons. First, involuntary medication constitutes an unwanted "intrusion[ ] into [a patient's] body and mind."…..Second, psychotropic medications carry a risk of "significant side effects."….. Third, there is a potential for such medications to be misused—that is, there is a danger that they might be prescribed primarily to manage or control patients rather than to treat their illnesses." (citations omitted). ¶20.

Because involuntary medication "implicates fundamental rights", the court reviewed this appeal under the plain error doctrine and rejected the state's forfeiture arguments. ¶ 27. Further, since this matter was determined on the case's merits the court then declined to consider H.P.'s ineffective assistance of counsel arguments. ¶ 27.

Risks vs. Benefits of the Ordered Medication

One element the state must prove is that the proposed treatment's benefits outweigh its risks. 405 ILCS 5/2-107.1(a-5)(4)(D) (West 2014). ¶ 23. As for the benefits element, the court found that the doctor's testimony that each medication would treat different symptoms is sufficient proof concerning the drugs' benefits. ¶ 31.

As for the risks of the interactions of multiple ordered medications, courts have recognized the importance of protecting patients from the risks of interactions, but that no prior Illinois cases have addressed this precise question of what evidence the state must present of the risks arising from the medications' interactions. ¶ 35. The fifth district appellate court held that evidence of the potential risks from medications interactions must be presented: "We believe that the possibility of harm resulting from drug interactions is a crucial consideration in determining whether the benefits of a proposed course of treatment outweigh the risk of harm. Without pertinent information on the possibility of such harm, courts do not have adequate information to make a meaningful determination. Thus, we now hold that the state must provide trial courts with expert testimony addressing known drug interactions in order to meet its statutory burden of proving that the benefits of the proposed treatment outweigh the harm." ¶ 36

In this case, because the state did not ask the doctor about any known interactions between the requested medications that he wanted to administer simultaneously, the state did not meet its burden. ¶ 36

Testing and Other Procedures

At trial, no testimony was presented as to the specific tests requested, the frequency of those tests or why they were essential for monitoring. ¶ 40 In the court's determination, the doctor's testimony that H.P. would be monitored by blood tests, was insufficient proof the requested tests were essential for the safe and effective administration of the treatment. ¶ 40 The state itself conceded this point on appeal. ¶ 40.

Dosages and Individuals Authorized to Administer Medications

The court found that at trial the state also presented insufficient evidence of the medications' dosage or who would administer them, also warranting reversal.

¶ 42. Though the Code does not require the state to present this evidence, the court reaffirmed its precedent, including that of *In re Christopher C.,* (2018 IL App (5th) 150301, ¶¶ 23-24) and found that the state must present some evidence of the medication dosages and who would administer it. ¶¶ 43-47. Further, having the petition "made a part of the record" at trial at the state's request, is insufficient to prove this, for it was not specifically entered into evidence for purposes of establishing the requested dosages. ¶ 45. As for who is to administer the treatment, the state at trial presented evidence for two doctors to administer the medication, but not for the others, therefore not satisfying this requirement. ¶ 48.

Order reversed.■

Barbara Goeben is a staff attorney with the Illinois Guardianship and Advocacy Commission, Metro East Regional Office in Alton.

Appellate Update

BY ANDREAS LIEWALD

Garton v. Pfeifer, 2019 IL App (1st) 180872 (Opinion filed May 13, 2019)

In this case, the appellate court held that both an attorney, who improperly issued subpoenas for mental health records, and a mental health provider, who improperly complied with the subpoenas, may be held liable for violations arising under the Mental Health and Developmental Disabilities Confidentiality Act.

Background

Plaintiff Ryan Garton filed claims against attorney Jeremy Pfeifer (Pfeifer), Linda Garton (Linda), and North Shore University Hospital (NorthShore) for alleged violations of the Mental Health and Developmental Disabilities Confidentiality Act (Act) (740 ILCS 110/1 *et seq.* (West 2014)). ¶1. This matter involved subpoenas that were issued by Linda's attorney, Pfeifer, and complied with by NorthShore, during post dissolution of marriage proceedings. ¶3.

