

MENTAL ILLNESS COMMITMENT PROCEDURES - BACKGROUND MEMORANDUM

Senate Concurrent Resolution No. 4033 (attached as an appendix) directs the Legislative Council to study the commitment procedures for individuals with mental illness. The testimony received during the hearings on Senate Concurrent Resolution No. 4033 indicated that in the past several years, changes in clinical practices and service delivery systems have created a need for new and different responses in caring for persons with mental illness and substance abuse. The testimony further indicated that as a result of these changes, it is important that the mental health commitment laws and procedures be reviewed.

BACKGROUND

The majority of North Dakota's initial laws concerning the voluntary, involuntary, and emergency commitment of individuals with mental illness were enacted in 1957 and were not substantially changed until 1977. In 1977 the Legislative Assembly enacted Senate Bill No. 2164, the bill that created North Dakota Century Code (NDCC) Chapter 25-03.1. The bill established many of the commitment procedures for the individuals with mental illness and chemical dependency which are currently in effect. The bill was precipitated by a number of state and federal court decisions that had invalidated state commitment laws similar to North Dakota's laws.

A number of the commitment procedures contained in NDCC Chapter 25-03.1 have been amended in the years since the chapter was enacted in 1977. For example, in 1989 Senate Bill No. 2389 replaced the terms "alcoholic individual" and "drug addict" with "chemically dependent person," set forth more specific procedures for the application for involuntary treatment, and permitted the parties to waive the preliminary hearing. In 1993 Senate Bill No. 2370 authorized the state's attorney to seek reimbursement of funds expended by the county for a respondent who was determined to be indigent but is later found to have funds or property, clarified that a respondent has a right to a preliminary hearing, and set forth a procedure for a respondent to seek the discharge of a petition.

COMMITMENT PROCEDURES FOR MENTALLY ILL AND CHEMICALLY DEPENDENT INDIVIDUALS - SUMMARY OF STATUTORY PROVISIONS

North Dakota Century Code Chapter 25-03.1 provides for commitment procedures for mentally ill and chemically dependent individuals.

Voluntary Commitment Procedures

Section 25-03.1-04 provides that the screening and admission of an individual to a public treatment facility for mental illness or chemical dependency must be performed by the regional human service center in the region in which the individual is physically located. Upon receipt of the request, the regional human service center is to arrange for an evaluation of the individual and, if appropriate, is to treat the applicant or refer the applicant to the appropriate treatment facility.

Involuntary Commitment Procedures

Section 25-03.1-07 provides that a person may be involuntarily admitted to the State Hospital or another treatment facility only if it is determined that the individual requires treatment.

Petition for Involuntary Treatment

Section 25-03.1-08 provides that any adult (the applicant) may present a petition for involuntary treatment of an individual (the respondent) to the state's attorney of the county where the respondent is located or to an attorney retained by the applicant to represent the applicant through the proceedings. The petition must be verified by affidavit of the applicant and must contain assertions that the respondent requires treatment; detailed facts that are the basis of the assertion; and names, telephone numbers, and addresses of witnesses to those facts. To assist in completing the petition, the state's attorney may direct a qualified mental health professional designated by the regional human service center to investigate and evaluate the specific facts alleged by the applicant. The investigation must be completed as promptly as possible and include observations and conversations with the respondent, if possible. The state's attorney or the retained attorney must file a petition with the clerk of court if the information provided by the applicant or by the investigation provides probable cause to believe that the respondent requires treatment. If the state's attorney determines there is insufficient grounds for

filing a petition with the court, the state's attorney may refer the applicant to other community resources.

Section 25-03.1-09 provides that the clerk of court, upon the filing of a petition for involuntary treatment, is to notify the district judge or juvenile court judge. The judge is to review the petition and the accompanying documentation to determine whether it meets requirements of law and whether it establishes probable cause to believe the respondent requires treatment. If probable cause has not been established, the petition must be dismissed unless an amendment can cure the defect.

If the judge determines probable cause has been established, the respondent or the respondent's nearest relative or guardian must be served with:

1. A copy of the petition and supporting documentation.
2. A notice informing the respondent of procedures required by the law.
3. A notice of the respondent's right to preliminary and treatment hearings; the right to be present at the hearings; the right to have counsel; the right to an independent evaluation; and if the respondent is indigent, the right to counsel and an independent expert examiner, each at the expense of the county of the respondent's residence.
4. A notice that if an expert examiner is to be appointed, the respondent must be given an opportunity to select that examiner.

Court-Ordered Examination

Section 25-03.1-10 provides that if the petition is not accompanied by a written supportive statement of a psychiatrist, physician, or psychologist who has examined the respondent within the last 45 days, the court is to order the respondent to be examined by an expert examiner of the respondent's choice or one appointed by the court. The county of the respondent's residence is responsible for paying the cost of the court-ordered examination.

