2013 IL App (4th) 130088-U

NO. 4-13-0088

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 19, 2013
Carla Bender
4th District Appellate
Court, IL

In re: TERRI M., a Person Found Subject to Involuntary Admission and Administration of Psychotropic Medication,	)	Appeal from Circuit Court of McLean County
THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellee,	)	No. 12MH416
v.	)	Honorable
TERRI M., Respondent-Appellant.	)	Rebecca Simmons Foley, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order finding respondent subject to involuntary administration of psychotropic medication is reversed where the State failed to provide respondent with the statutorily required written notification concerning alternatives to the proposed treatment.

¶ 2 Following a January 2013 hearing, the trial court found respondent, Terri M., subject to involuntary administration of psychotropic medication (405 ILCS 5/2-107.1 (West 2010)). Respondent appeals, arguing the State did not comply with section 2-102 (a-5) of the Mental Health and Developmental Disabilities Code (Mental Health Code) (405 ILCS 5/2-102 (a-5) (West 2010)) where it failed to provide respondent with written notification concerning alternatives to the proposed treatment. We agree with respondent and reverse the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On January 14, 2013, the State filed a petition for involuntary administration of psychotropic medication. The petition sought authority to administer the following four psychotropic medications to respondent for a period of 90 days: Haldol; Prolixin; Risperdal; and Depakote.

¶ 5 During the January 17, 2013, hearing on the petition, Dr. Carmen Chase, respondent's treating psychiatrist, testified she diagnosed respondent with chronic paranoid schizophrenia and moderate bipolar disorder, manic. Dr. Chase testified the benefits of the requested medications outweighed the harm. According to Dr. Chase, respondent had the ability to understand the advantages and disadvantages of the medications, but Dr. Chase was unsure whether she understood their benefits. Dr. Chase opined respondent would not be able to function in society without the medications.

¶ 6 According to Dr. Chase, respondent was notified verbally and in writing of the benefits and possible side effects of the proposed medications. After respondent read through the materials, she asked Dr. Chase if Topamax could be substituted for Depakote. Dr. Chase agreed to her request and prescribed a low dose of topiramate (generic of Topamax). However, Dr. Chase had not attempted to raise the dose due to respondent's resistance to taking medications. Dr. Chase testified topiramate may be as beneficial as Depakote if taken at the right dose and explained Topamax was not listed in the petition because "if [respondent is] willing to take it, we wouldn't need to force the medication."

¶ 7 In its January 17, 2013, order, the trial court authorized the involuntary administration of all four requested psychotropic medications for a period of 90 days. The court found the State had proved by clear and convincing evidence respondent lacked the capacity to

make a reasoned decision regarding her medications.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, respondent argues the trial court erred in granting the State's petition for involuntary administration of psychotropic medication where the State failed to prove it provided respondent with written notification concerning alternatives to the proposed treatment.

¶ 11 A. Mootness Doctrine

¶ 12 We initially note the trial court entered its order on January 17, 2013, and limited the enforceability of the order for a period not to exceed 90 days. That 90-day period has since passed. Thus, as the parties agree, this case is moot. Therefore, before we can address the merits of respondent's appeal, we must first determine whether any exception to the mootness doctrine applies.

¶ 13 An issue raised in an otherwise moot appeal may be reviewed when (1) addressing the issues involved is in the public interest, (2) the case is capable of repetition, yet evades review, or (3) the petitioner will potentially suffer collateral consequences as a result of the trial court's judgment. *In re Alfred H.H.*, 233 Ill. 2d 345, 355-63, 910 N.E.2d 74, 80-84 (2009).

¶ 14 The collateral-consequences exception to the mootness doctrine allows a reviewing court to consider an otherwise moot case because a respondent has suffered, or is threatened with, an actual injury traceable to the petitioner and it will likely be redressed by a favorable judicial decision. *Alfred H.H.*, 233 Ill. 2d at 361, 910 N.E.2d at 83. While the State argues there are no collateral consequences because respondent has been previously treated for mental illness and prescribed psychotropic medication, the record does not reflect respondent has been

previously subjected to an order for involuntary administration of medication. The collateral-consequences exception applies in situations where (1) the record does not indicate the respondent has previously been subject to an involuntary-treatment order but (2) it appears the respondent will likely be subject to future proceedings that would be adversely impacted by her involuntary treatment. *In re Wendy T.*, 406 Ill. App. 3d 185, 189, 940 N.E.2d 237, 241 (2010); *In re Joseph P.*, 406 Ill. App. 3d 341, 346, 943 N.E.2d 715, 720 (2010) (citing *In re Val Q.*, 396 Ill. App. 3d 155, 159, 919 N.E.2d 976, 980 (2009) ("The collateral-consequences exception applies to a first involuntary-treatment order.").

