ILLINOIS STATE BAR ASSOCIATION

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Mental Health Matters

The newsletter of the Illinois State Bar Association's Section on Mental Health Law

Editor's Note

BY SANDRA M. BLAKE

This issue of *Mental Health Matters* presents summaries of three recent appellate court opinions, all offering tremendous guidance for mental health law practitioners.

The *Marcus S.* opinion from the third district laments some of egregious errors by courts, prosecutors, and defense counsel in involuntary admission and involuntary treatment cases and proposes some ways to correct those errors through education. Some of those suggestions have been the topic of discussion of this section council for some time.

In re the Marriage of Wendy W. and James W. addresses issues which arise in the context of marital disputes, a minor's right to control access to his or her mental health record, whether a therapeutic school record is a mental health record and other very

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Appellate Update: *Marcus* Appeals Trigger Call to Action

BY ANDREAS LIEWALD

***In re Marcus S.,* 2022 IL App (3d) 160710; *In re Marcus S.,* 2022 IL App (3d) 170014 (3d) 170014, opinion filed January 18, 2022.**

On January 18, 2022, the Third District Appellate Court entered two opinions admonishing all participants at trial level, including the trial court, the state's attorney's offices, and court-appointed counsel [the public defender's offices] for the "brazen disregard of the law" in mental health civil commitment and involuntary treatment hearings, and not safeguarding a respondent's constitutional rights. *In re Marcus S.,* 2022 IL App (3d) 160710, ¶51 (*Marcus1)*; and *In re Marcus S.,* 2022 IL App (3d) 170014 (3d) 170014, ¶52 (*Marcus2*). This article will outline the history of both cases at trial level, the appellate court's holdings, and the appellate court's recommendations to the Illinois Supreme Court "to stop these continuing, egregious violations of respondents'

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Editor's Note

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practical issues faced by practitioners on a regular basis.

Since the beginning of the COVID pandemic, there has been an increase in the number of mental health cases worldwide. There has also been an increase in willingness to talk about those issues more openly. *Mental Health Matters* is always looking for contributions for publication. Please consider sharing. ■

Appellate Update: *Marcus* Appeals Trigger Call to Action

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constitutional and statutory rights in these cases." *Marcus1,* ¶51, *Marcus2,* ¶52.

Writer's note: Legal Advocacy Service (LAS), a division of the Illinois Guardianship and Advocacy Commission, was appointed as counsel to Marcus S. on both appeals. After LAS became aware of the numerous, systematic rights violations at trial level to Marcus S. and other respondents in Peoria and La Salle counties, as well as Champaign and McLean counties, where respondents were represented by the public defender's offices in mental health hearings, it hired staff attorneys to represent respondents in those regions prior to the appellate court's opinions in these matters. *See also In re Angela C.,* 2022 IL App (3d) 170154-U, ¶28, 29, and *In re Cathleen E.,* 2022 IL App (3d) 170415-U, ¶28, where LAS represented prior respondents on appeals involving rights violations and ineffective assistance of counsel [the public defender's office] at trial level. In involuntary admission and involuntary treatment hearings in Illinois, if the trial court determines that the respondent is unable to obtain counsel, the court shall appoint as counsel an attorney with the Guardianship and Advocacy Commission, if available. 405 ILCS 5/3-805 and 405 ILCS 5/2-107.1(a-5)(3) (Lexis 2022). However, if an attorney from Guardianship and Advocacy is not available, the court shall appoint as counsel the public defender or, only if no public defender is available, an attorney licensed to practice law in Illinois. *Id.*

Facts at Trial Level

Both appeals involve the same Respondent, Marcus S., who was 23 years old, has a history of a mental illness, and has been treated with various psychotropics on and off since he was 18 years old. *Marcus1,* ¶3, *Marcus2,* ¶3.

Facts in First Appeal

In mid-October, 2016, Marcus burnt his hand while attempting to burn large quantities of trash in his backyard, far away from his house. *Marcus1,* ¶3. He put out the fire himself and went to the emergency room, where he received treatment for his hand. *Marcus1,* ¶3. One week later, Marcus's father brought him to Unity Point Methodist Hospital in Peoria (Unity Point) for follow-up medical care and possible mental health care. *Marcus1,* ¶4. Marcus S. was admitted to Unity Point as a psychiatric patient. *Marcus1,* ¶4. Although Marcus tried to sign in on a voluntary basis, Unity Point staff filed a petition for involuntary commitment on October 25, 2016. *Marcus1,* ¶4. The petition did not include the names of any of Marcus's relatives or information as to why they could not be contacted, as required by section 3-601(b)(2) of the Mental Health and Developmental Disabilities Code (Code), and Marcus's public defender did not object to this defect. 405 ILCS 5/3-601(b)(2) (West 2016). *Marcus1,* ¶4.

On October 27, 2016, Dr. Lancia, Marcus's treating psychiatrist at Unity Point, filed a petition for involuntary medication requesting the administration of 27 medications. *Marcus1,* ¶5. Although Dr. Lancia listed the preprinted statutory criteria for involuntary treatment in the medication

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petition, he did not list any facts supporting the statutory criteria. *Marcus1,* ¶5. Marcus's public defender never moved to dismiss the petition for failing to state a cause of action or otherwise objected to the petition's inadequacy. *Marcus1,* ¶5.

