2013 IL App (2d) 130156-U
No. 2-13-0156
Order filed November 1, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re BARBARA D., Alleged to be a Person Subject to Involuntary Treatment	)	Appeal from the Circuit Court of Kane County.
	)	No. 13-MH-4
(The People of the State of Illinois, Petitioner-Appellee, v. Barbara D., Respondent-Appellant).	)	Honorable Kathryn D. Karayannis, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the trial court's order authorizing respondent's involuntary treatment, as the State did not show that respondent had been given proper written notice concerning alternatives to the proposed treatment: the petition itself, even if it lawfully could, did not provide such notice; such notice was required even if such alternatives were not "reasonable"; and there was no evidence that respondent could not have understood such notice.

¶ 2 Respondent, Barbara D., appeals from a judgment granting a petition for the involuntary administration of psychotropic medicine under section 2-107.1 of the Mental Health and Developmental Disabilities Code (Code) (405 ILCS 5/1-107.1 (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 her about alternatives to the proposed treatment. We reverse.

¶ 3 On January 8, 2013, Dr. Arturo Fogata, a psychiatrist at the Elgin Mental Health Center (EMHC), filed a petition to have respondent involuntarily administered psychotropic drugs. The petition alleged that Fogata had known respondent since June 10, 2008; had reviewed her medical records and examined her personally; and had spoken with EMHC staff members about her. The petition alleged further that respondent had serious mental illnesses, bipolar disorder (manic) and psychosis, that had caused a deterioration in her ability to function, in that she was unemployed and homeless. After listing the drugs that Fogata wanted to administer, the petition stated, as pertinent here (handwritten insertions are in bold):

> "12. I have explained the risks and the intended benefits of the treatment to the patient/respondent, and also have provided that information in written or printed form to the patient/respondent.
>
> ✓ Yes
>
> No
>
> 13. The patient/respondent objects to the administration of the requested psychotropic medication(s) and/or the range of dosage. However, the patient/respondent lacks the capacity to make a reasoned decision about the treatment for the following reasons:
>
> **Impaired Judgment.**
>
> 14. Other less restrictive treatment services, such as counseling, therapy, education, activities, and rehabilitation have been explored:
>
> ✓ Yes OR No

> However, such treatment services have been found to be inappropriate to treat the patient/respondent1 [*sic*] without the use of psychotropic medication for the following reasons:
>
> **Not cooperative, paranoidly** [*sic*] **psychotic, impaired judgment**"

¶ 4 On February 8, 2013, the trial court held a hearing on the petition. Fogata testified as follows. He had been the attending psychiatrist when respondent was involuntarily admitted to EMHC on June 10, 2008. Respondent was later released but, on December 1, 2012, she was readmitted involuntarily after she became "very psychotic" and reportedly assaulted her brother. Fogata had diagnosed respondent with "bipolar disorder, manic, psychotic." She suffered from delusions, including a persistent belief that she was pregnant even though tests had proved otherwise. She had refused to take her psychotropic medicine and, as a result, had become unable to care for herself. Respondent had not explained her refusal and had been uncommunicative with the staff. When she did take her medicine, her mood stabilized and her psychosis came under control.

¶ 5 Fogata testified that he was seeking permission to administer several drugs to respondent. Asked whether she had been provided written materials on the risks and benefits of these drugs, Fogata said yes. He was not asked whether respondent had been advised in writing about nondrug alternatives to the proposed treatment. Fogata testified that respondent did not have the capacity to make a reasoned decision about the proposed medication regimen, because she had no insight into her illness and she would need to keep her psychosis "in good control." Further, although less restrictive services had been provided for her, she was unlikely to stabilize without being medicated.

¶ 6 Respondent's brother, Edward Makowski, testified that, when she was released from EMHC, she would take her psychotropic medicine for a short time, then stop. When she was on her

medicine, she was easy to talk to and not combative. When she stopped, she became delusional and combative and accused people of persecuting her and stealing from her.

¶ 7 Respondent testified that she did not believe that she had a mental illness. She had not taken psychotropic medicine since 2008, when she suffered from postpartum depression. She had participated in an art-therapy group at EMHC, but, after the therapist left, she declined to participate in any other therapy groups, because she "just didn't like" them. Respondent did not want to take psychotopic drugs, because she was pregnant and they would cause "massive birth defects." She had been given "written material regarding the risks and benefits of these medications."

¶ 8 The trial court granted the State's petition to medicate respondent for a period not exceeding 90 days. Respondent timely appealed.

¶ 9 On appeal, respondent contends that the judgment must be reversed because the State did not comply strictly with section 2-102(a-5) of the Code, which, as pertinent here, states, "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 argues that the record does not show that she was ever advised in writing of the alternatives to the proposed administration of psychotropic drugs.

