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Mental Health Matters

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

A final court's not-so-final words

BY MATTHEW R. DAVISON

If one were to review two of the most recent and critical Illinois Supreme Court decisions in the mental-health field, *In re Rita P.*[1] and *In re James W.*,[2] it would be easy to conclude such cases have not been fundamentally altered or modified and they are the law of the land for their respective issues. After all, across the spectrum, popular legal research platforms yield little warnings that any meaningful changes have occurred to these opinions (save some minimal distinguishing case law outside the scope of mental-health law). But do these cases still mean what they say? Practitioners must remember to consider other resources and authority outside of applicable case law or risk overlooking critical developments stemming from both decisions.

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Overview of the healthcare landscape as it relates to Medicaid managed care

BY DARA M. BASS

The ISBA Mental Health Law Section Council welcomed Samantha Olds Frey to speak at the Council meeting on April 10, 2017. Ms. Olds Frey is the Executive Director of the Illinois Association of Medicaid Health Plans (IAMHP). She has a Master's Degree in Public Policy and Administration from Northwestern University. She previously served as Speaker Michael Madigan's Human Services & Medicaid budget analysist, wherein she helped negotiate and craft legislation for Medicaid in the state of Illinois.

Ms. Olds Frey discussed many of the specific challenges associated with Affordable Care Act (ACA) changes, including Medicaid expansion and the concept of Block Grant or Per Capita Caps. She described many of the challenges to healthcare in the state of Illinois due to the

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A final court's not-so-final words

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For instance, *In re Rita P.* involved 405 ILCS 5/3-816(a) and whether the statute's language of "shall" regarding final orders and findings of fact and law was mandatory or directory. The Court reminded that, when statutory language issues a procedural command to a government official, it is presumed by law that such language is directory and not mandatory.[3] Despite the respondent's strong contention that a directory reading would significantly impair one's liberty interests, the Illinois Supreme Court went on to hold that 5/3-816(a) is directory and not mandatory.

Consequently, some may now surmise that, following *Rita P.*, circuit courts are under no obligation or inclination to ensure certain written findings are set forth in conjunction with final orders in mental-health matters. Sure enough, case law would appear to support this conclusion as *Rita P.* remains ostensibly unaffected and intact. Such analysis is incomplete, though, as it ignores specific post-*Rita P.* recommendations of the Illinois Supreme Court's Special Advisory Committee for Justice and Mental Health Planning, which resulted in the Court adopting four standardized mental-health orders that directly address the issue of written findings of fact and law. Regarding the adoption of the form orders, Justice Karmeier referenced *Rita P.*, stating "[w]e also asked the Committee to examine a related issue posed by *In re Rita P.,* 2014 IL 115798: compliance with the statutory requirement that all final orders under the Code be in writing and accompanied by a statement on the record of a trial court's findings of fact and conclusions of law."[4] Additionally, as set forth in the Court's press release, "[t]he adoption of standardized and uniform orders throughout the entire state will assist judges who routinely hear mental health cases to make clear, concise and complete findings of fact on the record. It also provides guidelines to judges who may lack experience in these types of cases."[5] Thus, by adopting uniform orders, the effect of *Rita P.* has arguably been somewhat blunted by the very same Court that issued the opinion.

Likewise, consider the Illinois Supreme Court's recent decision of *In re James W*. This case involved whether a respondent was prejudiced by the length of time (96 days), between his jury demand and the date when jury trial eventually took place. The Court answered in the negative, finding that, under the circumstances, such a delay did not prejudice the respondent before the Court.

Practitioners researching jury demands and trial issues in Illinois' mental-health jurisprudence will certainly come across the *James W.* decision, but they would be mistaken to end their inquiry on a belief that such delays are now routinely endorsed and acceptable. Tellingly, even a special concurrence in *James W*. expressed concern about a different set of circumstances where a different respondent could very well be prejudiced by similar delays in their own mental-health proceedings.[6] Like with *Rita P.*, echoes of *James W.* reverberated in the 24-member Special Advisory Committee for Justice and Mental Health Planning where a new Supreme Court Rule, Rule 293, was proposed to "clarify the time limitation jury in a mental health involuntary commitment hearing and to make that time requirement mandatory."[7]

Rule 293 was adopted by the Illinois Supreme Court on April 3, 2017 and effective immediately. It reads in full:

> **Rule 293. Jury Trial in Involuntary Admission Proceeding**
>
> Upon request by a respondent for a jury trial on whether he/she is subject to involuntary admission on an inpatient or outpatient basis in accordance with 405 ILCS 5/3-802, the court shall schedule said jury trial to commence within 30 days of the request.

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> Any continuance of the jury trial setting shall not extend beyond 15 days, except to the extent that continuances are requested by the respondent pursuant to 405 ILCS 5/3-800(b).

Ill. Sup. Ct. R. 293.

Notably, the committee comments to Rule 293 resemble the look and feel of ongoing criticisms and concerns of *James W.* but make no explicit reference to said case: "[t]his rule was adopted to clarify the time limitation that a trial court has in which to convene a jury in a mental health commitment hearing and to make that requirement mandatory. Any mental health petition for involuntary commitment not timely set for hearing is subject to dismissal."[8] The omission of *James W*. by name and citation from the committee comments is significant as it is a reason that service providers of legal research software may not formally be "flagging" *James W*. as distinguished or modified in any way – leaving some researchers ignorant about recent Illinois Supreme Court rule changes and how such rules interplay with the respective case law.