Without filing a motion or notice of motion, or obtaining a court order, Attorney Pfeifer issued a subpoena to NorthShore seeking plaintiff's mental health records (initial subpoena). NorthShore responded to the subpoena by delivering the requested records to the presiding judge. ¶3. The circuit court ordered that the copies of plaintiff's mental health records that had been produced to the circuit court be sealed. ¶4. Pfeifer stated on the record that he had not seen or reviewed the mental health records in any way. ¶3. The circuit court ordered Pfeifer to reissue a subpoena to NorthShore with notice to plaintiff, and afforded plaintiff and NorthShore an opportunity to file written objections to an *in camera* inspection of plaintiff's records. ¶4. Pfeifer then faxed a copy of the initial subpoena to NorthShore, along with a copy of the circuit court's order (reissued subpoena). ¶5. NorthShore responded to the reissued subpoena by sending plaintiff's mental health records to Pfeifer's law office, even though the subpoena directed that the records be delivered to the circuit court. ¶5.

During a hearing on whether to release plaintiff's mental health records, the report of proceedings reflected that Pfeifer handed the judge an opened envelope containing plaintiff's mental health records. ¶5. Pfeifer stated that he did not look at them. ¶5. Pfeifer explained that his law partner had opened the envelope, saw that the contents related to plaintiff, and did not look any further. ¶5. The circuit court then heard arguments on whether the records might contain relevant information, whether any privileges against disclosure applied, and whether the records should be released for an *in camera* inspection. ¶5. The court denied Pfeifer's request to release plaintiff's mental health records and request that the circuit court conduct an *in camera* inspection of the records, and ordered the records sealed. ¶5.

Subsequently, plaintiff filed a three-count amended complaint, asserting identical violations of the Act by each defendant. ¶6. Plaintiff alleged that Linda and Pfeifer had "devised a scheme to publicly disclose [plaintiff's] health records," and that Linda "authorized Pfeifer to issue the initial subpoena. ¶6. He asserted that the initial subpoena was "fraudulently issued" by Linda and Pfeifer, did not contain language required by the Act, and was served without proper notice and without leave of the court. ¶6. He further alleged that NorthShore complied with the initial subpoena despite its facial deficiencies, and sent one copy of his records to the court and a second copy of his records to Pfeifer. ¶6. He alleged "on information and belief" that Pfeifer gave a copy of the records to Linda and that she read the records. ¶6. He alleged that he "has been compelled and will be compelled to spend large sums of money, including legal fees and [sic] costs to resist disclosure of the records***, has suffered and will continue to suffer extreme mental and emotional distress, and has suffered other and related personal and pecuniary losses." ¶6.

Pfeifer moved for summary judgment on count I of the amended complaint, arguing that plaintiff would not be able to prove that he was "aggrieved" under section 15 of the Act (740 ILCS 110/15 (West 2014)). ¶7. Pfeifer argued that (1) a technical violation of the Act alone did not constitute being "aggrieved;" (2) there was no evidence that anyone saw the records that the circuit court sealed and refused to review; (3) the records had no impact on the contempt judgment finding Linda not guilty; and (4) there was no evidence that plaintiff suffered any damages as a result of the issuance of the subpoena. ¶7. NorthShore's motion

for summary judgment on count III raised substantially similar arguments. ¶7. Linda's motion for summary judgment on count II asserted that she could not be held liable in connection with the subpoena because Pfeifer stated in his discovery deposition that he alone investigated whether any mental health records existed, and further stated that she did not tell him about the existence of any mental health records. ¶7. Linda further argued that there were no facts to establish that she had anything to do with the issuance of the initial subpoena and that she never saw any of plaintiff's mental health records. ¶7.

