

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. _____

Burleigh Co. No. 08-20114-MH-00104

In the Interest of L.B.,
Respondent/Appellant.

Corrected Brief for Appellant

An Appeal from a South Central Judicial District Court's Findings of Fact, Conclusions of Law, and Order Following Treatment or Continuing Treatment Hearing and an Order for Less Restrictive Treatment Held on November 14, 2014, the Honorable Bruce A. Romanick, Presiding.

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Question Presented for Review

I.

Whether the District Court Erred in Not Dismissing the Involuntary Commitment When the Expert Examiner Failed to Testify.

II.

Whether the District Court Erred When it Found L.B. Chemically Dependent.

III.

Whether the District Court Erred When it Found L.B. Requiring Treatment.

IV.

Whether the District Court Erred When it Failed to Consider and Order the Least Restrictive Alternative Treatment.

[¶1]

I. Statement of the Case.

[¶2] This is an expedited appeal of a Burleigh County District Court's Findings of Fact, Conclusions of Law and Order Following Treatment or Continuing Treatment Hearing and an Order for Less Restrictive Treatment, finding L.B. chemically dependent, requiring treatment and ordering L.B. up to ninety (90) days of treatment at the Alternative Care Services facilities (ACS Apartments) in Bismarck, North Dakota. **Appendix 16-19. [Hereinafter App __].** This appeal is taken under Section 25-03.1-29 of the North Dakota Century Code and Rule 2.1 of the North Dakota Rules of Appellate Procedure.

[¶3] A Petition for Involuntary Commitment was signed by the petitioner, Dr. Gabriella Balf, on November 10, 2014. **App. 2** The petition was approved by District Court Judge, James Hill, and filed with the clerk of the district court also on November 10, 2014. *Id.*

[¶4] The undersigned was appointed to represent L.B. **App. 7.** A preliminary hearing was scheduled because L.B. was alleged to be both mentally ill, chemically dependant requiring treatment. **App. 8.** An Emergency Treatment Order was signed and filed because it was alleged that emergency treatment was necessary.

App. 9.

[¶5] On November 13, 2014, Dr. Lacey Armstrong, psychiatrist, and Ms. Carmen Johnson, License Addiction Counselor (LAC) signed and filed the Report of Examination (Form F2) and Report Assessing the Availability and Appropriateness of Alternative Treatment (Form F2A). **App. 11 - 14.** The Report of Examination, by Dr. Armstrong, concluded that L.B. "did not meet criteria for mental illness

commitment.” **App. 11.** However, the same Report of Examination, by Carmen Johnson concluded that L.B. met the requirements for a chemically dependent person and requiring treatment. **Id. at 11-12.**

[¶6] Since Dr. Armstrong, concluded that L.B. “did not meet criteria for mental illness commitment the scheduled Preliminary Hearing was changed to Treatment Hearing at the hearing. Transcript at 2-7 [Hereinafter Tr. ___]. See *also*, N.D.C.C. 25-03.1-11.1 (2013).

[¶7] On November 30, 2011, the treatment hearing was held. **Tr. 2-18.** Prior to addressing the substantive issues of the case, there was discussion about Ms. Johnson refusing to appear before the court without being subpoenaed and an order requiring her to testify. **Tr. 2-7.** The following statements by the parties’ attorney was made:

21 I don't know if the parties are prepared to simply
22 go to a treatment hearing, being alcohol is the only option
23 at this time.

24 MR. RUNGE: We were. We were.

25 THE COURT: What do you mean "were".

2

1 MR. RUNGE: Well, I think probably you should
2 speak with the state's attorney.

3 THE COURT: Anybody can tell me what's going on.
4 Ms. Kahl.

5 MS. KAHL: We're prepared to go through with the
6 preliminary. And the witness for the evaluation is Carmen
7 Johnson, and she refused to appear today without having a
8 subpoena, as well as a Rule 42^[1] Order from you stating she
9 was authorized to testify because the defendant did not --
10 or the respondent did not sign any of the waivers.

11 THE COURT: Okay.

12 MS. KAHL: So she did not come today.

¹ 42 C.F.R. §2.64 (2014).

13 MR. RUNGE: Clarification on this, Your Honor.
14 I'm peeved about it.
15 THE COURT: Well --
16 MR. RUNGE: Simply because while my client did not
17 sign Authorizations of Release of Information, I think the
18 state's attorney's office could have subpoenaed her, had her
19 brought here, and the Court could have ordered her to
20 testify under Rule 42.
21 THE COURT: The Court can order testimony. There
22 is no doubt about that.
23 MR. RUNGE: I don't believe it's necessary there
24 be a written order in place ahead of time. This is a delay
25 in my client's due process, as a result.