The commitment and medications hearing were both held on November 1, 2016. *Marcus1,* ¶6. Marcus testified that he had tried to sign himself into Unity Point as a voluntary patient but was not permitted to do so. *Marcus1,* ¶6. Marcus's public defender did not ask for a recess to address Marcus's attempt to become a voluntary admittee. *Marcus1,* ¶6.

Dr. Lancia testified, in part, that Marcus had been taking Zyprexa at the hospital voluntarily as prescribed for a few days. *Marcus1,* ¶8. Dr. Lancia feared that Marcus might stop taking the Zyprexa when he left the hospital. *Marcus1,* ¶8. He therefore opined that Marcus needed an injection of long-acting medication. *Marcus1,* ¶8. Dr. Lancia opined that Risperdal's long-acting injection was a more practical alternative than Zyprexa's long-acting injection because Zyprexa required the patient to sit for a long period of time while the injection is administered and would therefore require a willing patient. *Marcus1,* ¶8.

Dr. Lancia did not file a predisposition report containing a social history and a detailed treatment plan including treating goals and an estimated timetable for their attainment, as required by the Code. *Marcus1,* ¶9. Rather, he merely filed a cursory, one-page treatment plan that listed problems and goals but no specific treatment methods or timetable. *Marcus1,* ¶9. The public defender did not object to the incomplete treatment plan or to the absence of a predisposition report and the psychiatrist testified in conclusory fashion that he did not believe that Marcus could be released to a less restrictive facility than Unity Point. *Marcus1,* ¶9.

The trial court ordered Marcus subject to involuntary commitment to Unity Point for 90 days and found it to be the least restrictive treatment alternative. *Marcus1,* ¶10. The court concluded that, because of a mental illness, Marcus was reasonably expected to engage in conduct placing himself or others in danger of physical harm. *Marcus1,* ¶10. It further found that Marcus was unable to understand the need for treatment because, although he had been taking Zyprexa, he had refused Risperdal and was therefore likely to deteriorate if not treated as an inpatient. *Marcus1,* ¶10.

The involuntary medication hearing took place immediately after the commitment hearing. *Marcus1,* ¶11. During the medication hearing, Dr. Lancia testified that Marcus was voluntarily taking Zyprexa and "seem[ed] to show some improvement." *Marcus1,* ¶11. However, Dr. Lancia stated that Risperdal or Haldol would be better options because they allow for a long-lasting injectable form to be given once every two to four weeks. *Marcus1,* ¶11. The psychiatrist asked the court to approve 27 medications in all. *Marcus1,* ¶11. Although Dr. Lancia testified that, to his knowledge, Marcus had not suffered any side effects from any of the 27 medications listed, he acknowledged that Marcus had "potential allergies" to two of the requested medications, Risperdal and Haldol. *Marcus1,* ¶11.

Marcus testified that, when he had taken Risperdal and Haldol in the past, he could not breathe and was not able to move his jaw, arms, or legs. *Marcus1,* ¶12. He described these reactions as "horrible" and very painful. *Marcus1,* ¶12. Marcus testified that, for that reason, he refused to take Haldol or Risperdal because the Zyprexa was "working just fine" and he did not have any adverse reactions to Zyprexa. *Marcus1,* ¶12. He did not want Haldol or Risperdal forced on him. *Marcus1,* ¶12.

Marcus's mother testified that, when Marcus was hospitalized at another facility several years ago, the hospital staff told her that he had experienced tremors, involuntary twitches, and jaw locking, which was alleviated by another "side effect" medication. *Marcus1,* ¶12. However, Marcus testified that "it [side effect medication] didn't help, it still hurt." *Marcus1,* ¶12.

Afterwards, Dr. Lancia was recalled to testify. *Marcus1,* ¶13. Dr. Lancia testified that he would "prefer to stay away" from Risperdal and that Risperdal would be "really down the line" of medications he wished to administer to Marcus. *Marcus1,* ¶13. He acknowledged that Marcus might also have "minor problems" with Haldol. *Marcus1,* ¶13. Dr. Lancia stated he was now considering different options than he was before, like "sticking with the atypicals," *ie,* second generation drugs with fewer side effects, such as Abilify and Invega, both of which have long-lasting injectables. *Marcus1,* ¶13.

Although a 105-page packet of medication handouts was filed in the record, information about one of the 27 requested medications (Abilify Aristrada) was not included in the packet. *Marcus1,* ¶14. Moreover, no witness testified that the packet was ever provided to Marcus. *Marcus1,* ¶14. Marcus's public defender did not object to the incomplete packet or to the lack of proof that Marcus was provided with the packet. *Marcus1,* ¶14.

The trial court found Marcus subject to all 27 of the requested medications for up to 90 days. *Marcus1,* ¶15.

Facts in Second Appeal

On December 3, 2016, 32 days after the involuntary commitment and medication orders were entered by the circuit court of Peoria County, Marcus was involuntarily admitted to OSF St. Elizabeth Medical Center in Ottawa (OSF) for psychiatric care. *Marcus2,* ¶4. According to Dr. Chuprevich, Marcus's treating psychiatrist at OSF, Unity Point "let [Marcus] go and a week later he ended up at St. Francis emergency room" in Peoria. Dr. Chuprevich stated that Unity Point did not want Marcus back, so OSF was contacted. *Marcus2,* ¶4. Although Dr. Chuprevich acknowledged the possibility that Marcus was still under a court order for ongoing treatment, neither Marcus's public defender, nor the State, nor the trial court investigated the issue further or sought to obtain Marcus's prior court records. *Marcus2,* ¶4.