Plaintiff filed a cross-motion for summary judgment on counts I and III against Pfeifer and NorthShore, and essentially argued that a violation of the Act was sufficient to establish liability. ¶8. In his response to Pfeifer's and NorthShore's motions for summary judgment, plaintiff asserted that he had "suffered emotional and psychological injuries[.]" He supported this assertion that "he also testified in his deposition *** about the physical and psychological effect of [defendants'] violations [of the Act], including anxiety, being violently ill, throwing up, overwhelmed [*sic*] with cold sweats, headaches, feeling violated and afraid[.]" ¶8. He provided citations to the pages and lines of the transcript of his own discovery deposition, which was attached as an exhibit to NorthShore's motion for summary judgment. ¶¶ 8-9.

The circuit court granted defendants' motions for summary judgment and denied plaintiff's cross-motion for partial summary judgment. ¶9. With respect to Linda's summary judgment, the circuit court observed that there were no facts to support plaintiff's allegations that (1) Linda and Pfeifer devised a scheme to issue the subpoenas, (2) Linda authorized Pfeifer to issue the subpoenas, or (3) Linda had any knowledge that Pfeifer issued the subpoenas. ¶9. Furthermore, the court observed that there were no facts tending to show that Linda ever saw plaintiff's mental health records. ¶9. The circuit court found that there was no genuine issue of material fact as to whether Linda's conduct caused any of the damages plaintiff allegedly suffered. ¶9.

With respect to Pfeifer's and NorthShore's motions for summary judgment, the circuit court observed that the initial subpoena was improperly issued, but that the reissued subpoena "cured" any notice defects, since plaintiff's attorney was present when the court ordered the subpoena to be reissued. ¶10. The circuit court found that it was undisputed that NorthShore responded to the reissued subpoena by sending the records to Pfeifer's office rather than the circuit court. ¶10. However, the circuit court found plaintiff forfeited his claim because he did not raise any objection when Pfeifer handed an opened envelope containing the mental health records. ¶10. The circuit court further observed that plaintiff failed to produce any medical records reflecting any physical or mental injuries that he allegedly suffered as a result of the subpoenas. ¶10.

Analysis

1. The circuit court erred in its summary judgment by concluding that as a matter of law plaintiff was not entitled to recover for defendants' violation of the Act.

The appellate court stated that the Act imposes stringent protections on the disclosure of mental health records for litigation purposes, identifies who may request the records and for what purposes, and regulates how the request for disclosure should be made and handled. ¶17. Section 10(4) of the Act provides a recipient of mental health services a privilege against disclosure of mental health records in various proceedings. 740 ILCS 110/10/(a) (West 2014). ¶ 17. The appellate court cited to section 10(a) of the Act, which identifies 12 situations in which mental health records may be disclosed and specifies the procedure for disclosure. *Id.* ¶17. The appellate court held that the only situation that was potentially relevant—but ultimately was not—was section 10(a)(1), which provides that, under certain circumstances, "[r]ecords and communications may be disclosed in a civil, criminal or administrative proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense[.]" *Id.* ¶17.

The appellate court cited to Section 10(d) of the Act, which provides that no party or his attorney shall serve a subpoena for mental health records unless the subpoena is accompanied by a written court order or the written consent of the person whose records are being sought. 740 ILCS 110/10(d) (West 2014). ¶18. "No such written order shall be issued without written notice of the motion to the recipient [of the mental health treatment] and the treatment provider." *Id.* ¶18. "The circuit court must provide the parties and others entitled to notice an opportunity to be heard prior to issuing an order allowing the subpoena." *Id.* ¶18. "If the circuit court permits the subpoena to be issued, a copy of the circuit court's order must accompany the subpoena; compliance with the subpoena is prohibited if it is not accompanied by the circuit court's written order." *Id.* Finally, the subpoena:

> shall include the following language: 'No person shall comply with a subpoena for mental health records or communications pursuant to Section 10 of the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/10, unless the subpoena is accompanied by a written order that authorizes the issuance of the subpoena and the disclosure of records or communications or by the written consent under Section 5 of that Act of the person whose records are being sought.' *Id.* ¶18.

"Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act." *Id.* Section 15. ¶19.