3

Tr.2-3.

[¶8] The parties agreed to go ahead with the Treatment Hearing. **Tr. 7.** At the close of the treatment hearing, the court made and filed its Findings of Fact, Conclusions of Law and Order Following Treatment or Continuing treatment Hearing (Form C-09). **App. 16.** The court also filed its Order for Less Restrictive Treatment (Form C-13). **App. 19.**

[¶9] On November 16, 2014, L.B. requested that transcript be ordered by the court. **App. 20.** On November 18, 2014, the transcript was completed and filed on November 18, 2014. **Doc ID# 14.**

[¶10] **II. Statement of the Facts.**

[¶11] On November 10, 2014, Dr. Gabriella Balf, a psychiatrist for Sanford Health, in Bismarck, North Dakota completed a Petition for Involuntary Commitment on L.B. **App. 2.** The petition was approved and filed the same day. **Id.**

[¶12] The petition alleged, in paragraph three (3), that the petitioner believed that the respondent was "mentally ill and as a result of such condition there is a reasonable expectation of a serious risk of harm if respondent is not treated and

“chemically dependent and as a result of such condition there is a reasonable expectation of a serious risk of harm if respondent is not treated.” **App. 3.** The petitioner further alleged, “[t]hat the assertions contained in paragraph 3 are based upon the following specific facts (attach additional sheets, if necessary): ‘This is the 4th admission since April 2014 for alcohol or substance abuse - related complications,’” among other things. **Id.**

[¶13] On November 13, 2014, Dr. Lacey Amrstrong and Ms. Carmen Johnson, LAC, filled out and filed a Report of Exam (Form F-2). **App. 11.** In the Report of Exam, Dr. Armstrong hand wrote that the “Patient does not meet criteria for mental illness commitment.” **Id.** Ms. Johnson stated:

Respondent is a 45 year-old female who was hospitalized with alcohol withdrawal and admitted to ICU with Delirium Tremens and on life support for a few weeks prior to being stabilized and transferred to the psychiatric unit. Per Sanford reports, she has been hospitalized 4 times since April for alcohol-related medical Issues. She Is an insulin-dependent diabetic and continues to drink despite this. She has not followed through with seeking treatment on her own throughout the discharges the past several months and minimizes the seriousness of her thinking related to her medical issues and current hospitalization. She meets criteria for the chemical dependency commitment due to imminent danger being probable if she does not enter treatment in a structured facility based on her recent substance-related medical history.

Id.

Ms. Johnson concluded her report by checking the following:

2. It is concluded that the respondent (Check all that apply):
* * *
- [X] is an individual with an illness or disorder characterized by a maladaptive pattern of usage of alcohol or drugs, or combination thereof, resulting in social, occupational, physical

problems and is a chemically dependent person.

* * *

3. It is further concluded that as a result of the illness or dependency identified in item #2, there exists a serious risk of harm to the respondent, others or property and substantial likelihood of (check all that apply):

* * *

- [x] substantial deterioration in physical health or substantial injury, disease or death resulting from poor self-control or judgment in providing for one's shelter, nutrition or personal care.

* * *

6. Alternative treatment [X] is [] is not in the best interests of the respondent or others and respondent and the respondent [] is [X] is not in need of hospitalization for the following reasons: She denies any suicidal or homicidal ideation. She is medically stable. She will be in a supportive, structured environment for treatment.

App. 12.

[¶14] A Treatment Hearing was held on November 14, 2014, pursuant to sections N.D.C.C. 25-03.1-11.1 and N.D.C.C. 25-03.1-19 of the North Dakota Century Code.

Tr. 2-7. N.D. Cent. Code § 25-03.1-11.1 (2013), N.D. Cent. Code 25-03.1-19 (2013).

