JUDICIAL ADMINISTRATION OF THE BAKER ACT AND ITS EFFECT ON FLORIDA'S ELDERS

REPORT AND RECOMMENDATIONS OF THE SUBCOMMITTEE ON CASE ADMINISTRATION

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EXECUTIVE SUMMARY

Introduction

Chapter 394 of the Florida Statutes, known as "The Baker Act," governs mental health services, including voluntary admissions (section 394.4625), involuntary examination (section 394.463) and involuntary placement (section 394.467). Enacted in 1971, the law was designed to protect the rights and liberty interests of citizens with mental illnesses and ensure public safety.

According to media reports from 1971, the Baker Act, named in honor of its sponsor Representative Maxine Baker, strengthened the legal and civil rights of patients of state mental institutions. Perhaps more importantly, the Baker Act was designed to require the state Division of Mental Health to offer community services to most patients with mental illness, and reserve confinement only if an individual is dangerous to himself or others. During legislative debate on the sweeping revision of Florida's then 97-year-old mental health laws, Representative Baker told her colleagues that "only 9 percent of our patients are dangerous to themselves or others, yet 91 percent are under lock and key." She added that "for the 58 percent of our patients who are committed involuntarily, they lose all their civil rights and leave with an indelible stigma. In the name of mental health, we deprive them of their most precious possession–liberty." (See Times-Miami Herald Service report from May 11, 1971.)

The state is the only entity with the authority to restrict a person's liberty. Involuntary mental health examination and placement involve a balancing of individual rights with the state's *parens patriae* authority and police powers. There were 19,424 petitions for involuntary placement filed under the Baker Act in 1997, which is a 22.3 percent increase from 1996. And, according to data collected by the Department of Mental Health Law and Policy at the University of South Florida, there were more than 70,000 involuntary examinations in 1997. Thus, implementation of the statutory provisions governing involuntary examination and placement, and the accompanying deprivation of liberty, affect a large number of Floridians every year.

The *St. Petersburg Times* reported in 1995, based on a review of more than 4,000 cases and a statistical analysis of 3,151 petitions for involuntary examination, that "about two-thirds of the people forced into treatment in Pinellas [County] in 1993 and 1994 were 65 and over." Public testimony before the Florida Legislature indicated that many elders fared poorly and some even died during or shortly after their hospitalization under the Baker Act. While the Baker Act was overhauled in 1996 by the Florida Legislature in response to these allegations, according to a June 14, 1998, article in the *St. Petersburg Times*, "some mental health advocates, and the state records, suggest the Baker Act still is being used to confine older people, many of whom may simply be confused or unable to care for themselves."

Obviously, an incorrect decision on the involuntary examination or placement of anyone, but particularly a vulnerable elder, can have a disastrous effect. The Subcommittee believed it was imperative to review the judicial administration of Baker Act cases to determine whether there are additional precautions the State Courts System can implement to eliminate abuse or misuse of the Act.

Provisions of the Baker Act

Under the Baker Act, persons can be compelled into a local hospital or crisis unit (defined as "receiving facilities") for an involuntary examination for up to 72 hours. To qualify for an involuntary examination, persons must have a mental illness as defined in the statute and be unable or unwilling to provide express and informed consent to voluntary examination. The person, as a result of mental illness, must also be dangerous to themselves or others or seriously neglectful of themselves. The involuntary examination process may begin in one of three ways:

1. Any person may sign an affidavit that outlines why a person meets the criteria for an involuntary examination. A circuit judge then decides whether the affidavit adequately documents the legislatively-mandated criteria; if so, the judge enters an *ex parte* order for involuntary examination directing a law enforcement officer to take the person into custody and deliver that person to the nearest receiving facility.
2. A law enforcement officer encounters someone who meets the criteria and takes that person to the nearest receiving facility.
3. A doctor or other specified health care provider decides that a person meets the criteria for an involuntary examination, and a law enforcement officer takes the person into custody and delivers the person to the nearest receiving facility.

Within the 72-hour period of involuntary examination, one of the following four actions must be taken, based on the individual needs of the person being detained:

1. The person may be released; or
2. The person may be released for outpatient treatment; or
3. The person may voluntarily agree to further inpatient treatment; or
4. The receiving facility may petition for involuntary placement. If a petition is filed, a hearing must be held within five days.

