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ILLINOIS STATE BAR ASSOCIATION

Mental Health Matters

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

Editor's note

By Sandra Blake

The vast majority of cases brought under the Mental Health and Developmental Disabilities Code are moot on appeal. Therefore, Illinois appellate courts first determine whether the issues they are being asked to consider qualify as exceptions under the mootness doctrine. Where collateral consequences survive the expiration or cessation of a court order that are likely to be redressed by a favorable judicial determination, appellate review is permissible. Review of an otherwise moot issue is also allowed under the public interest exception, which requires a clear showing of each of the following criteria: (1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur." *(Citations omitted)*.

This issue is dedicated to representative cases decided by the courts over the past year which have survived the courts' mootness analysis. ■

Illinois Supreme Court rules on commitment, medication cases

By Barbara Goeben

***In re Lance H.*, 2014 IL 114899, (Petition for Rehearing denied 1/26/15)**

During the course of his testimony at a hearing on a Petition for Involuntary Admission, the respondent orally requested voluntary admission to Chester Mental Health Center. The court did not address this request, and at the conclusion of the hearing, ordered respondent's continuing commitment. The Fifth District Appellate Court held that the circuit court's failure to address the respondent's request for voluntary admission violated Section 801 of the Mental Health Code.

In a recent opinion by Chief Justice Garman, the Illinois Supreme Court held that the circuit court did not commit reversible error when it did not address the respondent's request for voluntary admission and instead issued an order for the respondent's continuing commitment, thereby reversing the appellate court ¶¶ 1, 41; 405 ILCS 5/3-801 (West 2010). The decision is important for several reasons.

The Mental Health Code, precedent and policy emphasize the importance of voluntary admission to mental health patients. Section 3-801 of the Mental Health Code provides that a patient may request voluntary admission to a mental health facility at any time prior to an adjudication that he is subject to involuntary admission. 405 ILCS 5/3-801 (West 2010), ¶¶ 25, 40. If a patient wants to maintain voluntary status at a mental health facility, he is required to complete a written application for voluntary admission, which is then reviewed by the mental health facility director. If the application is denied and the party is in a state-operated facility, then the respondent can request an administrative review

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Illinois Supreme Court rules on commitment, medication cases

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of this decision.

The court noted that the respondent's power to request voluntary admission does not give the circuit court authority to rule for or against that voluntary admission. The "Mental Health Code does not vest the circuit court with authority to rule for or against voluntary admission to a mental health facility, based on an in-court request for voluntary admission during a hearing for involuntary admission." 405 ILCS 5/3-801 (West 2010), ¶¶ 25, 40. "Looking to the plain language of section 3-801, only the facility director is tasked with evaluating a request for voluntary admission..." ¶ 29

Although the court retains jurisdiction to hear objections to dismissal of a commitment petition when a respondent signs an application for voluntary admission, "[t] he court has no authority to grant or order voluntary admission." ¶ 30 "The circuit court in hearing the petition is not reviewing the facility director's decision. Instead, the court is focusing on the best interest of the respondent and the public." ¶ 30.

If the patient requests to be voluntary during a hearing, [t]he Mental Health Code similarly does not require the circuit court to *sua sponte* continue a proceeding for involuntary admission upon such a request." ¶ 40. However, "a circuit court may, in its discretion, grant a continuance to file an application for voluntary admission, upon a motion by respondent's counsel." ¶ 40.

In addition, the Supreme Court held that the Mental Health Code does not vest the circuit court with the authority to rule on a patient's application to be a voluntary patient. ¶ 40.

Therefore the respondent's counsel should be the one to move for a continuance, or a recess, in order for the respondent to complete the application for a voluntary admission. Neither the State's Attorney representing the petitioner, nor the circuit court itself has a duty to suspend the hearing pending the voluntary admission request. When representing a mental health patient in a commitment hearing, it is important to request a continuance if there is a pending application for voluntary admission.

