Standard of Proof for Residential Placement of Minor in State's Custody

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Court Proceeded Appropriately during Placement Hearing Involving Native American Child

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In *Tuluksak Native Community v. Department of Health and Human Services*, 530 P.3d 359 (Alaska 2023), the Alaska Supreme Court held that the Office of Children's Services (OCS), under Alaska Stat. § 47.10.087 (2020), was authorized to place a child in an out-of-state residential psychiatric treatment facility using the clear and convincing standard. Additionally, the lower court did not plainly err in failing to consider the Indian Child Welfare Act's (ICWA) placement preferences.

Facts of the Case

In 2021, OCS filed an emergency petition for temporary custody of Hanson N. (a pseudonym adopted by the court), a 15-year-old boy from Tuluksak, Alaska, and member of the Tuluksak Native Community (also referred to as the Tribe). He was subsequently removed from his mother's care and placed in the care of an extended relative. Several months later, Hanson presented voluntarily to an emergency room and was admitted to North Star Behavioral Hospital without involvement of OCS or the court. The reason for admission was that Hanson "had some sort of incident. . . took a rope and tied it around his neck" (*Tuluksak*, p 363). OCS then requested an Alaska Stat. § 47.10.087 review hearing. A statewide injunction required this judicial hearing within 30 days. Alaska Stat. § 47.10.087 allows a court to authorize OCS to place a child in its custody into a secure residential psychiatric treatment center if certain statutory conditions are met. It requires showing that the child is "gravely disabled or is suffering from mental illness and, as a result, is likely to cause serious harm to the child or to another person" and that "there is no reasonably available, appropriate, and less restrictive alternative for the child's treatment" (Alaska Stat. § 47.10.087).

Neither Hanson nor his attorney were present at the initial hearing. Tuluksak Native Community filed a response to OCS's hearing request questioning whether the statute applied because Hanson had been voluntarily admitted to North Star. The Tribe also raised arguments regarding discovery and requested a continuance.

Over the objection of the Tribe, the court proceeded with the hearing. OCS called Mr. Sabo, one of Hanson's treatment providers at North Star who testified about Hanson's condition. OCS argued that there was clear and convincing evidence that Hanson experienced a "mental illness," was dangerous to himself and needed placement exceeding 30 days. The court found that Hanson met criteria for placement under Alaska Stat. § 47.10.087. Three further hearings were held. During the second hearing, neither Hanson nor his attorney were present, so the court did not proceed. At the third hearing, Hanson's attorney appeared but stated they were not ready to proceed and reported that Hanson did not want to be moved out of state. At the final hearing, Hanson and his attorney were present. OCS notified the court that they were seeking Hanson's placement at an out-of-state residential facility. Mr. Sabo testified again, describing Hanson's mental illness, threats to others, and suicidal statements. He stated that Hanson needed long-term psychiatric care. OCS called a nurse consultant, John Luchansky, to testify about the proposed placement for Hanson. Mr. Luchansky testified that Hanson was accepted at two of nine facilities North Star had applied to, in Texas and Utah. Mr. Luchansky testified that OCS looked for treatment facilities which accepted Alaska Medicaid. Mr. Luchansky was not aware if Indian Health Services maintained a list of "tribally affiliated" facilities. At the conclusion of the hearing, the court found that OCS had "barely met its burden" regarding statutory placement criteria (*Tuluksak*, p 367) but that Hanson

could be placed out of state with review hearings held every 30 days.

The Tribe appealed the placement decision, raising several points: the application of Alaska Stat. § 47.10.087 to this case was unconstitutional; the court erred by applying the incorrect standard of proof; and the court erred by placing Hanson at a secure residential treatment facility without making appropriate findings under the ICWA or Alaska law. The Tribe raised other constitutional arguments, but the court did not consider them.