Section 25-03.1-11 provides that the respondent must be examined within a reasonable time by an expert examiner as ordered by the court. If the respondent is taken into custody under emergency treatment provisions, the examination must be conducted within 24 hours of custody. The examination report must be filed with the court and must contain:

1. Evaluations of the respondent's physical condition and mental status.
2. A conclusion as to whether the respondent requires treatment.
3. If the report concludes that the respondent requires treatment, a list of available forms of care and treatment which may serve as alternatives to involuntary hospitalization.
4. The signature of the examiner.

If the examiner concludes that the respondent does not require treatment, the court may terminate the proceedings and dismiss the petition. If the examiner concludes that the respondent requires treatment, the court is to set a date for hearing. If the respondent is in custody and is alleged to be suffering from mental illness or a combination of mental illness and chemical dependency, the preliminary hearing must be within seven days of the date the respondent was taken into custody. If a preliminary hearing is not required, the treatment hearing must be held within seven days of the date the court received the examiner's report, not to exceed 14 days from the time the petition was served.

Section 25-03.1-11.1 provides that, with the consent of the court, the parties may waive the preliminary hearing and conduct the treatment hearing within the time period set for the preliminary hearing.

Notice of Hearings

Section 25-03.1-12 provides that the court is to give notice of a petition and of a time and place of any hearing to the respondent, parents of a respondent who is a minor, the respondent's attorney, the petitioner, the state's attorney, the superintendent or the director of any hospital or treatment facility in which the respondent is hospitalized or is being treated, the spouse of the respondent, any guardian, and other relatives or person that the court may determine.

Right to Counsel

Section 25-03.1-13 provides that every respondent is entitled to legal counsel. The section also provides procedures for appointing counsel, waiver of the right to counsel, and compensation of counsel for an indigent respondent.

Preliminary Hearing

Section 25-03.1-17 provides that a respondent who is in custody and who is alleged to be mentally ill or to be suffering from a combination of chemical dependency and mental illness is entitled to a preliminary hearing. At the preliminary hearing, the judge is to review the medical report and allow the petitioner and the respondent an opportunity to testify and to present and cross-examine witnesses. The court may receive the testimony of any other interested person. The judge may receive evidence that would otherwise be inadmissible at a treatment hearing. If the court does not find probable cause to believe that the respondent requires treatment, the court is to dismiss the petition.

If the court finds probable cause to believe that the respondent requires treatment, the court is to consider less restrictive alternatives to involuntary detention and treatment. The court may then order the respondent to undergo up to 14 days' treatment under a less restrictive alternative, or if it finds that alternative treatment is not in the best interest of the respondent or others, the

court is to order the respondent detained for up to 14 days for involuntary treatment in a treatment facility.

Treatment Hearing

Section 25-03.1-19 provides that the involuntary treatment hearing, unless waived by the respondent, must be held within 14 days of the preliminary hearing. If the preliminary hearing is not required, the involuntary treatment hearing must be held within seven days of the date the court received the examiner's report. The hearing must be held in the respondent's county or in the county where the State Hospital or treatment facility treating the respondent is located. At the hearing, evidence in support of the petition must be presented by the state's attorney, private counsel, or counsel designated by the court. The petitioner and the respondent must be afforded an opportunity to testify and to present and cross-examine witnesses. The court may receive the testimony of any other interested person. There is a presumption in favor of the respondent and the burden of proof in support of the petition is upon the petitioner. If, upon completion of the hearing, the court finds the petition has not been sustained by clear and convincing evidence, the court is to deny the petition, terminate the proceeding, and order the respondent to be discharged if the respondent was hospitalized before the hearing.

Section 25-03.1-20 provides that if the respondent is found at the involuntary treatment hearing to require treatment, the court may:

1. Order the individual to undergo a program of treatment other than hospitalization;
2. Order the individual hospitalized in a public institution; or
3. Order the individual hospitalized in any other private hospital if the attending physician agrees.

Alternatives to Hospitalization

Section 25-03.1-21 provides for alternatives to hospitalization. Before making its decision in an involuntary treatment hearing, the court is to review a report assessing the availability and appropriateness of treatment programs other than hospitalization for the respondent which has been prepared and submitted by the State Hospital or treatment facility. If the court finds that a treatment program other than hospitalization is adequate to meet the respondent's treatment needs and is sufficient to prevent harm or injuries that the respondent may inflict upon oneself or others, the court is to order the respondent to receive whatever treatment other than hospitalization is appropriate for a period of 90 days.

Section 25-03.1-22 provides that an initial order for involuntary treatment may not exceed 90 days.

