

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
IN THE INTEREST OF I.K.

South Central Human Service Center,	)	Supreme Court #
	)	
Petitioner & Appellee	)	Stutsman County # 2003-R-186
	)	20030131
	)	
-vs-	)	
	)	
I.K.,	)	
	)	
Respondent & Appellant	)	

IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 4 2003

STATE OF NORTH DAKOTA

**BRIEF OF APPELLANT**

APPEAL FROM THE MAY 13, 2003 CONTINUING  
ALTERNATIVE TREATMENT ORDER  
AND THE MAY 8, 2003 ORDER, BOTH ISSUED  
IN STUTSMAN COUNTY DISTRICT COURT  
JAMESTOWN, NORTH DAKOTA  
BY THE HONORABLE MIKAL SIMONSON

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## ISSUES

1. Whether I.K. is a person requiring treatment.
2. Whether the court properly vacated the dismissal and discharge order.
3. Whether the court had authority to order I.K. to take Seroquel without following the procedures and time limits of N.D.C.C. § 25-03.1-18.1.

1 **STATEMENT OF THE CASE**

2 On August 8, 2002, Judge James M. Bekken issued a  
3 continuing alternative treatment order for I.K. to "undergo  
4 treatment other than hospitalization for nine (9) months  
5 outpatient treatment through SCHSC." (Appendix p. 4) The  
6 order was in effect until May 8, 2003, or until further order  
7 of the court. (Appendix p. 4)

8 On April 8, 2003 a petition was filed in Stutsman County  
9 District Court requesting continuing treatment for I.K.  
10 through the South Central Human Service Center for one year.  
11 (Appendix pp. 8-9) According to the petition, I.K. required  
12 further treatment for the following reason: "When complying  
13 with treatment through the South Central Human Service Center,  
14 respondent is able to maintain in the community." (Appendix  
15 p. 8) In the report of examination, Dr. Ed Yabut, MD,  
16 concluded that I.K. required further treatment because of,  
17 "Past history of non-compliance with medication and  
18 treatment." (Appendix p. 10)

19 A hearing on the petition was scheduled for April 28,  
20 2003. (Appendix p. 4) At that hearing I.K. moved to dismiss  
21 the petition, claiming that the hearing was untimely under  
22 N.D.C.C. § 25-03.1-22. The trial court, the Honorable Mikal  
23 Simonson, agreed and dismissed the petition. (Appendix p. 13)

24 Petitioner then moved to vacate the Judge's dismissal and  
25 discharge order. (Appendix p. 14) I.K. opposed the motion  
26 (Appendix p. 19), and oral arguments were held on May 8, 2003.

1 The court reversed its earlier ruling and scheduled a  
2 continuing alternative treatment hearing for May 12, 2003.  
3 (Appendix pp. 20-21)

4 At the continuing treatment hearing Dr. Yabut testified  
5 that I.K. suffers from schizoaffective disorder (bi-polar) but  
6 presented no testimony on any of the factors under N.D.C.C. §  
7 25-03.1-02(11) to prove I.K. is a person requiring treatment.  
8 Kim Weyer also testified for the petitioner and I.K. testified  
9 on her own behalf. The court issued an order on May 13, 2003,  
10 for continued alternative treatment for up to one year.  
11 (Appendix p. 22) The order included a requirement for her to  
12 take Seroquel. (Appendix p. 22) I.K. filed a timely notice  
13 of appeal pursuant to N.D.C.C. § 25-03.1-29 (Appendix p. 23)  
14 This is an expedited appeal pursuant to Rule 2.1 N.D.R.App.P..  
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1 **STATEMENT OF FACTS\***

2 I.K. is a 68 year old widow, originally from LaMoure, who  
3 now resides in Jamestown. She has been diagnosed with  
4 schizoaffective disorder (bi-polar), and suffers from somatic  
5 delusions. She made unfounded claims that her hands and legs  
6 were swelling. Despite medical evidence to the contrary, she  
7 believes that she has cancer of the uterus. She does have  
8 recurring vaginal infections for which she receives medication  
9 under the care of Dr. Ernster at Dakota Clinic. She also  
10 takes synthroid for a thyroid condition. From April to August  
11 of 2002 she resided at the Transitional Living home on the  
12 North Dakota State Hospital grounds. Prior to that she was a  
13 patient at the State Hospital, beginning in November, 1998.