Ruling and Reasoning

First, the Alaska Supreme Court held that OCS was correct to proceed under Alaska Stat. § 47.10.087 to seek placement for a minor in its care. The court cited its recent decision in *In re Hospitalization of April S.*, 499 P.3d 1011 (Alaska 2021). In this case, a minor in OCS custody was hospitalized for a mental health evaluation. At the 30-day commitment hearing, the superior court held that the first 30 days of the minor's hospitalization were voluntary under Alaska Stat. § 47.30.690 (2022), a statute that allows a child to be admitted to a treatment facility if the parent or guardian signs admission paperwork. But, the Alaska Supreme Court reversed, holding that OCS did not qualify as a parent or guardian, and that OCS cannot voluntarily commit minors in its care. Rather, OCS has the option to pursue an involuntary commitment or seek placement in a secure residential treatment facility under Alaska Stat. § 47.10.087. Therefore, in Hanson's case, proceeding under Alaska Stat. § 47.10.087 was appropriate.

Second, the Alaska Supreme Court held that the lower court did apply the correct standard of proof at the .087 hearing. Notably, Alaska Stat. § 47.10.087 does not explicitly identify the applicable standard of proof. The Tribe argued that because the court described the evidence presented as "barely" meeting the standards in Alaska Stat. § 47.10.087, the court must have assumed the appropriate standard of proof was preponderance of the evidence. The Alaska Supreme Court did not agree and stated that a clear and convincing standard was appropriate for the involuntary commitment of a minor. The trial court met this standard by considering Mr. Sabo's testimony and concluding that a residential facility was the best placement for Hanson. The court noted that placing a minor in a psychiatric facility "implicates protected liberty interests to such a degree that a lesser standard would not be appropriate" (*Tuluksak*, p 373).

Third, the state supreme court held that the lower court's failure to explicitly apply ICWA placement preferences was not plain error but that the court should always consider these preferences when placing Native children in foster care in residential facilities. Section 1915(b) of the ICWA emphasizes that Native children should be placed in "reasonable proximity" to their home, with preference for placement at Native-approved institutions. Placing a Native American child at a secure residential psychiatric facility is considered a foster care placement, and the court stated that an .087 hearing involves the placement preferences outlined by the ICWA. Importantly, no party directly raised an ICWA argument before the trial court or objected to the placement of Hanson on ICWA grounds. The court noted that limited treatment facilities were available, tribally affiliated or not, that were able to meet Hanson's treatment needs. The court observed that although the trial court record did not identify tribally run facilities that may have been appropriate for Hanson, it was not obvious that the failure to do so was prejudicial or would have changed the outcome of Hanson's placement.

Discussion

Addington v. Texas, 441 U.S. 418 (1979), established clear and convincing evidence as the most appropriate standard of proof in civil commitment proceedings, to balance a state's interests with individual liberty rights. *Parham v. J.R.*, 442 U.S. 584 (1979), discussed that, like adults, minors have significant liberty interests at stake when committed for psychiatric treatment. But *Parham* did not require the same legal protections as *Addington*, in part because of the presumption that guardians will act in their child's best interest when seeking psychiatric hospitalization. But, placing a minor in state custody in a secure residential placement may implicate more substantial liberty concerns. For example, the Florida Supreme Court, in *The Department of Children and Family Services v. J.W.,* 890 So. 2d 337 (Fla. Dist. Ct. App. 2004), held that "the proper standard of proof in proceedings for the involuntary commitment of a dependent child to a residential mental health facility is clear and convincing evidence" (*J.W.*, p 340). Alaska joins these states in applying this standard. *Tuluksak* also highlights the role of mental health treatment providers in these placement hearings, and

the court's reliance on their testimony to identify least restrictive placement alternatives.