The appellate court held that it was clear from the record that neither Pfeifer nor NorthShore complied with the Act in issuing or responding to the initial subpoena. ¶21. The appellate court held that plaintiff never introduced "his mental condition or any aspect of his services received for such condition as an element

of his claim or defense. 740 ILCS 110/10(a) (West 2014) ¶21. Although Pfeifer argued that he sought plaintiff's mental health records because those records might contain relevant information pertaining to plaintiff's credibility in a criminal contempt trial, the appellate court held that Section 10(a) does not contemplate the disclosure of mental health records for the purpose of attacking the credibility of a witness in a criminal contempt trial, and that Pfeifer advanced no statutory exemption to justify issuing the subpoena without complying with the Act. ¶ 21. The appellate court held, "clearly and unquestionably," that the initial subpoena sought records to which no exception to the privilege against disclosure applied. ¶21.

Furthermore, the appellate court held that both Pfeifer's issuance of the initial subpoena and NorthShore's response thereto were in direct violation of the act. ¶22. "The issuance of the initial subpoena by Pfeifer and NorthShore's compliance with the subpoena ignored every applicable provision of section 10(d) of the Act: (1) the subpoena was issued without a written order of the circuit court; (2) because no order was even sought, no notice of any motion seeking such an order was provided to either Ryan [plaintiff] or NorthShore; (3) because no motion had been filed, no hearing was held at which any objections could be made by Ryan or the treatment provider prior to the issuance of the subpoena; (4) NorthShore complied with the subpoena despite the requirement that the subpoena be accompanied by a written court order authorizing the issuance of the subpoena; and (5) the subpoena lacked the mandatory disclosure language required by the Act." ¶22. The appellate court held that it was clear that Pfeifer and NorthShore violated the Act by serving and responding to the initial subpoena. ¶22.

The appellate court held that it was clear that Pfeifer did not comply with the Act when he sent the reissued subpoena to NorthShore, because the reissued subpoena once again did not contain the mandatory disclosure language required by section 10(d) of the Act. ¶23. The appellate court also held that NorthShore failed to properly comply with the reissued subpoena when it delivered the subpoenaed records to Pfeifer's law office rather than to the circuit court, which completely undermined the entire purpose of the Act. ¶23. The initial and reissued subpoenas clearly directed NorthShore to deliver the subpoenaed records to the circuit court. ¶23. The appellate court held that it was clear that Pfeifer and NorthShore violated the Act by serving and responding to the reissued subpoena. ¶23.

2. Pfeifer's client [Linda] was not held vicariously liable for Pfeifer's violation of the Act.

The appellate court held that there was no evidence in the record tending to show that Linda authorized Pfeifer to subpoena plaintiff's mental health records, or that she had any knowledge that Pfeifer did so. ¶25. The appellate court held that it had no basis from which it might conclude that any genuine issue of material fact existed as to whether Linda violated the Act, and therefore affirmed the circuit court's order granting summary judgment in favor of her on count II of plaintiff's amended complaint. ¶25.

3. The plaintiff did not waive nor forfeit any of his rights under the Act by failing to raise an objection in the circuit court when the violations were initially discovered.

The appellate disagreed with the circuit court's finding that plaintiff forfeited his right to pursue a damage claim under the act. ¶28. The circuit court's explanation for its judgment was premised on the facts that (1) the circuit court allowed Pfeifer to reissue the subpoena, thereby "curing" the complete lack of a motion and notice of the initial subpoena, and (2) plaintiff effectively forfeited his claims as an aggrieved person under section 15 of the Act by failing to object in the contempt proceedings when Pfeifer handed the circuit court judge an open envelope containing plaintiff's mental health records. ¶28. Regardless of whether the order allowing the reissued subpoena "cured" any absence of a motion and lack of notice defects in the initial subpoena, plaintiff's complaint asserted that he was injured as a result of Pfeifer's issuance of the initial subpoena, which was served without a court order, prior notice, or the mandatory disclaimer language of the Act, and NorthShore's compliance with a facially noncompliant subpoena. ¶28.