14 Since August of 2002 she has received medication  
15 monitoring, case management services, and psychiatric services  
16 through the South Central Human Service Center. She sees a  
17 psychiatrist there every 4 to 6 weeks, and is on a very low  
18 dose, 50 mg per day, of Seroquel, an antipsychotic medication.  
19 Staff from the Human Service Center administer her medication  
20 at her apartment in the morning and afternoon, Monday through  
21 Friday. Easter Seals provides the same service on weekends.  
22 She has been compliant in taking the medication.

23 I.K. receives monthly Social Security and North Dakota  
24 PERS retirement benefits. Her son and daughter are her co-  
25 guardians, and her son manages her money, paying her rent and  
26 other monthly expenses. Each week he sends I.K. \$50 which she



1 uses to purchase groceries, clothing and personal items. She  
2 walks to nearby grocery stores, and, unless the weather is  
3 inclement, nearly two miles to Wal Mart or KMart to shop. She  
4 manages her spending money well, and looks for bargains.

5 Kim Weyer, I.K.'s case manager from the Human Service  
6 Center, who spends approximately 45 minutes with I.K. each  
7 Friday afternoon, testified that I.K. keeps a very neat  
8 apartment and cares for herself properly. I.K. properly  
9 interacts with the other residents of James House, where she  
10 lives, and spends time at Progress Activity Center where she  
11 plays card games, or bingo, or participates in other social  
12 activities.

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26 \* No transcript was available until after the brief was filed.



1 The standard for involuntary commitment remains clear and  
2 convincing proof that the mentally ill individual is a person  
3 who requires treatment as defined by statute, not one who  
4 would benefit from treatment. In Interest of D.H., 507 N.W.2d  
5 314, 316 (N.D. 1993). There was not clear and convincing  
6 evidence that a serious risk of harm exists to I.K., others,  
7 or property. In fact, the testimony revealed that I.K. is  
8 largely self sufficient, cooperating in her treatment, and of  
9 no harm to herself or others.

10 Even though I.K. was committed to outpatient treatment  
11 rather than hospitalization, it does not change the standard  
12 for determining whether she is a person requiring treatment.  
13 See In Interest of J.K.L., 541 N.W.2d 698 (N.D. 1996). The  
14 standard is the same because even outpatient treatment is  
15 intrusive. That is certainly true for I.K., who has  
16 healthcare workers in her apartment every day of the week.  
17 As one commentator has noted, "Outpatient commitment occupies  
18 a paradoxical place in mental health law because it began as  
19 an expression of liberty and has been transformed into an  
20 expansion of state power over individuals." Robert M. Levy  
21 and Leonard S. Rubenstein, The Rights Of People With Mental  
22 Disabilities 41 (1996). "[O]utpatient commitment has been  
23 transformed to a means by which people with psychiatric  
24 disabilities may be compelled to take antipsychotic medication  
25 or ordered into programs even if they do not meet the criteria  
26 for involuntary hospitalization." Id.

1           It has not been shown that I.K. continues to be a person  
2 requiring treatment as defined by statute. The court was  
3 clearly erroneous when it determined I.K. continues to require  
4 treatment. The order must be reversed.