¶ 10 Because the order has expired, the appeal is moot. See *In re Nicholas L.*, 407 Ill. App. 3d 1061, 1070 (2011). Nonetheless, we reach the merits because compliance with the Code is a matter of substantial public interest and the issue that respondent raises is likely to recur. See *id*. at 1071.

¶ 11 We note that, although respondent did not raise the written-notice issue in the trial court, the State has not contended that the issue is forfeited. Therefore, the State has forfeited any claim of forfeiture. See *In re Katarzyna G.*, 2013 IL App (2d) 120807, ¶ 10. Moreover, as the issue concerns respondent's interest in personal liberty, we would disregard her forfeiture. See *id.*

¶ 12 Section 2-102(a-5) requires strict compliance; the lack thereof compels reversal. *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 Stater still bears the burden of presenting clear and convincing evidence of compliance." *Katarzyna G.*, 2013 IL App (2d) 120807, ¶ 13. Here, respondent notes, Fogata testified that he had advised her in writing about the risks and benefits of the drugs that he sought to administer to her, but not that he had advised her of the alternatives to being medicated. She also notes that there was no other evidence that she had been advised in writing of the alternatives to the administration of psychotropic drugs.

¶ 13 The State responds first that the petition itself satisfied section 2-102(a-5), because respondent was duly served with it and it stated that alternatives were inappropriate because she was "[n]ot cooperative, paranoidly [*sic*] psychotic, impaired judgment." We disagree.

¶ 14 Because the involuntary administration of mental health services implicates fundamental liberty interests, statutes governing the applicable procedures should be construed narrowly. *In re Barbara H.*, 183 Ill. 2d 482, 498 (1998). The State cites no authority holding that an involuntary-treatment petition by itself can satisfy section 2-102(a-5)'s requirement that a respondent be advised in writing of "alternatives to the proposed treatment." 405 ILCS 5/2-102(a-5) (West 2012)). We observe that the purpose of requiring written notice is to "provide[] a respondent with the opportunity to review the information at a time and in a manner of his choosing." *In re Dorothy*

J.N., 373 Ill. App.3d 332, 337 (2007). We cannot reconcile this purpose with allowing the State to advise a person about alternatives to involuntary medication only after the State has petitioned a court to allow that treatment. In view of the serious liberty interests at stake, the purpose of section 2-102(a-5) is slighted if the person is not informed of the alternatives promptly. Moreover, we see no undue burden on the petitioning physician from a requirement of prompt notice.

¶ 15 Even if the written-notice requirement may be satisfied solely by the petition, the State did not do so here. We again note that section 2-102(a-5) must be construed strictly against the State. *Barbara H.*, 183 Ill. 2d at 498. Under section 2-102(a-5), the physician must "advise the recipient, in writing, *of the side effects, risks, and benefits of* the treatment, as well as *alternatives to the proposed treatment.*" (Emphases added.) 405 ILCS 5/2-102(a-5) (West 2012). This language may be read to require the physician to advise the recipient about (1) the side effects, risks, and benefits of the proposed treatment; and (2) alternatives to the proposed treatment. But it may also be read to require the physician to advise the recipient about (1) the side effects, risks, and benefits of the proposed treatment; and (2) the side effects, risks, and benefits of alternatives to the proposed treatment.

¶ 16 The language at issue is ambiguous; it may be read plausibly either way. See *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 11 (2009). Therefore, under the rule of strict construction, we must choose the latter reading. Thus, even if the petition alone could have satisfied section 2-102(a-5), it would have needed to mention the side effects, risks, and benefits of the alternatives to psychotropic medication. Moreover, it would have needed to *advise* respondent, *i.e.*, "give [her] information" or provide "recommendation[s] regarding a decision or course of conduct." Webster's Third New International Dictionary 32 (1993). Yet the petition stated only that the alternatives were

inappropriate without medication because respondent was "[n]ot cooperative [and] paranoidly [*sic*] psychotic" and had "impaired judgment." Telling respondent summarily that alternatives were inappropriate because she was mentally ill fell short of informing her about, or making recommendations about, the side effects, risks, and benefits of the alternatives.

¶ 17 The State cites *In re Vanessa K.*, 2011 IL App (3d) 100545, without explanation. We find *Vanessa K.* distinguishable insofar as it is sound. There, the physician who sought to medicate the respondent testified that he wanted to administer Prolixin Decanoate (Prolixin), which the petition had not named. After talking to the respondent's attorney, the trial court "narrowed the petition" to make Prolixin the "primary medication." *Id.* ¶ 9. Both the State and the respondent herself objected, the State noting that, up until that point, the physician had not advised the respondent in writing about Prolixin. After a 10-minute recess, the physician testified that he had given the respondent oral and written information on Prolixin. (The written information was in the record on appeal.) *Id.* The court granted the petition, allowing the administration of Prolixin only. *Id.* ¶ 10.