Both *Rita P*. and *James W*. are reminders to all practitioners not to cease their research and inquiries at only case law – even at the state supreme court level. What do *Rita P*. and *James W*. mean today? What are the holdings when compared and contrasted against new uniform orders and rules? When these case names are mentioned in courtrooms across counties, are they uttered for their underlying holdings or instead for their effect on procedure and rules? Perhaps, ideally, it is best to not consider either opinion in isolation, nor to consider Rule 293 and the new uniform orders in a vacuum. Instead, both cases (and their external effects) serve as reminders that a larger dialogue outside of the courthouse is available and sometimes necessary to achieve equity and guidance. ■

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1. 2014 IL 115798, 10 N.E.3d 854.
2. 2014 IL 114483, 10 N.E.3d 1224.
3. The presumption may be overcome in two ways: "(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." *In re Rita P.*, 2014 IL 115798, ¶ 44, 10 N.E.3d 854, 865–66.
4. <http://www.illinoiscourts.gov/Media/PressRel/2017/040317.pdf> (last visited May 10, 2017) (hereafter "April 3, 2017 ISC Press Release".)
5. *Id.*
6. *In re James W.*, 2014 IL 114483, ¶¶ 52-56 (Theis, J. specially concurring).
7. April 3, 2017 ISC Press Release, *supra* note 4.
8. <http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_II/ArtII.htm#293>

Overview of the healthcare landscape

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lack of a budget and a very large backlog of bills, as well as significant payment delays from the state to providers. In addition, Medicaid has not increased its fees to some providers for nearly two decades. In some parts of Illinois, Medicaid programs are not covered by any providers. Ironically, there is a decrease in mental health spending because providers are no longer providing services.

One innovation has been the "1115 waiver," which is a contract between the Federal and state governments that "waives" Federal and Medicaid requirements and gives the Federal government authority to approve experimental, pilot or demonstration projects. The goal of this project is to evaluate new policy approaches by Medicaid, including the creation of innovative service delivery systems that improve care, increase efficiency and reduce costs. There are a number of people who can be affected by the Medicaid changes including seniors, people with disabilities, low-income families, children with special needs and ACA adults. A Request for Proposals (RFP) has been issued to determine what the changes to Medicaid might be.

This RFP is likely to create a number of different changes in Medicaid for the state of Illinois. With the RFP, some likely outcomes include that there will be fewer plans in the Chicago region (though likely more plans in other regions in Illinois), and plans will operate statewide. Also, there may be new health plans in the market and a single formulary available, which means that patients will have access to fewer pharmaceuticals.

As a result of these changes, IAMHP is trying to take steps to improve this situation.

These include: finalizing a single roster for delegated credentialing, creating a more streamlined form for prior authorization requests, creating best practice guidelines for discharge planning, connecting health plans and providers to address existing concerns, working with HFD to better standardize the billing processes, and partnering with providers to collectively improve the Medicaid program. ■

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Appellate update

BY BARBARA GOEBEN

Illinois Supreme Court

In re Linda B., 119392. Respondent was held on a medical floor for 17 days before a petition for involuntary admission was filed. Issue: timeliness of filing a petition for involuntary admission. Status: Oral arguments were held on May 9, 2017. Opinion pending. 2015 IL App (1st) 132134 (February 18, 2015).

In re Benny M., 120133. The appellate court held that the trial court improperly kept Respondent shackled over Respondent's objection during an involuntary medication trial. Appellate court ruled that *Boose* hearing is required to determine the necessity of restraint during trial. Appellee's brief was due May 31, 2017. Equip for Equality may file amicus brief. 2015 IL App (2d) 141075 (November 2, 2015).

In re M.I., 2016 IL 120232 State's PLA was allowed on January 22, 2016. 2015 IL App (3d) 150403 (November 10, 2015).

In re Miroslava P., State's PLA denied September 28, 2016. Appellate court held section 3-609 of the Mental Health Code requires petitioner to send a copy of a petition for involuntary admission to respondent's foreign consulate, if respondent requests such notification. 2016 IL App (2d) 141022 (March 30, 2016).

Published Appellate Court Decisions

People v. Viramontes, 2017 IL App (1st) 142085 (January 9, 2017). First District upheld a criminal conviction, finding in part that the trial court's refusal to tender to the defendant some but not all of a witness's mental health records for six years is not reversible error.

Background

Defendant challenged the trial court's decision to limit the disclosure of a witness's mental health records. ¶ 77. Prior to trial, the defense moved to produce all of a witness's mental health records; the witness was taking psychotropic drugs and Forensic Clinical Services recently evaluated her. ¶ 77. After an *in camera* review of all of the mental health records, the trial court determined that several records were discoverable, including her 2010 admission to Cermak Hospital following an arrest; records from Forensic Clinical Services; and records from Norwegian American Hospital from August 2008. ¶ 77. The court refused to tender other mental health records, all of which were dated from 2002-2008. ¶ 77.

What mental health records are admissible with regard to a witness's testimony?

"It is well established under Illinois law 'evidence of a witness' mental condition is admissible to the extent it bears upon the credibility of the witness' testimony.'" ¶ 79 *citing, People v. Votava*, 223 Ill.App.3d 58, 74 (1991) (citing *People v. Monk*, 174 Ill. App.3d 528, (1988)).

Initially, the First District noted that mental health records, even reviewed *in camera*, can become part of the appellate record pursuant to Illinois Supreme Court rule 415(f). ¶ 80; Ill. S. Ct. R. 415(f).

