

The State of South Carolina

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February 27, 1989

The Honorable Patrick B. Harris
Member, House of Representatives
213 Blatt Building
Columbia, South Carolina 29211

Dear Representative Harris:

You have advised of a situation facing probate courts in which an individual has been involuntarily admitted to a facility for chemical dependence treatment, only to then be diagnosed as having a psychiatric illness as the primary problem. This decision or determination is received by the probate court during the course of the patient's hearing. You have inquired as to whether the probate court must discharge the patient from treatment for chemical dependence and begin judicial proceedings to facilitate transfer from chemical dependency treatment to psychiatric treatment. It is the opinion of this Office that the course described in your inquiry would be the preferable manner in which to proceed.

Chemical Dependence Treatment

Commitment of an individual for treatment of chemical dependency is governed by Chapter 52 of Title 44, South Carolina Code of Laws (1988 Cum. Supp.). Chapter 52 covers voluntary admissions, emergency admissions, and involuntary commitment; this opinion will deal only with the procedures for involuntary commitment and commencement of judicial proceedings thereunder. Section 44-52-70 et seq. of the Code specifies the several steps to commence proceedings:

1. Any adult person or head of a treatment facility may file a petition with the appropriate probate court alleging that an individual is chemically dependent 1/ and in need of involuntary commitment.

2. The petition is to be accompanied by the certificate of a licensed physician who has examined the individual within 48 hours of the filing of the petition, to the effect that in his opinion, the individual is chemically dependent and in need of involuntary commitment for care and treatment. If the individual has refused to submit to an examination by a physician, that is to be alleged in the petition.

3. The court sets a date for hearing the petition, not to be later than twenty days from the filing of the petition, unless good cause is shown for the delay.

4. The individual for whom involuntary commitment is sought is to be represented by counsel at all stages of the proceedings.

1/ "Chemical dependency" is defined by Section 44-52-10(1) of the Code to be

a chronic disorder manifested by repeated use of alcohol or other drugs to an extent that it interferes with a person's health, social, or economic functioning; some degree of habituation, dependence, or addiction may be implied.

A "chemically dependent person in need of involuntary commitment" is defined by Section 44-52-10(11) to be a person suffering from chemical dependency as shown by:

- (a) recent overt acts or recent expressed acts of violence;
- (b) episodes of recent serious physical problems related to the habitual and excessive use of drugs or alcohol, or both;
- (c) incapacitation by drugs or alcohol, or both, on a habitual and excessive basis as evidenced by numerous appearances before the court within the preceding twelve months, repeated incidences involving law enforcement, multiple prior treatment episodes, or testimony by family or by members of the community known to the person relating to a lifestyle adversely affected by alcohol or drugs, or both.

5. Notice of the hearing, to whom it must be directed, and the contents thereof are specified in Section 44-51-80.

6. The court may order an examination of the individual for whom involuntary commitment is sought, by Section 44-52-90. Written reports of the evaluation by the examiners are to be submitted within seven days of the hearing. A background investigation may also be ordered.

7. If the court finds, by clear and convincing evidence, that the individual is a chemically dependent person in need of involuntary commitment, the court will consider reasonable alternative dispositions and may impose involuntary commitment as provided for in Section 44-52-110.

8. Involuntary commitment is not to exceed a treatment period of ninety days' inpatient care, by Section 44-52-120.

9. A notice of intent to discharge may be filed if the head of the treatment facility determines that the grounds for treatment no longer exist, or that further treatment will not significantly assist the individual. If, after five days following filing of the notice of intent to discharge, the probate court receives no objection, the individual may be discharged, by Section 44-52-120. If an objection is filed with the court, the court will hold a hearing prior to issuing an order of discharge.

These steps are simplified for purposes of this opinion; reference should be had to the appropriate statute for the detailed procedures. The foregoing sets forth the due process requirements as well as the standard of proof which is to be met when a chemically dependent is found to be in need of involuntary commitment.

Involuntary Psychiatric Commitment

Chapter 17 of Title 44 of the South Carolina Code of Laws (1976) provides the mechanism for voluntary, emergency, and judicial commitment of individuals to receive psychiatric care. ^{2/} For purposes of today's opinion, only the process of judicial (or involuntary) commitment will be outlined. The procedures begin at Section 44-17-510 of the Code and provide the following:

^{2/} A "mentally ill person" is defined by Section 44-23-10(1) of the Code to be "a person afflicted with a mental disease to such an extent that, for his own welfare or the welfare of others or of the community, he requires care, treatment or hospitalization."

1. A written petition is filed with the appropriate probate court by an interested person or superintendent of a mental institution, accompanied by the certificate of a designated examiner who states his opinion that the individual is mentally ill and should be hospitalized, also stating his basis for the determination. If the individual refuses to submit to an examination, the examiner or petitioner must set forth their bases for the conclusion that the individual needs psychiatric treatment and not merely the conclusion.

