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NO. 52797-9

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Detention of T.C.,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

T.C. was committed to Western State Hospital as gravely disabled in May 2018. The State petitioned to have him recommitted as gravely disabled in July 2018, this time alleging that he was ready for a less restrictive placement when an appropriate one was available. T.C.'s psychologist testified at trial that, while discharge to T.C.'s daughter's home was a viable placement, T.C. would still be in danger of serious physical harm in the community, and that a less restrictive alternative treatment order would be in T.C.'s best interests. T.C.'s daughter and granddaughter-in-law testified that they could care for him at their home, and T.C. argued that, based on this, he should not be found gravely disabled.

The Commissioner who heard the case weighed the testimony of the psychologist and the relatives, and ultimately found that T.C. was gravely disabled, but that less restrictive alternative treatment was in his best interest. And the Superior Court judge who heard the case on revision properly found that the record supported the Commissioner's findings, remanding the case to have T.C. immediately released under court order to his relatives' home.

T.C. now asks this Court to reverse the decision of the Commissioner, arguing that she applied an incorrect legal standard when determining that T.C. was gravely disabled. T.C. claims that the

Commissioner failed to consider the availability of assistance from willing and able family members when deciding whether he was gravely disabled, but this did not occur. The court below properly took into account the testimony of the family witnesses willing to care for T.C., finding that, even with their assistance, T.C. would still be gravely disabled, but that he could live with them as part of a less restrictive alternative treatment order. Because there was sufficient evidence to support the ruling that T.C. was gravely disabled, the appeal should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did substantial evidence support the lower court's finding that T.C. was gravely disabled as a result of a mental disorder?

III. COUNTERSTATEMENT OF THE FACTS

T.C. was charged with two counts of Child Molestation in the First Degree and found incompetent to stand trial. CP 1-2. He was referred for civil commitment on the basis of those dismissed felony charges and on allegations that he was gravely disabled due to a mental disorder. CP 3-4. T.C. ultimately stipulated to the entry of a 90-day commitment order based on grave disability in return for the State not proceeding on the violent felony commitment grounds. CP 14-18. He also stipulated that treatment in a less restrictive alternative to hospitalization was not in his best interest or the best interests of others. CP 17. Doctors at Western State Hospital

petitioned for additional involuntary treatment on July 19, 2018. CP 23. At the hearing on the petition, T.C.'s psychologist, Donald Slone, and T.C.'s daughter and granddaughter-in-law testified.

A. Testimony of Dr. Donald Slone

Dr. Slone was the sole witness for the Petitioners and opined that T.C. suffered from neurocognitive disorder, possibly Alzheimer's. CP 20, 29, 48. Because of this mental disorder, T.C. has difficulty with his memory, concentration, and problem-solving abilities. CP 48. T.C. had angry outbursts on the ward when his needs were not immediately met, CP 49, though Dr. Slone later clarified that some of these outbursts were due to back pain. CP 56-57. Compounding these difficulties, Dr. Slone noted that T.C. did not believe he suffered from any mental impairment. CP 48-49; *see* CP 85-86.¹ Dr. Slone also testified that T.C. would need assistance to procure food and

¹ Q -- have you -- have they talked to you about Alzheimer's or dementia or anything?

A Yeah, ah -- they haven't talked to me about that, but I know about it. 'cause I hear it all the time; I've read about it. And everything.

Q Do you think you have something like that?

A No I don't think I have 'em.

Q Okay. Do you think [you have] any kind of mental health diagnosis?

A No.

Q Do you think you need treatment for your mental health --

A No.

CP 86.

shelter due to his cognitive impairment, and required cueing to complete self-care activities like getting his medications and food. *See* CP 49-50.

Dr. Slone also testified that T.C. would need assistance obtaining care for underlying medical issues, primarily diabetes. CP 51. Dr. Slone testified that diabetes care was likely too complex for T.C. to navigate on his own. *Id.* T.C. had previously lived in a retirement community where all of these things had been provided for him, and he continued to need assistance with properly attending to his medical needs in a secure setting. CP 51-52.