The trial court's denying access of six years of mental health records was not an abuse of discretion, because the "vast majority of the records concerned depression, anxiety, and an eating disorder, none of which would be relevant to testing" the witness's credibility. ¶ 82. Conviction affirmed.

People v. Gillon**,** 2016 IL App (4th) 140801 (December 8, 2016)**.** Fourth District reversed an order finding the defendant guilty of violating probation on the ground of criminal trespass and assault; it held that the trial court improperly relied on the parties' stipulations to the DHS finding that the defendant had been restored to fitness instead of making an independent determination. ¶ 31, 33.

Background

Defendant previously pleaded guilty to two felony charges and was granted a 30-month probation. ¶ 5. The State then filed a petition to revoke the probation, due to the fact that the Defendant refused to leave a Little Ceasars Pizza and was cursing at customers. ¶ 11. On April 21, 2014 a Dr. Lo, a psychiatrist, prepared a report finding Mr. Gillon unfit to stand trial because of his inability to cooperate with counsel and his lack of understanding of the nature of the proceedings. ¶ 7. On May 5, 2014 at the fitness hearing, the circuit court declared the defendant unfit to stand trial and placed him in DHS's custody. ¶ 8.

Two weeks later on May 22, 2014 a DHS licensed clinical social worker filed a report with the court opining that the defendant was now fit to stand trial. ¶9. On June 30, 2014 the trial court then conducted another fitness hearing and accepted the parties' stipulation to the DHS report finding fitness. ¶10. At the hearing on the State's petition to revoke, conducted on July 28, 2014, after the court granted the State's petition, the defendant yelled at the judge. ¶13. The judge then noted on the record the defendant's agitation and screaming, that the defendant's yelling was heard through two locked doors and that he had to be removed from the courtroom. ¶14. At the subsequent resentencing hearing, the defendant stated he was off of his medication at the time and did not remember the Little Ceasars incident, and that he made some statements about entering a plea bargain. ¶15.

Requirement of Independent Judicial Evaluation before a Finding of Fitness

"Defendant presents three arguments on appeal. First, defendant claims the trial court erred when it found him restored to fitness in a "truncated restoration hearing" consisting only of the conclusory opinion of the Department and the parties' stipulation thereto. Second, defendant

claims the court erred when it failed to *sua sponte* reopen the issue of his fitness based upon his behavior at subsequent proceedings. And third, the court erred in failing to conduct a *Krankel* inquiry when defendant questioned his attorney's failure to adequately communicate with him." ¶17. Because the Fourth District agreed with defendant's first two contentions of error, they did not consider the third, declaring it moot. ¶17.

The appellate then reviewed the law requiring the determination of fitness; noting that due process bars the prosecution of a defendant found unfit to stand trial. ¶17. Because this issue is constitutional in dimension, "the court may not simply "rubber stamp" an expert's ultimate conclusion that a defendant has been restored to fitness." (citations omitted). ¶21. Citing both the Second District's holding in *People v. Cook*, 2014 IL App(2d) 130545, ¶15 and the Illinois Supreme Court's holding in *People v. Lewis*, 103 Ill.2d 111 (1984) the court then stated the decision for finding fitness rests with the court and not the experts. ¶23-24. Here the record indicated that the trial court relied solely on the parties' stipulation in finding that the defendant had been restored to fitness. ¶25.

The Fourth District noted that it is not stating that stipulations in fitness hearings are prohibited, but four issues give pause to the trial court's acceptance of the fitness stipulation in this case. ¶26. First, there should "be a high level of judicial scrutiny in a restoration hearing." ¶27. Namely the court should ensure that the defendant is indeed able to understand the nature of the proceedings and able to assist in his own defense. ¶27. Second, the determination of fitness occurred only two weeks after the defendant's placement at a DHS facility. ¶28. Third, the report was submitted by a licensed clinical social worker, which requires a more thorough analysis by the court than if the report was conducted by a psychiatrist or psychologist. ¶28. "Finally, defendant's behavior in proceedings conducted after he had been restored to fitness should have put the parties and the court on notice as to whether the Department's opinion was correct" ¶30. For these reasons, the trial court erred in accepting the stipulation for fitness; cause is reversed and remanded. ¶31-32.

In re Clinton S., 2016 IL App (2d) 151138 (December 2, 2016). Second District affirmed a court order for the involuntary administration of psychotropic medication that also authorized hemodialysis treatment on the respondent. ¶ 1 The respondent in his appeal raised two issues 1) that the State failed to prove by clear and convincing evidence that the benefits of the medication outweighed the harm and 2) that the trial court's order exceeded the scope of the testing and other procedures that section 2-107.1 of the Mental Health Code authorizes. ¶ 1.

Background

Elgin Mental Health filed a petition for the involuntary administration of psychotropic medication which included a request for the authority to involuntarily administer regular hemodialysis treatment. The doctor asserted that Mr. S. was suffering from end-stage kidney failure and that the hemodialysis treatment was necessary to prolong his life. ¶ 4. Mr. S., according to the doctor's testimony, initially underwent 18 of the thrice-weekly treatments, but had later begun to refuse said treatments. ¶ 9. The doctor further testified that without the treatment the psychotropic medications would cause toxic accumulations in his body that could lead to a coma. She would therefore not otherwise administer the medications (except in the limited case where the person becomes violent) unless she knew that respondent would be undergoing regular hemodialysis. ¶ 9-10. The circuit court then granted Elgin's petition, which included the authority to administer the hemodialysis treatment.