2. Notice of the petition and the individual's right to counsel must be given, as provided in Section 44-17-520.

3. Within three days after the petition is filed (excluding Saturdays, Sundays, and holidays), the court appoints counsel for the individual (unless he has retained counsel). The court appoints two designated examiners, one of whom is a licensed physician, who will examine the patient and report their findings as to the individual's mental condition and need for treatment. If the examiners do not execute the certification provided for within twenty-four hours, the proceeding is terminated and the individual is to be released. If the individual is determined to be mentally ill, that determination and the bases therefor are to be recorded. The individual is to be given the opportunity to request an additional examination by an independent examiner. These requirements are in Section 44-17-530 of the Code.

4. If the examiners (other than the independent examiner) report their opinion that the individual is not mentally ill, the proceedings terminate immediately, by Section 44-17-540. As with the alcohol or chemically dependent individual in Section 44-52-100, there is a mechanism in Section 44-17-540 to reach a consensus if the designated examiners disagree in their findings. The report required thereunder is to be provided within seven days. If the report finds mental illness to exist, the probate court holds a hearing, for involuntary commitments, not less than five nor more than seven days from receipt of the report, excluding Saturdays, Sundays, and holidays.

6. Notice of the hearing required by Section 44-17-540 is to be given as provided in Section 44-17-550 and must be given at least five days in advance. A copy of the examiners' report is to be provided to the individual's counsel.

7. Conduct of the hearing is governed by Section 44-17-570.

8. Upon completion of the hearing and consideration of the record, if the probate court finds by clear and convincing evidence that

the person is mentally ill, needs treatment and because of his condition:

(1) lacks sufficient insight or capacity to make responsible decisions with respect to his treatment; or

(2) there is a likelihood of serious harm to himself or others, 3/

then the probate court may order inpatient or outpatient treatment at an appropriate facility, by Section 44-17-580. If the court finds the individual not to be mentally ill, the proceedings are dismissed. Failure to adhere to outpatient treatment can trigger a supplemental hearing.

9. If an order of hospitalization is issued, it expires after thirty days if the individual has not been admitted to a facility, unless this date is extended by the probate court. See Section 44-17-600.

3/ The phrase "likelihood of serious harm" is defined by Section 44-23-10(2) of the Code to mean that

because of mental illness there is (1) a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior and serious harm to them or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community.

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10. A right of appeal is provided for in Section 44-17-620. A right to reexamination is provided for in Section 44-17-630. Examination of a newly-admitted patient is provided for in Section 44-17-650.

As stated with respect to involuntary commitment of alcohol and chemically dependent individuals in need of treatment, this brief outline covers the basic requirements of involuntary judicial commitment for mental illness; reference must be had to the respective statutes for the fine details.

In many respects, the two processes are similar, particularly with respect to the burden of proof (making a showing of clear and convincing evidence); the ultimate finding to be made by the probate court in each instance is entirely different, however.

Due Process Requirements

This Office has reemphasized on several occasions that civil commitment for any purpose constitutes a significant deprivation of liberty, necessitating due process considerations. See Ops. Atty. Gen. No. 77-375, dated November 30, 1977, and another dated December 22, 1988, citing to such landmark United States Supreme Court cases as Addington v. Texas, 441 U.S. 418 (1979) and Vitek v. Jones, 445 U.S. 480 (1980). See also Op. Atty. Gen. dated April 18, 1986 (to the effect that recommitment of a conditionally discharged outpatient constitutes a deprivation of liberty which must be accompanied by due process).

Each of the two civil commitment procedures fulfills due process requirements as outlined above; at every step in each proceeding are notice and hearing requirements. In addition, a heavy burden of proof is required to be met. However, the findings to be made are entirely different: under Section 44-51-110, the probate court must find the individual to be a "chemically dependent person in need of involuntary commitment" and in Section 44-17-580, the court must find that the person is "mentally ill, needs treatment and because of his condition: (1) lacks sufficient insight or capacity to make responsible decisions with respect to his treatment; or (2) there is a likelihood of serious harm to himself or others." As noted in the footnotes, supra, the definitions of "chemical dependency," "chemically dependent person in need of involuntary commitment," "mentally ill person," and "likelihood of serious harm" are all different; it is very likely that evidence offered to establish alcohol or chemical dependency might not be sufficient to establish mental illness in the same person. (Such would, of course, entail questions of fact rather than questions of law.)

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Conclusion

If an individual were to be adjudicated to be a "chemically dependent person in need of involuntary commitment" under the relevant statutes, meeting the burden of proof and fulfilling the various requirements, and then transferred to another facility for treatment of mental illness (having been non-judicially determined to be the primary problem), without fulfilling the statutory requirements of Chapter 17 of Title 44 and meeting the burden of proof thereunder, a serious question as to unconstitutional deprivation of liberty without due process is raised. To protect this important constitutional guarantee, it is the opinion of this Office that proceedings be followed as outlined in Chapter 17 of Title 44 should a person involuntarily committed for chemical dependency be found (by the facility rather than a probate court) to be more in need of treatment of mental illness. Transfer of such a patient from a facility for treatment of chemical dependence to a facility for treatment of mental illness solely on the belief of the staff of the chemical dependence treatment facility would not accord the patient sufficient due process.

With kindest regards, I am

Sincerely,

Patricia D. Petway /an

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

Robert D. Cook

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