Dr. Slone explained that T.C. had continued to experience cognitive decline and was not able to make rational decisions about his need for psychiatric treatment. CP 52-53. This was highlighted by T.C.'s recent decline in attending active treatment groups on the ward, though Dr. Slone later clarified on cross-examination that this was likely due to ongoing pain issues related to surgery. CP 52; CP 57-58. Finally, Dr. Slone opined that he believed that T.C. met the criteria for commitment due to grave disability because of his inability to provide for his essential needs without assistance. CP 53. Even though Dr. Slone believed T.C. continued to be gravely disabled due to his mental disorder, he qualified that opinion by stating that T.C. could be treated in a setting less restrictive than secure hospitalization. CP 53-56.

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B. Testimony of Roxanne Wrice

Ms. Wrice is T.C.'s daughter. CP 61. She testified that she was willing to house her father, provide his meals, and provide his diabetes care. CP 61-62. She also testified that she would otherwise help provide for his doctor's visits, daily needs and supervision. CP 63. She did not yet have handrails in place for his bed, but had "secured" the bathroom for him. *Id.* She said she would take care of his finances, as well. CP 64. Throughout this testimony, Ms. Wrice offered few specifics, mostly offering generalized assurances that "everything" would be taken care of. CP 62 ("But yes, we will make sure he has it -- everything on time."); CP 63 ("[Defense Counsel] Okay. And he's -- will he -- will you be able to assist him if he needs it, was showering -- [Ms. Wrice] Absolutely. Everything --"); CP 64 ("-- I have everything -- I'll take care of everything for him."); CP 67 ("-- I'll have everything set up[,] in response to questioning about T.C. not having a psychiatrist in the community yet); CP 68 ("It doesn't matter. If it was within a couple hours, I'd be happy -- you know, everything would be taken care of."); CP 70 ("-- I don't think he needs to be here that long. You know? It shouldn't take that long to be able to get everything set up. You give me a phone number; I will get it set up. Or I'll make the calls today. And get everything set up for him.").

Ms. Wrice was aware that T.C. had previously been charged with child molestation, but was not otherwise concerned about having two young girls in the home with him because he would be well supervised. CP 65-66. She also admitted that T.C. did not have a current psychiatrist in the community and would not have one if he were discharged from the hospital that day. CP 67. When asked if she had a plan in place if T.C.'s condition deteriorated, Ms. Wrice said "[w]e'll take care of it," mentioning a nearby dementia facility that she had "looked into." CP 71. When pressed about what she would do if T.C.'s condition deteriorated beyond the point that she felt comfortable caring for him, she said she would go to the dementia facility and "have a talk with them." CP 71. Her plan if he was in a mental health crisis was to "[t]ake him to the hospital." CP 71-72.

C. Testimony of Rindy Brown

Ms. Brown is T.C.'s granddaughter-in-law. CP 73. She is a certified nursing assistant. *Id.* She testified that she was capable of monitoring and caring for T.C.'s diabetes. CP 74. She also testified about her medical training and experience. CP 76. In response to a question about what medical equipment was in place to care for T.C., Ms. Brown testified only that they had "everything that he needs now, and if he needed something extra, we would be able to obtain that for him." CP 77. She then elaborated that they had a wheelchair ramp, saying that was really all he needed. *Id.*

She then testified that they had appropriate medical equipment for his diabetes care. CP 78. When asked if she had a plan in place in case his condition deteriorates, Ms. Brown said only that they “would address that at that time[,]” saying that she believed he was “capable now.” CP 78. But Ms. Brown had not personally consulted with T.C.’s treatment team about what was truly necessary for his current needs. CP 79-80.

D. Testimony of T.C.

T.C. testified that he would cooperate with care if his family took him in, including his diabetes care, “if [he] need[ed] it”, and that he would be willing to continue to work with his doctors. CP 82-83. He confirmed that he had been having difficulties with his memory. CP 83. He then began discussing, unprompted, his work history and history of living on the street in Tacoma. CP 83-84. He claimed he would comply with his doctors’ recommendations. CP 84.

But T.C. rejected any indication that he had a psychiatric condition, saying that his diagnosis was “loss of memory” and he had only heard and read about dementia or Alzheimer’s. CP 85-86. T.C. flatly denied having any mental health diagnosis. CP 86. He also denied that he needed any treatment at all for a mental health diagnosis. *Id.* Despite this, he was compliant with his medications and said he would continue to take them in the community. CP 88.