5           **2. Should the court have vacated the dismissal and discharge**  
6 **order?**

7           Relief from a judgment or order is governed by Rule 60(b)  
8 N.D.R.Civ.P. That rule states that on motion and upon such  
9 terms as are just, the court may relieve a party or a party's  
10 legal representative from a final judgment or order in any  
11 action or proceeding for the following reasons:

- 12           (i) mistake, inadvertence, surprise, or excusable
- 13           neglect;
- 14           (ii) newly discovered evidence which by due diligence
- 15           could not have been discovered in time to move for a
- 16           new trial under Rule 59(b);
- 17           (iii) fraud (whether denominated intrinsic or
- 18           extrinsic), misrepresentation, or other misconduct of
- 19           an adverse party;
- 20           (iv) the judgment is void;
- 21           (v) the judgment has been satisfied, released, or
- 22           discharged, or a previous judgment upon which it is
- 23           based has been reversed or otherwise vacated, or it is
- 24           no longer equitable that the judgment should have
- 25           prospective application; or
- 26           (vi) any other reason justifying relief from the
- 27           operation of the judgment. N.D.R.Civ.P. 60(b).

28           One who moves for Rule 60(b) relief has the burden of  
29 establishing sufficient grounds for disturbing the finality of  
30 the judgment or order. Johnson, Johnson, Stokes, Sandberg and  
31 Kragness, LTD., v. Birnbaum, 555 N.W.2d 583 (N.D. 1996). The  
32 fact that the court may have made a mistake of law does not  
33 justify vacating the order. Production Credit Association v.  
34 Dobrovolny, 415 N.W.2d 489 (N.D. 1987); Thronset v. L.L.S.,

1 485 N.W.2d 775 (N.D. 1992). An erroneous ruling by a trial  
2 court may furnish grounds for appeal, but it does not divest  
3 the court of subject matter jurisdiction nor invalidate the  
4 judgment rendered under the erroneous ruling. Matter of  
5 Estate of Hansen, 458 N.W.2d 264 (N.D. 1990).

6 The South Central Human Service Center (SCHSC) did not  
7 specify under which section of Rule 60(b) it was proceeding.  
8 Subsections (i), (ii), (iii) and (v) are not proper grounds  
9 for relief.

10 The only two provisions of Rule 60 upon which the SCHSC  
11 could have relied are 60(b)(iv) and 60(b)(vi). The decision  
12 whether to vacate a judgment under Rule 60(b)(iv) is not  
13 within the trial court's discretion; rather, if the judgment  
14 is valid the motion to vacate it must be denied, and if it is  
15 void the court must vacate it. First National Bank of Crosby  
16 v. Bjorgen, 389 N.W.2d 789 (N.D. 1986). A judgment is void  
17 only if the court lacks subject matter jurisdiction over the  
18 action or personal jurisdiction over the parties. Production  
19 Credit Association v. Dobrovolny. The court clearly had  
20 subject matter jurisdiction pursuant to N.D.C.C. § 25-03.1-03  
21 and personal jurisdiction over the parties, so the order could  
22 not have been vacated under that provision of the rule.

23 Rule 60(b)(vi) is not to be used in cases where another  
24 subdivision of the rule might be employed. First National  
25 Bank v. Bjorgen. This subdivision should only be used when  
26 none of the other subsections apply, and then only in

1 extraordinary circumstances. Watne v. Watne, 391 N.W.2d 636  
2 (N.D. 1986). Here, there are no extraordinary circumstances.  
3 The relief being sought was available through an appeal. A  
4 motion under Rule 60(b) is not a substitute for appeal. First  
5 National Bank of Crosby v. Bjorgen. Hence, the SCHSC's proper  
6 course of action was an appeal rather than a motion to vacate.

7  
8 **3. Can the court order I.K. to take Seroquel without**  
9 **following the procedures set forth in N.D.C.C. § 25-03.1-18.1?**

10 In its May 13, 2003 order for continuing treatment, the  
11 court required I.K. to "continue to take Seroquel until May  
12 12, 2004, a period of one year, or until further order of the  
13 court." This was included in the order even though none of  
14 the requirements of N.D.C.C. § 25-03.1-18.1 were followed.  
15 Not only does that statute specifically limit a medication  
16 order to 90 days in length, but it also requires a specific  
17 request for forced medication certified by two physicians and  
18 a determination based on specific factors. No requirement of  
19 the statute was met.

