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2018 IL App (3d) 170063-U

Order filed January 9, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

In re BRITTNEY P.,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
(The People of the State of Illinois,	)	Peoria County, Illinois,
	)	
Petitioner-Appellee,	)	Appeal No. 3-17-0063
	)	Circuit No. 17-MH-9
v.	)	
	)	
Brittney P.,	)	Honorable
	)	Suzanne L. Patton,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: The court erred by granting the petitions for involuntary commitment and involuntary administration of psychotropic medications without testimony of an expert who examined respondent or notice of the side effects, risks, benefits, and alternatives to the proposed treatment.

¶ 2 Respondent, Brittney P., challenges her involuntary commitment and the involuntary administration of psychotropic medications, arguing (1) the court violated section 3-807 of the Mental Health and Developmental Disabilities Code (Code) (405 ILCS 5/3-807 (West 2016))

when it granted the petition for involuntary commitment without the expert testimony of someone who had examined her; (2) the use of Dr. Rama Embar's hearsay testimony violated her constitutional right to due process; (3) the court erred by denying her motion for directed finding; and (4) the court violated section 2-107.1 of the Code (405 ILCS 5/2-107.1 (West 2016)) and her right to due process by granting the petition for involuntary treatment. We reverse.

¶ 3 FACTS

¶ 4 On January 11, 2017, a petition for the involuntary commitment of respondent to Unity Point Methodist in Peoria, Illinois, was filed. The next day, January 12, 2017, a petition for administration of psychotropic medications was also filed. Hearings on both petitions were held on January 17, 2017. The main witness testifying at the hearing was Dr. Rama Embar, who was considered the treating physician psychiatrist for respondent at Unity Point. At the time of the hearing, Embar had not yet examined respondent and the entire testimony was thus based on Embar's review of respondent's mental health records. Respondent had briefly visited Embar's office the previous day, but had refused to talk to Embar without her attorney present. Embar testified that respondent had been released from McFarland State Hospital a week before being admitted to Unity Point and had been admitted to several hospitals prior. After reviewing respondent's records, Embar stated respondent was homeless, had called 911, and was brought to the emergency room for a psychiatric evaluation as she was delusional. Embar said respondent had been diagnosed with schizophrenic disorder and respondent was "probably *** not improving due to her inconsistency with taking the medication." Embar further stated that doctors had tried to prescribe respondent medication during several of her hospitalizations, but "every note says she's not consistently taking the medication." Embar did not believe respondent understood the need for continuing treatment and would be able to take care of herself, stating,

"She's able to take care of herself to some extent," but "with her delusional content, I don't think she will be able to function very well outside [of the hospital] without any medications and control her symptoms." Embar recommended that respondent be committed for 90 days. At the close of Embar's testimony, respondent moved for a directed finding, which the court denied. Respondent then testified that she did not believe she needed the medication and she did not like the way it made her feel.

¶ 5 The court granted the petition and committed respondent for 90 days. Immediately following the commitment hearing, a hearing was held on the petition for the involuntary administration of psychotropic medication. The petition was completed by Dr. Andrew Lancia, but he did not testify at the hearing. Instead, Embar again testified. Embar discussed the treatment that respondent would receive. Embar stated respondent was unable to make a reasoned decision regarding her medication and there was no less restrictive treatment available. The State did not present any evidence establishing that respondent was provided with written notice regarding the alternatives to the proposed treatment or the side effects, risks, or benefits of the treatment. The court granted the petition and ordered the medication to be administered for up to 90 days.

¶ 6 ANALYSIS

¶ 7 On appeal, respondent argues (1) the court violated section 3-807 of the Code when it granted the petition for involuntary commitment without the expert testimony of someone who had examined her; (2) the use of Embar's hearsay testimony violated respondent's constitutional right to due process; (3) the court erred by denying her motion for directed finding; and (4) the court violated section 2-107.1 of the Code and her right to due process by granting the petition for involuntary treatment. Respondent admits the case is rendered moot by the expiration of the

90-day deadline of the orders, but asks that we consider the issues under one of the exceptions to the mootness doctrine. The State solely argues the case is moot and none of the exceptions apply. We find the issues are moot, but are subject to review under the capable of repetition yet avoiding review exception to the mootness doctrine. We further find the court erred by involuntarily committing respondent without the testimony of an expert who had examined her and in ordering the administration of psychotropic medication without providing respondent with written notice.

¶ 8 Courts of review do not generally decide moot questions unless one of the exceptions to the mootness doctrine applies. *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). The capable of repetition yet evading review exception permits review of a moot issue is (1) the challenged action is of a duration that is too short to be fully litigated prior to its cessation, and (2) there is a reasonable expectation that the complaining party will be subject to the same action again. *Id.* at 358. In order to satisfy the second element, "there must be a substantial likelihood that the issue presented in the instant case, and any resolution thereof, would have some bearing on a similar issue presented in a subsequent case." *Id.* at 360. The State agrees the first element is satisfied, but argues respondent cannot satisfy the second element.