Mootness

The appellate found that this appeal qualified under both the capable-of-repetition and public interest exception to the mootness doctrine. ¶ 17. The capable-of-repetition exception applies, the Second District found, given the Respondent's mental health history and end-stage kidney failure, it is likely that he will be subjected to a petition with similar requests in the future. ¶ 17. The public interest exception also applies because cases under the Mental Health Code have not addressed whether a procedure for treatment of a physical health condition (such as kidney failure) can be ordered pursuant to section 2-107.1. ¶ 17.

The Benefits of the Medication Outweighed the Harm

The Second District held that the trial court did not err by factoring in the hemodialysis treatment in considering whether the benefits of the medication outweighed its risks. It noted "[w]e do not believe that a trial court under these circumstances is bound to consider the benefits and harm of psychotropic medication in a vacuum, without any regard for the absence or presence of treatment for a respondent's physical health condition. Rather, we believe that the better approach is for a trial court to consider the totality of the evidence in rendering its conclusion. Here, the trial court heard evidence that hemodialysis would offset a significant harm that the psychotropic medication would cause. In our view, it would be untenable to hold that this type of evidence may not be factored into a trial court's consideration of the benefits and harm of psychotropic medication." ¶ 23. Unlike a previous case, *In re Val Q.*, 396 Ill.App.3d 155 (2nd Dist. 2009), here the psychiatrist had performed a consultation with Mr. S.'s kidney specialist to inform "the trial court of the risks and benefits associated with her proposed treatment plan." ¶ 25. The trial court was not at fault then in considering that the respondent would be getting the treatment in determining whether the benefits of the medications outweighed their risks.

Whether the Trial Court is Authorized to Order Hemodialysis Treatment under sec. 5/2-107.1(a-5)(4)(G)

The Second District also held that the trial court was authorized to order hemodialysis as a procedure for the safe and effective administration of the psychotropic medication. See 405 ILCS 5/2–107.1(a–5)(4)(G) (West 2014) (authorizing the trial court to grant a petition for "testing and other procedures"

that are "essential for the safe and effective administration of the treatment"). ¶ 27.

Here, the Court found that the doctor's testimony satisfies that rationale of the prior precedent in *Donald L.*, 2014 IL App (2d) 130044, ¶ 26. (concluding that trial courts may not allow doctors to administer unspecified tests at their own discretion) insofar as it pertains to "other procedures" authorized under section 2-107.1 because without the hemodialysis treatment the respondent's end stage kidney failure would make him susceptible to toxic accumulation of chemicals from the psychotropic medication. ¶ 28.

The Second District also rejected the Respondent's argument that a health-care power of attorney or a guardianship would be the proper vehicle to order this treatment. ¶ 30. It noted "Even if one of these alternative vehicles had been used, and assuming that the individual granted such authority would have consented to hemodialysis on respondent's behalf, Susnjar would not necessarily have been adequately assured that she could safely and effectively administer psychotropic medication. We see no reason why Susnjar should not have persisted with the section 2–107.1 petition as a means of guaranteeing that respondent would receive hemodialysis." ¶ 31.

In affirming the ordering of the hemodialysis treatment, the appellate court also cited to the Illinois Supreme Court holding in *In re Mary Ann P.,* 202 Ill.2d 393, 406 (2002), which precludes the trial court from authorizing anything short of the complete treatment plan. Because the Respondent's medical and physical health conditions were inextricably linked, the psychiatrist's treatment plan addresses both of these conditions. ¶ 32.

The Second District did, however, caution that "a section 2–107.1 petition should not be used as an end-around to obtain authority for testing or other procedures to treat a respondent's physical health condition, we believe that the statute includes the necessary safeguards." ¶ 34. Judgment affirmed. ¶ 35.

PLA filed April 25, 2017.

People v. Wallace, 2016 IL App (1st) 142758 (November 26, 2016). Defendant, who was convicted following a guilty plea to first-degree murder and residential arson, filed a *pro se* post-conviction petition. Among other issues, the First District denied the petition and the defendant's argument that post-conviction's counsel failure to include defendant's mental illness as a reason for the untimeliness of the petition was reversible error, for there was no indication that petitioner's mental health condition was responsible for the petition's untimely filing. ¶33.

In re Debra B., 2016 IL App (5th) 130573 (May 31, 2016). Respondent appealed the trial court's order for the involuntary administration of psychotropic medication. Respondent argued that the Stated failed to prove by clear and convincing evidence that (1) she was suffering as a result of her mental illness; or (2) her ability to function had deteriorated since the onset of her symptoms. ¶1. She also argued that the State failed to prove that she was unable to make a reasoned decision regarding the medications because the record does not establish that she was informed about alternatives to medication. ¶1.

Although the appeal was technically moot, the appellate court considered Respondent's arguments under the public-interest exception. ¶19. Under the public-interest exception, the appellate court may consider an otherwise moot appeal if (1) the case presents a question of public nature; (2) there is a need for an authoritative determination to guide public officials; and (3) it is likely that the question will recur. ¶20, citing *In re Alfred H.H.,* 233 Ill. 2d 345, 355-56 (2009). The appellate court found that the instant case met all three criteria. Cases challenging the sufficiency of the evidence "are inherently case-specific," as a result of which such cases *usually* "do not present the kinds of broad public[-]interest issues" presented by most other mental health cases. ¶21, *Id* at 356-57. Although this case involved a challenge to the sufficiency of the evidence, the appellate court believed that the questions raised by Respondent have "broader implications than most sufficiency-of-the-evidence claims." ¶22.

