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**Court of Appeals, Div. II,
of the State of Washington**

In re Detention of T.L.C.:

State of Washington,

Respondent,

v.

T.L.C.,

Appellant.

Reply Brief of Appellant

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| <i>O'Connor v. Donaldson</i> , 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975) | 6, 7 |
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1. Introduction

The central question in this case is when is it appropriate for the State to interfere in a person's choice of where to live and how to care for their own needs? Thousands of Washingtonians currently live in assisted living facilities or receive in-home care from professionals or family members. If the trial court's analysis in this case was correct, the State can impose its own preferred treatment on these individuals by simply speculating that they would not be able to provide for their own essential needs if they were living on their own without support.

T.L.C. chose to live with family members who would help him with food, hygiene, medication, and coordinating doctor's appointments. The State's evidence speculated that T.L.C. might have been in danger living on his own but did not demonstrate that T.L.C. would be in danger in his chosen environment living with family. The trial court found T.L.C. gravely disabled and ordered him committed with a less restrictive alternative. The State believes the trial court's analysis was correct. It was not. The State failed to prove that T.L.C. would be in danger while living with his family. There was no justification for State interference with T.L.C.'s right to live safely in freedom with the support of his family. This Court should reverse and clarify the legal standard.

2. Reply to State's Counterstatement of Facts

The State highlights portions of Dr. Slone's testimony but fails to acknowledge that testimony's shortcomings. For example, when Dr. Slone was asked about T.L.C.'s ability to care for his diabetes, Dr. Slone testified,

Q Anything that he needs assisted care with that he couldn't get himself?

A The diabetes he's going to need assistance with.

Q Would he -- would we [sic] be able to do his own diabetes care in the community?

A Um, I don't think so.

THE COURT: Why?

DR. SLONE: It -- it's just complicated. And with the cueing he needs, he probably wouldn't be paying attention to his blood sugars. I don't have any specific notes about that, in here. (PAUSE) I mean it -- 'cause to take care of your blood sugar, among other things, you need to be aware of what it is and you need to check it regularly, and he needs cueing just to -- for his hygiene. So he's not going to keep up with that.

MR. BOLING: And are you aware of any difficulties he had with things like that out in the community? Or -- or were those care -- was that assistance given to him also in the community?

A Well, he's had some cognitive decline. He was in a retirement facility where his meals and cleaning were provided for him. And I'm not sure what other kind of assistance he got there, that's all the chart has.

CP 51-52. Dr. Slone’s testimony was speculative at best. Without any evidence of prior difficulties in the community, the doctor speculated that because monitoring blood sugar is “complicated” and because T.L.C. required cueing for his hygiene that T.L.C. would “probably” not pay attention to it if left on his own without assistance. This testimony does not rise to the level of clear, cogent, and convincing evidence of recent, tangible failure to provide for essential human needs that is required by *LaBelle*. It does not present a high probability of serious physical harm within the near future, especially because T.L.C. was not going to be alone in the community. He was going to live with family members who were capable caregivers able to provide the prompting and diabetic care that he needed.

The State also emphasizes Dr. Slone’s opinion that T.L.C. was gravely disabled due to an inability to provide for his essential needs without assistance. Dr. Slone testified,

Q And if he released to the community -- would there be any -- without any structure care, would there be any risk that he would be rehospitalized?

A Yes, I think there would be.

Q And why do you say that?

A It’s just inability to provide his own needs without some kind of assistance.

Q And would he -- and would he be able to seek out his own psychiatric care in the community?

A No.

CP 53. Again, this testimony assumes that T.L.C. would be alone in the community, left to fend for himself. He would not. He planned to live with family members who were capable of providing the assistance he needed, including seeking any needed psychiatric care. *See, e.g.*, CP 70-72.

The State attempts to frame the trial court's analysis as weighing the testimony and credibility of the family members, but the record shows that the trial court's decision was based not on credibility but on a mistaken legal analysis:

I was going through the LaBelle case to determine whether or not some of the comments that you'd mentioned, Ms. Gore, were that those were supported by *LaBelle*, and my reading of *LaBelle*, and again, this is not my first time, but this is going back through it here while on the record, just unsure of whether or not I missed something. **That case doesn't stand for the proposition that if there's family that are there, then that means that the person wouldn't be gravely disabled...** I believe that the state's met its burden as to prong A, and I think that the evidence that you presented though, makes me believe that a less restrictive alternative is in the respondent's best interest. However, **I don't think, at least at this point in time, that there's a sufficient plan to ensure that he is otherwise ready to be released.**

CP 93-94 (emphasis added). In other words, the trial court analyzed Prong A without considering the assistance of family because the court believed *LaBelle* did not require it. The trial

court instead analyzed Prong A as if T.L.C. were being released into the community on his own, without assistance. Then, if the family had “a sufficient plan,” perhaps they could have proven that he was ready to be released. This kind of burden-shifting is improper. The State bears the burden of proving, through recent, tangible examples, that a person presents a high probability of serious physical harm within the near future due to failure to provide for basic human needs. If the person is going to be living with family, the State must prove by clear, cogent, and convincing evidence that the family will fail to provide those needs. It is not enough to prove the person is a danger on their own and then ask the family to present “a sufficient plan” to overcome the conclusion of grave disability.

