DIVISION ONE
FILED: 07-13-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH 2009-002504	1 CA-MH 10-0005 1 CA-MH 10-0008 (Consolidated)
	DEPARTMENT B
IN RE MH 2009-002618	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause Nos. MH 2009-002504
MH 2009-002618

The Honorable Michael D. Hintze, Judge Pro Tempore

AFFIRMED

Richard M. Romley, Acting Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
and Victoria M. Mangiapane, Deputy County Attorney
and Bruce P. White, Deputy County Attorney
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorneys for Appellants

N O R R I S, Judge

¶1 This consolidated appeal arises out of orders entered by the superior court requiring L.F. and C.C. (collectively, "appellants") to undergo involuntary mental health treatment. Before entering the orders, the court conducted evidentiary hearings at which counsel for each appellant and petitioner expressly stipulated to admit the two evaluating physicians' affidavits in lieu of their in-person testimony -- a practice now explicitly authorized by a recent statutory amendment. *See* Ariz. Rev. Stat. ("A.R.S.") § 36-539(B) (Supp. 2009).[1]

¶2 Despite the amendment, appellants argue the superior court was required to engage in a colloquy with them to determine whether they knowingly, voluntarily, and intelligently waived their rights to have the physicians testify in person. We rejected this argument in *In re MH 2009-001264*, 224 Ariz. 270, 229 P.3d 1012 (App. 2010), and held such a colloquy was not required. Although that decision affirmed a treatment order issued before the effective date of the amendment, we nevertheless adopt its reasoning and again reject this argument.

FACTS AND PROCEDURAL BACKGROUND

¶3 The facts of these cases are undisputed. The superior

[1]"The evidence presented by the petitioner or the patient shall include . . . testimony of the two physicians who performed examinations in the evaluation of the patient, *which may be satisfied by stipulating to the admission of the evaluating physicians' affidavits as required pursuant to § 36-533, subsection B*." (Emphasis reflects legislative amendment.)

court found by clear and convincing evidence each appellant was, as a result of a mental disorder, persistently or acutely disabled, in need of psychiatric treatment, and unwilling or unable to accept voluntary treatment. In C.C.'s case, the court based its finding on counsel's "agreement to stipulate to submit the doctors' affidavits in lieu of their testimony," and on testimony of a police officer, a crisis therapist, and an emergency room nurse, all three of whom had substantive interactions with C.C. In L.F.'s case, the court based its finding on counsel's agreement the "parties are stipulating to the admission of the [physicians'] affidavits," *see also infra* note 2, and on testimony of a case manager employment specialist and a case manager specialist who had substantive interactions with L.F. The court ordered each appellant to undergo a combination of inpatient and outpatient treatment not to exceed 365 days. Appellants timely appealed.

DISCUSSION

¶4 Appellants argue constitutional due process required the superior court to engage in a colloquy to determine whether he or she agreed to the stipulation of physicians' affidavits in lieu of their in-person testimony. We generally review constitutional and statutory claims de novo. *In re MH 2009-001264*, 224 Ariz. at __, ¶ 7, 229 P.3d at 1014.

¶5 We note appellants failed to raise their argument in the superior court, and "we generally do not consider issues, even constitutional issues, raised for the first time on appeal." *Id.* (quoting *Englert v. Carondelet Health Network*, 199 Ariz. 21, 26, ¶ 13, 13 P.3d 763, 768 (App. 2000)). Further, appellants invited the alleged error in jointly stipulating the physicians' affidavits into evidence. *See id.* at ¶ 8. "By the rule of invited error, one who deliberately leads the court to take certain action may not upon appeal assign that action as error." *Id.* (quoting *Schlecht v. Schiel*, 76 Ariz. 214, 220, 262 P.2d 252, 256 (1953) and citing *State v. Armstrong*, 208 Ariz. 345, 357 n.7, ¶ 59, 93 P.3d 1061, 1073 n.7 (2004)).

¶6 Considering the merits of appellants' claim, however, this court's opinion in *In re MH 2009-001264* addressed the precise question presented here and persuades us to reject appellants' claim. The only difference between that case and this appeal is that here, appellants' treatment orders were entered after the effective date of the amendment to A.R.S. § 36-539(B). Neither appellant argues the amended statute is unconstitutional, but they seem to suggest a tension exists between the requirement of the physicians' testimony and the practice of admission of the physicians' affidavits in lieu of their in-person testimony. We disagree.

¶7 In *In re MH 2009-001264*, as here, "the superior court held a hearing at which Appellant . . . cross-examined witnesses. The only right [Appellant] waived was to confront and cross-examine two specific witnesses. Appellant's counsel had presumably reviewed the affidavits, interviewed the physicians and Appellant, and explained Appellant's rights to [Appellant]."[2] 224 Ariz. at __, ¶ 10, 229 P.3d at 1014-15 (citing A.R.S. § 36-537(B) (Supp. 2009)). Thus, counsel was "able to assess the effect of the evaluating physicians' testimony and determine whether they should appear in person." *Id.* at __ & n.5, ¶ 10, 229 P.3d at 1015 & n.5. Here, as in *In re MH 2009-001264*, "we have a deliberate decision to forego the attendance and cross-examination of two evaluating physicians whose written testimony presented all statutorily required information via sworn affidavit." *Id.* at ¶ 11.

¶8 In addition, acquaintance witnesses in appellants' cases bolstered the physicians' affidavits and the allegations of mental disorder contained therein. The first physician's affidavit for C.C. stated, consistent with testimony of petitioner's witnesses and the second physician's affidavit,

[2]Indeed, L.F.'s counsel stated to the court: "I have reviewed both [physicians'] affidavits with my client. And it is to his benefit to stipulate to the admission of the affidavit, rather than having the live testimony of the doctors."

C.C. “had been allegedly breaking into motor homes,” “had given two different names to a DPS officer who found a license with a [third] name,” “attempted to escape from the emergency room,” and “had visual hallucinations.” The second physician’s affidavit for L.F. stated, consistent with testimony of petitioner’s witnesses and the first physician’s affidavit, L.F. “has a long history of mental disorder,” “stopped taking his medications for the past 2 months and has become increasingly paranoid, delusional, religiously preoccupied, agitated and threatening to family members.” On this record and adopting the reasoning in *In re MH 2009-001264*, we reject appellants’ contention the superior court must engage in a colloquy with the patient facing involuntary treatment regarding the admission of physicians’ affidavits in lieu of their in-person testimony.

CONCLUSION

¶9 For the foregoing reasons, we affirm the superior court's involuntary mental-health treatment orders.

/s/
_____
PATRICIA K. NORRIS, Judge

CONCURRING:

/s/
_____
JON W. THOMPSON, Presiding Judge

/s/
_____
ANN A. SCOTT TIMMER, Chief Judge