In re James W., 2014 IL 11448, (Petition for Rehearing denied 5/27/14)

James W. was an involuntary patient at Chester Mental Health Center when a subsequent Petition for Involuntary Admission was filed. On the eve of trial, the respondent requested a jury hearing, resulting in a 96-day delay. In an opinion by Justice Karmeier, the Illinois Supreme Court addressed two issues: first, whether an eve of trial jury request is timely; and second, whether the 96-day delay between the patient's demand for the jury and the jury hearing requires reversal of the commitment order. ¶ 1

The Supreme Court reversed the Fifth District Appellate Court's opinion which found that the circuit court's setting the jury trial 96 days after the respondent's demand violates section 3-800(b) of the Mental Health Code. ¶¶ 1, 49; 405 ILCS 5/3-800(b) (West 2010).

Jury Trial Request-

The Supreme Court addressed the timing of a jury demand prior to an involuntary commitment petition. ¶¶ 28-30. Pursuant to "the Civil Practice Law, a defendant must normally file a jury demand no later than the filing of his answer. 735 ILCS 5/2-1105(a) ¶ 28. However, because the Mental Health Code does not require an answer to petitions, this limitation is not applicable in involuntary admission cases. ¶ 28. Therefore, even though James W.'s request for a jury trial did not come until the day of the hearing, his request was not untimely. ¶¶ 28, 30. The Court reaffirmed that the right to a jury trial should be liberally construed in favor of granting a jury demand in an involuntary admission case, and that the demand is timely and should be allowed where, as was the case here, it was made before either party presents opening arguments or calls any witnesses. ¶ 28.

The Importance of Objecting at the Circuit Court Level

The Supreme Court noted that it is incumbent on attorneys for both the State and the respondent to raise their objections at the circuit court level. ¶¶ 30-31 "Because neither James nor his lawyer ever questioned the scheduling or suggested that the jury trial be set more expeditiously, we cannot agree with the appellate court that James was somehow forced to choose between "foregoing

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his statutory right to ask for a jury or waiting 97 days for a hearing."… James was never asked to make any choice. He demanded a jury trial, the circuit court agreed to give him one when a jury would next be available, and he and his attorney assented to the scheduling without complaint. Had James or his attorney balked at an August trial date, the trial court may well have been willing to consider alternatives. Based on the record before us, there is no reason to believe it would have done otherwise. Had the matter been addressed promptly, when the trial court was in a position to do something about it, the ensuing litigation could therefore have been avoided." ¶ 31, n 4.

Directory Reading of Section 5/3-800(b) Requirements- The Supreme Court then upheld the circuit court order, even though the jury trial occurred later than the 15-day setting deadline, finding that "[t]he proposition that failure to strictly adhere to section 3-800(b)'s 15-day limitation does not, in itself, render the circuit court's judgment invalid is consistent with this Court's recent decision in *In re M.I.,* 2013 IL 113776 regarding the difference between statutory commands which are mandatory and those which are directory. As we explained in that case, the law presumes that statutory language issuing a procedural command to a government official is directory rather than mandatory, meaning that the failure to comply with a particular procedural step will not have the effect of invalidating the governmental action to which the procedural requirement relates. That presumption can be overcome under either of two conditions: (1) when there is negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading *(citations omitted).* Neither circumstance, however, is present here." ¶ 35

Did the Circuit Court's Actions Create Prejudice?

In reviewing the facts, the Supreme Court did consider the element of prejudice with regards to compliance with section 3-800(b)'s requirements. ¶¶ 38-40. Because of James W.'s extensive and severe history of mental illness and because the record did not indicate that the result would have been different if the trial had been held three months earlier, the Supreme Court did not find any prejudice for the respondent. ¶¶ 39-40. This opens reversal on the issue of prejudice, for those patients without an extensive and severe history of mental illness.

In re Rita P., 2014 IL 115798, Opinion filed 5/22/14

Respondent appealed a Cook County Circuit court order granting a Petition for Involuntary Treatment with psychotropic medication. The First District Appellate Court agreed with respondent that the court's non-compliance with section 3-816(a) of the Mental Health Code (405 ILCS 5/3-816(a) (West 2010)), which requires "a statement on the record of the court's finding of fact and conclusions of law", requires a reversal. ¶¶ 1, 68.

