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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
SUPREME COURT # \_\_\_\_\_

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AUG - 5 2005

IN THE INTEREST OF K.G.

STATE OF NORTH DAKOTA

William Pryatel, M.D., )  
 )  
Petitioner/Appellee, )  
 )  
-vs- )  
 )  
K.G., )  
Respondent/Appellant. )

Stutsman County Case # 04-R-211

**BRIEF OF APPELLANT**

Appeal from the Continuing Treatment Order following Continuing Treatment Hearing  
Issued May 11, 2004  
In Stutsman County District Court  
Jamestown, North Dakota  
By the Honorable James M. Bekken  
Southeast Judicial District Judge

Jodie Koch Scherr, #05339  
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## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether the district court erred by ordering hospitalization and finding that “a treatment program other than hospitalization is not suitable to the Respondent’s treatment needs” (App. p. 8) without requiring a more comprehensive Petition for Continuing Treatment (App. p. 15, 15a), Report Assessing the Availability and Appropriateness for the Respondent of Treatment Programs other than Hospitalization (App. p. 13, 13a), Report of Examination (App. p. 14, 14a) as well as more thorough testimony and statements from the Petitioner in its consideration of less restrictive treatment alternatives under N.D.C.C. § 25-03.1-21, N.D.C.C. §25-03.1-23 and N.D.C.C. §25-03.1-31(1).

## STATEMENT OF THE CASE

On May 11, 2005, Honorable James M. Bekken entered an order for continuing treatment following a continuing treatment hearing committing K.G. to the North Dakota State Hospital until "May 11, 2006, a period of one year, or until further order of the court." (App. p. 8) K.G. now appeals this order to the North Dakota Supreme Court.

Prior to this order, K.G. received treatment at the North Dakota State Hospital and the North Dakota State Hospital Transitional Living Home pursuant to an order issued on June 3, 2004 by the Honorable John Greenwood. This order stated that K.G. "undergo treatment for two weeks at the NDSH followed by treatment through the NDSH TL home for the remainder of one year or until June 2, 2005 or until further order of the court." (App. p. 22). On June 23, 2004, the Honorable Mikal Simonson entered an order revoking the alternative treatment and requiring in-patient hospitalization for K.G. at the North Dakota State Hospital for the remainder of the commitment period, namely until June 2, 2005. (App. p. 21). On August 4, 2004, North Dakota State Hospital petitioned the court to again transfer K.G. to the T.L. Home citing that she had gained "maximum benefit from inpatient level of care." (App. p. 20). Subsequently, Honorable John T. Paulson issued an order for less restrictive treatment. (App. p. 19). K.G. was then transferred to the Transitional Living Home on August 4, 2004. The next day, the North Dakota State Hospital filed a notice of detention with the court requesting that K.G. be put back into the North Dakota State Hospital as an in-patient for the remainder of the commitment period. (App. p. 17). Following the modification hearing, the Honorable John T. Paulson issued an order committing K.G. to the North Dakota State Hospital until June 2, 2005. (Omitted from appendix, please see court file and records).

On May 2, 2005, the William Pryatel, M.D. filed a petition for continuing treatment with the court. (App. p. 15, 15a). A continuing treatment hearing was held on May 11, 2005. (App. p. 12). The Honorable James M. Bekken issued a continuing treatment order following a continuing treatment hearing requiring K.G. to be hospitalized at the North Dakota State Hospital until May 11, 2006, a period of one year, or until further order of the court. (App. p. 8).

A motion for extension of time to file appeal was filed with the court by Attorney Thomas Merrick on June 8, 2005. (App. p. 7). Honorable James M Bekken granted this motion the same day. (App. p. 6). Honorable John T. Paulson issued an order appointing Jodie Koch Scherr as counsel for K.G. on June 24, 2005. (App. p. 5). Another motion for extension of time to file appeal was filed with the court on July 6, 2005. (App. p. 4). Honorable John T. Paulson granted this motion on July 7, 2005. (App. p. 3). Then, K.G. filed a notice of appeal on August 3, 2005, pursuant to N.D.C.C. § 25-03.1-29 and Rule 2.1 N.D.R.App.P., respectfully seeking review by the North Dakota Supreme Court. (App. p. 1, 2).

## STATEMENT OF FACTS

K.G. is a thirty-two year old person of Native American descent. She has been admitted to the North Dakota State Hospital almost sixty times. She carries diagnoses of schizoaffective disorder bipolar type, borderline personality, and alcohol and cannabis dependence.

