DIVISION ONE
FILED: 9/17/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE MH2013-000134	1 CA-MH 13-0026
	DEPARTMENT D
	MEMORANDUM DECISION (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. MH2013-000134

The Honorable Susan G. White, Judge Pro Tempore

ORDER VACATED

William G. Montgomery, Maricopa County Attorney — Phoenix
By Anne C. Longo, Deputy County Attorney
And Bruce P. White, Deputy County Attorney
Attorneys for Appellee

Marty Lieberman, Maricopa County Legal Defender — Phoenix
By Cynthia Dawn Beck, Deputy Legal Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Appellant appeals from an order entered pursuant to Arizona Revised Statutes ("A.R.S.") section 36-540(A)(2) (Supp.

2012)[1] finding Appellant to be persistently or acutely disabled as the result of a mental disorder and requiring court-ordered, involuntary mental-health treatment. Appellant argues the superior court did not honor her statutory right to an independent mental health evaluation and abused its discretion by denying her request for a continuance. For the following reasons, we vacate the civil commitment order.

FACTUAL AND PROCEDURAL HISTORY

¶2 In October 2012, Phoenix Police responded to a report of a woman sleeping in an alley who appeared to have stopped breathing. Appellant refused assistance and refused to move out of the alley. The police arrested her, charging her with a misdemeanor for the prohibited use of a public right of way. In January 2013, the superior court found Appellant unable to assist in her own defense, and therefore incompetent pursuant to A.R.S. § 13-4517 (2009) in her criminal case. The court additionally found there was reasonable cause to believe that Appellant was a danger to herself, a danger to others, persistently or acutely disabled, or gravely disabled, and ordered the Maricopa County Attorney to file a petition for a court-ordered mental health evaluation pursuant to A.R.S. § 36-521 (2009).

[1] We cite to the most recent version of the statute when there are no relevant material changes.

¶3 Doctors Riley and Alexander evaluated Appellant and petitioned for court-ordered treatment alleging Appellant was persistently or acutely disabled. On January 25, 2013, the superior court scheduled a civil commitment hearing for February 1, 2013, *see* A.R.S. § 36-535(B) (Supp. 2012), appointed an attorney to represent Appellant, and issued notice to Appellant the same afternoon, *see* A.R.S. § 36-536(A) (Supp. 2012).

¶4 At the outset of the hearing, Appellant's counsel asked the court to waive Appellant's presence, *see* A.R.S. § 36-539(B) (Supp. 2012), and then requested a ten-day continuance until February 11, 2013, *see* A.R.S. § 36-535(B). Appellant's counsel explained that she wanted to request a seven-day extension, but she had a scheduling conflict so she was requesting ten days. Counsel also explained that the reason for the request was three-fold: Appellant was not present and could not testify because she felt ill; Appellant requested that counsel search for some witnesses to testify on her behalf; and Appellant wanted to exercise her right to an independent mental health evaluation pursuant to A.R.S. § 36-538 (Supp. 2012). In response to the court's questioning, Appellant's counsel explained that although she did not think the additional witnesses would be helpful because they knew Appellant before the relevant time period, she did believe that an independent mental health evaluator may be helpful. Petitioner's counsel

objected to the continuance, arguing that she and her witnesses were ready to proceed. Petitioner's counsel also asserted that Appellant had not been taking her medication over the last seventy-two hours in preparation for the hearing, and that the requested ten-day continuance was "rather lengthy."

¶5 The superior court denied Appellant's request for a continuance. Appellant's counsel then requested a six-day continuance which the court also refused, stating "I just don't see it. . . . Not under the circumstances," and noting that it already had Appellant's Rule 11 records, Petitioner's evaluating doctors' reports, and that an extra week in the hospital was unnecessary. After speaking with Appellant during a brief recess, the hearing recommenced with Appellant present. Thereafter, the parties stipulated to the admission of both doctors' affidavits in lieu of their testimony. *See* A.R.S. § 36-539(B).

¶6 Two witnesses who were acquainted with Appellant testified for Petitioner. *See id*. The first was a behavioral health technician at the hospital where Appellant had been admitted, and the second was a mental health professional at the Lower Buckeye Jail where Appellant spent at least six weeks.

