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The State of South Carolina

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December 22, 1988

The Honorable Patsy S. Stone
Judge of Probate, Florence County
Box L
City-County Complex
Florence, South Carolina 29501

Dear Judge Stone:

You have requested the opinion of this Office relative to the procedures required during supplemental hearings held to determine whether a mental patient's outpatient treatment placement should be revoked and the patient involuntarily confined to a mental health facility for further inpatient treatment. Specifically, you question whether expert testimony or evidence is required to support a revocation decision rendered at the supplemental hearing.

This Office, in its unpublished opinion 1977 Op. Atty. Gen. # 375, concluded that:

> [A mentally ill] individual involved in an involuntary out-patient treatment program cannot be committed to an in-patient treatment [program] without a determination pursuant to Section 44-17-580.

Section 44-17-580 requires that prior to commitment 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. . . ."

This Office will not issue a new opinion where a prior opinion governs and we will continue to be guided by the prior

opinion unless such prior opinion "is clearly erroneous or the applicable law has changed." Op. Atty. Gen., October 3, 1986. After review of the statutory amendments subsequent to 1977 and the intervening judicial decisions, I conclude that there are no cogent reasons to reverse the 1977 conclusions.

The 1977 opinion relied upon both constitutional and statutory analysis in support of its conclusions. First, with regard to the due process considerations that underlie the opinion, the intervening case law provides further support for the conclusions. The United States Supreme Court in Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), and in Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), reemphasized that civil commitment for any purpose constitutes a significant deprivation of liberty, necessitating due process considerations. In Addington, the Court recognized that the purpose of civil commitment is not punitive, but treatment, a conclusion noted in the 1977 opinion. The Court further instructed that:

> Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists.

441 U.S. at 429, 99 S.Ct. at 1811; see also Parham v. J. R., 442 U.S. 609, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). Addington and Vitek both reemphasized the United States Supreme Court's holding in O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), wherein the Court held that, "a state cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. at 576, 95 S.Ct. at 2494. O'Connor further instructs that "even if involuntary confinement was initially permissible, it could not constitutionally continue after that [initial] basis no longer existed." 422 U.S. at 575, 95 S.Ct. at 2493. Thus, involuntary confinement decisions must be based upon examination of the person's present condition and a patient's condition in the past cannot be determinative.[1]

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1. Parenthetically, I note that South Carolina case law similarly recognizes that mental illness is not generally a static condition, but instead is fluid and volatile, and accordingly, former determinations of mental illness are not controlling with regard to an individual's current condition. In Re Cogdell's Estate, 236 S.C. 404, 114 S.E.2d 562 (1960); Cathcart v. Matthews, 105 S.C. 329, 89 S.E.2d 1021 (1916).

A recent line of cases in the D. C. Court of Appeals recognizes in a most similar situation that due process protections are applicable to the decision to revoke a mental patient's outpatient status since the patient's outpatient status creates a "conditional liberty interest." In Re Mills, 467 A.2d 971 (D. C. App. 1983); In Re Stokes, 546 A.2d 356 (D. C. App. 1988); In Re James, 507 A.2d 155 (D. C. App. 1986). The Mills court concluded that due process requires the Court to make new findings on the need for inpatient treatment, mental illness and dangerousness prior to transferring the outpatient to an involuntary inpatient status.[2]

Similarly, review of the South Carolina statutory law convinces that there has been no intervening statutory amendments that compel a revisiting of the 1977 opinion's reliance upon the statutory provisions then extant. The statutory scheme that governs the transfer of mentally ill patients from a least restrictive placement to a more restrictive placement remains unchanged and incorporates the procedural requisites within Sections 44-17-510 through 44-17-580. See, Section 44-23-210, Code of Laws of South Carolina (1976). Moreover, the South Carolina courts have recognized that the opinion of the Attorney General interpreting statutory provisions should not be disregarded absent cogent reasons. Hamilton v. Marchant, 279 S.C. 479, 309 S.E.2d 781 (S. C. App. 1983).

In conclusion, there are no cogent reasons to revisit this Office's related conclusions in its published opinion, 1977 Op. Atty. Gen. # 376. That opinion clearly governs your immediate request. A revocation of a mental patient's outpatient status and concomitant confinement of the patient in a hospital for involuntary treatment requires a court finding pursuant to Section 44-17-580 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. . . ."

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2. This Office, in Op. Atty. Gen., April 18, 1986, observed that courts have generally concluded "that recommitment of a conditionally discharged outpatient constitutes a deprivation of liberty that must be accompanied by due process." We further recognized therein the "conditional liberty" interest of the outpatient.

I continue to suggest that this hearing should be preceded by the procedural requisites prescribed in Sections 44-17-510 through 44-17-570 in order that the procedure comport with the General Assembly's legislative scheme governing the transfer of mental health patients from a least restrictive facility to a more restrictive facility provided in Section 44-23-210. Of course, these procedures prescribe current mental examinations by designated examiners. Additionally, the due process clause most likely requires evidence from experts of the patient's current mental condition prior to revocation of the patient's outpatient status.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

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REVIEWED AND APPROVED:

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