K.G. has been hospitalized as an in-patient at the North Dakota State Hospital since August 2004, following a flurry of releases and re-admissions. Since that time she has remained on a locked ward of the hospital. In April of 2005 K.G. had a few episodes of increased irritability and aggressiveness which Dr. Pryatel, her treating psychiatrist, testified could have been attributed to medication changes occurring during that time. She has a history of self-sabotaging behaviors such as cutting on herself, drinking and using cannabis to excess, and impulsive tendencies.

Dr. Pryatel stated that he has known K.G. "for a long time" and that she seems to go through a series of assaultive, aggressive behaviors, which lasts for a period of days to weeks, then "kind of gets it together." He stated that the potential is there for K.G. to have a job but that "she hasn't been able to handle it so far." Dr. Pryatel testified that there is no least restrictive alternative treatment available as K.G. "AWOL"ed from the TL Home and was only there one day last time. Furthermore, he stated that K.G. is on a behavior modification program to increase adaptive behaviors and decrease mal-adaptive behaviors. This program is administered through a reward/punishment system. He states the goal of the program is for K.G. to have no self-harm; no aggressive behaviors and be cooperative; and to follow the rules. When asked what defines and how long is needed for "good behavior", Dr. Pryatel's response was "I don't know."

K.G. attended her continuing treatment hearing at the Stutsman County Courthouse on May 11, 2005 and testified on her own behalf. She did not dispute that she is a person with a mental illness or that she is a person in need of treatment. Conversely, she agreed that she need treatment and accepts the responsibility for the choices she has made and wants help to make better ones. In the same vein, she stated that she is now ready to be transferred at the very least to an open unit or to a transitional living facility so that she has more opportunities to do activities and to learn working and living skills. She also stated that in April 2005 she had not been taking all of her medications so that was causing problems and that she is now ready to make choices to do better.



## LAW AND ARGUMENT

1. K.G. asserts that the district court erred by ordering hospitalization and finding that “a treatment program other than hospitalization is not suitable to the Respondent’s treatment needs” (App. p. 8) without requiring a more comprehensive Petition for Continuing Treatment (App. p. 15, 15a), Report Assessing the Availability and Appropriateness for the Respondent of Treatment Programs other than Hospitalization (App. p. 13, 13a), Report of Examination (App. p. 14, 14a) as well as more thorough testimony and statements from the Petitioner in its consideration of less restrictive treatment alternatives under N.D.C.C. § 25-03.1-21, N.D.C.C. §25-03.1-23 and N.D.C.C. §25-03.1-31(1).

When an individual is found by the trial court to be a “person requiring treatment” under N.D.C.C. § 25.03.1-02(12), he or she has the right to the least restrictive conditions necessary to achieve the purposes of treatment. N.D.C.C. § 25.03.1-21; 25-03.1-40(2). The North Dakota Supreme Court held in In the Interest of J.K., 1999 ND 182. 599 N.W.2d 337 (N.D. 1999) that the district court is required to make a two prong assessment: (1) whether a treatment program other than hospitalization is adequate to meet the individual’s treatment needs, and (2) whether an alternative treatment program is sufficient to prevent harm or injuries which an individual may inflict on himself or others. Furthermore, the district court must find, by clear and convincing evidence, that the alternative treatment is not adequate or that the hospitalization is the least restrict alternative. Id. Moreover, N.D.C.C. §25-03.1-23 requires that “a petition for an order authorizing continuing treatment must contain a statement setting forth the reasons for the determination that the patient continues to be a person requiring treatment: a statement

describing the treatment program provided to the patient and the results of that treatment; and a clinical estimate as to how long further treatment will be required.”

Additionally, N.D.C.C. § 25-03.1-01 provides that “the provisions of this chapter are intended by the legislative assembly to: (5) Encourage, whenever appropriate, that services be provided within the community. K.G. asserts that little, if any, meaningful attempt was made by the petitioner to fully explore suitable and available treatment alternatives.

In the Report of Examination (App. p. 14, 14a) prepared by William Pryatel, M.D. a sum total of five phrases were listed in response to four open ended questions listed on the form. Specifically, under numbered section “1. Evaluation of physical and mental condition of respondent:” Dr. Pryatel wrote, “Patient has problems controlling her impulses. Needs “prn” medication to keep from losing control.” To numbered section “4. The above conclusions are based upon the following tests, facts, circumstances, and observations:” Dr. Pryatel responded, “Patient has had numerous “prn” medication doses to keep herself in control.” Under numbered section “5. List the form of care and treatment that may serve as alternatives to involuntary hospitalization:” Dr. Pryatel stated, “None at this time.” For numbered section “6. Alternative treatment:” Dr. Pryatel checked the box by “is not in the best interests of the respondent or other and the respondent”, and box by “is in need of hospitalization for the following reasons:” to which he wrote “Please refer to #1.”