¶7 Appellant testified on her own behalf explaining why she did not want to take certain medications. She also testified about her frustrations dealing with the court and

counsel in her criminal case, and her frustration in the current proceedings because she had no witnesses to testify for her, and she had only met with counsel for the first time two days prior to the hearing.

¶8 The superior court found by clear and convincing evidence that Appellant was persistently or acutely disabled as a result of a mental disorder and was unable or unwilling to accept voluntary treatment. *See* A.R.S. § 36-540(A). The court ordered Appellant to undergo combined inpatient and outpatient treatment for a period not to exceed 365 days, with inpatient treatment not to exceed 180 days. *See* A.R.S. § 36-540(C), (D), (F)(3).

¶9 Appellant timely appealed. This Court has jurisdiction pursuant to A.R.S. § 36-546.01 (2009) and A.R.S. § 12-2101(A)(10) (Supp. 2012).

DISCUSSION

¶10 Appellant argues that because she showed good cause, the superior court abused its discretion by denying her request for a continuance. Appellant also argues that she was denied due process when the court failed to strictly adhere to the requirements of A.R.S. § 36-538 which grants patients the right to an independent mental health evaluation. Thus, Appellant's argument primarily involves the interpretation and application

of two statutes governing civil commitment proceedings: Section 36-535(B) and Section 36-538.

¶11 This Court reviews issues of statutory interpretation *de novo*, *In re MH 2001-001139*, 203 Ariz. 351, 353, ¶ 8, 54 P.3d 380, 382 (App. 2002), and reviews the denial of a motion to continue for an abuse of discretion, *In re MH2003-000240*, 206 Ariz. 367, 369, ¶ 10, 78 P.3d 1088, 1090 (App. 2003). "A trial court abuses its discretion when it exercises discretion in a manner that is either manifestly unreasonable or based on untenable grounds or reasons." *Kimu P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 39, 42, ¶ 11, 178 P.3d 511, 514 (App. 2008) (citation and internal quotation marks omitted). "We view the facts in a light most favorable to upholding the court's ruling." *In re MH2009–002120*, 225 Ariz. 284, 290, ¶ 17, 237 P.3d 637, 643 (App. 2010).

¶12 When construing statutes we give meaning to each clause and to the spirit and purpose of the law, *In re MH2010-0026337*, 228 Ariz. 74, 80-81, ¶ 24, 263 P.3d 82, 88-89 (App. 2011), and in doing so we look to the scheme as a whole, *Kaku v. Ariz. Bd. of Regents*, 172 Ariz. 296, 297, 836 P.2d 1006, 1007 (App. 1992). *See also Miliner v. Colonial Trust Co.*, 198 Ariz. 24, 27, ¶ 8, 6 P.3d 329, 332 (App. 2000). Clear and unambiguous language is given its plain and ordinary meaning unless absurd consequences would result. *MH2010-0026337*, 228 Ariz. at 80-81,

¶ 24, 263 P.3d at 88-89; *MH 2001-001139*, 203 Ariz. at 353, ¶ 12, 54 P.3d at 382 ("[T]he primary purpose of statutory interpretation is to effectuate legislative intent," the best evidence of which is the plain language of the statute).

¶13 Generally, we would give the superior court broad discretion in deciding whether to grant a continuance. *See MH2003-000240*, 206 Ariz. at 369-70, ¶ 10, 78 P.3d at 1090-91. However, here that discretion must be viewed through the lens of the reason for the continuance, which primarily was the patient's statutory right to obtain an independent evaluation after having six days notice of the hearing and meeting with her attorney for the first time only two days before the hearing. On these facts, we conclude the superior court erred in denying the continuance when the request for the independent evaluation could not have been made more than a day or two before the hearing.

