

2014 IL App (2d) 130650-U
No. 2-13-0650
Order filed May 21, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MILENKO M., Alleged to be a Person)	Appeal from the Circuit Court
Subject to Involuntary Treatment)	of Kane County.
)	
)	No. 13-MH-93
)	
(The People of the State of Illinois, Petitioner-)	Honorable
Appellee, v. Milenko M., Respondent-)	Alice C. Tracy,
Appellant).)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff concurred in the judgment.
Justice Jorgensen specially concurred.

ORDER

¶ 1 *Held:* We reversed the trial court’s order authorizing respondent’s involuntary treatment: although respondent’s physician advised him of the risks and benefits of the proposed treatment (psychotropic drugs), he did not advise him of “alternatives to the proposed treatment”; an alternative course of psychotropic drugs set out in the petition was either part of the proposed treatment, not an “alternative,” or only one of more “alternatives.

¶ 2 Respondent, Milenko M., appeals a judgment ordering him involuntarily medicated under section 2-107.1 of the Mental Health and Developmental Disabilities Code (Code) (405 ILCS 5/2-107.1 (West 2012)). Respondent contends that the judgment must be reversed because the

petitioning physician violated section 2-102(a-5) of the Code (405 ILCS 5/2-102(a-5) (West 2012)) by failing to advise him about alternatives to the proposed treatment. We reverse.

¶ 3 On June 11, 2013, Dr. Syed Hussain of the Elgin Mental Health Center (EMHC) petitioned to have respondent involuntarily administered psychotropic drugs. In the petition, Dr. Hussain stated that he had known respondent since March 13, 2013; that he had examined respondent, reviewed his medical records, and obtained information from EMHC staff members about him; that respondent suffered from a serious mental illness, “[b]ipolar [a]ffective disorder, depressed, reverie, with psychotic features, with catatonia/stupor,” that had caused his ability to function to deteriorate; and that respondent lacked the capacity to make a reasoned decision about the proposed treatment, owing to his mental illness.

¶ 4 Paragraph 8 of the petition listed several drugs that Dr. Hussain sought approval to administer. Paragraph 9 listed two “Alternative Medication(s)” for which Dr. Hussain sought approval “[i]f a foregoing medication is not effective, and/or cannot be effectively administered.” In paragraph 12, Dr. Hussain stated that he had “explained the risks and the intended benefits of the treatment to [respondent], and also [had] provided that information in written or printed form to [him]. Nowhere in the petition did Dr. Hussain state that he had advised respondent of the risks and benefits of any alternatives to the administration of the drugs listed in paragraphs 8 and 9.

¶ 5 On June 14, 2013, the trial court held a hearing on the petition. Dr. Hussain testified about his diagnosis of respondent and the evidence upon which he based his petition. He also testified that he had given respondent written information on the risks and benefits of the various drugs that he sought to administer. He did not testify that he had provided respondent written information on any alternatives to the proposed course of medication. Respondent testified that

he did not believe that he needed the proposed treatment. The court granted the petition, authorizing the involuntary medication of respondent for up to 90 days. He timely appealed.

¶ 6 On appeal, respondent contends that the order must be reversed, because the State failed to prove by clear and convincing evidence that Dr. Hussain complied with section 2-102(a-5) of the Code. For the following reasons, we agree with respondent and reverse.

¶ 7 We note that this appeal is moot because the order has long since expired. See *In re Nicholas L.*, 407 Ill. App. 3d 1061, 1070 (2011). Nonetheless, we address the merits, because (as the State concedes) compliance with the Code is a matter of substantial public interest and the issue that respondent raises is likely to recur (*id.* at 1071). Also, as the State agrees, respondent has not forfeited his claim by failing to raise it in the trial court, as the issue concerns his fundamental interest in liberty. See *In re Katarzyna G.*, 2013 IL App (2d) 120807, ¶ 10.

¶ 8 We turn to the merits of respondent's appeal. Section 2-102(a-5) requires strict compliance. *Nicholas L.*, 407 Ill. App. 3d at 1073. "Whether there has been strict compliance *** presents a question of law that is reviewed *de novo*, but the State still bears the burden of presenting clear and convincing evidence of compliance." *Katarzyna G.*, 2013 IL App (2d) 120807, ¶ 13. Section 2-102(a-5) provides, as pertinent here, "If the services include the administration of *** psychotropic medication, the physician or the physician's designee shall advise the recipient, in writing, of the side effects, risks, and benefits of the treatment, as well as *alternatives to the proposed treatment*, to the extent such advice is consistent with the recipient's ability to understand the information communicated." (Emphasis added.) 405 ILCS 5/2-102(a-5) (West 2012). Respondent contends that the record does not show that he was ever advised in writing about the alternatives to the proposed administration of psychotropic drugs.