The appellate court agreed with Respondent that the State failed to demonstrate that she lacked the capacity to make a reasoned decision regarding the medications because it failed to prove that she was provided with written information regarding reasonable alternatives to medication. ¶25. 405 ILCS 5/2-102(a-5) (West 2012). There was no information in the record to allow the trial court to conclude that Respondent was provided with any written information regarding alternatives to medication. ¶28. Although the petition and affidavit stated that Respondent was explained the alternatives forms of treatment, allegations and information in supporting documents are not sufficient to support an order authorizing involuntary treatment if they are not admitted into evidence. ¶30, citing *In re Bobby F.,* 2012 IL App (5th) 110214 ¶¶22-23; and *In re Phillip E.,* 385 Ill. App. 3d 278, 284 (5th Dist. 2008).

Regarding suffering, the State had to show that Respondent was experiencing physical pain or emotional distress, and had to provide some factual basis. ¶38, 44. The appellate court found that the psychiatrist did not provide any insight into why he believed her symptoms of a mental illness caused her to suffer. ¶45. He did not explain how these symptoms caused her to feel grief, anxiety, depression or any other type of emotion distress. ¶45. Although Respondent herself used the word "suffering" in her testimony, she testified that the suffering was because of her inpatient hospitalization, that she missed her daughter, and that she was concerned about her daughter's ability to properly manage her home and care for her mother and her pets. ¶47. "This is not the type of "suffering" that can be alleviated by psychotropic medication." ¶47.

Regarding deterioration, the psychiatrist offered the "somewhat conclusory opinion" that Respondent's ability to function had deteriorated. ¶48. The appellate court held that the State had to show a deterioration in the Respondent's ability to function on a basic level. ¶50. The psychiatrist admitted that Respondent was eating properly and was not threatening staff or patients. ¶52.

Although he testified that she aggravated other patients, he did not testify that she was disruptive. ¶52. The appellate court found that from the evidence, it appeared that Respondent functioned reasonably well, "at least in the environment of the facility." ¶52. The appellate court therefore concluded that the State did not show the type of deterioration in Respondent's ability to function that would support an order for involuntary treatment. Finally, although the State noted that the psychiatrist testified that Respondent had threatened an officer and expressed suicidal ideations at a jail prior to her admission, the appellate court was not persuaded. ¶53. "The statute explicitly provides that the court must find that the respondent's illness has been "marked by the continuing presence of the symptoms" justifying involuntary medication "or the repeated episodic occurrence of these symptoms." ¶53. 405 ILCS 5/2-107.1(a-5)(4)(C) (West 2012). The appellate court limited its consideration to the behavior and symptoms that the psychiatrist observed on an ongoing basis while the Respondent was hospitalized. ¶53.

The appellate court therefore held that the trial court's findings that Respondent was suffering and that her ability function had deteriorated were against the manifest weight of the evidence. ¶53.

Reversed. ¶55.

Rule 23 Appellate Decisions

People v. Durr, 2017 IL App (1st) 141899-U (February 3, 2017). The First District affirmed the circuit court's dismissal of a defendant's petition for post-conviction relief, for he failed to make a substantial showing that the trial counsel was ineffective for not investigating his mental health issues and failing to request a fitness hearing.

Background

Defendant filed a *pro se* petition for post-conviction relief--though he pled guilty to his criminal charge-- alleging among other matters, counsel's failure to raise his mental status at trial. Post-conviction counsel filed a supplemental post-conviction petition alleging ineffective assistance of counsel because of the trial counsel's failure to investigate and obtain the defendant's medical history and request a fitness hearing even though the defendant was previously hospitalized for hearing voices and was taking Zyprexa. ¶ 7.

The circuit court, in granting the State's motion to dismiss the post-conviction petition, made the following observations: 1) the defendant's "supporting evidence did not establish that the defendant was unfit on the day he pled guilty because that evidence predated his guilty plea"; 2) that "mental health issues did not necessarily raise a *bona fide* doubt as to an individual's fitness and the record showed that the defendant understood the court proceedings" and; 3) defendant failed to attach documents to his motion corroborating the assertion that trial counsel knew of mental impairments or that at the time of his guilty plea he was taking psychotropic medication. ¶ 11.

Ineffective Assistance of Post-Conviction Counsel

Defendant argued in part that post-conviction counsel was ineffective because of the failure to attach the corroborating documents. ¶ 18. The First District denied this argument noting that the trial court record cited post-conviction counsel's difficulty in obtaining some of the medical records and did obtain the IDOC medical records, therefore the presumption that counsel provided reasonable assistance is not rebutted. ¶ 19.

Ineffective assistance of defendant's trial counsel for failure to investigate mental issues and by not requesting a fitness hearing

Defendant also argued that trial court counsel was ineffective for failing to investigate his mental health issues and for failing to request a fitness hearing. ¶ 23. The First District also rejected this argument. It noted that "the fitness to plead guilty and mental illness are not synonymous." ¶ 27. The court then explained that the key question is whether the defendant could understand the proceedings, not whether he was mentally ill for "[T]he existence of a mental disturbance or the need for psychiatric care does not necessitate a finding of *bona fide* doubt since '[a] defendant may be competent to [to plead guilty] even though his mind is otherwise unsound.' " ¶ 27 *citing, People v. Hanson*, 212 Ill.2d 212, 224–25 (2004).