In the Report Assessing Availability and Appropriateness of Alternate Treatment (App. p. 13, 13a). Dr. Pryatel was equally as brief. For example, in response to numbered section “1. The following treatment programs, facilities or resources which

could possibly serve as alternatives to hospitalization for the above named respondent include: (NOTE: List in detail any possible programs, facilities, public or private agencies, community resources, etc., whether or not such programs, facilities or resources are appropriate and feasible at the present time.)” Dr. Pryatel listed “A. State Hospital TL Home” and “B. Services through SCHSC including psychiatric appointments, case management, and medication monitoring.”

On the Petition for Continuing Treatment, (App.p. 15, 15a), Dr. Pryatel responded to numbered section “4. That the determination that further treatment is required was made by the petitioner for the following reasons:” with “Patient has problems controlling her impulses. Needs “prn” medication to keep from losing control.” Under numbered section “6. That the respondent has been provided with a treatment program consisting of: [decribe]” Dr. Pryatel wrote “Medication, milicu therapy.” To numbered section “7. That results of said treatment program have been;” Dr. Pryatel’s response was “Patient still has problems controlling her impulses.” Finally to numbered section “8. That a clinical estimate of the period of time further treatment will be required is:”, Dr. Pryatel succinctly responded with, “One year.”

“In some cases, a reporting doctor may reasonably conclude that less restrictive alternative to hospitalization simply do not exist.” In the Interest of J.S., 545 N.W. 2d 145, 148 (N.D. 1996). While K.G. can accept that conclusion, she argues that she can do so only after that reporting doctor, in this case Dr. Pryatel, has given her case his very best effort. Conversely, in K.G.’s case, Dr. Pryatel gave almost no effort at all. The forms were filled out with the barest of bare responses. In fact, in several instances, K.G. asserts that Dr. Pryatel did not even address the question posed. Rather, he gave one or

two-word responses which were vague, non-detailed, repetitive, and pathetically inadequate.

Even if N.D.C.C. §25-03.1-23 is interpreted as requiring less description or justification than N.D.C.C. §25-03.1-21 in terms of what the petitioner is mandated to provide to the court, the fact still remains that statements setting forth reasons for treatment and describing the treatment program and results are statutorily required. Additionally, N.D.C.C. §25-03.1-31(1) regarding the procedure to extend continuing treatment orders states that the "burden of proof is the same as in an involuntary treatment hearing" which is set at clear and convincing. Furthermore, K.G. argues that this is her life and liberty at stake and as such, Dr. Pryatel has a duty to put forth his best efforts, not just give the minimalist attempt possible. Having earned a medical degree, Dr. Pryatel should be able to come up with a more descriptive and detailed account of his reasoning for K.G. need for treatment and the results of that treatment. There might be something to be said about being concise but K.G. asserts that Dr. Pryatel has crossed the threshold into the neglectful range of non-effort and uncaring. K.G. argues the district court erred in ordering hospitalization for her based on the Petitioner's inadequate responses.

Regarding Dr. Pryatel's testimony, the same brief and vague types of answers were provided repeatedly. For example, Dr. Pryatel referred several times to K.G. needing to modify her behavior but when asked directly by Attorney Merrick to define good behavior and to put a time frame on how long good behavior would be required, his response was simply "I don't know." K.G. asserts that Dr. Pryatel provided very little

practical or clear explanations pertaining to K.G. treatment plan, results of the treatment plan, or alternatives to hospitalization.

The findings of the district court are critical to make certain the basis of the district court's decision is clearly articulated and shows the careful and serious consideration so clearly intended in the contest of an involuntary commitment proceeding in fact has been given. In the Interest of Palmer, 363 N.W.2d 401, 403 (N.D. 1985). In her dissenting opinion in In the Interest of R.F., 2005 ND 54, 692 N.W.2d 905, Justice Kasper states "R.F. has the right to have viable and plausible alternatives adequately and fairly considered before being ordered to the State Hospital for treatment." She admonishes the district court for having a "nothing-else-to-do-with-him" rationale, which she states is not clearly convincing to be sufficient to order in-patient hospitalization. Id. Furthermore, after reviewing Dr. Pryatel's testimony and the district court's ruling in that case, Justice Kaspner summarizes the lackadaisical nature in which in-patient hospitalization is permitted to be the "norm" stating "in-patient hospitalization is not a way station at which less-restrictive alternatives are to be explored." Id. Justice Kaspner urges the reversal of the district court's order and "remand for the statutorily required consideration of alternative treatment options." Id.