Only one witness testified at the treatment hearing, Dr. Gabriella Balf. **Tr. 7-19.**

[¶15] Dr. Balf was the petitioner and testified. **App. 2. Tr.7.** However, Dr. Balf did not perform the examination on L.B. **App 11-14.** Dr. Balf did not prepare the Report of Examination (Form F-2) nor did she prepare the Report Assessing the Availability and Appropriateness of Alternative Treatment (Form F-2A). **Id.**

[¶16] On direct examination, Dr. Balf testified, that she first saw L.B. as a consultant, when L.B. was in the Intensive Care Unit (ICU) **Tr. 7.** She indicated that she continued to follow L.B. until November 11, 2014. **Id.** Dr. Balf had been

following L.B. through Dr. Balf's behavior health clinic, but not consistently. *Id.*

[¶17] Dr. Balf testified that "[t]his detox was the most severe of all. *Id.* L.B. was in delirium tremens and she was re-intubated three times because of the severity of the delirium." **Tr. 8-9.**

[¶18] At the close of the doctor's direct examination, the court asked whether L.B. would like to cross-exam the doctor. **Tr. 12.** L.B. declined. *Id.* The Court then examined the doctor. **Tr. 12-13.** The petitioner re-directed her examination of the doctor. **Tr. 13-14.** L.B. again declined to cross-exam the doctor. **Tr. 14.**

[¶19] On closing, the petitioner argued:

11 MS. KAHL: I think there's sufficient information
12 to warrant treatment in this case. She clearly is
13 chemically dependent if she's been in the ER 12 times for
14 being overly intoxicated, as well as being comatose at least
15 four times as a result. The last time she was in the
16 hospital for three weeks and possibly could have, you know,
17 died from the excessive alcohol that was in her system.
18 And the treatment that's currently been
19 recommended is pretty -- it's not very evasive. It's all
20 outpatient treatment. It would help change maybe the
21 behavior or her way of thinking.

Id.

[¶20] On closing, L.B. argued:

22 THE COURT: Okay. Mr. Runge.
23 MR. RUNGE: Yes, Your Honor. I ask the Court to
24 dismiss this in whole. The reason why is that the State has
25 not carried the burden of proof insofar as we may believe

14

1 that she is chemically dependent and requiring treatment,
2 but the Court needs to look at the Report of Exam. That has
3 to be considered.

4 The Court also has to consider the report
5 assessing availability and appropriateness of alternative
6 treatment. These, right now hearsay statements, they're not
7 admissible. The Court has to have these people present to

8 testify. Dr. Balf did not, which would have been a conflict
9 any way, but Lacey Armstrong, the psychiatrist up there did
10 the report of examination as well as Carmen Johnson, who is
11 not here.

12 Also, I have no way of cross-examining a piece of
13 paper on the Report Assessing Availability and
14 Appropriateness of Alternative Treatment. And the Court has
15 to consider the least restrictive. I haven't had an
16 opportunity to cross-examine Ms. Carmen Johnson.

17 THE COURT: The doctor just testified she needed
18 residential treatment.

19 MR. RUNGE: The doctor can testify to anything she
20 wants, but Carmen Johnson, West Central, has the key to
21 these outpatient services. Dr. Balf does not have the
22 authority to put her into the less restrictive treatment
23 over at West Central, only West Central can order -- only
24 West Central can get this done.

25 THE COURT: West Central can't order anything.

15

1 West Central, I can order --

2 MR. RUNGE: Only West Central can approve these
3 outpatient services. Even though you may order it, it still
4 has to go through them to approve it. I understand what
5 you're looking at, but look at it from my point of view.
6 And I've been doing these for 25 years now, Your Honor. You
7 need to have these people present in order to testify, in
8 order for me to cross-examine them because there may be
9 other alternatives they didn't put in here that she should
10 have. I don't know.

11 So I want this -- I am asking the Court to dismiss
12 this case. They didn't place -- they didn't prove their
13 burden.

* * *

Tr. 14-16.

[¶21] At the close final arguments, the court made the following statement:

14 THE COURT: Well, I disagree. They proved their
15 burden. They didn't follow the -- you didn't have the
16 person here, so I'm not even going to consider the orders.
17 I'm going consider the doctor's testimony is the only
18 evidence before the Court.

19 The doctor testified Ms.[B.]'s been in the
20 hospital 15 times this year, alone. Twelve times for

21 alcohol; three hospitalizations. This most recent one comes
22 in on the 12th of October is in ICU for three weeks. She
23 has a severe alcohol dependency problem, which is
24 exacerbated by her diabetes, so when she uses -- and then
25 the doctor even testifies there is some use of

16

1 methamphetamine which obviously is a problem, as well,
2 indicating a chemical dependence. So I'm going to find she
3 is chemically dependent, has to be determined where she can
4 be placed. I don't have an alternative. Maybe she can go
5 into the RIS Apartments, I don't know, ACS; if she can't,
6 she might have to go to the state hospital.

7 So I'm going to order that she is chemically
8 dependent, that she's in danger. That the doctor even said
9 she had to be intubated. If she carries on this way, she is
10 in serious danger of jeopardizing her own health. So I'm
11 going to order that she be treated.