Section 394.467, Florida Statutes, authorizes a person to be involuntarily placed for treatment upon a finding of the court that:

- The person has a mental illness and because of the mental illness:
  - The person has refused voluntary placement for treatment or is unable to determine whether placement is necessary; and

- The person is incapable of surviving alone or refuses to care for himself or herself and such neglect poses a real and present threat of substantial harm; or there is substantial likelihood that in the near future the person will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior; and

• All available less restrictive treatment alternatives which would offer an opportunity for improvement of the person's condition have been judged to be inappropriate.

Reasons for this Study

Inadequate processes and forms as well as errors or delays in the judicial administration of Baker Act cases may deny Florida citizens timely due process. Protecting rights and liberties is vital to the mission of the Florida State Courts System. This study sought to determine whether the rights of patients and the responsibilities of those charged with carrying out the laws were being properly observed.

There were several important reasons for studying the processing of cases involving vulnerable elders in Florida. Florida is the fourth largest state in the nation, with more than 14 million residents. The state presently has the largest proportion of older adults in the United States. More than 3.4 million Floridians are age 60 and older, and this population is expected to greatly increase in the future.

There is a sizeable population in Florida directly affected by the Baker Act. There are 601,206 Floridians with mental illnesses and 302,700 with Alzheimer's disease. In fact, the combined population of Florida residents with mental illnesses and Alzheimer's disease (903,906) is greater than the entire population of Alaska (614,010), Delaware (743,603), the District of Columbia (523,124), Montana (880,453), North Dakota (638,244), South Dakota (738,171), Vermont (590,883), and Wyoming (480.907) (Source: Population Estimates Program, Population Division, U.S. Bureau of the Census, Washington, DC 20233).

The need for this study was additionally identified through:

C *Horizon 2000, The 1998-2000 Operational Plan for the Florida Judicial Branch*, Objective II-D, Enhance the Timely Processing and Management of Cases, which states that "the Fairness Committee is asked to develop and submit a report and recommendations on case processing issues as they relate to vulnerable elders;"

C The January 1, 1994, *Action Plan* of the Florida Supreme Court Committee on Court-Related Needs of the Elderly and Persons with Disabilities;

C House Bill 1705, enacted during the 1998 Legislative Session; and

C Advocacy by the Department of Elder Affairs, Statewide Human Rights Advocacy Committee, and other individuals and groups.

The right to an impartial, fair, and timely hearing prior to involuntary placement is the keystone of the Baker Act. No comprehensive review of the judicial administration of Baker Act cases had been undertaken in the nearly three decades since the law has been in place. This study complements the 1996 legislative scrutiny of and modifications to the law, and will hopefully enhance the protection of rights of vulnerable elders who are involuntarily placed in mental health facilities.

The Study

Limited funding, time, and staff support were obstacles to this study. The Subcommittee applied for supplemental grant funding, but was not successful in securing the resources required to audit case files, observe judicial proceedings, or conduct personal interviews with participants. Nevertheless, the Subcommittee maximized its resources by conducting the following tasks:

- Reviewed judicial administration procedures and forms.
- Reviewed the applicable Florida Statutes and case law.
- Reviewed Florida and national literature, including law review articles, other legal research resources, and media reports.
- Conducted meetings in Tallahassee, Tampa, Fort Lauderdale, Miami, and Orlando to provide interested persons with the opportunity to submit written and oral presentations. Testimony was received from:
  - chief judges, administrative judges, other judges, and general masters;
  - court staff;
  - clerks of court;
  - disability advocates;
  - guardians;
  - public defenders, state attorneys, and other attorneys;
  - individuals with psychiatric disabilities; and
  - other interested persons.
- Conducted a comprehensive written survey of:
  - judges,
  - general masters,
  - state attorneys,
  - public defenders, and
  - clerks of court.

Findings, Conclusions, and Recommendations

Based on its research and deliberations, the Subcommittee presents the following overview of its findings, conclusions, and recommendations in regard to the Baker Act. These and other findings, conclusions, and recommendations are discussed in greater depth in the full report.