OSF filed a petition for involuntary commitment under the Code on December 22, 2016, 19 days after Marcus was involuntarily admitted to OSF. *Marcus2,* ¶5. Accordingly, the petition was untimely. *Marcus2,* ¶5. In addition, the petition did not name any of Marcus's relatives, as mandated by the Code. *Marcus2,* ¶5. No

one ever testified that Marcus was ever given a copy of the petition, as required by the Code. *Marcus2,* ¶5. Marcus's public defender did not object to the State's violations of the Code. *Marcus2,* ¶5. He did not argue that the petition was untimely or deficient in any respect. *Marcus2,* ¶5. Nor did he suggest that the State failed to prove that the petition had been given to Marcus or that any other mandatory procedural and substantive requirements of the Code were not satisfied. *Marcus2,* ¶5.

Also on December 22, Dr. Chuprevich filed a petition for involuntary medication under the Code. *Marcus2,* ¶6. The petition consisted of a preprinted form that merely stated the statutory elements and the legal and factual conclusions. *Marcus2,* ¶6. Although the petition directed the preparer to briefly explain reasons [why the] individual met the criteria for each statutory element, Dr. Chuprevich included a reason for only one element, *i.e.* that other, less restrictive services were explored and found inappropriate "because of non-compliance." *Marcus2,* ¶6. The State provided no reasons in support of the other required elements. *Marcus2,* ¶6. Nevertheless, the public defender did not move to dismiss the petition for failing to state a cause of action. *Marcus2,* ¶6.

The trial court ordered the State to provide a typed predisposition report as required by section 3-810 of the Code (405 ILCS 5/3-810 (West 2016)). *Marcus2,* ¶7. In response, the State filed a one-page form preliminary treatment plan with handwritten information filled in. *Marcus2,* ¶7. Marcus's public defender did not object to the State's failure to file a complete predisposition report that fully complied with section 3-810's requirements. *Marcus2,* ¶7.

At the commitment hearing, Dr. Chuprevich testified in part that although an intermediate care facility for the mentally ill would be a "great steppingstone" to independent living, Dr. Chuprevich believed it would be inadequate for Marcus because "outpatient has failed repeatedly." *Marcus2,* ¶9. He recommended that Marcus be committed for 90 days to "Environmental Health as part of the Department of Human Services." *Marcus2,* ¶9. The state's attorney did not ask Dr. Chuprevich about the one-page treatment plan and did not seek to amend the plan to make it a complete written predisposition report. *Marcus2,* ¶9.

Marcus testified in part that he was hospitalized at Unity Point pursuant to a court order after he was denied permission to sign into that facility as a voluntary patient. *Marcus2,* ¶10. He further testified that he had been begging the doctor not to force him into court because he did not want to have to deal with another "kangaroo court" like the one that had committed him to Unity Point. *Marcus2,* ¶10.

The trial court found Marcus subject to involuntary commitment at "McFarland Mental Health-DHS" due to his inability to provide for his basic needs and his refusal of treatment. *Marcus2,* ¶11.

The involuntary medication hearing commenced immediately afterwards. *Marcus2,* ¶12. The State questioned Dr. Chuprevich about the risks and benefits of the three medications he was asking to prescribe (Haldol, Cogentin, and Depakote), whether the benefits of those drugs outweighed their risks, and what tests were necessary for the safe and effective administration of the medications. *Marcus2,* ¶12. However, the State did not ask Dr. Chuprevich about Marcus's capacity to make a reasoned decision to accept or refuse medication. *Marcus2,* ¶12. Nor did it ask him any questions relating to the other required elements of the involuntary medication statute such as whether written information had been provided to Marcus. *Marcus2,* ¶12. Marcus's public defender did not object to the State's lack of proof on these issues. *Marcus2,* ¶12.

Although Dr. Chuprevich testified that he knew Marcus had been on Haldol before and he thought that Marcus might have been court ordered to take Haldol, Dr. Chuprevich stated that he had not investigated Marcus's records. *Marcus2,* ¶13. Neither Marcus's public defender, nor the state's attorney, nor the trial court paused the proceedings so that Marcus's records could be obtained and examined. *Marcus2,* ¶13

Marcus testified he was concerned about the risks of impotence and death that are associated with Haldol. *Marcus2,* ¶14. He stated that he had previously had a bad reaction to Haldol during which he "couldn't breathe," vomited copious amounts of phlegm, and thought he was "dying." *Marcus2,* ¶14. Marcus testified that he took Cogentin in an effort to alleviate these bad side effects but that it "doesn't do a thing" and "just destroys your impotently [*sic*]." *Marcus2,* ¶14. Marcus testified that his experience with Depakote was that "it made you act like a zombie." *Marcus2,* ¶14. He characterized Dr. Chuprevich as a "bully" who had been "strong arming" him the entire time he had been his patient. *Marcus2,* ¶14. He stated that Dr. Chuprevich "has not discussed anything with me" and that he had been forcing Marcus to take long-acting Haldol shots and Cogentin even though Haldol was on Marcus's allergies list. *Marcus2,* ¶14. Neither the State nor Marcus's public defender asked Dr. Chuprevich about his basis for administering involuntary medication to Marcus before obtaining a court order. *Marcus2,* ¶14.