3. Reply Argument

The trial court erred in ordering T.L.C. committed due to grave disability. Contrary to the trial court’s reasoning, the statutory definition, as interpreted in *LaBelle* to meet constitutional standards, requires the court to consider the presence of family support in determining whether a person is “in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety.” The trial court applied an incorrect legal standard. Under the

correct standard, substantial evidence does not support a finding of grave disability. This Court should reverse.

3.1 The trial court's finding of grave disability is not supported by substantial evidence.

T.L.C.'s opening brief explained the high burden of proof that the State must meet before a person can be declared gravely disabled and restricted against their will. Br. of App. at 8-11. The State argues that the trial court properly considered and weighed the evidence. But the evidence does not meet the standard.

The constitutional standard is well-expressed in *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975):

A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.

May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify

a person from preferring his home to the comforts of an institution.

...

In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Since the jury found, upon ample evidence, that O'Connor, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that O'Connor violated Donaldson's constitutional right to freedom.

O'Connor, 422 U.S. at 575-76.

The principle embodied by the *O'Connor* decision is that a person has the constitutionally protected liberty to choose their own living environment, whether it is on the street, in a residence alone, in assisted living, or with family or friends. The State has no right to interfere with that choice unless the person would be a danger to themselves or others in that environment. To forcibly remove a person from their chosen living environment when they pose no danger is a violation of the person's constitutional right to freedom.

It follows, then, that the legal standard for "grave disability" must take into consideration the person's chosen living environment. Here, T.L.C.'s chosen living environment is with his family. The State's burden, then, was to demonstrate, to the high standards set forth in *LaBelle*, that T.L.C. would be in

danger of serious physical harm resulting from a failure to provide for his essential human needs **while in the care of his family.**

The trial court and the State wish to apply a different standard and a different burden of proof. The trial court erroneously found T.L.C. gravely disabled based on the State's evidence (speculative as it was) that T.L.C. would be in danger if he were released into the community alone, without any support. The trial court then shifted the burden to T.L.C.'s family to demonstrate that they had a sufficient plan to prove that they would be able to care for him. This is incorrect as a matter of law. It improperly shifts the burden of proof.

The State must bear the burden to justify its interference with a person's liberty. If a person chooses to place themselves in the care of others, and by so doing is not in danger of harm, the State has no compelling interest to intervene. Because this is a matter of constitutionally-protected liberty, the State must always bear the burden.

T.L.C.'s brief argued that the State's evidence failed to meet the required standard of proof. Br. of App. at 11-15. The evidence was too speculative. There were no recent, tangible examples of T.L.C. failing to provide for his essential human needs. The only tangible needs identified by the State—T.L.C.'s need for prompting to take care of his basic activities of daily

living—would be easily and adequately provided in T.L.C.’s chosen environment living with family. There simply was not clear, cogent, and convincing evidence that T.L.C. was in danger of serious physical harm resulting from failure to provide for his essential human needs. In fact, T.L.C.’s care team was comfortable with the idea of T.L.C. living with his family.

It should not be enough for the State to argue that the family did not have “a sufficient plan.” The State’s burden is to prove the person is in danger of harm, through recent, tangible evidence of failure to provide for essential human needs. A care plan is a part of a less restrictive alternative, which comes into play only **after** a person is found gravely disabled. The lack of a care plan meeting the standards for a less restrictive alternative cannot be evidence of grave disability. Grave disability must be proven first, through evidence the person is in danger of harm in their chosen environment. Only then is the State justified in requiring a less restrictive alternative with a detailed care plan. To the extent the trial court’s decision was based on T.L.C.’s family not having a care plan, it was error.

The State agrees that to prove the necessary danger of serious physical harm it must present recent, tangible evidence of failure or inability to provide for essential human needs. Yet the State’s brief does not point to any evidence in the record that T.L.C. would have failed to provide for his needs if he was living

with his family. Indeed, as noted above, T.L.C.'s care team was comfortable with the prospect of T.L.C. living with his family. The State failed to meet its burden and now cannot show that there was substantial evidence to support the trial court's decision.

Evidence that T.L.C. would have failed to provide for his own needs if he was living alone, without support, is irrelevant. He was not going to live alone without support. He chose to live with his family. There was no evidence that he would be in danger of harm in his chosen living environment. Without a serious risk of harm, the State has no business interfering.

4. Conclusion

The trial court applied the wrong standard in determining whether T.L.C. was gravely disabled. A determination of grave disability must also consider the availability of assistance from willing and able family members and friends. Under this standard, the trial court's finding that T.L.C. was gravely disabled was not supported by substantial evidence that was clear, cogent, and convincing. This Court should reverse.

Respectfully submitted this 1st day of July, 2019.

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I certify, under penalty of perjury under the laws of the State of Washington, that on July 1, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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