In an opinion written by Justice Theis, the Illinois Supreme Court reversed the First District Appellate Court. The ruling focused on two issues: first, whether this appeal satisfies one of the exceptions to the mootness doctrine; and second, whether the Mental Health Code's provision for a statement on the record of the circuit court's "finding of fact and conclusions of law" under section 3-816(a) of the Mental Health Code is directory, rather than mandatory. ¶¶ 1, 40. This opinion is noteworthy on the issues of mootness and the directory nature of section 3-816(a).

Mootness

The Court addressed whether this appeal satisfies one of the exceptions to the mootness doctrine. ¶¶ 29-40. Though there is no dispute that this appeal is moot because the original commitment order expired (¶ 29), the Supreme Court did clarify some aspects of mootness in relation to mental health appeals.

The Illinois Supreme Court first addressed the issue of mootness under the collateral consequences exception. In essence, the court rejected the *per se* application of the collateral consequences exception to all first time mental health orders: "Application of the collateral consequences exception cannot rest upon the lone fact that no prior involuntary admission or treatment order was entered, or upon a vague, unsupported statement that collateral consequences might plague the respondent in the future. ¶ 34. Rather, a reviewing court must consider all the relevant facts and legal issues raised in the appeal before deciding whether the exception applies. *Alfred H.H.,* 233 Ill. 2d at 364. ¶ 34. Collateral consequences therefore must be identified that "could stem solely from the present adjudication." Prior "appellate court opinions that hold otherwise… are overruled." ¶ 34.

The Court then determined that it would not consider whether the collateral consequences exception applies to this appeal, because it found that the public interest exception to the mootness doctrine applies to this case. ¶¶ 36-40. For the public interest exception to apply each of the following criteria must be satisfied: "(1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur." ¶ 34. The Court determined this appeal satisfied these criteria, especially noting that this is a case of first impression. ¶¶ 36-40.

In light of this decision, in order to preserve the collateral consequences exception to a potentially moot issue on appeal, the best practice would be for the litigator to introduce as much evidence as possible of the respondent's criminal and social background. Thus, for example, if the respondent has had no prior criminal history or still has a driver's license, the collateral consequences of the mental health order is easier proven to the reviewing court.

Mandatory Versus Directory

The Supreme Court held that section 3-816(a), stating that the final orders "shall be in writing and shall be accompanied by a statement on the record of the court's finding of fact and conclusions of law," is directory. ¶¶ 42, 52. Noting that:

> "The law presumes that statutory language that issues a procedural command to a government official indicates an intent that the statute is directory. This presumption may be overcome, and the provision will be read as mandatory, under either of two conditions: (1) when the statute contains language prohibiting further action, or indicating a specific consequence, in the case of noncompliance, or (2) when the right or rights the statute was designed to protect would generally be injured by a directory reading."
>
> ¶ 44 *(citations omitted).*

Since section 3-816(b) failed to list any consequence in case of non-compliance the first condition for a mandatory reading is not satisfied. ¶ 45. Likewise, the Court found that the second condition for a mandatory reading is also not satisfied for there is "no reason to conclude that a respondent's appeal

rights or liberty interests will generally be injured through a directory reading of section 3-816(a)." ¶ 68. Specifically the Court rejected the arguments that section 3-816(a) would injure the respondent's appellate rights, liberty interest or right to notice of the circuit court's reasoning. ¶ 68.

In light of this decision, the litigator must consider prejudice when arguing about a procedural violation of the Mental Health Code; the best practice would be for the litigator to introduce as much evidence as possible to demonstrate how the procedural error affects the respondent. ■

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Appellate update

By Andreas Liewald

In re Donald L., 2014 IL App (2d) 130044, (Opinion filed 2/5/2014)

The respondent successfully appealed the trial court's failure to comply with the Mental Health Code when it allowed his doctors to administer unspecified tests ("…and other tests necessary to evaluate safe administration of medications…") and the trial court's finding that he lacked capacity to make a reasoned decision about medication.