Finally, *Tuluksak* highlights the importance of recognizing the potential implications of the ICWA and the effects it may have on a Native American minor's psychiatric placement. Removal of Native American children from their families of origin can result in feelings of isolation and threaten their cultural identity (Wills C, Norris D. Custodial evaluations of Native American families: Implications for forensic psychiatrists. J Am Acad Psychiatry Law. 2010 Dec; 38:540-6). When making placement decisions for Native children, it is imperative to use the provisions of the ICWA to ensure that placements prioritize the child's connection to their tribal community and heritage. Forensic psychiatrists can serve as advocates for the incorporation of the ICWA placement preferences.

Trial Courts Can Reject Unrebutted Expert Opinion

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In *Menard v. State*, 291 A.3d 1025 (Conn. 2023) the Connecticut Supreme Court held that the trial court's rejection of expert testimony about a diagnosis of posttraumatic stress disorder (PTSD) was acceptable and not arbitrary in part because the expert witness failed to independently assess the credibility of the plaintiffs' reports of PTSD symptoms.

Facts of the Case

Connecticut state troopers Scott Menard, Darren Connolly, and Robert Zdorjeski sustained injuries during a traffic stop when an intoxicated driver collided with one of their police cruisers. The collision resulted in the parked vehicle making physical contact with the troopers. They were ambulatory after the accident and transported for medical evaluation. The troopers filed separate but nearly identical complaints against the state of Connecticut, alleging that they sustained physical injuries during the accident and that they were entitled to underinsured motorist benefits from the state. In addition, they alleged that because of the accident, they had PTSD.

The troopers' cases were consolidated for trial. At the trial, each trooper testified that the accident affected them physically and mentally, reducing their ability to fulfill employment obligations. They also presented medical evidence of treatment and assessment from a licensed professional counselor, Jennifer Honen. Ms. Honen was both the expert witness in the case and the treating clinician for the troopers. She testified that she diagnosed the troopers with PTSD. She was asked how she evaluated for malingering. She explained she would consider malingering only if there were subjective "red flags" such as "odd. . . personality or character strategy. . . or different reports. . . of stormy and short relationships. . . a characterological disorder" (*Menard*, p 1034). She testified that she presumed the troopers' reports of PTSD symptoms were truthful in part because of an absence of these red flags. Ms. Honen was also aware of psychological tests for malingering but stated that she did not administer them because she was not a psychologist. She stated that she assumed that the troopers' descriptions of their symptoms were truthful. She did not testify about factors that weighed against malingering.

The trial court issued a joint memorandum of decision, determining that the troopers should be awarded limited damages, but the sum was only a fraction of what was sought. The court concluded that damages for PTSD were not compensable under the uninsured or underinsured motorist statute (UM and UIM), which allowed damages for "bodily injury" (Conn. Gen. Stat. Ann. §§ 38a-336a(1)(A), 38a-336 (a)(2) (2022). The court noted that the troopers' PTSD stemmed from a psychological and not a physical injury, so did not qualify as a bodily injury. The court also did not find Ms. Honen's forensic evaluation sufficiently credible to establish a diagnosis of PTSD.

The troppers contended that Ms. Honen's diagnosis of PTSD relied both on their reporting of symptoms and her clinical observations during treatment. The court rejected the troppers' arguments, observing

that their treatment notes "almost exclusively recounted symptoms" reported by the troppers rather than objective observations of signs or symptoms.

That all three plaintiffs had the same diagnosis was also questioned on cross-examination. Ms. Honen explained that people can withstand a certain amount of trauma before it becomes pathological. She was unable to adequately address how all three troopers reached their maximum capacity for processing trauma at the same time from the same event. Ms. Honen was also unaware of inconsistencies between the troopers' report and factual circumstances. For example, she was unaware that Mr. Connolly's report of having been run over by a car was factually inaccurate.