E. Commissioner’s Ruling

A Pierce County Commissioner held that the State had proven that T.C. had a mental disorder – specifically neurocognitive disorder – and, because of that disorder, was in danger of serious physical harm arising from a failure to provide for his own basic health and safety needs, meeting the commitment standard under “prong A” of grave disability. CP 29, 93-94. The Commissioner held that the Petitioners had not proven that he was gravely disabled under the “prong B” definition, however, which requires that the person “manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.” CP 29, 94.

The court found that the testimony supplied by T.C.’s family did not negate a finding that he was gravely disabled under definition (a) and unable to meet his health and safety needs, but credited that testimony in finding that he did *not* meet commitment criteria under definition (b). *Id.* This was mainly due to the conclusory assurances that they would care for him (with few other details) and the fact that they did not actually have all that was needed in place to care for T.C.’s psychiatric needs. *Id.* The Commissioner did credit this testimony as evidence that it was in T.C.’s best interests that

he be treated in an environment less restrictive than secure hospitalization. CP 95.

F. Superior Court Revision

T.C. sought revision of the commissioner's order in the Pierce County Superior Court. CP 99. The superior court agreed with the State that T.C. was gravely disabled and that less restrictive treatment than secure hospitalization was in his best interests. RP 17, 20, Oct. 19, 2018. The judge agreed that T.C.'s family did not seem prepared to safely care for him immediately. *Id.* at 19-20. The superior court then remanded the case to the commissioner to immediately enter orders to discharge T.C. to his relatives' home. *Id.* at 23-24; CP 116. On remand, the commissioner entered orders discharging T.C. to his relatives' home under less restrictive conditions. CP 111-114; RP 16, Oct. 23, 2018.

T.C. appeals the superior court's Order on Revision finding him gravely disabled based on the evidence adduced before the commissioner.

IV. ARGUMENT

A. Standard of Review

This Court reviews the superior court's ruling on revision, not the commissioner's ruling at trial. *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132, 136 (2004). On revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based only

on the record that was before the commissioner. *Id.*; RCW 2.24.050. This is the case even where the commissioner hears live testimony. *Matter of Marriage of Lyle*, 199 Wn. App. 629, 632, 398 P.3d 1225, 1228 (2017) (citing *Ramer*, 151 Wn.2d at 116). *But see Perez v. Garcia*, 148 Wn. App. 131, 139, 198 P.3d 539, 543 (2009) (“Where the commissioner hears live testimony . . . the superior court is to review the commissioner’s findings of fact and conclusions of law for substantial evidence.”).² Any findings or orders of the commissioner not successfully revised become the decision of the superior court, and a denial of revision constitutes an adoption of the findings of the commissioner. *Maldonado v. Maldonado*, 197 Wn. App. 779, 789, 391 P.3d 546, 552 (2017).

A trial court’s findings of grave disability will generally not be overturned at the appellate level if they are supported by substantial evidence that the trial court could reasonably have found to be clear, cogent, and convincing – i.e., that the issue in question was shown to be “highly probable.” *In re Det. of LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986). Put another way, a sufficiency of the evidence challenge to a finding of

² Division I of this Court has expressly disapproved of this reasoning in *Perez*, calling it dicta and a misapplication of precedent. *Charbonneau ex rel. Charbonneau v. Foster*, No 67922-8-I, 2013 WL 2919200, at *7 (Wash. Ct. App. June 10, 2013) (unpublished). The State cites this case for the Court’s information only; it is unpublished and not binding upon this Court.

grave disability will not prevail if the finding is supported by substantial evidence “in light of the ‘highly probable’ test.” *Id.*

Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.” *Matter of Det. of A.S.*, 91 Wn. App. 146, 162, 955 P.2d 836 (1998). The appellate court must ask whether there was any “evidence or reasonable inferences therefrom to sustain the verdict when the evidence is considered in the light most favorable to the prevailing party.” *Goodman v. Boeing Co.*, 75 Wn. App. 60, 82, 877 P.2d 703 (1994). The appellate court must defer to the trier of fact on the persuasiveness of the evidence, witness credibility, and conflicting testimony. *In re Matter of Knight*, 178 Wn. App. 929, 937, 317 P.3d 1068 (2014).