I. INCREASE THE AVAILABILITY OF QUALITY COMMUNITY MENTAL HEALTH SERVICES AND THE USE OF LESS-RESTRICTIVE ALTERNATIVES

The Subcommittee heard repeatedly that there is a chronic shortage of quality mental health resources in Florida, particularly community mental health services. Upon passage of the Baker Act in 1971, Representative Maxine Baker, for whom the law is named, told the *Times-Miami Herald Service* "there are so many people who are better treated in the community, through group therapy and other methods of treatment. With this bill, we can treat more persons with less money without subjecting many of them to institutionalization." Sadly, Representative Baker's vision has never been fully realized in Florida. As long as the critical shortage of community mental health resources continues in Florida, judicial consideration and determination of less restrictive alternatives, as required by the Baker Act, lacks the full significance it was intended to have.

According to Wayne Basford, an attorney with the Advocacy Center for Persons with Disabilities, the Department of Children and Families acknowledges that approximately 60 percent of the individuals in South Florida State Hospital could be discharged if adequate community-based support existed. He reported that the mental health facility recidivism rate is substantially impacted by the availability of community services and supports, such as psychotropic drugs and assertive community treatment (ACT) teams.

Richard Durstein, a professional guardian and member of the Human Rights Advocacy Committee in Pinellas County, and others spoke to the Subcommittee about the new generation of medications for individuals with mental illnesses. These new drugs, while excellent, are extremely expensive and thus beyond the financial reach of many persons. The question that may need to be addressed is whether providing services to persons with mental illnesses who are unable to afford treatment and medication is more cost effective than rotating these individuals in and out of mental health facilities and the justice system.

Many survey respondents and speakers noted the relationship between ability to pay and the length and quality of confinement. They said the system is a “revolving door” for indigent patients, who are back on the street quickly. It is an issue of fairness in regard to the allocation of services. There should be equal protection under the law for persons with and without insurance or private funds.

Participants in the process agreed with the activists' assessment. A general master in southern Florida who responded to the Subcommittee's survey posed the rhetorical question, "how meaningful is an inquiry into whether the least restrictive alternative has been determined appropriate if there is

no alternative but involuntary hospitalization?" That general master went on to lament the "woeful lack of services for juveniles, at least those juveniles who must rely on public resources for their treatment."

Another issue on which the Subcommittee heard testimony was the quality of some treatment. Hugh Handley, public guardian in the Second Judicial Circuit, expressed deep concern about the poor conditions in some assisted living and other facilities. Wayne Basford spoke of the ethical and moral concerns when society confines individuals to substandard treatment.

The Agency for Health Care Administration (AHCA) is authorized to impose fines and administrative penalties for violations by mental health facilities and professionals, in regard to both voluntary and involuntary placements. However, it was reported that AHCA lacks the funds and staff necessary to take vigorous and proactive enforcement action in regard to mental health facilities and professionals.

Paul Stiles, of the Department of Mental Health Law and Policy at the University of South Florida, reported that the Department of Children and Families is seeking legislative approval and funding for two pilot projects for a community team approach to address the mental health needs of elders. The Subcommittee applauds and supports the Department's efforts to address the needs of individuals with psychiatric disabilities, particularly vulnerable elders, in a manner that is more likely to preserve their dignity while being less disruptive and more cost effective.

Furthermore, the Subcommittee adds its voice to those who are pleading with the Florida Legislature and other policymakers to divert additional resources to quality community supports and services that will enable citizens with mental illnesses to lead full and meaningful lives and avoid unnecessary institutionalization.

Related Recommendations

- The Florida Legislature, the Department of Children and Families, and other policy makers should adequately fund quality community supports and services for persons with mental illnesses.

- The Florida Legislature should fund positions within the Department of Children and Families for the purpose of exploring less restrictive alternatives to involuntary placement and require the Department to report to the court on same.

- The Florida Legislature should review the statutes and regulations to ensure that community facilities are adequately regulated. The Florida Legislature should also require community facilities that house people who require mental health treatment to facilitate those persons' access to such treatment by qualified professionals.

- The Florida Legislature should adequately fund the Agency for Health Care Administration and require the Agency to actively monitor and vigorously enforce regulations related to

community facilities, such as assisted living and other facilities, to improve the quality of care and services for residents.

- Judges, general masters, public defenders, and state attorneys should have a working knowledge of community mental health resources and visit the less restrictive alternatives available within their community.

- The Florida Legislature should amend the statutes to expressly permit the use of less-restrictive alternatives to involuntary in-patient examinations.

- The Florida Legislature should make funding available to jurisdictions that are willing to coordinate an interdisciplinary exploration of innovative alternatives designed to reduce the traumatic effect of involuntary examinations. Such pilot projects should be monitored and evaluated by independent entities, to determine their effectiveness.