The appellate court noted that it had previously found that "[n]othing in section 10(d) excuses a court order when the records are first examined by the trial judge." ¶29. "[The defendant's] subpoena violated the specific terms of section 10(d) because he served it without first obtaining a court order." *Mandziara v. Canulli,* 299 Ill. App. 3d 593, 599 (1st Dist. 1998). ¶29. The appellate court held that plaintiff was aggrieved by Pfeifer's and NorthShore's noncompliance with the Act and he allegedly suffered damages; he did not become "unaggrieved" when the circuit court ordered the reissuance of the subpoena. ¶29.

The appellate court found no support for the proposition that a person claiming to be aggrieved under the Act as a result of conduct that took place in a separate judicial proceeding must object or assert their claims in that proceeding, or that a failure to object to the noncompliance with the Act in the earlier proceeding precludes a separate action seeking redress for a violation of the Act. ¶30. The appellate court cited to section 15 of the Act, which provides, "Any person aggrieved by a violation of this Act may sue for damages, an injunction, or other appropriate relief. Reasonable attorney's fees and costs may be awarded to the successful plaintiff in any action under this Act." 740 ILCS 11/15 (West 2014). ¶31. The appellate court held that the plain language of the Act does not limit "aggrieved" to only those whose mental health records have been disclosed; the plain language of the Act is broad enough to include any injury that is directly traceable to "a violation of [the] Act." ¶31

The appellate court held that a plain reading of the Act and the *Mandziara* decision led it to find that a person aggrieved by the disclosure of mental health records in violation of the Act – whether it be a person, hospital, or any other entity – may seek relief pursuant to section 15 of the Act. ¶35. "There is no exception for a health care provider that provides the subpoenaed records directly

to the circuit court where the Act is not strictly complied with." ¶17.

4. There were material issues of fact as to whether plaintiff suffered damages that he was injured as a result of defendants' violation of the Act.

The appellate court held that neither Pfeifer nor NorthShore advanced any meaningful argument that plaintiff failed to allege or present sufficient facts to demonstrate proximate cause for violations of the Act. ¶36. Plaintiff's amended complaint alleged that he suffered injuries as a result of learning that Pfeifer had subpoenaed plaintiff's mental health records and that NorthShore had complied with the subpoena, and he testified at his deposition that he experienced emotional distress as a result of learning that his mental health records might be exposed. ¶36. The appellate court held that plaintiff had, at a minimum, established a question of fact as to whether Pfeifer's and NorthShore's violations of the Act were a proximate cause of his injuries. ¶36. The fact that plaintiff did not seek medical treatment for his conditions or identify any evidence to corroborate his testimony went to the weight of his testimony and his credibility, but did not affect the admissibility of his deposition testimony. ¶42. The appellate court noted that such testimony is routinely considered by a fact finder in the determination of liability and the assessment of damages. ¶42.

The appellate court rejected NorthShore's argument that plaintiff was required to allege a contemporaneous physical injury or impact, as the physical impact rule applies to freestanding claims of negligent infliction of emotional distress, but the physical impact rule does not apply here where the plaintiff sought damages for emotional distress that is "part and parcel of the damage that *results from* the wrong that was committed." (emphasis in original.) *Cochran v. Securitas Security Services USA, Inc.,* 2017 IL 121200, ¶¶24. ¶43. The appellate court saw no principled basis for why a person aggrieved under the Act should not be permitted to recover emotional distress damages arising out of violation of section 10(d) of the Act. ¶44.