12 I will order alternative, as the doctor indicated,
13 of residential treatment which is less severe than the state
14 hospital, and hopefully we can get her into that.

15 Having said that, Ms. Kahl, you need to carry the
16 message downstairs that, you know, you folks might need to
17 start subpoenaing anybody who is involved. If they're not
18 going to try to assist the system by showing up, then we can
19 bring them here. When they don't show for a subpoena, then
20 we'll move on from there.

21 And, Doctor, I appreciate you running over here.
22 That was above and beyond the call of duty, as usual. I
23 think you've been in my Court before, and I appreciate your
24 efforts.

25 Ms. [B.], I'm going to issue an order that

17

1 requires you to have treatment. I'm going to order
2 alternative; hopefully, you can get in, you know, that's the
3 issue. I don't know that. And if she can't, then she might
4 be going to the state hospital.

5 So Ms. Kahl, I suggest you call over there to find
6 out what their plan is.

7 MR. RUNGE: Your Honor, I'm going to object to
8 that. If there is anything going on, I need to be
9 cross-examining a witness, not just having her make phone
10 calls over there.

11 THE COURT: I'm saying to get her into alternative
12 treatment.

13 MR. RUNGE: Well, that should be on the record,

14 Your Honor. That's part of this case.
15 THE COURT: Well, it's not going to be. If you
16 want to file a motion, you know where the Supreme Court is.
17 It can all work that way, but my order is going to indicate
18 she goes into residential setting, and if none are
19 available, the state hospital is the only place I can get
20 her treatment. So we'll see what happens beyond that.
21 Getting her into the system doesn't mean you don't -- I
22 don't have anything alternative, other than residential
23 setting. That's what I'm hanging my hat on from the
24 doctor's testimony.
25 All right. Thank you.

18

Tr. 15-18.

[¶22] At the close of the hearing, the court found by clear and convincing evidence that L.B. had an alcohol dependency. **Tr. 15-18.** In its written findings, the court found clear and convincing evidence that “the Respondent is Chemically dependent.” **App. 16.** The court also found:

That if the Respondent is not treated, there exists a serious risk of harm to self, others or property, and a substantial likelihood of:

* * *

Substantial deterioration in physical health, or substantial injury, disease, or death resulting from recent poor self-control or judgment in providing one's shelter, nutrition, or personal care;

* * *

App. 29.

[¶23] The court further found:

VI

That a treatment program other than hospitalization would not be adequate to meet the Respondent's needs or sufficient to prevent harm or injuries to the Respondent or others. The specific risks if the Respondent is not hospitalized are: **Treatment available through residential treatment in the community.** (emphasis added).

CONCLUSIONS OF LAW

I

That the Respondent is mentally ill or chemically dependent as defined by N.D.C.C. 25-03. 1-02 and is or continues to be a person requiring treatment.

Based on the above, the Respondent is ordered to undergo treatment at the ACS apartments available WCHS for a period not to exceed 90 days, ending on 02/13/2015.

App. 18.

[¶24] In its Order For Less Restrictive Treatment, the court stated:

The Court has considered a petition for less restrict treatment and has either heard testimony or accepted the Respondent's waiver of hearing;

IT IS NOW ORDERED that the Respondent undergo treatment at the requested facility for the remainder of the treatment [type] commitment ending on 2/13/15 [date], or until further order of the Court.

Description of treatment: Outpatient with residential component. ACS apartment is available, is now available (next word illegible) to Court.

* * *

App. 19.

[¶25] L.B. now appeals.

[¶26] **III. Jurisdiction.**

[¶27] The district court had jurisdiction under North Dakota Const. Art. VI, §8, 25-03.1-03, and section 27-05-06(1) of the North Dakota Century Code. The appeal from the district court was timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. Art. VI, § 6, sections 25-03.1-29, 29-01-12 and 29-28-06 of the North Dakota Century Code.

[¶28]

IV. Scope of Review

[¶29] **North Dakota Supreme Court's Scope of Review of this Appeal is Limited and the Standard is Governed by Rule 52(a) of the North Dakota Rules of Civil Procedure.**

[¶30] Pursuant to 25-03.1-29 this court is "limited to a review of the procedures, findings, and conclusions of the lower court." N.D. Cent. Code § 25-03.1-29 (2013), *In the Interest of U.A.M.*, 446 N.W.2d 23, 26 (N.D. 1989), *In re Reidel*, 353 N.W.2d 773 (N.D. 1984). Second, only a licensed psychiatrist or clinical psychologist or licensed addition counselor may make an evaluation of the respondent's mental status. N.D. Cent. Code § 25-03.1-02 §7 (2013), *In the Interest of Goodwin*, 366 N.W.2d 809, 814 (N.D. 1985), *In the Interest of Rambousek*, 331 N.W.2d 548, 551 (N.D. 1983).