¶ 9 We find our recently decided case of *In re Tara S.*, 2017 IL App (3d) 160357, instructive. In *Tara S.*, the State filed petitions for the involuntary commitment of the respondent to a mental health facility and the involuntary administration of psychotropic medication. *Id.* ¶¶ 3-4. The court held hearings on the petitions on the same day. *Id.* ¶ 6. A psychiatrist testified she had not yet examined the respondent, but had read the respondent's medical history. *Id.* The respondent had been mentally ill for 10 years, had two prior hospitalizations, and had previously taken psychotropic medications that had restored her functioning. *Id.* ¶¶ 6, 10. The psychiatrist further

testified that the respondent did not understand her mental illness and that her condition could be stabilized with treatment. *Id.* ¶ 6. The court granted the petition for commitment for a period of 90 days, and then held a hearing on the State's petition for the involuntary administration of psychotropic medication. *Id.* ¶ 9. Based on the psychiatrist's review of the respondent's medical chart, she determined that the respondent had previously taken psychotropic medications and they had restored the respondent's functioning. *Id.* ¶ 10. She then opined that the benefits of the treatment outweighed the side effects and there were no less restrictive options. *Id.* The record did not show the respondent had received written information containing "the 'side effects, risks, and benefits of the treatment, as well as alternatives to the proposed treatment.' " *Id.* ¶ 25 (quoting 405 ILCS 5/2-102(a-5) (West 2016)). The court granted the petition and ordered the administration of the psychotropic medication for up to 90 days. *Id.* ¶ 12.

¶ 10 We found the issue to be moot as the 90 day period had expired. *Id.* ¶ 16. However, we found that it met both elements of the capable of repetition yet avoiding review exception to the mootness doctrine. *Id.* In doing so, we agreed that, as the orders were only for 90 days, they were too short to be fully litigated prior to their cessation. *Id.* We then stated:

> "The record establishes that respondent is a person with a 10-year history of mental illness. This history included two prior hospitalizations. No evidence was presented that the proposed treatment plan would alleviate respondent's mental illness entirely. Rather, the evidence showed that her cognitive function would be stabilized once the treatment was in full effect. However, respondent had received and discontinued treatment in the past. Therefore, it is very likely that respondent will face future involuntary hospital admissions or involuntary administration of psychotropic medication proceedings." *Id.* ¶ 17.

As we found that an exception to the mootness doctrine applied, we accepted the State's confessions that (1) under section 3-807 of the Code the respondent could not be committed without testimony from an expert who had actually examined her and (2) the respondent did not receive any written notice regarding the psychotropic medication as required under section 2-102(a-5) of the Code. *Id.* ¶¶ 22-23, 26.

¶ 11 The facts, here, are almost identical to *Tara S.* Like in *Tara S.*, respondent has a long history of mental illness with prior hospitalizations. She also has received and discontinued the use of psychotropic medications in the past. There was no evidence that, after being hospitalized and receiving medication for 90 days, respondent's mental illness would be entirely alleviated. "Therefore, it is very likely that respondent will face future involuntary hospital admissions or involuntary administration of psychotropic medication proceedings." *Id.* ¶ 17. Thus, we find the issues presented reviewable under the capable of repetition yet avoiding review exception to the mootness doctrine. We now turn to the merits of respondent's appeal.

¶ 12 The State concedes that the orders for involuntary commitment and involuntary administration of psychotropic medications both must be reversed for failure to comply with the Code. After reviewing the record, we accept the State's confession.

¶ 13 Section 3-807 of the Code provides:

> "No respondent may be found subject to involuntary admission on an inpatient or outpatient basis unless at least one psychiatrist, clinical social worker, clinical psychologist, or qualified examiner *who had examined the respondent* testifies in person at the hearing. The respondent may waive the requirement of the testimony subject to the approval of the court." (Emphasis added.) 405 ILCS 5/3-807 (West 2016).

¶ 14 Here, Embar had not personally examined respondent before testifying at the hearing, but instead based the testimony on a review of respondent's medical records, which does not satisfy this requirement. *Tara S.*, 2017 IL App (3d) 160357, ¶ 23. Moreover, the record does not show respondent waived this requirement. Therefore, the order for involuntary commitment must be reversed.

¶ 15 Further, section 2-102(a-5) of the Code requires the recipient of psychotropic medication to be provided with written notice of the "side effects, risks, and benefits of the treatment, as well as alternatives to the proposed treatment." 405 ILCS 5/2-102(a-5) (West 2016). This requirement is not satisfied by verbal advice. *In re Vanessa K.*, 2011 IL App (3d) 100545, ¶ 20.

¶ 16 The record does not show that respondent was notified in writing of the side effects, risks, benefits, and alternatives to the medication. Therefore, the order for involuntary administration of psychotropic medication must also be reversed.

¶ 17 As we reverse both the involuntary commitment order and the involuntary administration of psychotropic medication order, we need not consider the rest of respondent's arguments.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Peoria County is reversed.

¶ 20 Reversed.

¶ 21 JUSTICE SCHMIDT, dissenting:

¶ 22 I would dismiss this appeal as moot. The majority finds that because appellant may face involuntary commitment and/or involuntary administration of psychotropic drugs in the future, this case meets the capable of repetition but evading review exception. *Supra* ¶¶ 9-11. The majority ignores the requirement that the resolution of the issues in this case would have a bearing on a similar issue presented in a subsequent case. See *In re Alfred H.H.*, 233 Il 2d 345

(2009). That requirement is lacking here. The majority relies upon *Tara S.* in deciding the mootness issue. That case, too, was wrongly decided. The trial court's resolution, albeit in error, will have no bearing on any future cases. The majority offers its resolution as a Rule 23 order. How then can this order be used in a future case? Tara S. will be unable to cite this order in any potential future case. We do not " 'review cases merely to set precedent or guide future litigation.' " *Id.* at 360 (quoting *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 8 (1997).