If this Court finds the substantial evidence standard has been met, “a reviewing court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently.” *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). This is particularly important where the trial court has heard conflicting testimony, evaluated the persuasiveness of the evidence, and assessed witness credibility. *See In re G.W.-F.*, 170 Wn. App. 631, 637, 285 P.3d 208 (2012). The reviewing court then evaluates the trial court’s

conclusions of law de novo, determining whether they are supported by the findings of fact. *Id.*

B. Substantial Evidence Supported the Finding that T.C. was Gravely Disabled as a Result of a Mental Disorder

There was substantial evidence for the trial court to find that T.C. was gravely disabled as a result of his mental disorder. A person may be detained for involuntary treatment for up to 180 days on the basis of grave disability if he or she:

(a) is in danger of serious physical harm resulting from a failure to provide for his or her essential human needs of health or safety; or

(b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety.

RCW 71.05.020(22)(a)-(b); *see also* RCW 71.05.280(4), RCW 71.05.320(4)(d). Either definition provides a basis for involuntary commitment; the State need not prove both. *See In re Det. of LaBelle*, 107 Wn.2d at 201-02. The court below found that T.C. met commitment criteria under definition (a), but not (b). CP 94.

The first definition of grave disability does not require that the danger of serious harm be “imminent.” *In re Det. of LaBelle*, 107 Wn.2d at 203. But the State “must present recent, tangible evidence of failure or inability to provide for such essential human needs as food, clothing,

shelter, and medical treatment which presents a high probability of serious physical harm within the near future unless adequate treatment is afforded.” *Id.* at 204–05. The *LaBelle* court recognized that a requirement of imminence might mandate the “premature release of mentally ill patients who are still unable to provide for their essential health and safety needs outside the confines of a hospital setting but who, because of their treatment there, are no longer in ‘imminent’ danger of serious physical harm.” *Id.* at 203.

A person may still be at risk of serious physical harm even if family members are willing to care for them. The oft-quoted passage from *O’Connor v. Donaldson*, 422 U.S. 563, 576, 95 S. Ct. 2486, 2494, 45 L. Ed. 2d 396 (1975), “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,” is frequently taken out of its analytical context. *In re Det. of LaBelle*, 107 Wn.2d at 201 (quoting *O’Connor*, 422 U.S. at 576). *O’Connor* stood for the proposition that a man, found non-dangerous by a jury, able to be cared for by a willing friend, could not be confined without constitutionally adequate statutory procedures. *O’Connor*,

422 U.S. at 574.³ This language from *O'Connor* and quoted repeatedly in Washington cases since *LaBelle*, does not foreclose a court's ability to weigh conflicting evidence about a person's dangerousness to themselves *even if* they have willing family support.

The trial court carefully weighed the testimony from T.C.'s family in coming to its conclusions. CP 94-95. It took into account those elements of T.C.'s care that they could provide at home. *Id.* T.C. erroneously contends that the commissioner *ignored* this evidence – but T.C. only asks that the evidence be weighed differently. *See Sunnyside Valley*, 149 Wn.2d at 879-80 (reviewing court must defer to trial court on weight and persuasiveness of evidence, even if it might have weighed it differently at trial). After weighing the totality of the evidence, the trial court correctly found that T.C.'s family were not actually prepared to safely transition him to the community. CP 93-95. The error that T.C. alleges occurred – that the commissioner did not consider the testimony of the family in coming to its conclusions – is not supported by the record.

There was substantial evidence for the trial court to find that T.C. would be at risk of serious physical harm if released immediately. He had previously had all of his basic health and safety needs met by an assisted

³ “The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement.” *O'Connor*, 422 U.S. at 574.

living facility. CP 51-52. He would need assistance getting his meals, getting shelter, and attending to his ongoing medical needs like diabetes and emergent conditions like a prior bone infection. CP 51, 57. He does not believe he has a mental disorder and would most likely not tend to his mental health needs independently. CP 86. That he had others willing to assist him in meeting these needs does not mean that he did not meet the criteria for grave disability.

The trial court did find, and the superior court ordered on revision, that T.C. be cared for in a less restrictive environment, under court order, with his family. CP 95; CP 116; RP 9-10, Oct. 23, 2018. Indeed, even if a court finds a person gravely disabled, it is required to determine whether it would be in the best interests of the person or others for the person to be treated in a less restrictive environment. RCW 71.05.320(1)(a) and (2). If the court determines that the gravely disabled person should be treated in a less restrictive setting, it must “remand him or her to the custody of the department of social and health services *or* to a facility certified for ninety day treatment by the department *or* to a less restrictive alternative for a further period of less restrictive treatment[.]” RCW 71.05.320(2).

