ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF I.K.

20030131

South Central Human Service Center, Petitioner & Appellee	)	Supreme Court No. 20030131
v.	)	Stutsman County No. 2003-R-186
I.K., Respondent & Appellant	)	

APPELLEE'S BRIEF

The Respondent appeals from the
Alternative Treatment Order and
the May 8, 2003 Order Vacating Dismissal
of Honorable Mikal Simonson
District Court, Stutsman County

PLAINTIFF'S ATTORNEY
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ISSUES PRESENTED

1. Whether the appellant has shown that order vacating the dismissal of petition for continuing treatment was a manifest abuse of the trial court's discretion.
2. Whether the trial court's finding that I.K. was a person requiring treatment was clearly erroneous.
3. Whether the reference to the prescription medication Seroquel in the continuing alternative treatment order was intended as an order for involuntary treatment with prescribed medication under N.D.C.C. §25-03.1-18.1.

STATEMENT OF THE CASE
AND
STATEMENT OF FACTS

Petitioner South Central Human Services will join in appellant's Statement of the Case and Statement of Facts, subject to the following qualifications:

1. Petitioner had no advance notice that I.K. would make an oral motion to dismiss the petition on grounds that the April 28, 2003, treatment hearing was untimely. (See appellant's brief, p. 2).

2. Dr. Yabut did testify to facts relevant to determining whether I.K. was likely to suffer substantial deterioration in her physical health, and thus was a "person requiring treatment" under N.D.C.C. §25-03.1-02(11). (See appellant's brief, p. 3).

3. It is uncertain whether the continuing treatment order was intended to "require" I.K. to take Seroquel. (See appellant's brief, p. 3).

LAW AND ARGUMENT

1. THE ORDER VACATING THE DISMISSAL OF THE PETITION WAS NOT A MANIFEST ABUSE OF THE TRIAL COURT'S DISCRETION.

The order vacating the dismissal of the petition can be overturned on appeal only if I.K. makes an affirmative showing that the order was a manifest abuse of discretion, defined as an unreasonable, arbitrary or unconscionable attitude by the trial court. Kraft v. Kraft, 366 N.W.2d 450, 453 (N.D. 1985); Bjorgen v. Kinsey, 466 N.W.2d 553, 561 (N.D. 1991). Rule of Civil Procedure 60(b) is "remedial in nature and should be liberally construed and applied." Sioux Falls Constr. Co. v. Dakota Flooring, 109 N.W.2d 244, 247 (N.D. 1961); Throndset v. L.L.S., 485 N.W.2d 775, 778 (N.D. 1992). Not surprisingly, the appellant's brief does not even mention, let alone apply, these well-settled standards of appellate review; instead, I.K. attempts to evade them by misstating or ignoring the grounds on which the petitioner (South Central Human Services) properly sought relief under Rule 60(b).

Specifically, I.K. contends the petitioner's motion to vacate was used as a "substitute for appeal" to correct the mistake of law under which the court acted in dismissing the petition. Appellant's brief, p. 10. However, I.K. fails to mention that the trial judge's order to dismiss was the result of accepting her erroneous contention that the treatment hearing was untimely, and that the mistake occurred only because I.K. gave petitioner no notice of her intention to move for dismissal on that basis. The motion to vacate, which was filed the very next day, was proper because this lack of notice constituted "surprise" under Rule 60(b)(i). See Appendix, p. 15. The appellant's entire

argument on this point is a summary conclusion: "Subsection (i) [is] not a proper ground for relief." Brief, p. 9.

Moreover, the "mistake of law" alluded to by I.K. – i.e., that the dismissal should not have been granted because the treatment hearing was timely, as the governing statute was N.D.C.C. §25-03.1-31, not Section 25-03.1-22 as cited in I.K.'s motion – was properly considered by the trial court in deciding the motion to vacate. See First Nat'l Bank v. Borgen, 389 N.W.2d 789, 796 n.9 (N.D. 1986) (citing "substantial justice" and "the merit in the claim or defense" as "relevant factors a trial court may consider in exercising its discretion"). The Borgen decision also held that the court should consider "any intervening equities . . . and any other factor that is relevant to the justice of the judgment under attack." Id. In effect, the trial court ruled that I.K.'s need for treatment should be decided on its merits, and not on the basis of an erroneous procedural argument for which the petitioner was given no opportunity to prepare a rebuttal. That ruling clearly was not an abuse of the court's discretion under Rule 60(b), and I.K.'s appeal on that ground must be denied.

2. THE FINDING THAT I.K. REQUIRED TREATMENT BASED ON THE LIKELIHOOD OF SUBSTANTIAL DETERIORATION IN HER PHYSICAL HEALTH WAS NOT CLEARLY ERRONEOUS

As the appellant's brief correctly notes, the continuing treatment order required the trial court to find that I.K. is both "mentally ill" and a "person requiring treatment" was proven by clear and convincing evidence. The diagnosis that I.K. has a chronic mental illness – schizoaffective disorder – is long-standing and is not at issue on this appeal. The

issue is whether the court properly found that I.K. required treatment, specifically a "likelihood of . . . substantial deterioration in [her] physical health . . . based upon recent poor self-control or judgment in providing one's shelter, nutrition, or personal care." N.D.C.C. §25-03.1-02(11)(c). That finding may be disturbed on appeal only if this Court is "firmly convinced it is not supported by clear and convincing evidence." In the Interest of R.N., 513 N.W.2d 370, 371 (N.D. 1994). Further, the finding is "sufficient if [it] 'enable[s] this court to understand the reasoning behind the [trial] court's decision' [citing Throndset, 485 N.W.2d at 777 n.2]", and is not to be "consider[ed] . . . in a vacuum, but read in light of the entire record." In the Interest of R.N., 513 N.W.2d at 371-72.