¶14 Section 36-535(B) requires the superior court to hold a hearing on a petition for court-ordered treatment within six business days after the filing of the petition, "[e]xcept that, on good cause shown, the court may continue the hearing at the request of either party."[2] Section 36-538 grants a proposed patient "the right to have an analysis of the person's mental

[2] Under the prior version of the statute, only a proposed patient could request a continuance. *See* ¶ 19 *infra*.

condition by an independent evaluator" for use at her civil commitment hearing. Because civil commitment results in a serious deprivation of a person's liberty, *In re MH 2006-000023*, 214 Ariz. 246, 248, ¶ 10, 150 P.3d 1267, 1269 (App. 2007), Section 36-535 is intended to protect a detained patient's liberty interests. *In re MH2010-002348*, 228 Ariz. 441, 444-45, ¶¶ 10-11, 268 P.3d 392, 395-96 (App. 2011). For that same reason, the civil commitment statutes have been narrowly tailored by the legislature and must be strictly followed. *In re MH 2007-001264*, 218 Ariz. 538, 539, ¶ 6, 189 P.3d 1111, 1112 (App. 2008) (citations omitted).

¶15 Signifying the legislature's commitment to preserving a patient's rights and liberty interests, Section 36-538 gives a proposed patient the statutory right to obtain an independent mental health evaluation, conducted by an "evaluator acceptable to the patient," who is appointed by the court if the patient cannot afford the cost. This statute echoes A.R.S. § 36-505 (2009), which states, "At all hearings . . . persons shall have the right to an analysis of their psychological condition by an independent evaluator." Section 36-538, however, does not provide a time period in which the right must be exercised or in which the court must be notified of a patient's intent to exercise the right. The absence of a time period, particularly in light of the many other time limits specified throughout the

statutory scheme, *see generally* A.R.S. §§ 36-535(B), -536(A), -537(B), indicates that the legislature did not intend to impose such limits on the right. *MH 2007-001264*, 218 Ariz. at 540, ¶ 14, 189 P.3d at 1113 ("The requirement of strict adherence to time constraints in court-ordered treatment statutes is evident in our jurisprudence."). Although there is not an explicit time in which the right may be exercised, it is exceedingly logical that an independent evaluation should occur before the hearing so that such evidence can be presented at the hearing. Moreover, because counsel is required to interview witnesses, and specifically the testifying mental health practitioners, at least twenty-four hours before the hearing, A.R.S. § 36-537(B)(4), it is also logical that the evaluation will take place with enough time before the hearing that counsel has an opportunity to fulfill her duties.

¶16 Appellant argues that she has a due process right to a Section 538 evaluation and that there was good cause for the continuance because she was trying to assert her statutory right to an independent evaluation. Appellee argues it was not error to deny Appellant's "last minute" request for a continuance because Petitioner and her witnesses were present and ready to proceed, and Appellant's counsel was equivocal about the need for an independent evaluation and how much additional time she needed.

¶17 We disagree that the request was equivocal. That counsel was unsure about what the results of an independent evaluation may show does not make the request any less clear. Moreover, counsel's comments were made in the context of opining on the comparative value between the witnesses Appellant wanted and an independent evaluation. We also disagree that Appellant's allegedly "last minute" request justified the denial of a continuance or other accommodation here. A review of the statutory scheme demonstrates why it is not surprising that requests pursuant to Section 538 may often be "last minute." Pursuant to Section 536, notice of a hearing and counsel must be afforded to a patient at least seventy-two hours (three days) before a hearing. Counsel must then meet with the patient within twenty-four hours of appointment (two days before the hearing). A.R.S. § 36-537(B)(1). So for example, counsel may be appointed at 3:00 p.m. on Monday May 1 for a Thursday May 4 hearing. Counsel must complete the patient interview and explain the patient's rights to her by 3:00 p.m. on May 2. Thereafter, counsel must potentially seek appointment of an independent evaluator who is "acceptable" to the patient from a court list, *see* A.R.S. § 36-538, and the appointment must be scheduled and successfully completed. Then, if the evaluator is going to testify, counsel must interview the evaluator at least twenty-four hours before the hearing. A.R.S. § 36-537(B)(4).

Going back to the example above, assuming counsel learns of the need, or the patient's desire, for an independent evaluation during the Tuesday May 2 interview, such evaluation needs to be complete and counsel must have a chance to interview the testifying evaluator by 3:00 p.m. on May 3 to be ready for the hearing on May 4.