[¶31] Third, the trial court's decision to order involuntary treatment is a two-step process. *In the Interest of U.A.M.*, 446 N.W.2d 23, 25-26 (N.D. 1989). The trial court must first find the respondent [chemically dependent]. *In the Interest of L.D.*, 2003 ND 182, ¶5, 671 N.W.2d 791. The trial court must then find the respondent a person requiring treatment. *Id. at* ¶6.

[¶32] Fourth, the trial court's decision to order involuntary confinement for a ninety-day treatment period must be based on clear and convincing evidence which is presented by the petitioner, because the respondent is presumed not to require treatment within the bounds of the North Dakota Century Code. N.D.Cent.Code § 25-03.1-19 (2013). Under Rule 52(a) of the North Dakota Rules of Civil Procedure, this Court will not set aside a trial court's decision unless that decision was "clearly erroneous." N.D.R.Civ. P. 52(a). In other words,

[i]n prior decisions, a majority of our court has expressed the view that the trial court's determination of whether or not there is clear and convincing evidence that the respondent is a person in need of treatment is a finding of fact which we will not set aside on appeal unless it is clearly erroneous under Rule 52(a). N.D.R.Civ.P.

In the Interest of U.A.M., 446 N.W.2d 23, 26 (N.D. 1989).

[¶33] In the present case, the trial court's determination that the L.B. was a chemically dependent person requiring treatment is a clearly erroneous conclusion. The facts presented by the petitioner/appellee at the treatment hearing were not clear and convincing and did not remove the presumption that the L.B. was not a person who was a chemically dependent person requiring treatment as will be shown below.

[¶34] Additionally, concluding that the ACS Apartments was the least restrictive alternative was also a clearly erroneous conclusion. The petitioner failed to provide any evidence of the least restrictive alternative.

[¶35] **V. Argument**

[¶36] **A. The Expert Examiner Failed to Appear to Support the Petition and as a Result, this Case Must be Dismissed.**

[¶37] The petitioner had two expert examiners. The first was Dr. Lacey Armstrong, psychiatrist and Ms. Carmen Johnson, License Addiction Counsel (LAC). **App. 11-12.** Dr. Armstrong did not testify because she did not find that L.B. was mentally ill. **Id. at 11.** Ms. Johnson refused to appear as a witness at L.B.'s Treatment Hearing. **Tr. 2-6.** Instead, only Dr. Gabriella Balf testified. **Tr. 7-13.** The written Report of Examination (Form F2) and Report Assessing the Availability and Appropriateness of Alternative Treatment (Form F2A) were only filed with the court. **App. 11-14.**

There was no testimony supporting any foundation in support of these two documents. They were hearsay.

[¶38] Per information from the petitioner's attorney, Ms. Johnson refused to appear because she had not been subpoenaed nor ordered to testify under 42 C.F.R. §2.64 (2014). There is nothing in the 42 C.F.R. Section 2 (2014) that prevented the petitioner from subpoenaing Ms. Johnson.

[¶39] 42 C.F.R. §2.64 (2014) states:

§ 2.64 Procedures and criteria for orders authorizing disclosures for noncriminal purposes.

(a) Application. An order authorizing the disclosure of patient records for purposes other than criminal investigation or prosecution may be applied for by any person having a legally recognized interest in the disclosure which is sought. The application may be filed separately or as part of a pending civil action in which it appears that the patient records are needed to provide evidence. An application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the patient is the applicant or has given a written consent (meeting the requirements of these regulations) to disclosure or the court has ordered the record of the proceeding sealed from public scrutiny.

(b) Notice. The patient and the person holding the records from whom disclosure is sought must be given:

(1) Adequate notice in a manner which will not disclose patient identifying information to other persons; and

(2) An opportunity to file a written response to the application, or to appear in person, for the limited purpose of providing evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) Review of evidence: Conduct of hearing. Any oral argument, review of evidence, or hearing on the application must be held in the judge's chambers or in some manner which ensures that patient identifying information is not disclosed to anyone other than a party to the proceeding, the patient, or the person holding the record,

unless the patient requests an open hearing in a manner which meets the written consent requirements of these regulations. The proceeding may include an examination by the judge of the patient records referred to in the application.