"The trial court may not "delegate[] its duty of assessing the risks and benefits of the medication to respondent's treating physicians." ¶ 26, citing *In Val Q.,* 296 Ill. App. 3d 155, 163 (2d Dist. 2009). "The same logic applies to the administration of tests. Without specific evidence, a court is unable to determine which tests are essential to the safe and effective administration of treatment as required by the Code." "The court may not delegate that determination to the respondent's doctors by allowing them to administer unspecified tests as they see fit." ¶ 26.

The appellate court also addressed whether the trial court's finding that respondent lacked capacity was against the manifest weight of the evidence. Although the evidence showed in part that respondent knew that he had a choice about medication, the psychiatrist testified that he was unable to understand the advantages and disadvantages of medication because "his fears and false beliefs made him unable to appreciate his problems." ¶ 33. Also, respondent was involuntarily admitted, did not believe that he had a mental illness, and he did not attend group treatment as suggested. ¶ 33. Although respondent previously received several of the medications prescribed, there was a conflict of evidence on how he tolerated those. ¶ 33.

People v. Bethke, 2014 IL App (1st) 122502, Opinion filed 2/6/14

The defendant was found not guilty of first degree murder by reason of insanity in 1993. He had been in a mental health center in the custody of the Illinois Department of Human Services since then. The defendant filed a petition requesting supervised off-grounds pass privileges, which was denied by the court following an evidentiary hearing. Under the Mental Health Code, the court is required to make sufficient findings of fact and conclusions of law in relation to the denial of pass privileges after an evidentiary hearing. Merely reciting the circumstances of the crime committed while mentally ill 20 years previously does not supply the court with clear and convincing evidence that off-grounds privileges should be denied.

The cause was remanded to the trial court for the limited purpose of allowing the court to enter more specific findings of fact and conclusions of law, consistent with the requirements of Section 3-816(a) of the Mental Health Code and Section 5-2-4 of the Unified Code of Corrections. ¶ 24.

In re James W., 2014 IL App (5th) 110495, Opinion filed 5/30/14

The jury was instructed regarding three alternative criteria necessary to find the respondent subject to involuntary admission. Two of these criteria were based on outdated statutory language from section 1-119 of the Mental Health Code (405 ILCS 5/1-119 (West 2008)). Although the trial court erred in giving an instruction based on a statutory provision that had been found unconstitutional in *In re Torski C.*, 395 Ill. App. 3d 1010, 1027, 918 N.E.2d 1218, 1232-33 (2009), there was sufficient evidence to sustain the jury's verdict based on the one valid criteria for involuntary admission (basic physical needs). "Thus, the improper jury instruction given at the respondent's involuntary admission trial constituted harmless error." ¶ 41.

Deprizio v. The MacNeal Memorial Hospital Association, 2014 IL App (1st) 123206, Opinion filed 5/28/14

Confidentiality privilege under the Mental Health and Developmental Disabilities Confidentiality Act. 740 ILCS 110/1 *et seq*., was called into question in this case.

Plaintiff alleged that she suffered from a lithium overdose as a patient at MacNeal Memorial ¶ 3.

MacNeal Hospital filed a motion to compel production of all of plaintiff's mental health records, offering two arguments in support: (i) plaintiff placed her mental condition at issue by introducing her mental well-being as an element of damages; and (ii) the records were relevant because plaintiff's bipolar disorder or depression might have caused or contributed to her cognitive impairment. ¶ 8.

The trial court found that plaintiff introduced her mental state as an element of her claim and conducted an *in camera* review of all her psychiatric records from 1992-2002. ¶ 9. After reviewing the records, the trial court ordered plaintiff to produce additional records reviewed by her expert witness and other redacted portions of records. ¶ 9. Plaintiff's attorney refused to disclose these records and took a "friendly" contempt appeal. ¶ 10.

The appellate court held that where pain and suffering is an element of a claim, the exclusive means of waiving mental health confidentiality privilege is testimony by or on behalf of the recipient of mental health services about the privileged records or communications. ¶ 27. When a party has introduced his or her mental condition as an element of a claim, the court examines records or testimony *in camera* and discloses only evidence

that is relevant, probative, not unduly prejudicial, and otherwise clearly admissible. ¶ 36. Disclosure of mental health information should be kept to a minimum even when the Mental Health Confidentiality Act's privilege is waived. ¶ 37.