¶18 Given the truncated time frames for these hearings, it should not be a surprise that a patient may attempt to exercise the rights granted in Section 538 at any time between two days before the hearing up until the day of the hearing. If a day of the hearing request was always too late, then the scheme could regularly operate to deny a right that the legislature was clearly trying to protect as evidenced by Section 538. Moreover, to deny the patient a right to a continuance for lack of good cause simply because a Section 538 evaluation is first requested on the day of the hearing, in light of the example above, ignores the scheme as a whole and how it operates, and could regularly produce absurd results. Thus, when a patient requests a continuance to obtain a Section 538 evaluation, the court must take into account the truncated time frames for these hearings before it denies the continuance for lack of "good cause".

¶19 Other statutory provisions indicate the legislature's recognition of the importance of continuances and independent

mental health evaluations to due process in civil commitment proceedings. First, Section 535 was amended in 2009 to include the good cause requirement and to permit a petitioner to request a continuance for a maximum of three business days. Previously, only the patient could request a continuance.[3] However, like the prior statute, the current version allows a maximum of thirty days for continuance upon the patient's request. It is clear that the legislature has placed these time limits not only to prevent delay, but to prevent delay that is not attributable to the patient. It is also clear that the law recognizes that both parties may have good reasons for a continuance, but that a patient's interests in a continuance and the delay therefrom are greater, and thus, a patient is afforded the potential for a longer continuance. *See* A.R.S. § 36-535(B).

¶20 In addition, Section 535(D) permits an intervenor to "cause physicians to personally conduct mental status examinations . . . and to testify to their opinions." It would be absurd to allow an intervenor to subject a patient to a mental health exam and call the examiner to testify, but if a

[3] The prior version also stated that the court must release a patient or hold a hearing within six days, unless the patient "upon consultation with his attorney, determines that it would be in his best interest to request a continuance." *See MH2003-000240*, 206 Ariz. at 369, ¶ 8, 78 P.3d at 1090 (analyzing previous version of statute and noting that the statute "apparently bar[s] the State from obtaining delays that would extend the patient's detention").

patient does not obtain her own independent evaluation at least twenty-four hours before the hearing she cannot present such evidence or show good cause for a continuance.

¶21 The State relies on *MH2003-000240*, in which this Court found that the denial of a patient's statutory right to hire independent counsel, *see* A.R.S. § 36-537(B)(1), did not deprive the court of its discretion to deny a continuance. 206 Ariz. at 369-70, ¶ 10, 78 P.3d at 1090-91. We held the superior court did not abuse its discretion because it based its decision on the following factors: the request was raised for the first time at the hearing, witnesses were ready to testify, a continuance for more than a week would be a significant expense to the hospital, and the patient did not have the funds to hire private counsel. *Id*. at 370, ¶ 10, 78 P.3d at 1091.

¶22 We find this case distinguishable. First, the patient in that case was afforded her due process right to counsel. Although she also had the statutory right to obtain private counsel, she was not forced to proceed to the hearing absent counsel. In other words, she was not entirely denied one of her rights much less a right that affected her other rights at the hearing. Here, on the other hand, Appellant had to proceed through the hearing without an independent evaluation or an independent evaluator to challenge the other evaluations and provide expert testimony in support of her case. In turn, this

affected Appellant's rights to call and cross-examine witnesses and present expert evidence at her hearing. *See generally* A.R.S § 36-539(B). Second, in *MH2003-000240*, there was evidence that belied the patient's reason for a continuance—she could not afford private counsel, thus, a continuance to hire counsel was unnecessary. Here, because Section 538 guarantees a patient the right to the appointment of an evaluator, had the request been granted, an evaluator would have been appointed. Thus, we do not find *MH2003-000240* controlling or persuasively analogous here.

¶23 To the extent Petitioner argues that Appellant had an opportunity to request the appointment of an evaluator prior to the day of the hearing, we note that the superior court did not make such finding, nor did it base its denial of a continuance on that reason. Rather, the court denied the continuance stating, "I just don't see it," and elaborating, "[n]ot under the circumstances. . . . We've got the Rule 11 records. . . . We've got the reports of the doctors, and I mean you're talking about basically an extra week [in the hospital]." Thus, it appears that the court was denying the motion for continuance because it felt that it had enough information to make its determination and did not want to extend Appellant's hospital stay. Moreover, given that Appellant's counsel did not meet with Appellant until two days before the hearing and the issue

did not come up until the morning of the hearing, any implication that the request was untimely is not supported by the record.