Mr. Menard and Mr. Connolly filed a motion to reconsider and for *additur*, challenging the trial court's conclusion that they were not entitled to recover damages for PTSD. Mr. Zdrojeski withdrew from the appeal. The appeals court rejected the troopers' arguments, agreeing with the lower court's decision that there was no coverage for PTSD claims under the statute. It did not address the rejection of expert testimony regarding the PTSD diagnosis. The plaintiffs appealed to the Connecticut Supreme Court, contending that the trial court's rejection of Ms. Honen's expert opinion was impermissibly arbitrary because her testimony was unrebutted and also supported by the record.

Ruling and Reasoning

The Connecticut Supreme Court concluded that the troopers' liability claims failed on grounds of "evidentiary insufficiency" because neither the testimony by Ms. Honen nor the diagnosis of PTSD was credible, and the trial court did not err in rejecting her testimony. The court emphasized that the fact finder "may accept or reject, in whole or in part" uncontradicted expert testimony (*Menard,* p 1035). The court pointed to several cases, including *State v. Weathers*, 260 A.3d 440 (Conn. 2021), which laid out factors for the trier of fact to consider when determining credibility, including the expertise of the witness, the opportunity to observe the evaluee, the thoroughness of the evaluation, and the reasonableness of the judgments made. Thus, the court concluded that the fact finder's rejection of Ms. Honen's testimony was not arbitrary as there was sufficient "basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief" (*Menard,* p 1035).

Ms. Honen's failure to independently assess the truthfulness of the troopers' reports of PTSD symptoms or assess for malingering made her testimony less credible. Furthermore, the court stated that "it may well be standard practice for therapists to presume the truthfulness of their patients' reporting of PTSD symptoms for treatment purposes" but "such an assumption is not sufficient for purposes of a forensic assessment" (*Menard,* p 1035). The court described how an expert witness should consider other diagnoses and how malingering could be ruled out.

Furthermore, the Connecticut Supreme Court was not obligated to address the relationship of PTSD manifesting in physical form, which could potentially qualify the plaintiffs for UM and UIM as a form of "bodily injury." The case was affirmed in part, reversed in part, and remanded.

Discussion

The *Menard* decision emphasized that the trier of fact has wide latitude in determining the credibility of expert testimony, including whether the methodology experts use to come to their opinion is reliable. The court points out, however, that this discretion is not boundless, and such testimony cannot be rejected arbitrarily. The court opined that there must be "some basis in the record" (*Menard*, p 1035) to support the conclusion that the expert testimony is "unworthy of belief." In this case, there was sufficient basis in the trial court record to reject the expert witness's testimony, despite it's being unrebutted.

This case also demonstrates the important difference between a mental health assessment for treatment and a forensic evaluation. Rates of malingering are estimated to be as high as 20 to 30 percent in personal injury claims for PTSD (Taylor S, Frueh BC, Asmundson GJ. Detection and management of malingering in people presenting for treatment of posttraumatic stress disorder: methods, obstacles, and recommendations. J Anxiety Disord. 2007; 21:22-41). The subjective nature of PTSD can make detection of false symptoms, including misattributed or factitious symptoms, more difficult. A forensic evaluator should follow a systematic approach to consider and rule out false PTSD in these cases (Matto, M, McNiel DE, Binder, RL. A systematic approach to the detection of

false PTSD. J Am Acad Psychiatry Law. 2019 Aug; 47(3):325-34). This includes gathering the patient's report of symptoms and the traumatic event as well as collateral information, such as treatment records and third-party interviews, and conducting psychological testing (Glancy GD, Ash P, Bath EP, *et al.* AAPL practice guideline for the forensic assessment. J Am Acad Psychiatry Law. 2015 Jun; 43(2 Suppl):S3-53).

The *Menard* case also highlights the problem of dual agency, where the treating clinician also serves as an expert witness. Some reasons to avoid dual agency are that it may adversely affect the therapeutic relationship, affect countertransference, and impede objectivity in forensic opinions and testimony. This form of dual agency should generally be avoided, if possible, as outlined in the AAPL Ethics Guidelines for the Practice of Forensic Psychiatry (https://www.aapl.org/ethics.htm).