The trial court found Marcus subject to involuntary medication for a period up to 90 days. *Marcus2,* ¶15. It found that the treatments proposed were not "unreasonable" and were in Marcus's best interest. *Marcus2,* ¶15. It further found that the State had proven that Marcus lacked the capacity to make a reasoned decision about his treatment even though Dr. Chuprevich had presented no opinion to that effect. *Marcus2,* ¶15. The trial court did not advise Marcus of his right to appeal its involuntary commitment and medication orders as required by section 3-816(b) of the Code, which requires the court to provide such notice both orally and in writing. 405 ILCS 3-816(b) (West 2016). *Marcus2,* ¶15. Nevertheless, Marcus filed a timely appeal. *Marcus2,* ¶15.

Appellate Court's Holdings in Both Appeals

The appellate court found that the State failed to satisfy mandatory requirements of the involuntary admission and involuntary treatment statutes in the Code for both appeals, which warranted the reversal of all the judgments for involuntary admission and involuntary treatment. *Marcus1,* ¶18-32; *Marcus2,* ¶17-31. The appellate court found "it alarming that these types of fundamental and obvious errors occur." *Marcus1,* ¶32, *Marcus2,* ¶31. The appellate court noted

that the Code provides that the state's attorney "shall ensure that petitions, reports and orders [filed pursuant to the Code] are properly prepared." Citing 405 ILCS 5/3-101 (West 2016). *Marcus1,* ¶32, *Marcus2,* ¶31. "The state's attorney utterly failed to fulfill this obligation in this case." *Marcus1,* ¶32, *Marcus2,* ¶31.

Failure to Comply with Involuntary Admission Statutes

In both appeals, the appellate court found that the State failed to satisfy the following mandatory requirements of the involuntary admission statute. *Marcus1,* ¶18*, Marcus2,* ¶18. First, in both commitment hearings, the State failed to include the names and contact information of Marcus's family members or to identify steps taken to make a diligent inquire to identify and locate such family members. 405 ILCS 5/3-601(b)(2) (West 2016). *Marcus1*, ¶19, *Marcus2,* ¶19. Because the State did neither, failure to provide this information rendered the petitions fatally defective. Citing *Lance H.,* 402 Ill. App. 3d 382, 387-89 (2010). *Marcus1,* ¶19, *Marcus2,* ¶19.

Further, the State in both commitment hearings failed to file a predisposition report as required by section 3-810 of the Code (405 ILCS 5/3-810 (West 2016)), which must include (1) information on the appropriateness and availability of alternative treatment settings; (2) a social investigation of the respondent; and (3) a detailed preliminary treatment plan that addresses the respondent's problems and needs, treatment goals, proposed treatment methods, and projected timetable for the attainment of the treatment goals. *Marcus1,* ¶20 *Marcius2,* ¶20. The State filed no predisposition report in either case. *Marcus1,* ¶20, *Marcus2,* ¶20. Instead, in both cases, it filed a cursory, one-page care plan that did not include all the required elements of a predisposition report. *Marcus1,* ¶20, *Marcus2,* ¶20. There was no testimony presented on the matters missing from the one-page plans. *Marcus1,* ¶20, *Marcus2,* ¶20. When the psychiatrists were asked in each case whether they believed that Marcus should be released into any less restrictive facility, they answered "no." *Marcus1,* ¶20, *Marcus2,* ¶20. The appellate court held in each appeal that "Such conclusory, cursory testimony does not suffice." Citing *In re Daryll C.,* 401 Ill. App. 3d 748 (2010). *Marcus1,* ¶20, *Marcus2,* ¶20.

Failure to Comply With Involuntary Treatment Statutes

Because the appellate court reversed the trial court's involuntary commitment orders, it also reversed the involuntary medication orders, which were contingent on Marcus receiving inpatient care pursuant to the commitment orders. Citing *In re John N.,* 364 Ill. App. 3d 996, 998-99 (2006). *Marcus1,* ¶21, *Marcus2,* ¶21. Although the appellate could have resolved the medication appeals on this ground alone, "[b]ecause these types of flagrant failures, utter disregard of the Code's requirements, and dereliction of duty both by the trial courts and counsel for both parties recur with disturbing regularity, we choose to address the involuntary medication order[s] as well." *Marcus1,* ¶22, *Marcus2,* ¶22.

The appellate court found that the State in both treatment hearings failed to establish mandatory requirements under section 2-107.1 of the Code, that (1) Marcus lacked the capacity to make a reasoned decision about the proposed treatment; (2) other, less restrictive alternatives to involuntary medication had been explored and found inappropriate; and (3) the benefits of each requested medication outweighed its potential harm. 405 ILCS 5/2-107.1(a-5)(4)(D)(E)and(F) (West 2016) *Marcus1,* ¶24, *Marcus2,* ¶24.

In both appeals, the appellate court found that the State failed to demonstrate that Marcus lacked capacity to make a reasoned decision about his treatment because Marcus was not given written information about the risks and benefits of the medications, and alternatives to the proposed treatment. *Marcus1,* ¶28, *Marcus2,* ¶28. In *Marcus1,* although a 105-page packet of medications handouts was filed in the record (the first page of which was signed by someone who claimed to have given the materials to Marcus), no one testified at trial that he had received written notice of the risks and benefits of, and alternatives, to each of the proposed medications as required by section 2-102(a-5) of the Code (405 ILCS 5/2-102(a-5) (West 2016)). *Marcus1,* ¶28. Moreover, in *Marcus1,* the appellate court held that even if Marcus had received the packet, it would have not satisfied the Code's written notice requirement because it contained no information whatsoever about one of the medications requested by the State and no information about possible treatment alternative to the 27 proposed medications. *Marcus1,* ¶28. To comply with section 2-107.1's requirements, the State had to provide evidence of the benefits and harms of *each* of the proposed drugs (*In re Alaka W.,* 379 Ill. App. 3d 251, 263 (2008)) and had to show that the benefits of each drug outweighed its harms (*In re C.S.,* 383 Ill. App. 3d 449, 452-53 (2008); *In re Mary Ann P.*, 202 Ill. 2d 393, 405-06 (2002). *Marcus1,* ¶28. In *Marcus2*, no one also testified that Marcus received mandatory written notice about the proposed medications and the alternatives, and the State conceded that no such notice was provided. *Marcus2,* ¶28.