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

(e) Content of order. An order authorizing a disclosure must:

(1) Limit disclosure to those parts of the patient's record which are essential to fulfill the objective of the order;

(2) Limit disclosure to those persons whose need for information is the basis for the order; and

(3) Include such other measures as are necessary to limit disclosure for the protection of the patient, the physician-patient relationship and the treatment services; for example, sealing from public scrutiny the record of any proceeding for which disclosure of a patient's record has been ordered.

42 C.F.R. §2.64 (2014).

[¶40] In this case, the petitioner could have easily subpoenaed Ms. Johnson to testify. Then and there, in courtroom, the court could have ordered Ms. Johnson to testify. The concern for privacy is not an issue because under N.D.C.C. 25-03.1-19, "All persons not necessary for the conduct of the proceeding must be excluded, except that the court may admit persons having a legitimate interest in the proceeding." *Id.* Additionally, the case file in this matter is closed to the public. It is a restricted file. Ironically, while Ms. Johnson refused to testify as to the contents

of the both the Report of Examination (Form F2) and Report Assessing the Availability and Appropriateness of Alternative Treatment (Form F2A), she disclosed both reports by filing them with the court.

[¶41] Dr. Gabriella Balf testified as the petitioner. Under section 25-03.1-19 of the North Dakota Century Code, L.B. has a right to confront and cross-examine both the petitioner and the expert examiners. Only Dr. Balf was present. N.D.Cent.Code §25-03.1-19 (2013).

[¶42] “Evidentiary matters at involuntary treatment hearings are governed by the North Dakota Rules of Evidence. NDCC 25-03.1-19. A petitioner, like Dr. Balf, for an involuntary commitment must present evidence to support the petition; allegations contained in the petition have no per se evidentiary value.” *In the Interest of D.H.*, 507 N.W.2d 314, 315 (N.D. 1993). The same is true for the petitioner’s expert witnesses.

[¶43] All information the doctor testified to was what she observed when she did the consult and used to support the petition. **App. 2-4.** And, that was not all that reliable. Dr. Balf declared L.B. to be both, mentally ill, chemically dependent and requiring treatment **App. 2.**

[¶44] Dr. Balf stated in the petition that L.B. was mentally ill. **App. 3.** Dr. Armstrong, who did the formal evaluation on L.B., contradicted Dr. Balf, because Dr. Armstrong did not find that L.B. was not mentally ill. **App. 11-12.**

[¶45] This left a testimonial gap, because the only other expert to evaluate L.B. was Ms. Johnson. *Id.* Ms. Johnson refused to testify and the petitioner made no effort to bring Ms. Johnson before the court. For all intents and purposes, there

was no expert testimony to support the Report of Examination nor the Report Assessing the Availability and Appropriateness of Alternative Treatment. L.B. had no opportunity to cross-examine the expert examiner. Incidentally, nowhere in Ms. Johnson's Report Assessing the Availability and Appropriateness of Alternative Treatment was there mention of other treatment facilities, such as Heartview, New Freedom Center or even the ne Ruth Meyers Hospitality Home.

[¶46] B. The Trial Court's Decision to Order L.B. to Outpatient Treatment for a Ninety Day Period is Not Supported by Clear and Convincing Evidence to Show that L.B. was a Person Who Was Chemically Dependent and Requiring Treatment Under Section 25-03.1-02 §§ 11 and 12 of the North Dakota Century Code.

[¶47] Appellate review of an involuntary treatment order is governed by N.D.C.C. § 25-03.1-29 and is "limited to a review of the procedures, findings, and conclusions of the lower court." *In Interest of R.N.*, 1997 ND 246, ¶ 9, 572 N.W.2d 820. A petition for involuntary treatment must be supported by clear and convincing evidence. N.D.C.C. § 25-03.1-19. Whether clear and convincing evidence was presented in support of the petition is a question of fact and will not be reversed unless it is clearly erroneous. *R.N.*, at ¶ 9. "We will affirm an order for involuntary treatment unless it is induced by an erroneous view of the law or if we are firmly convinced it is not supported by clear and convincing evidence." *Id.*

Whether a person requires treatment needs a two-step analysis. First, the court must find the person is mentally ill [or chemically dependent], and second, the court must find there is a reasonable expectation that, if the person is not hospitalized, there exists a serious risk of harm to himself, others, or property. *R.N.*, at ¶ 11. It is not enough that a person would benefit from treatment, the person must require treatment. See *In Interest of M.B.*, 467 N.W.2d 902, 904 (N.D.1991).