¶ 18 The respondent appealed, contending in part that the State had violated section 2-102(a-5) by failing to advise her in writing about Prolixin's side effects, risks, and benefits. *Id.* ¶ 21. The appellate court held that the written information that the physician provided to the respondent during the hearing satisfied the statute. Id. ¶ 23. (The court appeared primarily concerned with the respondent's argument that the written information discussed only Prolixin and not the drugs that had been, but no longer were, listed in the petition.) Whatever the soundness of the court's implicit holding that section 2-102(a-5) may be satisfied as late as the hearing on the petition, the court also implicitly held that the written information provided in that case was sufficient. The court did not hold that a petition's allegations, however summary, may satisfy section 2-102(a-5). While we

question the soundness of the first implicit holding, we note that, in any event, the second implicit holding distinguishes *Vanessa K.* from the present case. That opinion does not detail the written information that the physician provided. We cannot assume that it was as slight as that provided in the petition here. Thus, we reject the State's first argument.

¶ 19 We turn to the State's second argument: that, even if it did not advise respondent in writing about the alternatives to the proposed treatment, it was not required to do so. Although section 2-102(a-5) states that a respondent must be advised in writing about "alternatives to the proposed treatment" (405 ILCS 5/2-102(a-5) (West 2012)), the State posits that "alternatives" refers only to "reasonable" alternatives, *i.e.*, those that are "effective [or] viable, or have a chance at succeeding." The State then asserts that, because the trial court credited Fogata's testimony that there were no *reasonable* alternatives to medication here, section 2-102(a-5) had never required him to advise respondent about alternatives to medication.

¶ 20 The problems with the State's argument are manifest. First, the State urges us to disregard the plain language of section 2-102(a-5) and read an exception or condition into the unambiguous requirement that the physician advise the respondent about "alternatives" to medication. 405 ILCS 5/2-102(a-5) (West 2012). The section does not say "reasonable alternatives." We may not amend a statute by reading in exceptions, limitations, or qualifications that the legislature could easily have supplied but did not. *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 510 (2006).

¶ 21 Second, as a matter of policy, the State's proposal is unsatisfactory. There is no justification for requiring the physician to inform a potential recipient about only those alternatives that the physician (or a court at a later date) deems "reasonable." If an alternative to forced medication is unreasonable, it is still important that the recipient be so told. Being left to guess whether the

physician considers the alternatives unsuitable—and, if so, why—shows insufficient respect for the "fundamental liberty interests" (*Barbara H.*, 183 Ill. 2d at 498) implicated by the involuntary administration of psychotropic drugs, or for the need to enable a respondent to make a knowing choice whether to acquiesce in treatment.

¶ 22 Third, the proposed reading of section 2-102(a-5) would allow the State to make an end run around the requirement of informing the recipient of alternatives to medication: the physician could refuse to do so and then rely on the success of the petition to validate that decision retrospectively. The petition would thus satisfy a provision that requires strict compliance, even though, up until the trial court's decision, there has been no compliance at all. We cannot imagine that the legislature intended such a result. We therefore reject the State's second argument.

¶ 23 Finally, the State contends that it did not violate section 2-102(a-5), because that section required that Fogata advise respondent about alternatives to medication only to the extent that the advice was "consistent with [her] ability to understand the information communicated." 405 ILCS 5/2-102(a-5) (West 2012). The State reasons that, because the evidence proved that respondent did not know and would not admit that she was mentally ill, and suffered from delusions, she was unable to understand any information that Fogata might have communicated to her.

¶ 24 The record simply does not support the State's contention that at no time before the hearing did respondent have "the ability to understand" any information that Fogata might have communicated about alternatives to medication. 405 ILCS 5/2-102(a-5) (West 2012). There was evidence that respondent did not *believe* what Fogata had said about her mental state and that she was delusional in some important respects at least part of that time. But it simply does not follow

from this evidence that respondent was incapable of *understanding any* pertinent information about alternatives to the proposed involuntary medication.

¶ 25 The State had the burden to prove by clear and convincing evidence that it complied with section 2-102(a-5). See *Katarzyna G.*, 2013 IL App (2d) 120807, ¶ 13. The State did not establish by clear and convincing evidence that respondent was incapable of understanding any information that Fogata might have conveyed to her about alternatives to medication. Not only did the State produce minimal evidence of any such inability, but, whatever respondent's mental illness, her testimony showed that she was aware of alternatives such as therapy, had participated in therapy to some degree, and was capable of understanding questions and responding to them. Therefore, the State failed to show that it complied with section 2-102(a-5), and the judgment cannot stand.

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

¶ 27 Reversed.