In both appeals, the appellate court held that the State could not demonstrate that Marcus lacked capacity without showing, *inter alia,* that Marcus had received written notice of the risks and benefits of, and alternatives to, the proposed medications, as required by section 2-102(a-5) of the Code (405 ILCS 5/2-102(a-5) (West 2016). *Marcus1,* ¶28, *Marcus2,* ¶28. "'If such [written] notice is not given, then the State cannot establish that a respondent lacks the capacity to make a "reasoned decision" about treatment, because the written notice forms the basis upon which such decision can be made.'" Citing *In re Wilma T.,* 2018 IL App (3d) 170155, ¶23, (quoting *In re Katarzyna G.,* 2013 IL App (2d) 120807, ¶¶ 16-17; see also *In re Tiffany W.,* 2012 IL App (1st) 102492-B, ¶22; *In re Linda K.,* 407 Ill. App. 3d 1146, 1153 (2011), *overruled on other grounds, In re Rita P.,* 2014 IL 115798, ¶¶33-34. *Marcus1,* ¶28, *Marcus2,* ¶28. For this reason alone, the appellate court held that the trial courts committed reversible error by approving the State's involuntary medication petitions. Citing *Wilma T.,* 2018 IL App (3d) 170155, ¶23; and *Tiffany W.,* 2012 IL App (1st) 102492-B, ¶22. *Marcus1,* ¶29.

Further, the appellate court in both appeals found that there was evidence Marcus had capacity when Marcus cogently

testified at both medication hearings and showed an awareness of the side effects of the medications. *Marcus1,* ¶30, *Marcus2,* ¶29. In *Marcus1,* Marcus testified about the side effects of Haldol and Risperdal, which was corroborated by his mother's testimony. *Marcus1,* ¶30. In *Marcus2,* Marcus testified about prior bad experiences he had with Cogentin and Depakote. *Marcus2,* ¶29. "A person does not lack the capacity to make decisions about his own treatment merely because he has a mental illness (*In re Alaka W.,* 379 Ill. App. 3d at 265; *In re Phyllis P.,* 182 Ill. 2d 400, 401 (1998)) or because he disagrees with his doctor's proposed treatment (*In re Nicholas L.,* 407 Ill. App. 3d 1061, 1076 (2011)." *Marcus1,* ¶30. *Marcus2,* ¶29.

Also, regarding capacity, the appellate court in *Marcus1* found that Marcus was voluntarily taking Zyprexa while under Dr. Lancia's care at the hospital, which suggested that Dr. Lancia was treating him as a person with capacity to consent to mental health treatments. Citing *In re Hatsuye T.,* 293 Ill. App. 3d 1046, 1052 (1997) (noting that it is "most significant to the questions of capacity" when medical professionals treat their mentally ill patient as if she had the capacity to make her own treatment decisions). *Marcus1,* ¶30. Finally, the appellate court in both appeals found that the psychiatrists' testimonies were conclusory and insufficient as a matter of law to prove capacity. Citing *In re Larry B.,* 394 Ill. App. 3d 470, 477 (2009). *Marcus1,* ¶30, *Marcus2,* ¶28.

In both appeals, the appellate court held that the State failed to prove by clear and convincing evidence that the benefits of the proposed medications outweighed the harm when, although the psychiatrists testified to some of the medications, they failed to testify that the benefits outweighed their harms for all of them in each hearing as required by section 2-107.1(a-5)(4)(D) of the Code (405 ILCS 5/2-107.1(a-5)(4)(D) (West 2016)). *Marcus1,* ¶31, *Marcus2,* ¶30. In *Marcus1,* although Dr. Lancia mentioned the benefits outweighed harms of some of the drugs he proposed, he did not do so for all of them. *Marcus1,* ¶31. In *Marcus2,* the appellate court found that Dr. Chuprevich's testimony was wholly conclusory and therefore inadequate when he testified that he was only sure that one of the medications he proposed (Depakote) would help. *Marcus2,* ¶30. Finally, in both appeals, the appellate court found that the State failed to prove that the benefits of the drugs outweighed their harms given Marcus's history of suffering severe side effects from some of the requested drugs (Haldol and Risperdal in *Marcus1* and Haldol and Cogentin in *Marcus2*). *Marcus1,* ¶31, *Marcus2,* ¶30. To comply with section 2-107.1's requirements, the State had to provide evidence of the benefits and harms of *each* of the proposed drugs (*Alaka W.,* 379 Ill. App. 3d at 263) and had to show that the benefits of each drug outweighed its harms (*In re C.S.,* 383 Ill. App. 3d 449, 452-53 (2008)). *Marcus1,* ¶31, *Marcus2,* ¶30. "If only one medication on a proposed medication package does not satisfy this requirement, then the entire medication package must fail." Citing *C.S.,* 383 Ill. App 3d at 452-53; and *In re Mary Ann P.,* 202 Ill. 2d at 405-06. *Marcus2,* ¶30.