In the Interest of L.D., 2003 ND 182, ¶ 5, 671 N.W.2d 791.

[¶48] There is a presumption that in favor of the respondent. N.D.C.C. 25-03.1-19 (2011). The burden of proving, by clear and convincing evidence, that L.B. is a

person who is chemically dependent and requiring treatment is on the petitioner.

Id.

[¶49] 1. **There Was No Clear and Convincing Evidence that proved L.B. was “Chemically Dependent” as Mandated by the North Dakota Century Code.**

[¶50] Section 25-03.1-02 §§2 of the North Dakota Century Code states: “‘Chemically dependent person’ means an individual with an illness or disorder characterized by a maladaptive pattern of usage of alcohol or drugs, or a combination thereof, resulting in social, occupational, psychological, or physical problems.” N.D.C.C. 25-03.1-02 §§2 (2013).

[¶51] This definition is analogous with the definition of a “mental ill person,” in that, “there are thus two focal points of mental illness under our statute: first, disorder, and second, substantial impairment.” *See In the Interest of S.S.*, 491 N.W.2d 721, 722-23. (N.D. 1992).

[¶52] The only testimony taken was of Dr. Balf. She was the petitioner. There was no evidence presented to support the Report of Examination. The doctor only testified as to what she saw as a result of the consult, which was recited in the petition.

[¶53] The second element in the definition of a “chemically dependent person” is that this illness or disorder must result in “social, occupational, psychological, or physical problems.” Again, there was no evidence presented to support the Report of Examination.

[¶54] 2. There Was No Clear and Convincing Evidence that Showed the Appellant as a "Person Requiring Treatment" as Mandated by the North Dakota Century Code.

[¶55] 12. "Person requiring treatment" means a person who is mentally ill or chemically dependent, and there is a reasonable expectation that if the person is not treated for the mental illness or chemical dependency there exists a serious risk of harm to that person, others, or property. "Serious risk of harm" means a substantial likelihood of:

- a. Suicide, as manifested by suicidal threats, attempts, or significant depression relevant to suicidal potential;
- b. Killing or inflicting serious bodily harm on another person or inflicting significant property damage, as manifested by acts or threats;
- c. Substantial deterioration in physical health, or substantial injury, disease, or death, based upon recent poor self-control or judgment in providing one's shelter, nutrition, or personal care; or
- d. Substantial deterioration in mental health which would predictably result in dangerousness to that person, others, or property, based upon evidence of objective facts to establish the loss of cognitive or volitional control over the person's thoughts or actions or based upon acts, threats, or patterns in the person's treatment history, current condition, and other relevant factors, including the effect of the person's mental condition on the person's ability to consent.

N.D.Cent. Code § 25-03.1-02 §§ 12 (2013).

[¶56] The district court found that L.B. was a "chemically dependent person" and was a "person requiring treatment," in that, if not treated there was a substantial likelihood that there would be a:

- c. Substantial deterioration in physical health, or substantial injury, disease, or death, based upon recent poor self-control or judgment in providing one's shelter, nutrition, or personal care; or

App. 17.

[¶57] The court further stated that;

The following statements, behaviors, or conditions are evidence of danger to self, others, or property: ICU 3 weeks, for detox delerium tremens ER. for alcohol 13x in last year.

Id.

[¶58] The court relied solely on Dr. Balf's testimony who was not the expert examiner to form his findings. However, none of the expert witnesses were present to testify in support of their evaluations. **Tr. 7-18.**

[¶59] "The standard for involuntary commitment remains clear and convincing proof that the [chemically dependent] individual is a person who requires treatment as defined by the statute, not one who would benefit from treatment." *In Interest of R.N.*, 450 N.W.2d 758, 761 (N.D.1990); *In the Interest of M.B.*, 467 N.W.2d 902, 904 (N.D. 1991); *In the Interest of L.D.*, 2003 ND 182 ¶5, 671 N.W.2d 791. This is one of those cases whereby treatment for L.B. is not required even though she may benefit from treatment.

[¶60] **C. The Court Erred by Not Ordering the Least Restrictive Alternative Treatment.**

[¶61] The court did not review any report assessing the availability and appropriateness of alternative treatment. Section 25-03.1-21 §§1 of the North Dakota Century Code states:

Before making its decision in an involuntary treatment hearing, the court shall review a report assessing the availability and appropriateness for the respondent of treatment programs other than hospitalization which has been prepared and submitted by the state hospital or treatment facility. If the court finds that a treatment program other than hospitalization is adequate to meet the respondent's treatment needs and is sufficient to prevent harm or injuries which the individual may inflict upon the individual or others,

the court shall order the respondent to receive whatever treatment other than hospitalization is appropriate for a period of ninety days.

