DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN THE MATTER OF CHRISTINE S.	1 CA-MH 12-0080 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Mohave County

Cause No. S8015MH201200031

The Honorable Lee Frank Jantzen, Judge

AFFIRMED

Matthew J. Smith, Mohave County Attorney Kingman
By Dolores Milkie, Civil Deputy County Attorney
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman
By Diane S. McCoy, Deputy Appellate Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 After conducting an evidentiary hearing, the superior court found by clear and convincing evidence Appellant was, as a result of a mental disorder, persistently or acutely disabled, in need of psychiatric treatment, and unwilling and unable to

accept voluntary treatment. Accordingly, the court ordered Appellant to undergo a combination of inpatient and outpatient treatment not to exceed 365 days ("treatment order").

¶2 On appeal, Appellant first argues we should vacate the treatment order because the court conducted the evidentiary hearing by video conference in violation of her due process constitutional rights and, further, impermissibility coerced her into complying with the video conference procedure by "sua sponte finding that an objection to [the] same would amount to a request for a continuance."

¶3 Appellant did not, however, raise either argument in the superior court. Specifically, although the superior court advised Appellant six days before the scheduled date of the evidentiary hearing it would be conducted by a video conference, Appellant raised no objection to that procedure either before or during the evidentiary hearing. Thus, neither argument is properly before us. *In re MH 2009-001264*, 224 Ariz. 270, 272, ¶ 7, 229 P.3d 1012, 1014 (App. 2010) (appellate court does not generally consider issues, even constitutional issues, raised for the first time on appeal) (citation omitted). But, even if not waived, based on our review of the transcript of the evidentiary hearing, Appellant received a "full and fair adversarial hearing." *In re MH 2006-000749*, 214 Ariz. 318, 321,

¶ 14, 152 P.3d 1201, 1204 (App. 2007) (citation omitted); *see also In re MH2010-002637,* 228 Ariz. 74, 78-81, ¶¶ 15-27, 263 P.3d 82, 86-89 (App. 2011) (discussing availability of telephonic and video conferencing options for patient's attendance at involuntary treatment hearing).

¶4 The record also does not reflect the court found objecting to the video conference procedure "would amount to a request for a continuance." Instead, the court advised Appellant that if she objected to this procedure, she would need to file the objection promptly and it "may be considered a request for extension of time for the hearing pursuant to A.R.S. § 36-535(B) to allow for argument on the objection and coordination of a courtroom hearing."

¶5 Appellant next argues we should vacate the treatment order, challenging the sufficiency of the evidence. The treatment order is, however, supported by substantial evidence. *See generally Matter of Mental Health Case No. MH 94-00592*, 182 Ariz. 440, 443-46, 897 P.2d 742, 745-48 (App. 1995) (reviewing court will uphold treatment order if supported by substantial evidence and will set aside superior court's findings of fact only if "clearly erroneous or unsupported by any credible evidence").

¶6 At the hearing, the two physicians who evaluated Appellant testified that based on their observations and evaluations of Appellant, she was suffering from a mental disorder they identified as either schizophrenia, schizoaffective disorder, or a bipolar disorder. Although the physicians differed regarding the nature of the mental disorder, they testified without equivocation that Appellant was, in fact, suffering from a mental disorder that caused her to be persistently or acutely disabled as that term is defined under state law. *See* Ariz. Rev. Stat. ("A.R.S.") § 36-501(32) (Supp. 2012). Both physicians expressed their opinions to a reasonable degree of medical certainty or probability, and although they did not describe their opinions in those terms, that is not a requirement. *In re M.H. 2007-001236*, 220 Ariz. 160, 169-70, ¶ 30, 204 P.3d 418, 427-28 (App. 2008) (expert's failure to use "magic word or phrase" such as probability is not determinative).

¶7 Further, contrary to Appellant's argument on appeal, both physicians expressed to a reasonable degree of medical certainty that if not treated, Appellant's mental illness had a substantial probability of causing her to suffer severe and abnormal mental, emotional, or physical harm that would significantly impair her judgment, reason, behavior, or capacity

to recognize reality. *See generally* A.R.S. § 36-501(32)(a). Collectively, the physicians testified Appellant was disorganized, appeared confused, rambled "on and on" about different things that did not make sense, was delusional, suspicious of everyone around her, believed people were stalking her, and suffered from paranoid delusions. And, contrary to Appellant's argument on appeal, both physicians testified they had explained to Appellant the advantages and disadvantages of treatment and placement, but her mental illness interfered with her ability to make an informed decision regarding treatment.[1]

¶8 The two acquaintance witnesses who testified at the hearing substantiated the physicians' descriptions of Appellant. One witness explained Appellant "always thought people were stalking her" and "was getting very, very aggressive in her language," and the other witness described Appellant as "paranoid."

¶9 Finally, Appellant argues we should remand this case to the superior court to determine if Appellant received

[1]Appellant argues the affidavit submitted by one of the evaluating physicians in support of the petition for court-ordered treatment did not comply with the requirements of A.R.S. § 36-533(B) (Supp. 2012) because it failed to describe in detail the behavior that indicated Appellant was, as a result of a mental disorder, persistently or acutely disabled. As Appellee points out, however, this physician testified at the hearing and his testimony supplemented any deficiency in his affidavit and, further, his testimony in the evidentiary hearing complied fully with all statutory requirements for involuntary treatment.

effective assistance of counsel because the record does not reflect whether her attorney complied with the requirements of A.R.S. § 36-537(B)(4) (Supp. 2012). This statute requires a patient's attorney to, at least 24 hours before the evaluation or treatment hearing, "interview the physicians or the psychiatric and mental health nurse practitioner who will testify at the hearing, if available, and investigate the possibility of alternatives to court-ordered treatment."

¶10 Although we agree the record on appeal does not reflect whether counsel complied with this requirement, it was Appellant's obligation to create a record as to any alleged ineffective assistance of counsel before appellate review. *See In re MH2010-002637*, 228 Ariz. at 82, ¶ 32, 263 P.3d at 90 (person subjected to civil commitment hearing has a "number of means" of creating a record as to ineffective assistance of counsel before appellate review, such as raising that issue before the superior court, including seeking post-trial relief through appellate counsel before the superior court). Appellant did not create such a record. Accordingly, the record before us does not warrant remand.[2]

[2]In an appendix to her opening brief, Appellant submitted notes of conversations between Appellant and counsel. These notes are not part of the record on appeal. *See generally* Arizona Rule of Civil Appellate Procedure 11.

¶11 For the foregoing reasons, we affirm the superior court's treatment order.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
ANDREW W. GOULD, Judge

/s/
RANDALL M. HOWE, Judge