¶24 Our supreme court has instructed that "in determining whether civil mental health commitment proceedings afford basic Fourteenth Amendment due process, we must balance the liberty interests of the patient against the various interests of the state, and consider whether the procedures used or proposed alternatives will likely lead to more reliable outcomes." *In re MH-2008-000867*, 225 Ariz. 178, 181, ¶ 10, 236 P.3d 405, 408 (2010); *see id*. at ¶ 9 (stating "the appropriate test to determine whether Fourteenth Amendment procedural due process has been afforded in this context is the one set forth in *Mathews v. Eldridge*," 424 U.S. 319 (1976)). *MH-2008-000867* determined that "[w]hen considering telephonic testimony, the initial inquiry should be whether good cause has been shown for its use." *Id*. at ¶ 11; *see id.* at n.4 (noting court may consider convenience of continuance and costs associated with live witness testimony). The court held that the conflicting professional obligation of one of the evaluating doctors coupled with the unwillingness of the patient to continue the hearing,

"furnished the requisite good cause" for permitting telephonic testimony.[4] *Id.* at ¶ 11.

¶25 Balancing the parties' competing interests here, and considering the likely effect of the continuance on the accuracy and fairness of the process, we conclude that the superior court abused its discretion by denying the continuance because it impermissibly infringed on Appellant's statutory right to an independent evaluation. The denial was based on the court's impression that an additional evaluation was not needed because it already had Petitioner's doctors' reports and Appellant's Rule 11 records. However, as discussed above, there are no express limits on the exercise of the right for an independent evaluation afforded by Section 538. Moreover, that the court apparently thought it had enough evidence from the Petitioner's required filings and the Rule 11 file does not sufficiently consider Appellant's statutory right to an independent

[4] At the time of the proceedings, the statute only permitted the patient to request a continuance and required the court to either hold the hearing or release the patient. *MH-2008-000867*, 225 Ariz. at 179 n.2, ¶ 10, 236 P.3d at 406 n.2; *see also* ¶ 19 *supra*.

evaluation and that right as it relates to her other due process rights.[5]

¶26 We do not decide at what point during the proceedings a patient must assert her Section 538 rights because that may vary by case and would certainly intrude on the legislature's decision to not specify such a requirement. Nor do we hold that every request for a continuance for purposes of a Section 538 evaluation must be granted because that too depends on the case and would intrude on the discretion afforded to the superior court. However, here counsel asserted the issue came up that morning and that she was amenable to shorter extensions and it was undisputed that Appellant met her attorney only two days before the hearing.

¶27 Given the facts of this case, we cannot affirm the superior court's denial of Appellant's request for a continuance. *See Kimu P.*, 218 Ariz. at 42, ¶ 11, 178 P.3d at 514 (citation and internal quotation marks omitted). Truncated time frames and weighty interests require creative solutions. A better balance of the competing interests here may have involved taking Petitioner's witnesses' testimony and continuing the

[5] Nor are we convinced by the Petitioner's argument that Appellant has not shown the denial of an independent evaluation was prejudicial. We cannot expect a person subject to a commitment order to make an offer of proof on what an independent evaluation might show when the person has not had the time to have an evaluation ordered.

remainder of the hearing to give Appellant enough time for an independent evaluation, or utilizing telephonic testimony from Petitioner's witnesses at a continued hearing, or perhaps a combination of these and other solutions.

¶28 Appellant should have been granted a continuance for the purpose of obtaining an independent mental health evaluation to ensure she was afforded her statutory and due process rights under the statutory scheme. The failure to do so voids the court's order requiring involuntary treatment, and the order is therefore vacated.

CONCLUSION

¶29 For the foregoing reasons, we vacate the superior court's order requiring Appellant to undergo involuntary treatment.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
ANDREW W. GOULD, Presiding Judge

/S/
MICHAEL J. BROWN, Judge