The appellate court held that the trial court did not err in holding that plaintiff placed her mental condition at issue and did not err in limiting disclosure of mental health records to those mentioning cognitive defects. ¶12.

The discovery orders of the trial court were affirmed. Appellate Court found that plaintiff's attorney acted in good faith to test the validity of the orders, vacated the sanction against him, and granted him 10 days after the mandate issued to comply with the orders. ¶ 42. Affirmed and remanded. ¶ 43.

In re Torry G., 2014 IL App (1st) 130709, Opinion filed 7/18/14

The respondent appealed an order authorizing involuntary administration of psychotropic medication.

Public interest exception to mootness doctrine applies to permit review of the respondent's contention whether voluntary acceptance of medication can be considered a less restrictive alternative to court-ordered involuntary medication. ¶4.

Psychiatric evidence indicated that mental health treatment that is free from compulsion is more therapeutic and effective than forced treatment. (*citations omitted).* ¶ 34. Any treatment to which a mental patient is willing to consent should be considered a "less restrictive service [ ]" than forced treatment under section 2-107.1. Thus, when a patient is willing to take some forms of psychotropic medication, but not others, and the State seeks to forcibly administer medication in the latter category, the State must first prove by clear and convincing evidence that the drugs that the patient is willing to take "have been explored and found inappropriate." 405 ILCS 5/2-107.1(a-5)(4)(F). ¶ 35. Where a respondent is willing to voluntarily take psychotropic medication, a pretrial settlement would be favored, since it would serve the ends of judicial economy as well as protecting the respondent's liberty interests and effectuating treatment. ¶ 40.

Reversed.

*In re Steven T., 2*014 IL App (5th) 130328, Opinion filed 9/24/14

Respondent successfully appealed an order for involuntary administration of psychotropic medication.

The appellate court held that "[a] patient's decisional capacity to make treatment decision for himself is based upon the conveyed information concerning risks and benefits of the proposed treatment and reasonable alternatives to treatment." *(citation omitted)* ¶ 14. "The failure to provide the respondent with information about alternative nonmedical forms of treatment amounts to reversible error." *(citation omitted)* ¶ 14. In this case, the petition did not contain any information about the alternative, nonmedical forms of mental health treatment available to the respondent, nor did the psychiatrist testify that respondent received written information about those methods of treatment. ¶ 15. It was necessary for the respondent to be provided with written information about those methods available to him so that he could make a fully informed decision about his treatment. ¶ 15.

"When seeking the involuntary testing of a mental health patient, the State must prove by clear and convincing evidence that such testing is essential for the safe and effective administration of the treatment." 405 ILCS 5/2-107(a-5)(4)(G) ¶ 16. The State did not present evidence about the necessity of the requested testing and procedures. ¶ 17. The psychiatrist simply testified that the testing would be conducted at regular intervals and would be done within a month of starting the medication. ¶ 17. "Further, the petition mentioned a nasogastric tube, yet no information about the procedure was given at the hearing, and the information in the petition simply stated that the testing and procedures were essential for the safe and effective administration of the medication" ¶ 17 "Without more than a mere conclusion that the requested testing and nasogastric tube were necessary, the State failed to provide clear and convincing evidence to administer tests and potentially the nasogastric tube. ¶ 17.

In re E.F., 2014 IL App (3d) 130814, Opinion filed 9/4/14

The respondent appealed an order for involuntary administration of psychotropic medication.

The State conceded that the order for involuntary medication must be reversed as the trial court failed to hold separate hearings on the petition for involuntary commitment and petition for involuntary medication as required by section 2-107.1(a-5)(2) of the Mental Health Code. ¶ 45.

The appellate court also reversed because the trial court order failed to specify the exact medications and dosages the providers were to administer to the respondent and the State failed to comply in providing written information to alternatives to the proposed treatment. 405 ILCS 5/2-107.1(a-5)(6). ¶ 50.

The State also failed to comply in providing written alternatives to the proposed treatment as mandated in section 2-102(a-5) of the Mental Health Code. ¶ 61.

The appellate court reversed the order for involuntary medication and affirmed the commitment order. ¶ 73.