K.G. asserts that the reasoning of Justice Kaspner's dissenting opinion in In the Interest of R.F., 2005 ND 54, 692 N.W.2d 905 is on point with her own case in that the statutorily required consideration of alternative treatments has not been met, either in the petition, reporting forms submitted with the petition or by the Petitioner's own testimony. In fact, if allowed to "get by" with this drivel of an effort, K.G. argues the Petitioner will only continue to "warehouse" patients without fear of consequence. It would seem

counterintuitive to most individuals with any bit of common sense that a person such as K.G. is being provided any type of meaningful treatment whatsoever. Granted, K.G. has admittedly done her own share of self-sabotaging but even that begs the question of whether the "treatment" provided so far has made any difference.

While the Petitioner might argue that the minimum legal requirements were met in this instance, K.G. argues that: 1. No, the Petitioner did not even meet the minimum statutory requirements; and 2. For the district court to condone the Petitioner's feeble attempt at treating K.G. and barely making an effort to describe, much less seek out, viable alternative treatments to hospitalization, a terrible injustice has occurred, whether "legal" or not. Thus, K.G. urges that Justice Kaspner's dissenting opinion in In the Interest of R.F., 2005 ND 54, 692 N.W.2d 905 be adopted as the majority opinion in her own case. Since there is insufficient evidence that lesser restrictive treatments have been fully explored, K.G. asserts that the district court erred in its finding of continued hospitalization, because the petitioner failed to present clear and convincing evidence that a lesser restrictive treatment is not available or adequate to prevent harm to K.G. or others.

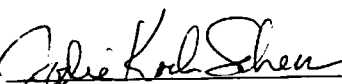
As such, K.G. seeks a reversal of the district court's order for continuing treatment following a continuing treatment hearing.

## CONCLUSION

K.G. appeals the district court's order for continuing treatment following a continuing treatment hearing dated May 11, 2005 and asserts her claim in the above law and argument. K.G. asserts that the District Court erred in its order because the evidence

and testimony provided is insufficient to show that there is no appropriate alternative, less restrictive treatment available to her. Therefore, K.G. respectfully requests the order for continuing treatment following a continuing treatment hearing be either reversed or remanded so that appropriate treatment can be provided and prays for relief accordingly.

Dated this 5<sup>th</sup> day of August, 2005.

By:   
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STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF BARNES )

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STATE OF NORTH DAKOTA

Jodie Koch Scherr, being first duly sworn oath. deposes and says: I am a citizen of the United States, over the age of 21 years and not a party to the above entitled action.

On the 5<sup>th</sup> day of August, 2005. I deposited in the United States Post Office of the city of Valley City, North Dakota an original and seven true and correct copies of the Appellant's Brief and Appendix.

The original and seven copies of the Appellant's Brief and Appendix of Appellant's Brief 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

To the best of my knowledge, information and belief, the address given above is the actual post office address of the party intended to be so served.

The above documents were duly mailed in accordance with the provisions of the North Dakota rules of Appellate Procedure.

*Jodie Koch Scherr*  
Jodie Koch Scherr

Subscribed and sworn to before me this 5<sup>th</sup> day of August, 2005.

(SEAL)

*Del Rose Wicks*

Del Rose Wicks, Notary Public  
Barnes County, North Dakota  
My Commission Expires: 09/28/09

DEL ROSE WICKS  
Notary Public  
State of North Dakota  
My Commission Expires Sep. 28, 2009



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AUG - 5 2005

STATE OF NORTH DAKOTA

Jodie Koch Scherr, being first duly sworn oath, deposes and says: I am a citizen of the United States, over the age of 21 years and not a party to the above entitled action.

On the 5<sup>th</sup> day of August, 2005, I deposited in the United States Post Office of the city of Valley City, North Dakota a true and correct copies of the Appellant's Brief and Appendix securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Leo Ryan  
Attorney for Petition/Appellee  
208 2<sup>nd</sup> Ave. S.W., PO Box 1727  
Jamestown, ND 58402-1727

To the best of my knowledge, information and belief, the address given above is the actual post office address of the party intended to be so served.

The above documents were duly mailed in accordance with the provisions of the North Dakota rules of Appellate Procedure.

*Jodie Koch Scherr*  
Jodie Koch Scherr

Subscribed and sworn to before me this 5<sup>th</sup> day of August, 2005.

(SEAL)

*Del Rose Wicks*  
Del Rose Wicks, Notary Public  
Barnes County, North Dakota  
My Commission Expires: 09/28/09

DEL ROSE WICKS  
Notary Public  
State of North Dakota  
My Commission Expires Sep. 28. 2009