Ineffective Assistance of Counsel

The appellate court, on both appeals, found that Marcus's trial counsel [the public defender's offices] provided ineffective assistance of counsel during the involuntary admission and involuntary medication proceedings. *Marcus1,* ¶34, *Marcus2,* ¶33. In *Marcus1*, Marcus was represented by the Peoria County Public Defender's Office, and in *Marcus2,* Marcus was represented by the La Salle County Public Defender's Office. *Marcus2,* ¶8. Although the opinion in *Marcus1* just refers to "trial counsel", the trial records reflect that Marcus was represented by the Peoria County Public Defender's Office. *Marcus1,* ¶34.

The appellate court noted that respondents facing involuntary commitment or involuntary administration of psychotropic medication have a statutory right to counsel under the Code. 405 ILCS 5/3-805 (West 2016); *Barbara H.,* 183 Ill. 2d 482, 493-94 (1998). *Marcus1*, ¶34, *Marcus2,* ¶33. "This right to counsel includes the right to effective assistance of counsel; anything less would render the statutory guarantee of counsel a mere "hollow gesture serving only superficially to satisfy due process requirements."" (Internal quotation marks omitted.) *In re Tara S.,* 2017 IL App (3d) 160357, ¶17. *Marcus1,* ¶34, *Marcus2,* ¶33. The appellate court applied the *Strickland* standard in determining whether counsel had effectively tested the State's case in the proceedings under the Code. Citing *Strickland v. Washington,* 466 U.S. 668 (1984). *Marcus1,* ¶34, *Marcus2,* ¶33. "To establish ineffective assistance under this standard, a respondent must show that his counsel's performance was deficient (*i.e.,* that he committed errors so serious that he was not functioning as counsel as contemplated by the Code) and (2) counsel's errors were so prejudicial as to deprive the respondent of a fair hearing." *In re Tara S.,* 2017 IL App (3d) 160357 ¶19. *Marcus1,* ¶34, *Marcus2,* ¶33. The appellate court held that of "paramount importance" in involuntary health proceedings is whether respondent's counsel held the State to its burden of proof and to its procedural requirements. *In re Sharon H.,* 2016 IL App (3d) 140980, ¶42. *Marcus1,* ¶34, *Marcus2,* ¶33.

Ineffective Assistance of Counsel in Commitment Hearings

In both appeals, the appellate court found that the State failed to comply with several mandatory requirements of the Code without meeting any challenge or objection from Marcus's public defenders. *Marcus1,* ¶36, *Marcus2,* ¶35. First, the appellate court noted on both appeals that the public defenders neither objected to the deficiencies in the State's petition for involuntary admission nor moved to dismiss the petition. *Marcus1,* ¶36, *Marcus2,* ¶35. The appellate court further noted that section 3-601(b)(2) of the Code required the State either to include the names and contact information of Marcus's family members in the petition or, if no such names are provided in the petition, to identify the steps taken to make a diligent inquiry to identify and locate any such family members. 405 ILCS 5/3-601(b)(2) (West 2016). *Marcus1,* ¶36, *Marcus2,* ¶35. In both cases, the State did neither. *Marcus1,* ¶36, *Marcus2,* ¶35. Failure to

provide this information rendered the State's involuntary admission petitions fatally defective. Citing *Lance H.,* 402 Ill. App. 3d 382, 387-89 (2010). *Marcus1,* ¶36, *Marcus2,* ¶35. The appellate court held that Marcus's public defenders' failure to notify the trial court that the State's petitions were defective amounted to ineffective assistance. Citing *In re Jessica H.,* 2014 IL App (4th) 130399, ¶¶26, 25. *Marcus1,* ¶36, *Marcus2,* ¶35.

The appellate court further found that the State in both appeals failed to file predisposition reports as required in commitment hearings by section 3-810 of the Code (405 ILCS 5/3-810 (West 2016)). *Marcus1,* ¶38, *Marcus2,* ¶36. Nor did the State present testimony that could have sufficed in lieu of a predisposition report. *Marcus1,* ¶38, *Marcus2,* ¶36. In both appeals, the State's failure to provide a proper predisposition report or equivalent testimony severely prejudiced Marcus, and Marcus's public defenders' failure to object to this error constituted ineffective assistance. *Marcus1,* ¶38, *Marcus2,* ¶36.

Ineffective Assistance of Counsel in Treatment Hearings

In both appeals, the appellate court found that the State did not prove that Marcus was provided with all the statutorily required written information on the side effects, risks, benefits, and alternatives to each of the proposed medications. *Marcus1,* ¶39, *Marcus2,* ¶37. Marcus's public defenders' failure to object to the State's lack of evidence on this dispositive issue was ineffective assistance. *Marcus1,* ¶39, *Marcus2,* ¶37. The appellate court held that Marcus had a due process right not to be medicated on an involuntary basis unless the State proved that he lacked the capacity to make a reasoned decision about his own medical treatment. The State could not prove that Marcus lacked the capacity without first demonstrating that he had received all the information required by the Code as to each proposed medication. 405 ILCS 5/2-102(a-5) (West 2016). *Marcus1,* ¶39, *Marcus2,* ¶37. The appellate court held that by failing to object to the State's failure of proof on this issue, Marcus's public defenders failed to protect Marcus's fundamental due process right, thereby depriving him of fair trials. *Marcus1,* ¶39, *Marcus2,* ¶37.