Sherer v. Sarma, 2014 IL App (5th) 130207, Opinion filed 9/5/14, corrected 9/11/14

The plaintiff, on behalf of her deceased daughter (Sara Sherer Ott), brought wrongful death and survival actions against the defendant, Dr. Sarma, alleging he had been negligent in the care and treatment of her daughter's husband (Jacob Ott). Sara and Jacob were two of Dr. Sarma's patients. Jacob had stabbed Sara to death. ¶ 5.

Citing *Eckhardt v. Kirts*, 179 Ill. App. 3d 863 (1989), the circuit court entered a written order granting Dr. Sarma's motion for summary judgment with prejudice. ¶ 17. The circuit court held that because there was no evidence that Jacob had ever made any specific threats to harm Sara, Dr. Sarma had no duty to warn Sara that Jacob was a possible threat. ¶ 17. The circuit court further held that the fact that Sara was also Dr. Sarma's patient did "not change the duty owed her" and that to expand Dr. Sarma's duty as the plaintiff suggested "would clearly be contrary to case law and public policy." ¶ 17.

Summary judgment is affirmed. ¶ 38.

In re Estate of Mary Lou Walker, 2014 IL App (1st) 132565, Opinion filed 12/3/14

Petitioner, Mary Lou Walker, sought to vacate an order adjudicating her disabled and appointing a limited guardian of her estate and person. ¶ 1. Walker argued that she was denied effective assistance of counsel during the underlying proceedings where her court-appointed counsel, Meersman-Murphy, also served as her guardian *ad litem,* thereby creating a *per se* conflict of interest. ¶ 1.

Walker claimed that she was entitled to relief because she was denied effective assistance of counsel. ¶ 28. The appellate court

held that "effective assistance of counsel" is a constitutional right afforded to defendants in criminal proceedings. *Pinkonsly*, 207 Ill. 2d 555, 567 (2003). ¶ 28. "In contrast, guardianship proceedings are governed by statutory authority, and the Probate Act provides that the trial court may appoint counsel if it finds the respondent's interests are best served by the appointment and counsel shall be appointed upon a respondent's request. 755 ILCS 5/11a-10 (West 2010)." ¶ 28. Thus, the constitutional right to counsel and the right to "effective assistance of counsel" that are paramount in criminal proceedings are not applicable to the statutory guardianship proceedings presented here. ¶ 28. "Although Walker erroneously labels her claims as "ineffective assistance of counsel," she is really arguing that the individual appointed to represent her interests during the guardianship proceedings served in a prohibited dual role of guardian *ad litem* and counsel creating a *per se* conflict of interest." ¶ 28. "Consequently, we must determine if Meersman-Murphy simultaneously acted as both guardian *ad litem* and counsel." ¶ 28.

In affirming the trial court, the appellate court found that Meersman-Murphy never simultaneously acted as Walker's guardian *ad litem* and attorney. ¶ 30. The record reveals the trial court appointed Meersman-Murphy as Walker's guardian *ad litem* on October 17, 2011 and as her attorney on December 12, 2011. ¶ 30. Meersman-Murphy's representations as reflected in the transcripts of the proceedings establish she did not simultaneously serve as Walker's guardian *ad litem* and counsel. ¶ 30. Meersman-Murphy also did not take a position on the necessity of guardianship. ¶ 31.

In re Linda B., 2015 IL App (1st) 132134, Opinion filed 2/18/15

Section 3-611 of Mental Health Code requires that the mental health facility director file a Petition for Involuntary Admission and two supporting certificates within 24 hours of after the respondent's admission to the facility. The appellate court held that the respondent was not admitted to the facility in a legal sense pursuant to Article VI of Mental Health Code when she first entered the medical floor of the hospital because of tachycardia and severe anemia. The court made this determination despite testimony that the respondent was monitored by a psychiatrist and a sitter, who provided one-to-one supervision, throughout her stay on the medical floor in light of her prior admission to the psychiatric unit of the hospital in January and her failure to take her medications. ¶ 5. Thus, the 24-hour filing requirement of Section 3-611 was inapplicable at that point. The petition was timely as it was filed within 24 hours after it was presented to mental health facility director at hospital. Affirmed.