Conclusion

The appellate court held, in sum, that plaintiff presented sufficient, competent evidence of damages in response to Pfeifer's and NorthShore's motions for summary judgment from which reasonable minds could reach different conclusions, thereby demonstrating the existence of a genuine issue of material fact. ¶45. Therefore, the circuit court's entry of summary judgment in favor of Pfeifer and NorthShore was reversed. ¶45. The appellate court further held that the circuit court erred by denying plaintiff's cross-motion for summary judgment on counts I and III of his amended complaint, as there was no genuine issue of material fact as to whether Pfeifer and NorthShore violated section 10(d) of the Act by issuing and complying with the initial subpoena. ¶45. The appellate court held that plaintiff was therefore entitled to partial summary judgment on the issue of liability for counts I and III of his amended complaint. ¶45. The appellate court entered partial summary judgment in favor of plaintiff and against Pfeifer and NorthShore on counts I and III of plaintiff's amended complaint on the issue of liability, and remanded for trial on the issues of proximate cause and damages. ¶45.

In re Christine R., 2019 IL App (3d) 180264 (Opinion filed September 10, 2019)

In this case, the appellate court reversed an order for involuntary admission and involuntary treatment when the trial court improperly removed Respondent at the commitment hearing and her attorney waived her appearance at a subsequent medication hearing. ¶1.

Background

Respondent, Christine R., was initially present at a commitment hearing. ¶4. As Respondent walked into court, she threw a file of paperwork toward the bench and was admonished by the court. ¶4. Respondent explained that she wanted to show the court paperwork she had been provided. ¶4. Respondent then asked to represent herself. ¶4. After the court questioned her, it denied her request and informed her that the public defender would represent her. ¶4.When Respondent's treating psychiatrist testified, Respondent disrupted the testimony. ¶5. The court explained to Respondent that if there was something that needed to be corrected, that when it was time, she would have an opportunity to clarify that information to the court. ¶5. As the psychiatrist continued to testify regarding neighbors' concerns about Respondent's behavior and threats toward them, Respondent interrupted. ¶5 The trial court stated that it recognized that she may have some concerns about the statements and that it will have an opportunity to hear them. ¶5. Respondent was admonished by the court that it would be the last time that it would ask her to stop interrupting. ¶5. The psychiatrist then testified regarding the police and Respondent interjected regarding her version of events. ¶6. The trial court then stopped the hearing. ¶6. Respondent stated that she needed for her public defender to object. ¶6. The court stated that it was going to take a recess, that Respondent was going to go into the hallway, that she may return to the courtroom, and that if she returned to the courtroom, she would have to be quiet throughout the testimony of the doctor. ¶6. The trial court noted that Respondent was raising her voice. ¶6. Respondent stated that her public defender needed to make her objections noted on the record and that her public defender should listen to her client. ¶6. The court requested for Respondent to be taken outside so that the proceeding may move forward. ¶6. When Respondent was taken out of the courtroom, the trial court stated that it wanted to make sure her agitation level was taken care of. ¶6.

After a recess was taken, the trial court stated that based upon its observation of Respondent and the proximity of her to the nurse, to the doctor, to the Court, and how aggressive her mannerisms had been inside of the space, it asked Respondent to be removed from the courtroom. ¶6.

When Respondent did not return to the hearing, the trial court asked Respondent's attorney whether she could adequately represent Respondent in her absence. ¶7. The attorney responded she

could, and the State moved to proceed in Respondent's absence. ¶7. The court agreed, finding that, based on its observations and "being on the receiving end of [Respondent's] communications and physical actions since the entry of the court," it was in Respondent's best interest that she remained absent. ¶7. The trial court stated it was difficult to proceed with Respondent's outbursts and excused her presence from the hearing. ¶7.

The hearing and the psychiatrist's testimony continued in Respondent's absence. ¶8. No other witness testified, and Respondent's counsel waived closing argument. ¶9. The trial court found Respondent subject to involuntary admission and ordered her committed for a 90-day period. ¶9.

The court recessed and when it reconvened it immediately proceeded to a hearing on the petition for involuntary administration of medication. ¶10. At the onset of the hearing, Respondent's absence was discussed. ¶10. The State asked the court to take judicial notice of the previous hearing and the statements made concerning Respondent's removal. ¶10. Respondent's counsel asked the court to waive Respondent's presence, which the court did. ¶10. The hearing took place in Respondent's absence. ¶10. After the psychiatrist testified again, the court granted the petition for administration of medication. ¶11, 12.