The minimum conditions for less restrictive treatment include:

- (a) Assignment of a care coordinator;
- (b) An intake evaluation with the provider of the less restrictive alternative treatment;

- (c) A psychiatric evaluation;
- (d) A schedule of regular contacts with the provider of the less restrictive alternative treatment services for the duration of the order;
- (e) A transition plan addressing access to continued services at the expiration of the order;
- (f) An individual crisis plan; and
- (g) Notification to the care coordinator assigned in (a) of this subsection if reasonable efforts to engage the client fail to produce substantial compliance with court-ordered treatment conditions.

RCW 71.05.585(1)(a)-(g). These minimum conditions help ensure that courts can fulfill the legislative intent of the Involuntary Treatment Act to provide appropriate care for people with mental disorders, ensure continuity of care, the safe, successful transition of patients from secure hospitalization to the community, and to prevent indefinite commitment of people with mental disorders. RCW 71.05.010(1)(a)-(c), (e), and (g).

The less restrictive treatment order entered after the superior court revision here accounted for the requirements. CP 112-13. T.C. was assigned a care coordinator. *Id.* It contained an individual crisis plan and a transition plan for T.C.'s continuing care at the expiration of the order. *Id.* It included the required intake and psychiatric evaluation. *Id.* This order provided the scaffolding that the lower court found was required to safely transition T.C. to his family's care, even though it found that he continued to be gravely disabled. CP 94-96; RP 19-20, Oct. 19, 2018.

T.C. urges this Court to clarify the standard for grave disability to take into account the willingness and ability of family to care for the person who is the subject of commitment proceedings, arguing against the mootness of his claim. Br. of Appellant at 8. But this Court must review appeals of civil commitment orders because each ordered commitment “may have adverse consequences on future involuntary commitment determinations.” *Matter of Det. of M.K.*, 168 Wn. App. 621, 625, 279 P.3d 897, 900 (2012). In any event, the trial court weighed the testimony of T.C.’s family when it determined that T.C. was gravely disabled under definition (a) and *not* gravely disabled under definition (b). CP 94. The commissioner noted that T.C.’s family members offered numerous conclusory statements about being able to care for T.C. in the community. CP 94. The commissioner found this testimony well-meaning, but not entirely credible. *Id.* Credibility determinations are not reviewable on appeal. *In re Det. of H.N.*, 188 Wn. App. 744, 763, 355 P.3d 294, 304 (2015).

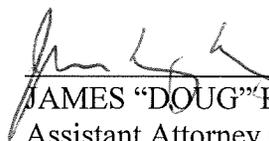
The trial court properly weighed the credibility and persuasiveness of the testimony of T.C.’s doctor against his family members. *See Sunnyside Valley*, 149 Wn.2d at 879-80. This Court must defer to the lower court’s determinations of credibility and persuasiveness of the evidence. *See In re G.W.-F.*, 170 Wn. App. at 637. The trial court below took into account the

factors that T.C. now says that it should have weighed in its determination. CP 93-96. Substantial evidence supported the commissioner's finding that T.C. was gravely disabled, despite the presence of family members willing to care for him in the community. It properly took those factors into account when it found T.C. gravely disabled and entered less restrictive conditions that would ensure his safe and successful transition to his family's care. This Court should affirm the lower court's orders.

V. CONCLUSION

The trial court had sufficient evidence to find that T.C. was gravely disabled, even with the support of his family. The trial court's determinations about the credibility of T.C.'s family and the persuasiveness of the evidence should not be disturbed on appeal.

RESPECTFULLY SUBMITTED this 31st day of May 2019.



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CERTIFICATE OF SERVICE

I, *Christine Townsend*, state and declare as follows:

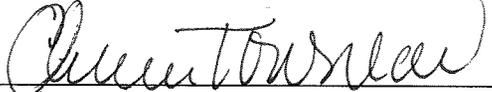
I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On May 31, 2019, I served a true and correct copy of this **RESPONDENT'S BRIEF** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

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- By United States Mail**

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of May 2019, at Tumwater, Washington.



CHRISTINE TOWNSEND
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

May 31, 2019 - 3:01 PM

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