Emergency Commitment Procedures

Section 25-03.1-25 provides that when a peace officer, physician, psychiatrist, psychologist, or mental health professional has reasonable cause to believe that an individual requires treatment and there exists a serious risk of harm to that person, other person, or property of an immediate nature that considerations of safety do not allow preliminary intervention by a judge, the peace officer, physician, psychiatrist, psychologist, or mental health professional may cause the person to be taken into custody and detained at a treatment facility, which includes any hospital, including the State Hospital, and any public or private treatment facility.

If a petitioner seeking the involuntary treatment of a respondent requests that the respondent be taken into immediate custody and the judge, upon reviewing the petition and accompanying documentation, finds probable cause to believe that the respondent requires treatment and there exists a serious risk of harm to the respondent, other person, or property if allowed to remain at liberty, a judge may enter a written order directing that the respondent be taken into immediate custody and detained until the preliminary or treatment hearing.

Transportation Expenses

Section 25-03.1-39 provides that whenever an individual is about to be involuntarily hospitalized, an official or person designated by the court is to arrange for the individual's transportation to the treatment facility with suitable medical or nursing attendants and by such means as may be suitable for the person's medical condition. Whenever practicable, the individual is not to be transferred by police officers or in police vehicles. If the individual is unable to pay for expenses of transportation and friends or relatives do not oblige themselves to pay the expense, the court may direct that the expenses are to be paid by the individual's county of residence.

RECENT DECISIONS

The North Dakota Supreme Court has addressed the issue of right to counsel in civil commitment proceedings. In *In re J.B.*, 410 N.W.2d 530 (N.D. 1987), the issue before the North Dakota Supreme Court was whether the trial court's denial of J.B.'s request for substitution of appointed counsel was a violation of J.B.'s right to due process under the 14th Amendment of the United States Constitution. At his treatment hearing, J.B., who was mentally ill, requested a newly appointed attorney. The court denied his request, concluding there was no basis for substitution of counsel other than what appeared to be J.B.'s severe mental disorder. The court held that individuals subject to North Dakota's civil commitment proceedings are entitled to representation by counsel;

however, the federal Constitution does not provide for counsel of choice in a civil commitment proceeding and substitution of counsel was within the discretion of the trial court.

Regarding the statutory standard of review, the North Dakota Supreme Court, in *In re R.N.*, 450 N.W.2d 758, 761 (N.D. 1990), held that the statutory standard is clear and convincing evidence that a mentally ill individual requires treatment, not that the individual would benefit from treatment.

The North Dakota Supreme Court has addressed the issue of appropriate treatment and alternatives to hospitalization. In *Alagada v. Marty*, 345 N.W.2d 46 (N.D. 1984), the court held that, in light of evidence that a treatment program outside a hospital was not adequate in meeting the individual's treatment needs nor sufficient to prevent harm or injury to him, the trial court did not err in its refusal to order treatment outside a hospital. In *Gustafson v. T.A.*, 472 N.W.2d 226 (N.D. 1991), the court held that if another course other than hospitalization is adequate for treatment and prevention of harm, the court is directed to use that alternative, rather than involuntary commitment; in *In re J.S.*, 499 N.W.2d 604 (N.D. 1993), the court held that the trial court must determine least restrictive alternatives for treatment; and in *In re J.A.D.*, 492 N.W.2d 82 (N.D. 1992), the court explained that the trial court must determine whether alternative treatment to hospitalization is adequate.

Regarding court-authorized involuntary treatment with prescribed medication, the North Dakota Supreme Court, in *Waters v. C.W.*, 552 N.W.2d 382 (N.D. 1996), held that when the choice is between involuntarily treating a patient with drugs that could stabilize the patient and allow an early release from hospitalization and not medicating the patient at all, which could cause deterioration in condition and lead to indefinite hospitalization, forced medication is the least restrictive form of treatment.

Regarding outpatient treatment, the North Dakota Supreme Court, in *Avard v. K.J.L.*, 541 N.W.2d 698 (N.D. 1996), held that evidence supported the trial court's conclusion that the respondent required treatment and that outpatient treatment was appropriate.

PREVIOUS STUDIES AND RESULTING LEGISLATION

1973-74 Interim

The Legislative Council's 1973-74 interim Judiciary "A" Committee, in its study of the state's Criminal Code, was concerned about the workability and constitutionality of the state's mental health commitment procedures. Because of its workload, the committee was unable to pursue the subject directly; however, the committee did recommend a study resolution, subsequently passed by the 1975 Legislative

Assembly, directing a study of mental health commitment procedures. The 1975 Legislative Assembly considered a measure, House Bill No. 1605, proposing a major overhaul of the state's mental health commitment procedures. The legislative history indicates that because of the size and complexity of the bill and the short amount of time available to consider the bill, House Bill No. 1605 was defeated, and the study resolution was passed.