In re Deborah S., 2015 IL App (1st) 123596, Opinion filed 1/16/15

The trial court found that the respondent was unable to provide for her basic physical needs and ordered her hospitalized.

Citing *In re Rita P.,* 2014 IL 115798 and *In re Alfred H.H.*, 233 Ill. 2d 345 (2009), the appellate court found that the collateral consequences exception to mootness applied to review the trial court's decision. ¶ 20. The respondent argued that an involuntary admission order will affect her ability to retain or renew her driver's license. ¶ 24. She pointed out that pursuant to the Illinois Vehicle Code, although the Secretary of State would only be able to deny the renewal or retention of a person's driver's license if there is good cause to believe that person would not be able to operate a vehicle safely due to a mental disability, that such renewal or retention would not be allowed at all in cases where a person had been adjudged to be afflicted with or suffering from a mental disability. 625 ILCS 5/6-103(5), (8) (West 2012). ¶ 24. The record showed that the respondent was previously employed as a substitute mail carrier and as a driver for Walmart, and that she currently is seeking employment. ¶ 25. The record shows that the respondent has a car at her disposal. Pursuant to the provisions of the Illinois Vehicle Code, the respondent's ability to seek employment similar to that she has held in the past would be negatively impacted by the involuntary admission order in a way that differs from the impact caused solely by her mental diagnosis. 625 ILCS 5/6-103(5), (8) (West 2012), ¶ 25.

The appellate court also found that there was insufficient evidence presented that the respondent was unable to provide for her basic physical needs. Factors to be considered in determining whether the respondent can provide for her basic physical needs include whether she (1) can obtain her own food, medical care, or shelter, (2) has a place to live or a family to assist her, (3) is able to function in society, and (4) has an understanding of money or a concern for it as a means of sustenance. *In re Shirley M.,* 368 Ill. App. 3d 1187, 1194 (4th Dist. 2006), ¶ 31.

The respondent testified that she was staying at HOS, a transitional facility, she regularly ate three meals a day. ¶ 32. No evidence was presented to contradict that assertion. The weight to be accorded to an expert's opinion depends on the factual basis for that opinion, given that the opinion's validity hinges on the reasons for it (*In re Winters,* 255 Ill. App. 3d 605, 609 (2d Dist. 1994), and here, the expert's opinion regarding the respondent's ability to obtain her own food does not appear to be based upon facts. ¶ 32. The same can be said about the expert's opinion that the respondent would not be able to obtain her own medical care. ¶ 33. The expert expressed concern regarding potential ramifications of untreated diabetes, as well as the respondent's potassium levels. ¶ 33. However, no evidence was presented that the respondent currently suffered from diabetes. ¶ 33. The respondent also was administered one dose of treatment for potassium and her level was raised to "low normal." ¶ 33.

Although the expert testified that HOS staff informed him that the respondent sat in her car on extremely hot days and refused water, which he believed could lead to heat stroke, he acknowledged that he did not know whether the air conditioning was on in the car during that time, and no evidence was presented regarding whether the respondent seemed to be in any physical distress on those occasions. ¶ 34.

Although it is unclear where the respondent would live upon discharge, not having a place to live is not a reason to confine a person in a mental health facility. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). ¶ 35. "We also observe that it has been held that a person is free to live on the street if she chooses to do so." *In re Long,* 237 Ill. App. 3d 105, 110 (1992), ¶ 35.

In relation to the respondent's ability function in society, the expert testified that HOS staff reported that the respondent believed that staff and residents at the facility were plotting against her. ¶ 33. These delusions, however, were the basis in finding the respondent suffered from a mental illness, and mental illness alone is insufficient to support involuntary admission. *In re Jakush*, 311 Ill. App. 3d 940, 944 (4th Dist. 2000), ¶ 36. The expert did not provide an opinion regarding the respondent's understanding of money. ¶ 38.