Though "the defendant alleged that he had difficulty understanding his trial counsel, the judge, and the court proceedings on the date he pled guilty, these assertions are rebutted by the record." ¶ 30. "The transcript from the plea shows that the defendant was able to understand the proceedings and participate. He responded in a coherent and appropriate manner to all of the trial court's questions concerning his understanding of the plea agreement. At the end of the hearing, when asked by the trial court whether he had any questions, the defendant, in no uncertain terms, stated that he did not." ¶ 30.

That even though the defendant may have had mental health issues at the time he plead guilty, he has not shown that at the time of his guilty plea he did not understand the nature and purpose of the proceedings and his inability to assist in his defense. ¶ 30. For these reasons, the First District found that the defendant had not made a substantial showing that he was prejudiced by the trial counsel's alleged failures and therefore the claim of ineffective assistance of counsel must fail; the trial court properly dismissed the post-conviction petition. ¶ 31. Judgment affirmed. ¶ 32.

***Phifer v. Gingher*,** 2017 IL App (3d) 160170-U (January 18, 2017; Motion to publish as opinion allowed March 30, 2017). The Third District affirmed the court finding the plaintiff's counsel in contempt for refusing to comply with the court's order requiring the production of plaintiff's mental health records in discovery, for the order does not violate the Mental Health and Developmental Disabilities Confidentiality Act.

Background

Plaintiff's complaint sought damages for "great pain and anguish both in mind and body" stemming from a car accident. ¶ 2. Citing privilege under the Mental Health and Developmental Disabilities

Confidentiality Act, the plaintiff resisted defendant's discovery requests for plaintiff's mental health records. ¶ 2. Following an *in camera* review of plaintiff's mental health records, the court ordered plaintiff to produce the records; plaintiff's counsel refused and requested to be held in indirect civil contempt in order to facilitate appellate review of the discovery ruling. ¶ 3. At issue is whether "plaintiff waived her therapist/recipient privilege under the Act by placing her mental health at issue in this case." ¶ 24.

Whether the plaintiff waived her privilege under the Mental Health and Developmental Disabilities Confidentiality Act.

Currently, "the case law provides that party may waive his or her statutory privilege by introducing his or her mental health condition through 'pleadings, answers to written discovery, a deposition, in briefs or motions, in argument before the court, or by stipulation.'" ¶ 25, quoting *Reda v. Advocate Health Care*, 199 Ill.2d 47, 61 (2002). However, as the Illinois Supreme Court in *Reda* held, "a neurological/physical injury such as a stroke and/or other brain damage does not *necessarily* create psychological damage or automatically place the plaintiff's mental health at issue." *Reda*, 199 Ill.2d at 57 ¶ 25.

The Third District held that this case differed from *Reda*, because in response to interrogatories, the plaintiff "affirmatively stated she was claiming "*psychiatric, psychological* and/or emotional injuries" as a result of this occurrence. (Emphasis added.)." ¶ 29. Also, during deposition she described injuries "to include anxiety in addition to memory loss, difficulty multitasking, headaches, frequent episodes of crying, and irrational fears interfering with her ability to drive or ride in a car and feel safe in the area where she lived." ¶30. Thus "the trial court correctly concluded the records at issue are relevant, probative, and not unduly prejudicial as required under the Act." ¶ 32.

The Court also rejected the plaintiff's counsel argument that they stepped back from this claim: absent "any agreed order, stipulation, or document of record confirming plaintiff's decision to abandon damages based on the psychiatric, psychological and/or emotional injuries addressed by defendant's interrogatory" the claim is still alive. ¶¶ 34-35. Order affirmed.

People v. Klein, 2016 IL App (2d) 141133 (December 9, 2016). Second District upheld a conviction for unlawful possession of a weapon by a felon, even though the trial court did not hold a fitness hearing. ¶1. This despite the fact the purpose of the police call from the defendant's relatives was for an involuntary mental health commitment, and that the police department took the defendant into custody with the intention of getting him mental health treatment. ¶13. The defendant asked that this issue of fitness, not raised at trial, be review under the doctrine of plain error. ¶31. The Second District held that since the trial court did not make a finding of bona fide doubt as to the defendant's fitness to stand trial, the defendant was not entitled to a fitness hearing. ¶37. Judgment Affirmed. ¶40.

Special Concurrence:

"PRESIDING JUSTICE SCHOSTOK, specially concurring:

> Although I concur with the ultimate disposition in this case, I write separately to draw attention to the unfortunate circumstances that this case presents. It is obvious that the defendant's parents were desperately in need of obtaining mental health treatment for their son, the defendant, and never called the sheriff's department in order to facilitate an arrest. However, with their son's lack of cooperation and refusal of treatment at the mental health facility, the situation ultimately resulted in an arrest.
>
> In light of the defendant's mental health issues and other facts of this case, I find troubling the State's decision to prosecute the defendant on such evidence. Nonetheless, based on the controlling case law, I agree with the majority that the defendant's conviction must be affirmed." ¶¶ 41-43.

People v. Burks. 2016 IL App (1st) 152581-U (November 1, 2016). First District held that a personality disorder may count as a mental illness for purposes of involuntary commitment of a person found not guilty by reason of insanity. ¶ 1. Also, the First District upheld as not against the manifest weight of evidence the circuit court's holding that the defendant could reasonably expect to physically harm herself or others. ¶ 1.