20 The previous outpatient order required I.K. to "mak[e]  
21 herself available to take medications as recommended by SCHSC  
22 staff and personnel." (Appendix p. 4) While that order  
23 required I.K. to "make herself available to take medications,"  
24 the new order requires her to **take Seroquel**. A mandate to  
25 take a prescribed medication makes the order improper, since  
26 none of the statutory safeguards of N.D.C.C. § 25-03.1-18.1

1 were followed. That statute is applicable to all persons  
2 committed to treatment. State v. Nording, 485 N.W.2d 781, 787  
3 (N.D. 1992)

4 This court has recognized that, "The question of  
5 administering psychotic medications is a complex one. Both  
6 the advantages and disadvantages of these drugs have been long  
7 debated and are well recognized." Id. In Nording this court  
8 pointed out that N.D.C.C. § 25-03.1-18.1 was enacted to  
9 safeguard a patient's right to be free of forced medication  
10 unless the medication is necessary, the least restrictive form  
11 of intervention, and its benefits outweigh its risks. Id.  
12 None of these questions as they apply to I.K. have been  
13 answered, however, because the proper procedure was not  
14 followed.

15 According to N.D.C.C. § 25-03.1-20(1) if an individual is  
16 found to be a person requiring treatment the court may order  
17 the individual to undergo a program of treatment other than  
18 hospitalization. A dictionary definition of "program" is "a  
19 scheme or plan." Webster's Dictionary and Thesaurus 297  
20 (2002). That would imply that the court only has authority to  
21 broadly outline a course of treatment.

22 The authority granted to the court by that statute is  
23 comparable to the authority granted to the trial court by  
24 N.D.C.C. Chapter 12.1-04.1, which was under consideration in  
25 Nording. In Nording this court held that a trial court has  
26 the authority to order treatment, but, when the treatment is

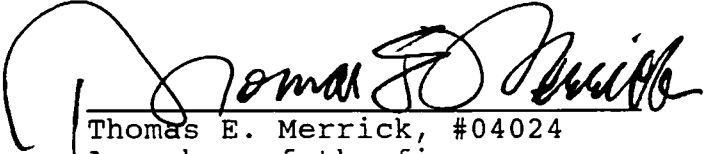
1 to include forced medication, the procedural requirements of  
2 N.D.C.C. § 25-03.1-18.1 must be met. Nording, 788. Because  
3 the order under consideration exceeds 90 days in length and  
4 was issued without the procedural safeguards of N.D.C.C. § 25-  
5 03.1-18.1, it must be reversed.

6  
7 **CONCLUSION**

8 There is no clear and convincing evidence that I.K. is a  
9 person requiring treatment. The May 13, 2003 continuing  
10 alternative treatment order should be reversed and the  
11 petition dismissed. Even if this court determines that I.K.  
12 is a person requiring treatment, the trial court exceeded its  
13 authority by ordering I.K. to take Seroquel for up to one  
14 year. In that case, the order must be reversed and remanded  
15 for further proceedings complying with N.D.C.C. § 25-03.1-  
16 18.1.

17 Dated this 2<sup>nd</sup> day of June, 2003.

18  
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA )  
 : ss  
COUNTY OF STUTSMAN )

Sandra M. Young, being first duly sworn on oath, deposes and says: I am a citizen of the United States, over the age of 18 years and not a party to the above entitled action.

On the 2nd day of June, 2003, I deposited in the United States Post Office of the city of Jamestown, North Dakota, an original and eight true and correct copies of the Brief of Appellant and Appendix.

The original and seven copies of the Brief of Appellant and Appendix were 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

One copy of the Brief of Appellant and Appendix were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

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511 2nd Ave. SE  
Jamestown, ND 58401

To the best of my knowledge, information and belief, such addresses as given above were the actual post office addresses of the parties intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

Sandra M. Young  
Sandra M. Young

Subscribed and sworn to before me this 2nd day of June, 2003.

Shirley M. Nitschke  
Shirley M. Nitschke  
Notary Public  
State of North Dakota  
My Commission Expires: 7-26-06

(SEAL)