Analysis

1. The appeal was heard under two exceptions to the mootness doctrine.

The appellate court held that this case was moot since the orders for involuntary admission and involuntary treatment have expired. ¶17. However, procedures to be followed in hearings concerning involuntary treatment of mental health services are "matters of a public nature and of substantial public concern." ¶17; citing *Mary Ann P.,* 202 Ill. 2d 393, 402 (2002). The appellate court held that this case fell under the public interest exception and under the capable of repetition yet avoiding review exceptions. ¶17. The evidence also established that Respondent had a long history of mental illness and had been hospitalized on numerous occasions; thus, it was likely that she would face involuntary commitment and administration of psychotropic medications in the future. ¶17.

2. The trial court violated Respondent's right to be present at the hearings.

Section 3-806 of the Mental Health and Developmental Disabilities Code (Mental Health Code) (405 ILCS 5/3-806 (West 2018)) affords a respondent the right to be present at any proceedings. ¶19. Under section 3-806, there are two exceptions to the requirement of the respondent's presence where: (1) respondent's counsel waives his or her presence and there is a clear showing to the court that the respondent's presence would subject her to a "substantial risk of serious physical or emotional harm; or (2) respondent's attorney informs the court that the respondent refuses to attend the hearing. 405 ILCS 5/3-806(a)-(b) (West 2018). ¶19. A respondent may lose her right to attend a commitment hearing if her conduct is so disruptive as to necessitate that she be excluded. *In re Barbara H.,* 288 Ill. App. 3d 367 (1997). ¶19.

In order to determine whether the trial court violated Respondent's right to be present at the commitment hearing and subsequent medication hearing, the appellate court held that it was necessary to determined whether either of the statutory exceptions to the right be present applied to this case. ¶20. Since neither party argued, and the record did not indicate, that Respondent refused to attend the hearing, the appellate court reviewed the proceedings to determine whether the remaining statutory exception was invoked so as to waive Respondent's right to be present. ¶20. The appellate court found that it was apparent from the outset that Respondent intended to fully participate in the proceedings. ¶20. At the commencement of the commitment hearing, Respondent informed the court that she wanted to represent herself, because she did not believe appointed counsel was prepared. ¶20. The appellate court also found that it was apparent that Respondent disrupted the proceedings by interrupting the court, the prosecutor, and a witness. ¶21. The appellate court noted that she made hand and/or finger gestures and spoke loudly, and this behavior continued despite the trial court's warning to Respondent about her behavior and the court's explanation that Respondent would have the opportunity, through counsel, to present evidence. ¶21.

The appellate court found that the removal of Respondent was not improper. ¶22. Her behavior disrupted the proceedings, interrupted the witness, and ignored the court's directives to remain quiet. ¶22. The appellate court cited *In Illinois v. Allen*, 397 U.S. 337, 343 (1970) (a disruptive criminal defendant may be removed from the proceedings with his behavior; defendant is allowed to return once he is able to behave. ¶22.

The appellate court found that although the trial court acted properly in removing Respondent, it erred when it failed to allow her the chance to return to the proceedings or make a record with the mandatory findings as to why her return did not take place. ¶23.

The appellate court held that the Mental Health Code requires that a respondent's absence at a civil commitment hearing is proper when the respondent's attorney waives her right to be present and the trial court finds by "a clear showing" that the respondent's presence would cause her a "substantial risk of serious physical or emotional harm." ¶24; 405 ILCS 5/3-806(a) (West 2018). The appellate court found that Respondent's counsel did not expressly waive her client's presence; rather, counsel stated she could adequately represent an absent Respondent. ¶24. The appellate court found that it could not assume or infer from the circumstances that Respondent was offered the chance to return as the record was silent regarding what transpired between her removal and the resumption of the commitment proceeding. ¶24; citing *People v. Carlson,* 221 Ill. App. 3d 445, 447 (5th Dist. 1991), which held that court cannot make presumptions regarding respondent's absence from commitment hearing.