¶ 15 Here, respondent's medical condition demonstrates a likelihood she would be subject to future proceedings which would be adversely impacted by past involuntary treatment. Thus, we conclude the collateral-consequences exception applies. See *In re Linda K.*, 407 Ill. App. 3d 1146, 1150, 948 N.E.2d 660, 664 (2011).

¶ 16 B. Statutory Requirements

¶ 17 On appeal, respondent argues the State failed to prove by clear and convincing evidence she lacked the capacity to make a reasoned decision about the proposed treatment where she was not provided the statutorily required written information about the alternatives to the proposed treatment. We agree.

¶ 18 " 'Whether substantial compliance with a statutory provision has taken place presents a question of law, which we review *de novo*.' " *In re Nicholas L.*, 407 Ill. App. 3d 1061, 1072, 944 N.E.2d 384, 394 (2011) (quoting *In re Laura H.*, 404 Ill. App. 3d 286, 290, 936 N.E.2d 801, 805 (2010).

¶ 19 Pursuant to section 2-107.1 of the Mental Health Code, psychotropic medication

may be administered when the trial court has determined by clear and convincing evidence each of the following factors:

> "(A) That the recipient has a serious mental illness or developmental disability.
>
> (B) That because of said mental illness or developmental disability, the recipient currently exhibits any one of the following: (i) deterioration of his or her ability to function, as compared to the recipient's ability to function prior to the current onset of symptoms of the mental illness or disability for which treatment is presently sought, (ii) suffering, or (iii) threatening behavior.
>
> (C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.
>
> (D) That the benefits of the treatment outweigh the harm.
>
> (E) That the recipient lacks the capacity to make a reasoned decision about the treatment.
>
> (F) That other less[-]restrictive services have been explored and found inappropriate.
>
> (G) If the petition seeks authorization for testing and other procedures, that such testing and procedures are essential for the safe and effective administration of the treatment." 405 ILCS

5/2-107.1(a-5)(4)(A) through (a-5)(4)(G) (West 2010).

"Clear and convincing evidence" is "that quantum of proof that leaves no reasonable doubt in the mind of the fact finder about the truth of the proposition in question." *In re John R.*, 339 Ill. App. 3d 778, 781, 792 N.E.2d 350, 353 (2003). Clear and convincing evidence is considered to be more than a preponderance but less than is required to convict an individual of a criminal offense. *John R.*, 339 Ill. App. 3d at 781, 792 N.E.2d at 353.

¶ 20 Before a respondent can make a reasoned decision about medication, she first must be advised as to the risks and benefits of the proposed course of treatment. *In re Louis S.*, 361 Ill. App. 3d 774, 780, 838 N.E.2d 226, 232 (2005) (quoting *John R.*, 339 Ill. App. 3d at 783, 792 N.E.2d at 354). To that end, section 2-102(a-5) of the Mental Health Code imposes the following additional requirements:

> "If the services include the administration of *** psychotropic medication, the physician or the physician's designee shall advise the recipient, *in writing*, of [(1)] the side effects, [(2)] risks, and [(3)] benefits of the treatment, as well as [(4)] *alternatives to the proposed treatment*, to the extent such advice is consistent with the recipient's ability to understand the information communicated." (Emphases added.) 405 ILCS 5/2-102(a-5) (West 2010).