1975-76 Interim

During the 1975-76 interim, the Legislative Council's State and Federal Government Committee, pursuant to House Concurrent Resolution No. 3002, studied the state's mental health commitment procedures. The committee received testimony from individuals working with and in the state's mental health system. The testimony highlighted different aspects and shortcomings of the present laws which lead the committee to the conclusion that the system needed a major overhaul rather than a few changes here and there. The committee recommended two mutually exclusive bills. The first bill, 1977 Senate Bill No. 2070, created a new commitment procedure, and in the process, abolished county mental health boards. The second bill, 1977 Senate Bill No. 2069, allowed for the formation of multi-county mental health boards. Both bills recommended by the interim committee failed to pass the Senate; however, Senate Bill No. 2164, which contained many of the same provisions as Senate Bill No. 2070, passed. Senate Bill No. 2164 established procedures for the voluntary, involuntary, and emergency commitment of individuals with serious mental disorders, alcoholism, and drug addiction.

1985-86 Interim

As part of its human service delivery system study during the 1985-86 interim, the Legislative Council's Budget Committee on Human Services reviewed the mental health services in the state. The testimony received by the committee included recommendations for the development of a community-based mental health delivery system with the human service center as the single portal of entry into the system and changing the role of state government from delivering mental health service to assuring that the services are provided with the use of private providers. The committee recommended a bill to develop an integrated, multidisciplinary continuum of services for chronically, mentally ill individuals. The bill was passed by the 1987 Legislative Assembly.

1987-88 Interim

During the 1987-88 interim, the Legislative Council's Budget Committee on Human Services Committee, as part of its study of the role and function of the State

Hospital in the provision of services to the mentally ill and chemically dependent, reviewed the law that provided for a 72-hour emergency detention before a preliminary hearing for persons who are believed to be suffering from mental illness, alcoholism, or drug addiction. The law provided that detention was to be in a treatment facility and not in a jail unless no other secure facility was available. The committee expressed concerns regarding the holding of persons in jail facilities before their mental health commitment hearings. The committee received testimony that jail facility operators were being trained and being provided information on the handling of mentally ill individuals. The committee made no recommendations regarding this issue. A bill passed during the 1989 legislative session, which amended NDCC Section 25-03.1-25, increased the maximum time period for detention before a preliminary hearing from 72 hours to 7 days.

1991-98 Interims

During the 1991-92, 1993-94, 1995-96, and 1997-98 interims, the Legislative Council's Budget Committee on Government Services monitored the continued development of a continuum of services to the mentally ill and chemically dependent. The committee also studied the change in the role of the State Hospital and the expansion of community services. The committee reviewed programs and enhancements to existing programs identified by each regional human service center, which may be needed to provide a comprehensive system of services to seriously mentally ill and chemically dependent individuals in need of services in each region.

During the 1991-92 interim, the Budget Committee on Government Services expressed its support for a proposed program that enabled individuals with the dual diagnosis of severe mental illness and chemical dependency to live in individual apartments while services are being provided to them at the regional human service center. The committee also expressed its support for proposed meetings between the Department of Human Services and private alcohol and drug abuse treatment providers to develop and organize a partnership for providing treatment services in the state.

During the 1993-94 interim, the Budget Committee on Government Services recommended that the Legislative Assembly continue the clubhouse programs at Minot and Grand Forks for sufficient time to allow for a fair test of the adequate implementation of the clubhouse model in North Dakota and provide proper and adequate funding for the clubhouse programs and psychosocial rehabilitation center.

During the 1995-96 interim, the Budget Committee on Government Services reviewed services and programs of psychosocial rehabilitation centers and clubhouse projects, expressed its support of the psychosocial rehabilitation centers and clubhouse projects, and encouraged the Legislative Assembly to consider further expansion of these programs. The committee also reviewed the mental health and chemical dependency commitment procedures but did not make any recommendations regarding changes to the procedures.

During the 1997-98 interim, the Budget Committee on Government Services reviewed the funding and operations of the State Hospital and the impact of welfare reform on mental health services. The committee also received recommendations regarding the expansion of clubhouse projects and a plan for the downsizing of the number of patients at the State Hospital. The committee did not make any recommendations as a result of its monitoring of mental health services during that interim.

SUGGESTED STUDY APPROACH

The committee, in its study of the commitment procedures for individuals with mental illness, may wish to approach this study as follows:

- Receive testimony from representatives of the Department of Human Services and the State Hospital regarding the voluntary, involuntary, and emergency commitment procedures, recent changes in clinical practices and service delivery systems for individuals with mental illness and substance abuse, and whether current commitment procedures are compatible with those changes.
- Receive testimony from the State's Attorneys Association regarding issues and concerns of state's attorneys in civil commitment proceedings.
- Receive testimony from mental health professionals and mental health associations regarding issues and concerns regarding the civil commitment process.
- Receive testimony from the judiciary regarding issues and concerns relating to the current civil commitment process.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1