- At involuntary placement hearings, judges and general masters should require the state attorneys to comply with the statutory requirement to prove that all less restrictive alternatives have been investigated and found to be inappropriate.

- Judges and general masters should ensure that the evaluation of less restrictive treatment alternatives (section 394.467(1)(b)) are given equal weight under the law with the criteria found in section 394.467(1)(a).

- The Florida Legislature should consider amending Chapter 394 to permit Chapter 744 guardians and Chapter 393 guardian advocates to participate in alternative placement decisions and receive adequate notice of the decision-making process.

II. IMPROVE THE ADMINISTRATION OF JUSTICE IN BAKER ACT CASES

Testimony before the Subcommittee often touched on the timeliness of Baker Act proceedings. In fact, timely judicial review drew more passionate reactions from mental health activists than any other issue the Subcommittee studied. Some individuals expressed the opinion that persons with mental illnesses should be entitled to at least the same protections as criminal defendants, prior to further restrictions on their liberty. Judicial review early in the process would increase the public's trust and confidence in the involuntary examination and placement processes.

Involuntary examination and placement involves a weighing of liberty rights with the need for treatment. Chapter 394 contains the only provisions in Florida law that allow restriction of liberties for an extended period of time with no judicial review. Until or without a court hearing, there is no due process.

Florida statutes require involuntary placement hearings to be conducted within five days. There are differing interpretations as to whether that provision means five working days or five consecutive

days. Even more troubling was the allegation that some courts ignore the five-day requirement altogether. In some jurisdictions, involuntary placement hearings are reportedly conducted only every other week.

System participants counseled that a balancing of due process rights is involved. While they agreed that no citizen should be detained without timely judicial review, they said that review loses its meaning without proper notice and effective representation. The Subcommittee found that because substantial liberty interests are adversely affected, the five-day calculation should be construed in the manner most favorable to the detained individual insofar as is reasonable.

Education was another issue of system-wide concern. Justice system participants reported that they are not always adequately trained on mental health issues. Judges, general masters, state attorneys, and public defenders are legal experts. Most of them possess no special knowledge or training about mental illnesses prior to being assigned to involuntary examination and placement matters. The Subcommittee found that training for justice system participants should go beyond a clear understanding of the applicable laws and procedures. It should also include an understanding of the problems and circumstances that often face elders and individuals with psychiatric disabilities.

Consistency and continuity go hand-in-hand with training to ensure an effective system. Oftentimes, there is no consistency or continuity in assignments of judges, state attorneys, and public defenders to Baker Act cases. In some jurisdictions, the newest judges, public defenders, and state attorneys are assigned to involuntary placement proceedings. In other jurisdictions, involuntary placement cases are rotated among the judges, public defenders, and state attorneys, so while many gain a little knowledge about mental illnesses, none develop a special expertise.

Individuals with psychiatric disabilities, advocates, and justice system participants appearing before the Subcommittee seemed to generally favor the use of general masters in involuntary placement proceedings. General masters are currently presiding over involuntary placement hearings in at least 8 of the 20 circuits. They often have or develop expertise in the subject matter. However, some courts, particularly those in less populated or rural areas, lack the resources for general masters. This creates an inequity of services available to Florida citizens from jurisdiction to jurisdiction.

There appears to be confusion, a lack of consensus, or even a disregard of the statutes and case law in regard to the appropriate role of the county courts in Baker Act proceedings. Persons in favor of extending jurisdiction over Chapter 394 matters to county judges note that it would increase chief judges' flexibility in making judicial assignments. They also believe that in situations involving misdemeanor crimes, such a change may shorten the process and allow an individual to receive treatment more quickly. Activists were generally opposed to extending jurisdiction to county courts. Complicating the matter even further, some county court judges are currently presiding over involuntary placement proceedings, despite the fact that there may be no legal authority for them to do so. The Subcommittee commends continued research and debate on the appropriate roles of county courts and county court judges in mental health proceedings.

The location and formality of hearings are also somewhat controversial. In Florida, the majority of involuntary placement hearings are held in receiving facilities. According to testimony, conducting

hearings in the facilities may confuse patients, particularly elder patients, who may be unaware that a court proceeding is underway at which their liberty interests are being determined. Certain jurisdictions are also considering conducting involuntary placement hearings by video. The Subcommittee learned that some individuals may react negatively to video hearings because of their mental illnesses. When individuals do not understand that a hearing has been held, they believe they have not been afforded their rights and are being held contrary to law.