In re Kurtis C., 2015 IL App (3d) 130605, Opinion filed 4/7/15

After the respondent voluntarily admitted himself to a hospital for mental health treatment, the admitting physician filed a petition for the involuntary administration of psychotropic medication ¶ 1. Prior to a hearing on the petition, the respondent indicated his desire to waive counsel and represent himself. *Id*. "The court never addressed respondent nor questioned him about his request to proceed *pro se*." ¶ 4. "Instead, the court gave the State an opportunity to respond." *Id*. The prosecutor stated that she wished to call the respondent's psychiatrist to testify regarding his request. *Id*. Based on the psychiatrist's testimony, the court found that the respondent was not competent to represent himself and ordered the respondent's attorney to continue representing him. ¶ 5. Following a hearing, the court entered an order for the involuntary administration of medications set forth in the petition.

The appellate court held that "[w]hen a respondent indicates his desire to represent himself, the trial court is obligated to determine whether he has the capacity to make an informed waiver of counsel." ¶ 24; 405 ILCS 5/3-805 (West 2012); *In re Lawrence S.*, 319 Ill. App. 3d 476, 480-81 (2d Dist. 2001). "In making such a determination, the trial court must ask the respondent questions concerning his mental ability, intelligence, and understanding of the basic purpose of counsel." ¶ 24; *In re Michael F.*, 2011 IL App (5th) 090423; ¶ 23; *Lawrence S.*, 319 Ill. App. 3d at 481. A court commits error if it rules on a respondent's request to waive counsel before making such an inquiry. ¶ 24; *Lawrence S.*, 319 Ill. App. 3d at 481; *In re Dennis D.*, 303 Ill.App. 3d 442, 448-49 (1st Dist. 1999). "Here, the trial court did not question defendant before denying his request to waive counsel and proceed pro se." ¶ 26.

"Because the trial court failed to question respondent to determine his ability to waive counsel and because the record lacks any suggestion of defendant's inability to act appropriately during the proceeding, the court committed reversible error." ¶ 26.

…and a little something extra

In re Latoya C., No. 116555

The Illinois Supreme Court denied the petition for leave to appeal and entered a supervisory order. However, the 1st District Appellate Court is directed to vacate its judgment in case No. 1-12-1477 to reconsider its judgment in light of *In re Rita P.,* 2014 IL 115798, to determine whether a different result is warranted. Although the Illinois Supreme Court reversed *Rita P.*'s 1st District holding that the trial court must make finds of fact, the 1st District Court in this case did not address the issue of the respondent's capacity, whether the benefits of the medications outweighed the harm, and whether less restrictive services have been explored.

In the Matter of the Detention of D.W. v. Department of Social and Health Services, 2014 WL 3882472 (Sup. Ct. of Washington), Opinion filed 8/7/14

Warehousing mentally ill patients in hospital emergency rooms ("psychiatric boarding") because there is not space at certified psychiatric treatment facilities is unlawful. Single-bed certifications for continued detention at non-certified hospitals were not permitted under Involuntary Treatment Act simply due to lack of beds at certified evaluation and treatment facility. ■

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

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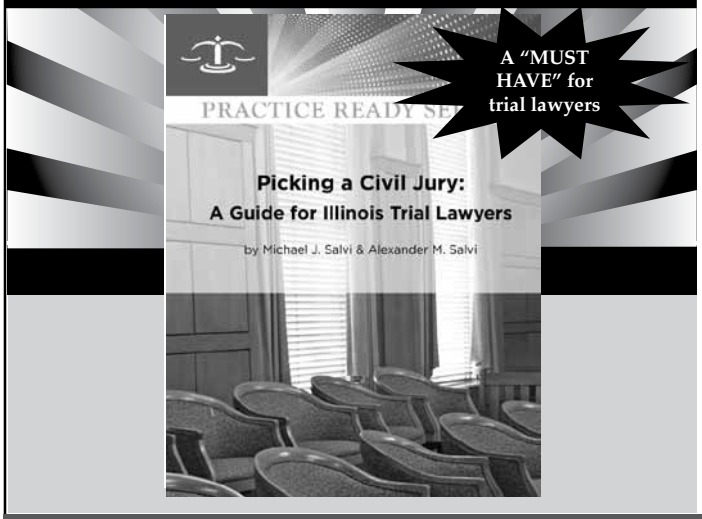

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