¶ 9 The record bears out respondent's contention. Neither the petition nor the testimony at the hearing contains any proof that Dr. Hussain provided respondent with any written advice about alternatives to the proposed treatment, much less about the side effects, risks, and benefits of any such alternatives.

¶ 10 The State contends that Dr. Hussain did satisfy section 2-102(a-5), because his petition stated that he had advised respondent in writing about both (1) his proposed first choice of drugs to administer (paragraph 8) and (2) his proposed alternative drugs (paragraph 9). The State argues that section 2-102(a-5) should be read to limit alternatives to "those alternatives being requested in court by the physician as viable options in case [the] respondent does not get effective relief from the first-choice treatment." We disagree.

¶ 11 Section 2-102(a-5) must be construed strictly against the State. *In re Barbara H.*, 183 Ill. 2d 482, 498 (1998). Under the State's reading of section 2-102(a-5), the "proposed treatment" here includes only Dr. Hussain's first choice of psychotropic drugs, while the "alternatives to the proposed treatment" would include those drugs that Dr. Hussain sought to administer as a second choice—and *only* those second-choice drugs. 405 ILCS 5/2-102(a-5) (West 2012).

¶ 12 We cannot accept this logic. First, to limit the "proposed treatment" to the petitioning physician's preferred choice of medicines, while excluding the second choice, is an implausibly narrow reading of that term. It is equally if not more reasonable to include both choices within the "proposed treatment." After all, Dr. Hussain did indeed *propose* both, albeit as alternatives. Moreover, both alternatives fit within the category of the involuntary administration of psychotropic drugs, which can plausibly be taken as the "proposed treatment." At most, the term "proposed treatment" is ambiguous and must be construed against the State.

¶ 13 Second, to limit “alternatives to the proposed treatment” to the alternatives that the petitioning physician seeks permission to administer conditionally is equally artificial. Even if the second-choice drugs could be considered among the “alternatives to the proposed treatment,” there are necessarily others. “[A]lternatives to the proposed treatment” cannot be read to mean only *some* of the alternatives, especially where, as here, those “alternatives” are generically similar to the proposed treatment. 405 ILCS 5/2-102(a-5) (West 2012). After all, “ ‘treatment’ includes more than medication.” *In re Laura H.*, 404 Ill. App. 3d 286, 292 (2010); see 405 ILCS 5/1-128 (West 2012). The State would have us limit a patient’s right to be informed to those types of treatment that the physician seeks to administer over his objection. That construction would severely tilt the process in favor of the physician and against the patient. We thus reject the State’s ground for holding that Dr. Hussain complied with section 2-102(a-5).

¶ 14 The State contends that refusing to read its proposed limitation into the statute would produce a result that the legislature did not intend, *i.e.*, requiring the physician to advise the patient in writing about all possible alternatives, whether or not they are applicable or viable under the patient’s particular circumstances. But we can avoid absurdity without restricting the patient’s right to be advised of treatment alternatives to the proposed treatment that the physician has already decided is necessary. To require information about treatments that the physician would not prefer to pursue if allowed to select more intrusive alternatives does not mean that the physician must inform the patient about every conceivable alternative, no matter how outlandish. But neither can we say that the statute allows the physician to forgo informing the patient of alternatives that the physician does not prefer. To ensure that his due process rights are met and protected, the physician or the physician’s designee must advise the recipient in writing of

alternative treatments to the extent such advice is consistent with the recipient's ability to understand the information communicated. 405 ILCS 5/2-102(a-5) (West 2012) .

¶ 15 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed.

¶ 16 Reversed.

¶ 17 JUSTICE JORGENSEN, specially concurring:

¶ 18 I agree with the majority that the State presented no evidence that Dr. Hussain complied with section 2-102(a-5) by advising respondent, in writing or otherwise, of "alternatives to the proposed treatment," and that, accordingly, we should reverse. However, I write separately to note that I would also limit the scope of the physician's requirement to encompass only those alternative treatments that fall within the reasonable standard of care for the patient's particular condition. Indeed, even if a patient can fully comprehend the information provided by his or her physician, I do not think it appropriate to suggest that the physician must inform the patient of every conceivable alternative treatment that is anything short of outlandish. Instead, the physician's burden and patient's rights should be balanced by requiring the physician to inform the patient of only those treatment alternatives that fall within the reasonable standard of care.