Typical abuses of the involuntary examination process, the Subcommittee learned, include initiation of the *ex parte* process by estranged spouses, dishonest neighbors, and other persons who may harbor a grudge. The Subcommittee received testimony indicating that some abuses of the involuntary examination and placement processes might be alleviated through the use of model forms released by the Department of Children and Families in November 1998. The model affidavit form captures information a state attorney would need in order to pursue perjury charges against a petitioner making false allegations. Judge Mark Speiser advised the Subcommittee that the Seventeenth Judicial Circuit recently modified its forms based on the model forms. The revised forms provide substantially more details than before, which allows the judge to make a more informed decision.

Related Recommendations

The State Courts System, state attorneys, public defenders, and clerks of court should continue to seek, and the Florida Legislature should fund, adequate resources for proceedings under Chapter 394.

The Florida Legislature should amend the statutes to clarify whether the five-day requirement includes or excludes weekends and holidays. If the Legislature determines that involuntary placement hearings must be held within five consecutive days, adequate additional funding must be provided to the courts, clerks, state attorneys, and public defenders to enable them to conduct meaningful, as well as timely, proceedings.

While the five-day issue is being clarified by the Legislature, the Chief Justice of the Florida Supreme Court should contact every chief judge and probate judge and encourage them to ensure that involuntary placement hearings are conducted within at least five working days of the petition being filed, unless a continuance is requested by the patient with consent of counsel, and granted. In order to comply with the statute, in most jurisdictions hearings would have to be held at least twice a week.

The chief judge of every judicial circuit should immediately implement procedures to ensure that involuntary placement hearings are conducted within five working days, unless a continuance is granted. In order to comply with the statute, most circuits will need to hold hearings at least twice a week.

- The Florida Legislature should direct and fund an interdisciplinary study on whether probable cause hearings should be held within 24 to 48 hours for all individuals who are involuntarily examined pursuant to Chapter 394.

- Judges, general masters, assistant state attorneys, and assistant public defenders should be adequately trained and educated on general mental health and elder issues, including community resources and issues identified in this report, ***prior*** to being assigned to Baker Act proceedings.

The Executive Office of the Governor and the Florida Supreme Court should jointly sponsor a statewide interdisciplinary summit on mental health issues related to Chapter 394. The objectives of the summit should include:

- educating participants on mental health issues;
- sharing information on "best practices" in regard to Baker Act cases; and
- providing a forum for the participants to discuss new and emerging mental health issues.

- Participants should include chief judges, probate judges, general masters, state attorneys, public defenders, clerks of court, administrative law judges, law enforcement officers, service providers, individuals with psychiatric disabilities, advocates, public and private guardians, and others involved in Baker Act proceedings.

- Chief judges, state attorneys, and public defenders should ensure continuity and consistency of the judges, general masters, assistant state attorneys, and assistant public defenders assigned to Baker Act proceedings.

- Continuing educational programs on elder, mental health, and disability laws and issues should be made available to all Florida judges and lawyers on an on-going basis.

- The trial courts presently allowing county judges to preside over mental health proceedings, including Chapter 394, should review their practices to ensure that those practices comply with current Florida law.

- The Florida Legislature should consider amending Chapter 394 to allow county courts to issue *ex parte* orders for involuntary examination, but maintain exclusive circuit court jurisdiction over involuntary placements.

The Florida Legislature should consider improvements to the *ex parte* provisions of section 394.463, Florida Statutes, including but not limited to:

- requiring and funding a pre-screening process;
- requiring a hearing prior to the issuance of an *ex parte* order; and
- clarifying the time frame within which the behavior in question must be observed.

- The Florida Legislature should review and correct any funding inequities that are created when residents of one county are involuntarily placed in another county.

- The State Courts System should request, and the Legislature should approve, additional funding to allow the establishment of general masters for involuntary placement proceedings in every jurisdiction that needs and wants such a resource.

- The Probate Section of the Florida Conference of Circuit Judges should immediately address the five-day issue with its members.

- The Probate Rules Committee and the Civil Procedure Rules Committee of The Florida Bar should determine whether probate or civil rules apply to Chapter 394 proceedings. Then the appropriate rules committee should consider whether to propose rules to clarify the procedures in regard to involuntary placement hearings.