The appellate court found that the record did not demonstrate a clear showing that Respondent would be subjected to serious physical or emotional harm if she attended the hearing. ¶25. Rather, the trial court noted Respondent's proximity to others in the courtroom and her aggressive behavior, its own observations of her behavior, and that the trial court itself was subjected to Respondent's "communications and physical actions." ¶25. The appellate court held that those findings were not the statutorily required findings of substantial physical or emotional harm. ¶25. The appellate court found that the trial court made no such mandated findings. ¶25. The trial court noted the presence of a nurse and two guards in the courtroom, but it never suggested any courtroom personnel expressed concern about their safety or concern that Respondent would harm herself. ¶25. The appellate court found that the record did not establish that there was any risk of harm to Respondent, to the court, or to others in the courtroom because of Respondent's presence. ¶25.

Moreover, the appellate court noted that it had no information about what happened when Respondent was removed from the commitment hearing. ¶26. The appellate court found that the trial court's admonishments never informed her that her conduct could result in permanent removal from the hearing. ¶26. To the contrary, the trial court told Respondent that she would be provided the opportunity to tell her story and clarify the evidence presented by the State, so long as she could remain quiet upon her return to the courtroom. ¶26. The appellate court found that because the record was devoid of any explanation or chronology of what happened to Respondent after her removal from the commitment hearing, it did not know if she was afforded a chance to return, as the trial court promised, or even if she wanted or was able to return. ¶26.

The appellate court distinguished this case from *In re Daryll C.,* 401 Ill. App. 3d 748, 750 (3rd Dist. 2010), when it took no issue with a civil commitment hearing taking place in the respondent's absence, where the respondent was in the courthouse washroom taking a nap, he had been informed that the hearing would proceed without him, that he could return at any time, and the court was aware that the respondent had been so informed. ¶27. Significantly, the record in *Daryll C.* indicated that the respondent was aware the hearing would proceed without him and he was free to attend at any time. *Id.* Here, however, no information was presented regarding Respondent's whereabouts or whether she wanted or was able to return to the proceeding. ¶27. The appellate court found that from the trial court's comments, it was unlikely that Respondent was free to attend the proceeding after her removal, and that the hearings continued in her absence, contrary to the statutory dictates which mandate a clear showing of substantial harm. ¶27; *In re James,* 67 Ill. App. 3d 49, 51 (1978). Consequently, the appellate court found that Respondent was denied her right to be present at the commitment hearing and reversed the trial court's involuntary commitment order. ¶27.

The reversal of the commitment order also vacated the medication order. ¶28; *In re John N.,* 364 Ill. App. 3d 996, 998 (2006). However, the appellate court addressed Respondent's argument to clarify the statutory requirements of a respondent to be present at a medication proceeding. ¶28. The appellate court found that Respondent was never provided the opportunity to be present at the medication hearing. ¶28. The State asked the court to take judicial notice of the commitment hearing and statements that were made regarding her removal from the hearing. ¶28. Respondent's attorney asked that Respondent's presence be waived "given the last hearing", the trial court accepted the waiver, and the parties proceeded on the merits of the petition in Respondent's absence. ¶28. The appellate court found that the record lacked any information regarding Respondent's whereabouts after her removal or about whether Respondent wanted to be present at the medication hearing. ¶29. Although Respondent's attorney sought waiver of her presence, she did not indicate whether Respondent wished to be presented, whether she became less agitated during the recess between proceedings, or whether Respondent was willing for the medication hearing to proceed in her absence. ¶29. Her attorney did not expressly waive her right to be present at either hearing, and the court's findings did not establish that Respondent was at risk of physical or emotional harm. ¶29. As occurred with the commitment hearing, the trial court permitted Respondent's absence in violation of the statutory requirement that she be present. ¶29.

The appellate court found that Respondent's statutory right to be present at each hearing was violated and reversed on those grounds. ¶29.■

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