Dr. Yabut of South Central Human Services testified that he has been I.K.'s treating physician since her release from the State Hospital in September 2002; that her mental illness is chronic; it has both a psychotic ("schizoid") element, such as I.K.'s delusional thinking regarding vaginal infections and supposed side effects of her psychiatric medication, Seroquel, and an "affective" element characterized by bipolar mood swings; that I.K. has poor insight into her condition, exemplified in part by her resistance to medication; and that her judgment and self control would deteriorate if she discontinued use of Seroquel, an anti-psychotic medication intended to alleviate her delusional thinking. Dr. Yabut also testified that, as alleged in the petition (Appendix, p. 10), I.K. has a history of non-compliance with medication if not subject to supervision. [The transcript was not yet available when this brief was prepared, and thus all summaries of testimony at the hearing are drawn from attorney's notes and recollections.] In Interest of R.N., the Court held that testimony as to the patient's "chronic mental illness [of] bi-polar disorder"

and "tend[ency] to quit taking her medicine because she lacks insight into her illness . . . clearly and convincingly shows that R.N. suffers from a mental illness impairing her judgment and self control." 513 N.W.2d at 372.

In assessing I.K.'s "recent" self control and judgment, as specified in Section 25-03.1-02(11)(c), the trial court necessarily took into account the fact that she was a patient at the State Hospital from November 1998 through September 2002. Appellant's brief, Statement of Facts, p. 4. Thus, I.K. has been receiving supervised treatment and medication for the last 4½ years, and as the trial court noted in its oral decision at the hearing, the result was the "rarity" of a "positive" mental health hearing in which the respondent was significantly improved. However, he also heard testimony from Kim Weyer, I.K's case manager at SCHS, regarding I.K.'s mental and physical state prior to admission to NDSH in 1998; and from I.K., including her unsubstantiated "medical" opinion that Seroquel caused swelling and cramping in her fingers and lower extremities (Dr. Yabut testified that he had found no objective evidence of these conditions during his regular examinations, and that they were not known side effects of Seroquel) and examples of "doctor shopping" for one who would confirm I.K.'s own "diagnoses."

"[A] court is entitled to consider what has happened in the past as relevant "prognostic" evidence of what is likely to occur in the future. (citations omitted). [An] extensive treatment history, combined with [a doctor's] opinion that [the patient] would deteriorate . . . if untreated, is clear and convincing evidence that she requires continued treatment." In the Interest of R.N., 513 N.W.2d at 372-73. Therefore, when "read in the light of the entire record" (id., at 371-72), the trial court's finding that I.K. requires

treatment to avoid substantial deterioration of her physical health was proven by clear and convincing evidence was proper and should be affirmed.

3. PETITIONER CONCEDES THAT THERE IS NO BASIS FOR A VALID ORDER FOR INVOLUNTARY TREATMENT WITH PRESCRIBED MEDICATION

The petitioner concedes I.K.'s contention that there is no evidentiary basis to order involuntary treatment with prescribed medication (i.e., Seroquel). Indeed, such an order was not requested in the petition, since I.K. had never refused to take the medication. See N.D.C.C. §25-03.1-18.1. Petitioner would submit, however, that it is questionable whether the reference to continued administration of Seroquel was even intended as an order; it is equally probable that the reference was mere dicta reflecting the fact that the continuing treatment which she receives consists primarily of taking Seroquel.

CONCLUSION

For the foregoing reasons, petitioner and appellee South Central Human Service Center respectfully submits that (1) the trial court properly exercised its discretion in granting the motion to vacate the order dismissing the petition for continuing treatment; (2) the finding that I.K. requires treatment was supported by clear and convincing evidence; and (3) the order for continuing treatment cannot be considered a valid order for involuntary treatment with prescribed medication. Petitioner therefore respectfully requests that the Court affirm the order that I.K. continue to receive alternative treatment

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for her mental illness until May 12, 2004, except to the extent it may be construed as an order for involuntary treatment with medication under N.D.C.C. §25-03.1-18.1.

RESPECTFULLY SUBMITTED this 6th day of June, 2003.

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STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

Jay Schmitz, being first duly sworn on oath, does depose and say that he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 6th day of June, 2003, the affiant deposited in the mailing department of the United States Post Office at Jamestown, North Dakota, the original and eight true and correct copies of the Appellee's Brief in the matter of In the Interest of I.K.

That the original and seven copies of the above document was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Penny Miller, Clerk
North Dakota Supreme Court
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

That one copy of the above document was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Thomas E. Merrick
Merrick & Schaar, P.C.
P.O. Box 1900
Jamestown, ND 58402-1900

That to the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the parties intended to be served.

That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

JAY SCHMITZ

SUBSCRIBED and SWORN to before me this 6th day of June, 2003.

NOTARY PUBLIC