Appellate Court's Recommendations to the Illinois Supreme Court

The appellate court noted in both appeals that "[t]his is far from the first time we have encountered such a brazen disregard for the law in civil commitment cases." *Marcus1,* ¶51, *Marcus2,* ¶52. "Our appellate court has repeatedly stressed the need for strict compliance with the legislatively established procedural safeguards for involuntary commitment proceedings." Citing *Alaka W.,* 379 Ill. App. 3d at 271-72; *In re Daniel M.,* 387 Ill. App. 3d 418, 422-23 (2008); and *Amanda H.,* 2017 IL App (3d) 150164, ¶46. *Marcus1,* ¶51, *Marcus2,* ¶52. "Nevertheless, our admonitions continue to go unheeded, and fundamental errors and omission recur with disturbing regularity." *Marcus1,* ¶51. "This threatens to render involuntary commitment and treatment proceedings, which involve massive intrusions on respondents' liberty, *pro forma* proceedings." *Marcus1,* ¶51. "This cannot be tolerated." *Marcus1,* ¶51.

In both appeals, the appellate court "hope[d] that our supreme court will act to stop the continuing, egregious violations of respondents' constitutional and statutory rights in these cases." *Marcus1,* ¶51., *Marcus2,* ¶52. It suggested that the Illinois supreme court could, for example, require that all trial courts presiding over these cases, attorneys in the state's attorney's offices, and any other counsel representing respondents in these cases receive adequate training as to the Code's requirements in order to ensure that such requirements are fully observed and strictly enforced. *Marcus1,* ¶51., *Marcus2,* ¶52.

The opinions in *Marcus1* and *Marcus2* highlight important issues involving respondent's civil and procedural rights in mental health proceedings, which far too often have been neglected. This may be an opportunity for the Illinois Supreme Court's Mental Health Task Force (a two-year initiative) to provide a statewide bench book for trial courts and educational resources to the state's attorney's offices and respondents' counsel to prevent these same mistakes from recurring.

More information on the Mental Health Task Force is available at: https://www.illlinoiscourt.gov/courts/additional-resources/mental-health-task-force/ ■

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Appellate Court Clarifies Minor's Right to Confidentiality

BY JOSEPH T. MONAHAN & MELISSA LUDINGTON

A recent First District Appellate Court opinion answers a number of decades-long and lingering questions about mental health records concerning minors. The decision is a must read for attorneys, mental health professionals, school administrators, school social workers, school counselors and anyone who works with minors and mental health. The opinion addresses issues which arise in the context of marital disputes, a minor's right to control access to his or her mental health record, whether a therapeutic school record is a mental health record and other very practical issues faced by practitioners on a regular basis.

***In re Marriage of Wendy W. and James W.*, 2022 IL App (1st) 201000, opinion filed March 24, 2022.** *Imagine that you are 14 years old and are seeing a therapist to deal with some anxiety or depression or just want to speak with a therapist about private matters. Being a teenager is difficult. You may be more comfortable talking with your therapist about things like sex, gender issues, pressure to take drugs and/or other concerns. Some things are easier to talk about with a therapist rather than your parent. But what if your parent or guardian could read the notes your therapist writes in your record? What if a parent or guardian could know all of the things you shared with your therapist? Would you be comfortable and open during your treatment? Would it make it more likely that you would not share the information with your therapist? What if you are OK with one parent seeing everything, but really do not want the other parent to access the information?*

In Illinois, minors over the age of 12 have limited authority themselves to decide what mental health records are shared and with whom they are shared. It is essential for professionals who work with children to be very clear about confidentiality and the limitations on confidentiality to protect minors' rights and to make certain they do not compromise the ethical and legal obligations they have to their minor clients.

Mental health practitioners often have to balance the pressure of a parent's request to see their child's mental health records with their client's desire to keep the records confidential. A parent may assume that they have a right to review everything; after all, they might be paying for the service and may even have identified the need and arranged for treatment. Parents, guardians and school professionals are often surprised to learn that, under the Illinois Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act), a minor 12 years or older has significant control over, and must consent to, the release of their mental health records.[1]

While the minor has some control over their record, it is not absolute. For example, if the parent or guardian requests to see the record, the minor must be informed of the request. If the minor objects or if the therapist finds there are compelling reasons for denying the access, the parent or guardian can petition the court for access.[2] Even if the minor objects, the parents are able to receive current physical and mental condition, diagnosis, treatment needs, services provided, and services needed, including any medication.

In *In re Marriage of Wendy W. and James W.*,[3] the First District addressed many of these issues in the context of a domestic relations action where the court had to examine the minor's statutory rights with the authorities ordered in a parenting agreement. Specifically, the Appellate Court in *Wendy W.* addressed what happens when a minor authorizes the release of records to one parent and denies authorization to the other.[4]

The case addresses the issues as part of a post-dissolution of marriage proceeding. The mother sought to restrict respondent father's parenting time based on allegations that visitation was distressing to the minor and the father would continue to interfere with their child's mental health treatment. The couple's original 2016 divorce decree allowed shared parenting time and access to their child's medical, mental health and school records. In 2019, however, Wendy filed an emergency petition to restrict her ex-husband James's parenting time based on their son's deteriorating mental health, assumed to be exacerbated by James's unsupervised visitation with his son. The court entered an order which suspended James's parenting time and other contact with his son. The order further instructed James not to interfere with his son's mental health treatment.