¶ 21 The State is required to present clear and convincing evidence of compliance with section 2-102(a-5). *Laura H.*, 404 Ill. App. 3d at 290, 936 N.E.2d at 805 (citing *Louis S.*, 361 Ill. App. 3d at 779-80, 838 N.E.2d at 231-232). Strict compliance with all of section 2-102(a-5) is necessary to protect the liberty interests of the mental-health treatment recipient. *In re Dorothy*

J.N., 373 Ill. App. 3d 332, 336, 869 N.E.2d 413, 416 (2007). The purpose of the written notice requirement is to allow a respondent "the opportunity to review the information at a time and in a manner of [her] choosing." *Dorothy J.N.*, 373 Ill. App. 3d at 337, 869 N.E.2d at 417. The failure to provide a respondent with written notification of alternatives to proposed treatment pursuant to the Mental Health Code "compels reversal." *Nicholas L.*, 407 Ill. App. 3d at 1073, 944 N.E.2d at 395.

¶ 22 Here, the statute is clear the State must present evidence respondent received written notification of the alternatives. *Louis S.*, 361 Ill. App. 3d at 780-81, 838 N.E.2d at 232-33. The State concedes the record is silent on this issue. Instead, the State, citing language from section 2-102(a-5) of the Mental Health Code, argues such notification was not necessary in this case because it was established respondent lacked the ability to understand the information. See 405 ILCS 5/2-102(a-5) (West 2010) (written notification of the treatment alternatives is required "to the extent such advice is consistent with the recipient's ability to understand the information communicated"). To the extent the State's argument suggests the application of a harmless-error analysis, we disagree. " '[T]he right to written notification is not subject to a harmless-error analysis' and *** strict compliance with the procedural safeguards of the Mental Health Code is necessary to protect the liberty interests involved." *Dorothy J.N.*, 373 Ill. App. 3d at 336, 869 N.E.2d at 416 (quoting *Louis S.*, 361 Ill. App. 3d at 780, 838 N.E.2d at 232).

¶ 23 We also disagree regarding the merits of the State's argument. We note determining a respondent's ability to understand treatment alternatives would seem to first require the presentation of those alternatives (see *In re Tiffany W.*, 2012 IL App (1st) 102492-B, ¶ 13, 977 N.E.2d 1183 (finding that only after respondent has been provided with written notice

could it be determined whether he lacked the capacity to make a reasoned decision)). That said, the record in this case does not support the State's position respondent did not possess the ability to understand treatment alternatives. If anything, the record reflects respondent did, in fact, possess such an understanding. According to respondent's testimony, she was willing to take Topamax, as opposed to Depakote, for the following reasons:

> "[I]t was my understanding as I was talking to another patient here that the—it was the type of medication that was still in a classification as a mood stabilizer, which I understand was important to Dr. Chase that I take a mood stabilizer, but the side effects were drastically different, and it was, you know, it could provide the same results or the benefits without the serious side effects, and keeping in mind that I do have the fibromyalgia and the chronic fatigue and the mild cognitive loss and all of the things the adult ADHD and all the other issues that I deal with, I've got to be very conscientious about all of the meds that I'm taking.
>
> And so I asked Dr. Chase about the Topamax to find out if it would be something that could be used instead of the Depakote, and she agreed to let me try it, and I did, and given some of the other circumstances or situations that have arisen since I've been here, you know, I think it's kept me calm, and I haven't noticed, you know, any negative side effects.
>
> I am kind of concerned and I want to do some more research

about the fact that Topamax may cause short-term memory loss, which I already *** have to deal with, as far as the *** head injury or whatever that I sustained that I take the Aricept for, but for right now the Topamax has seemed to be a reasonable alternative."

Moreover, Dr. Chase testified she agreed to substitute Topamax for Depakote based on respondent's request. As a result, the record rebuts the State's argument respondent lacked the ability to understand the alternatives to the medications sought to be administered.

¶ 24 In sum, the State failed to provide respondent with the statutorily required written information, *i.e.*, the alternatives of the proposed treatment. Absent its compliance with section 2-102(a-5), the State failed to prove by clear and convincing evidence respondent lacked the capacity to make a reasoned decision about the proposed treatment. See *Tiffany W.*, 2012 IL App (1st) 102492-B, ¶ 22, 977 N.E.2d 1183. As a result, the State failed to satisfy all of the necessary elements of section 2-107.1(a-5)(4) of the Mental Health Code. Accordingly, we must reverse the trial court's judgment.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we reverse the trial court's judgment.

¶ 27 Reversed.