Personality Disorder as a Qualifying Mental Illness

In her appeal of the order denying her petition for conditional release from DHS, Ms. Burks argued that she no longer qualifies for DHS involuntary admission because she only suffers from a personality disorder. ¶ 32 (She initially entered DHS custody on a finding of NGRI on three counts of homicide. ¶ 9.) The First District acknowledged that though the Illinois Supreme Court in *People v. Williams*, 38 Ill.2d 115, 123, held that a personality disorder cannot constitute a mental defect for purposes of the insanity defense, the Supreme Court subsequently clarified that personality disorders may qualify as grounds for involuntary commitments. *People v. Lang*, 113 Ill.2d 407 (1986). ¶ 3.

The Court noted "We find the reasoning of *Lang* fully applicable here. Because Mia's personality disorder substantially impairs her "emotional process, judgment, behavior, [and] ability to cope with the ordinary demands of life," (*Lang,* 113 Ill.2d 453), it qualifies as a basis for continuing Mia's involuntary commitment under section 5–2–4 of the Unified Code of Corrections, if, because of the personality disorder, the court should "reasonably expec[t][her] to inflict serious physical harm upon h[er]self or another." 730 ILCS 5/5–2–4(a–1)(B) (West 2014)." ¶ 35.

Risk of Harm Criteria

Though Ms. Burks had no documented violent behavior since 1997, she still displayed similar anti-social tendencies

(such as provoking others, violating DHS rules and credit card scams) that precipitated the homicides. The First District determined that the evidence therefore supports the finding that if discharged, the circuit court could reasonably expect Ms. Burks to act in antisocial ways and that will provoke others, which will cause Ms. Burks to act violently; thereby continuing to satisfy this commitment criteria. ¶ 38. Judgment Affirmed. ¶ 40-41.

In re Teresa B. 2016 IL App (1st) 151278-U (September 27, 2016). First District held that appeal of involuntary admission order satisfied neither the "public interest" nor the "capable of repetition" exception to the mootness doctrine.

With regards to the "capable of repetition" exception, this exception "tests for the reasonable likelihood that the "respondent will *personally be subject* to the same action again." (citations omitted). ¶ 18. Here, the First District found that "While the issues raised on appeal are likely to recur for future respondents in involuntary commitment hearings, in regard to Teresa herself, she does not make even a bare assertion she may again be personally be subject to an involuntary commitment hearing, and we decline to independently speculate on her situation. As both elements are necessary, this exception does not apply." ¶ 19. Therefore it is not sufficient to argue that a mental health patient will experience the same events again, but that the same respondent will experience the same issues.

As for the "public interest" exception, the First District also did not find mootness, for "we find no need to render an authoritative decision on the issue of impeachment of a police officer by use of a police report" because of the settle law on the issue. ¶ 33.

Interesting Point: "The constitutional right to confront witnesses applies in civil mental health involuntarily commitment hearings." citing *Vitek,* 445 U.S. at 494." ¶ 33.

People v. Anderson, 2015 IL App (1st) 150095-U (August 31, 2016). First District upheld the denial of Mr. Anderson's petition for a conditional release, finding that the circuit court's decision was not against the manifest weight of evidence. Though the two state's witnesses argued for continued hospitalization, Mr. Anderson, a resident at Elgin after a NGRI on the offense of burglary of a place of worship, argued that the denial of his petition was improper because he no longer met the statutory requirement for continued inpatient commitment. "Specifically, defendant notes that both doctors testified that he does not have a history of violence and that his mental illness has never caused him to physically hurt himself or others. Moreover, both Dr. Malis and Dr. Echevarria categorized defendant's future risk of inflicting harm upon himself and others to be low. Because neither the statute nor the constitutional guarantees of due process permit the commitment of harmless mentally ill individuals (730 ILCS 5/5–2–4 (a–1) (B) (West 2012); *Bethke,* 2014 IL App (1st) 122502, ¶ 18; *Robin,* 312 Ill.App.3d 716; *Hagar,* 253 Ill. App.3d 41), defendant argues that the court was required to grant his petition for conditional release" ¶ 30.

Noting the defendant's various past statements either disavowing his need for medication and/or having a mental illness and the defendant's non-compliance with medication when not hospitalized that resulted in potentially dangerous and criminal behavior, the First District found that the evidence that the defendant is still in need of inpatient services is not against the manifest weight of evidence. ¶ 32. This evidence in fact proves that he is likely to "engage in dangerous behavior and inflict injury on himself or others if he were to be released." ¶ 32.

The Court also found that though the ability to comply with a supervised off-grounds pass is not stated as a factor in consideration of denial of petition for conditional release, circuit courts can nevertheless consider it under 730 ILCS 5/5-2-4(g)(12): "any other factor or factors the Court deems appropriate." ¶ 34-35.

Other Litigation

B.H. v. Sheldon, 88 C 5599 (federal case regarding care of DCFS wards). An amended and revised DCFS BH implementation plan was filed in September 2016. Contained in the plan was a section concerning DCFS wards who are in psychiatric facilities beyond medical necessity (BMN). The following is the language concerning this project which should start in Nov. 2016:

> The Expert Panel requested that DCFS identify a target group of one hundred (100) children and youth from Cook County who are in psychiatric hospitals beyond medical necessity in order to determine their specific service and support needs and develop an approach to better care for and serve them. The parties and the Expert Panel agree that the target group shall initially include children and youth from Cook County who are in psychiatric hospitals and determined to be beyond medical necessity. The parties and the Expert Panel will evaluate whether to add additional children and youth, including youth in residential treatment facilities ready for discharge, as the project is developed and operationalized.
>
> Fifty (50) youth with whom the caseworker has been assessed to have a strong relationship will be assigned coaches. These coaches and caseworkers will be authorized to purchase and tailor services to meet the needs of the youth. The child and family teams will include everyone important in the youth's life, including the caseworker, the coach, providers, family, mentors, caregivers, clinicians, and the youth. A comparison group of fifty (50) will also consist of youth who have a strong relationship with the caseworker, but the caseworker

will not be assigned a coach. Instead, the children will receive services as usual with no expanded array of intensive evidence-based services beyond what is customarily available. A second comparison group will be fifty (50) BMN youth who are assessed not to have a strong relationship with their caseworker and their outcomes will be tracked as part of the evaluation. The program will be evaluated by the B.H. Experts by tracking proximal and distal outcomes. Children and youth will be selected from the actual population in beyond medical necessity status during the time the project is operational. ■

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

Letter from the Chair

BY JOSEPH T. MONAHAN

Welcome to the June edition of Mental Health Matters. We are so fortunate to have an engaged community of professionals willing to contribute articles to this publication in addition to advocating and educating our community on mental health policy issues. And of course, special thanks to Sandra Blake for her continuing efforts as editor.

As the Illinois legislative session moves forward, the Section Council continues to review, discuss and endorse various pieces of proposed legislation relating to mental health. Further, we have had the opportunity to hear presentations by passionate and knowledgeable guest speakers including Alan Mills, Executive Director of Uptown People's Law Center, a not-for-profit community legal clinic. Mr. Mills, along with a number of other attorneys and organizations represented the plaintiffs in the landmark class action case *Rasho v. Baldwin*, which challenged the inadequate mental health services provided by the Illinois Department of Corrections.


Joseph T. Monahan

Additionally, the Section Council has hosted Peter O'Brien, Sr., President and CEO of MADO Management, LP, which owns and operates a number of mental health rehabilitation facilities, as well as Kelly O'Brien, the Executive Director of the Kennedy Forum-Illinois. The Kennedy Forum is in the vanguard of efforts to address parity issues with mental health treatment.

Depending on space availability, ISBA members were invited to attend these monthly meetings in person. There was also a call-in option for those interested in attending and hearing these exceptional speakers.

Finally, our half-day CLE program on May 17 at the ISBA Chicago Regional Office featured a panel of attorneys discussing their years of experiences with outpatient commitment.

Thank you.
Joseph T. Monahan ■

Joseph T. Monahan, MSW, JD, ACSW is the founding partner of Monahan Law Group, LLC, in Chicago, which focuses its practice in mental health, confidentiality, guardianship, probate, and health care law. His clients include hospitals, outpatient mental health clinics, and mental health professionals. He may be contacted at jmonahan@monahanlawllc.com.

Mental health treatment inside the Illinois prison system and upon release from prison

BY DARA M. BASS

The Mental Health Law Section Council recently welcomed attorney Stuart Chanen to speak to the group. A partner with Valorem Law Group, as a part of his litigation practice, he represents clients in complex business disputes. He also provides criminal defense, conducts civil fraud prosecution and internal investigations. Further, he engages in employment litigation and represents plaintiffs in civil rights cases.

In the course of Mr. Chanen's *pro bono* work for Northwestern University School of Law's Center for Wrongful Convictions, he represented a defendant named Thaddeus Jimenez, who was arrested when he was 13 years old for a murder he did not commit. Mr. Jimenez subsequently spent 16 years in prison. Mr. Chanen and his team of attorneys who worked on Mr. Jimenez's case achieved exoneration and a Certificate of Innocence for Mr. Jimenez. In addition, Mr. Chanen succeeded in obtaining a $25 million verdict against the City of Chicago in favor of Mr. Jimenez. Further, Mr. Chanen achieved the release of 10 people from prison who were wrongfully convicted of rape or murder. He has obtained multiple Certificates of Innocence for clients.

Mr. Chanen has observed many clients who were wrongfully convicted leave prison with a lot of anger. Mr. Chanen shared his key principle that clients who hold onto the anger are the clients who ultimately suffer the most. Mr. Chanen's work on these cases has demonstrated to him that when young men, between 15 to 20 years old, are arrested, many of them enter prison with mental health issues.

Mr. Chanen provided some statistics regarding the general Illinois prison population and the mentally ill population within it. He explained that the prison population growth between the years 2000 and 2017 reflects neither growth nor reduction. He stated that 24 percent of the prisoners in the Illinois Department of Corrections (IDOC) are identified as a part of the prison's mental health caseload. During the 2015 fiscal year for the IDOC, 30,369 people left prison. He explained that 7,289 people on the prison's mental health caseload were released, mostly as parolees. As such, an extremely small percentage (as little as less than 1 percent) of the 24 percent which was identified as a part of the prison's mental health caseload, were given mental health placements upon their release from prison.

Mr. Chanen concluded his informative presentation by discussing some of the support groups available to exonerated individuals. He gathers that these groups may not explicitly focus on obtaining mental health services for clients but rather provide other services, which are necessary though more administrative.

Ultimately, Mr. Chanen's presentation emphasized the lack of mental health services for inmates, even among those who are identified as needing mental health treatment. He offered a valuable perspective on the lack of care this population receives upon exiting prison. ■

Dara M. Bass is an independent contractor attorney, based out of the Chicago area, who is licensed in Illinois and Missouri. She has been a member of the ISBA's Mental Health Law Committee since 2006. She may be contacted at: darabasslaw@gmail.com

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