In December 2019, James moved for production of their son's medical, psychiatric, psychological and school records. Their son had consented to release of his mental health records to his mother but denied consent to release the same records to his father. James argued that: (1) he was entitled to his son's mental health records based on their marriage dissolution parenting allocation; (2) the records were relevant to the issue at bar; and (3) he was entitled to his son's school records. Wendy objected based on the child's statutory privilege to keep the records confidential and the minor's objection to the disclosure of the records to his father. The trial court denied the father's entire request for records; the appellate court affirmed the denial of mental health records but reversed the release of non-privileged school records from a therapeutic school.

Mental Health Records

1. The court found that, although shared records were allowed per the parenting allocation agreement, the minor controlled the sharing of his mental health records once he reached the age of 12. The court emphasized that the Confidentiality Act is clear; the intent is to preserve

confidentiality of records and protect the privilege granted to the person receiving mental health services.[5] This includes minors over the age of 12 years who control the privilege and must provide consent to the release of their mental health records. Without his child's consent, the father cannot access the minor's mental health records except for limited information as allowed by statute; namely, the child's current physical and mental condition, diagnosis, treatment needs, services provided and services needed.[6] Further, the court rejected the father's assertion that he was requesting records from the mother rather than the mental health practitioner. The court noted that the father cannot circumvent the minor's privilege by seeking the documents from another source.[7] In fact, the court highlighted that any disclosure of the records by either the mother or the Guardian ad Litem would be in violation of the Confidentiality Act.[8]

2. The court also considered whether the Confidentiality Act protects these records when the minor's mental health is introduced as an allegation under the Illinois Marriage and Dissolution of Marriage Act.[9] James argued that their son's mental health was directly related to the emergency petition to restrict his parenting time and contact with his son. Under the Confidentiality Act: "in any action brought or defended under the [Marriage Act],*** mental condition shall not be deemed to be introduced by making such claim and shall be deemed to be introduced only if the recipient or a witness on his behalf first testifies concerning the record or communication (740 ILCS 110/10(a)(a))."[10] Although Wendy did argue that their son's mental health was a fact in support of her petition, it was not the minor who introduced his mental health condition as part of his parents' post-dissolution of marriage proceeding.[11] Given that he was not a party to the proceedings, the minor could not have waived his privilege.[12]

Therapeutic School Records

1. The father was also denied access to his child's school records by the trial court. The trial court determined that attendance at a therapeutic school, which provides education in a therapeutic setting, would warrant protection of the records under the Confidentiality Act.[13] The court recognized that there is a question whether a therapeutic school must comply with both the Confidentiality Act and the Illinois School Student Records Act.[14] It noted while a parent has the right to inspect and copy all school student records of their child, the Student Records Act does not specifically address access to records and communications which are protected by the Confidentiality Act.[15] The Student Records Act does specifically protect communications between a student and a mental health practitioner.[16] Considering both statutes, the court determined that academic records- such as the minor's grades, academic assessments and similar information – are not protected merely because they were recorded at a therapeutic school.[17] The court found, however, that many services provided by a therapeutic school to support the minor's mental health needs *are privileged* under the Confidentiality Act.[18] Accordingly, under these circumstances, a therapeutic school may not release information related to the minor's mental health beyond the limited information allowed under the Confidentiality Act.[19]

The Mental Health and Developmental Disabilities Confidentiality Act recognizes that minors over the age of 12 years hold the privilege to control access to their records, even preventing release to the child's parent(s) or guardian(s). Although the Confidentiality Act does allow a parent to petition a court for disclosure of the records, the court in *Marriage of Wendy W.* determined that disclosure sought over the minor's objection is protected by the Confidentiality Act, including when raised under the Marriage and Dissolution of Marriage Act. Further, the protection extends regardless of the treatment setting. The court clarified that this privilege extends to the academic setting – including a therapeutic school – but only for those services and communications with mental health practitioners. *Schools must assess their record keeping practices in order to ensure that mental health records are distinguishable from academic records and are not inadvertently released without proper consent.*

Most importantly, young people aged 12 and up need to be aware of their rights regarding confidentiality and their privilege to consent or object to the disclosure of their mental health records, and be empowered to exercise this privilege. An adolescent, like any recipient of mental health services, can only benefit if they are comfortable engaging in treatment. Fear of parental access to their records should not be a barrier to a minor's treatment success in mental health services.■

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1. 740 ILCS 110/4(a).
2. *Id.*
3. *In re Marriage of Wendy W. and James W.*, 2022 IL App (1st) 201000.
4. *Id.*
5. *Marriage of Wendy W.*, ¶ 34.
6. *Id.*, ¶ 50.
7. *Id.*, ¶ 34.
8. *Id.*, ¶ 39.
9. 750 ILCS 5/ *et seq.*
10. *Marriage of Wendy W.*, ¶ 39.
11. *Id.*
12. *Id.*, ¶ 40.
13. *Id.*
14. 105 ILCS 10/ *et seq.*
15. *Id.*, ¶ 45.
16. *Id.*, ¶ 47. Under the Student Records Act, a mental health practitioner includes a: psychologist or other psycho-therapist, school social worker, school counselor, school psychologist. 105 ILCS 10/5(f)(2).
17. *Marriage of Wendy W.*, ¶ 48.
18. *Id.*
19. Under the Confidentiality Act, a parent/guardian is entitled, without consent, to information about their over 12-year-old child's current physical and mental condition, diagnosis, treatment needs, services provided and services needed. 740 ILCS 110/4(a)(3).