N.D.Cent. Code 25-03.1-21 (2013).

[¶62] The court couldn't review neither the Report of Examination nor the Report Assessing the Availability and Appropriateness of Alternative Treatment. Neither expert witness were subpoenaed to court to support the document.

[¶63] A Report Assessing the Availability and Appropriateness of Alternative Treatment was filed with the district court. However, there was no testimony to support it. **Tr. 2-3.**

[¶64] In *In the Interest of J.K., a/k/a W.J.*, 1999 ND 182, 599 N.W.2d 337. This court held that:

Along with a written report, testimony at trial indicating specifically why alternative forms of treatment are not viable and why appropriate treatment methods are available only in a hospital may be sufficient to meet the statutory requirements. *In the Interest of J.S.*, 545 N.W.2d 145, 148 (N.D. 1996) (holding testimony supporting the report and indicating state hospital was "continuously searching" for an adequate alternative for treatment but no such program existed in the state satisfied requirements of N.D.C.C. § 25-03.1-21(1)); *In the Interest of J.S.*, 499 N.W.2d 604, 607 (N.D. 1993) (holding testimony about violent, aggressive, and unpredictable behavior to be clear and convincing evidence that treatment outside a hospital would not be appropriate was not clearly erroneous); *In the Interest of R.R.*, 479 N.W.2d 138 (N.D. 1992) (holding report listing two alternatives, which assessed the availability of treatment programs, weighed their appropriateness, and explained its conclusions and rejection of alternatives, along with testimony respondent was paranoid, antagonistic, violent, and explosive, provided a sufficient basis for concluding there were no appropriate alternative programs).

In the Interest of J.K., a/k/a W.J., 1999 ND 182, ¶18, 599 N.W.2d 337.

[¶65] In this case, there was no testimony to support the Report Assessing the Availability and Appropriateness. L.B. was denied the opportunity to cross-exam

the expert witness regarding alternative treatment. To make matters worse, the court ordered the petitioner to make ex parte contact with Ms. Johnson to make sure the one listed alternative to inpatient treatment was still available. **Tr. 18.**

[¶66] The court states:

5 So Ms. Kahl, I suggest you call over there to find
6 out what their plan is.

7 MR. RUNGE: Your Honor, I'm going to object to
8 that. If there is anything going on, I need to be
9 cross-examining a witness, not just having her make phone
10 calls over there.

11 THE COURT: I'm saying to get her into alternative
12 treatment.

13 MR. RUNGE: Well, that should be on the record,
14 Your Honor. That's part of this case.

15 THE COURT: Well, it's not going to be. If you
16 want to file a motion, you know where the Supreme Court is.
17 It can all work that way, but my order is going to indicate
18 she goes into residential setting, and if none are
19 available, the state hospital is the only place I can get
20 her treatment. So we'll see what happens beyond that.
21 Getting her into the system doesn't mean you don't -- I
22 don't have anything alternative, other than residential
23 setting. That's what I'm hanging my hat on from the
24 doctor's testimony.

25 All right. Thank you.

18

Tr. 18.

[¶67] By ordering the petitioner to communicate with Ms. Johnson as to whether alternative treatment was available, it clearly indicates, that the court failed to follow section 25-03.1-21 §§1 of the North Dakota Century Code. It is also clear that the court needed information about the availability of alternative treatment to the point where the court was willing to depend on information acquired in contravention of due process of law.

[¶68]

VI. CONCLUSION

[¶69] For the reasons set forth above, the L.B. respectfully requests the North Dakota Supreme Court to reverse the decision and order of the court below to dismiss the petition.

[¶70] Respectfully submitted this 14th day of December, 2014.

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[¶71]

CERTIFICATE OF SERVICE

[¶72] I certify that I am the attorney representing L.B. to this action. I made service of L.B.'s **CORRECTED BRIEF FOR THE APPELLANT** by electronic transmission (e-mail) true copies to Mr. Alexander J. Stock, Ass't Burleigh County State's Attorney, 514 E. Thayer Ave., Bismarck, North Dakota 58501 at astock@nd.gov on this 15th day of December, 2014, in accordance with Rule 5(f) of the North Dakota Rules of Civil Procedure and Supreme Court Order 14.

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