- Each judicial circuit, which has not already done so, should review and consider adapting and adopting the model forms prepared by the Department of Children and Families.

- The Florida Legislature should direct the Department of Children and Families to create a pamphlet that explains the purpose and statutory requirements of the *ex parte* process. The Department should provide copies of the pamphlet to the clerks of court for distribution to everyone seeking to file an *ex parte* petition. The Department should make the pamphlet available in large print and other accessible formats as required by the Americans with Disabilities Act, as well as in English, Spanish, Creole, and other common languages reflective of Florida's population.

- Clerks of court and judges should implement a system whereby the clerk's office checks felony, misdemeanor, injunction, abuse, neglect, exploitation, and divorce records to determine if there are any cases pending within the jurisdiction for the respondent or petitioner. If there are any pending cases, the relevant files should be presented to the judge together with the *ex parte* petition.

III. PROTECT INDIVIDUALS WITH PSYCHIATRIC DISABILITIES AND ENSURE THAT THEIR RIGHTS ARE OBSERVED

It is incumbent upon society in general and the justice system in particular to safeguard the rights of individuals who are detained under the Baker Act. Moreover, due process rights demand that detained individuals receive adequate representation at involuntary placement hearings. In Florida, individuals for whom involuntary placement is sought are almost exclusively represented by public defenders. Even so, there is reportedly no consistency in the quality of public defender representation in Baker Act proceedings from jurisdiction to jurisdiction.

- The Subcommittee learned that some individuals who were detained under the Baker Act reported they had not met with counsel prior to the hearing, received no advice about their testimony, and had no opportunity to plan a defense with counsel. However, public defenders reported routinely undertaking considerable preparations prior to the hearing. They were also given

high marks for their preparedness by presiding officers and their state attorney counterparts. Nearly 94 percent of the state attorneys responding to the survey said it appears the public defender's office has prepared its case ahead of time. Quality of public defender representation in Baker Act proceedings seems to hinge on two factors: (1) the priority placed on such cases by each public defender; and (2) the resources available to the public defenders.

The Subcommittee heard considerable testimony on the appropriate role of the patient's counsel in involuntary placement proceedings. Opinions on the appropriate role of counsel were primarily divided into two viewpoints: to advocate for the patient's rights and expressed desires versus to advocate for the patient's best interest. Proponents of the view that counsel's duty is to advocate for the patient's rights and expressed desires presented case law to support their position. They believe it is an ethical violation for counsel not to vigorously defend the client's rights and force the state to meet its burden of proof. Persons favoring the patient's best interest approach are concerned that an individual may be discharged without receiving necessary treatment and thereby come to harm.

The public defenders reported that their current primary position in involuntary placement hearings is to advocate for the patient's rights and expressed desires. Few indicated that their primary position is to advocate for the patient's best interest. While private counsel rarely appear, their primary position may occasionally differ from that of a public defender. Moreover, the role of private counsel sometimes depends on who is paying their fees.

The Subcommittee found that despite improved protections approved by the Florida Legislature in 1996, the *ex parte* process remains vulnerable to misuse by:

- mental health facilities and professionals for financial gain,
- family members who misunderstand the purpose of involuntary examination but are concerned about an individual who may be in need of mental health treatment, and
- anyone who may harbor a grudge against an individual.

A person may not be detained in a receiving facility for involuntary examination for more than 72 hours. Within that time, or the next working day thereafter if that time expires on a weekend or holiday, the statutes direct that certain action must be taken. The Department of Children and Families believes that if a facility has no intention of filing a petition for involuntary placement and the 72-hour period will expire on a weekend or holiday, the individual should be released within 72 hours and not unnecessarily detained until the following work day. Public defenders also expressed concern about this issue. One public defender responding to the survey believed the statute needs to be more specific about when the 72-hour period ends, in cases where no medical emergency exists.

The involuntary placement process is also vulnerable to abuse, and that abuse is often linked to financial gain or convenience of nursing homes, assisted living facilities, mental health facilities, or mental health professionals.

Problems exist as well in regard to voluntary admissions. In 1996, the Florida Legislature amended the Baker Act to strengthen patient rights. Despite these enhanced protections, the

Subcommittee learned that because in-patient treatment is extremely profitable mental health facilities and professionals sometimes abuse the voluntary admission process. Moreover, some patients deemed to be "voluntary" may in reality lack the capacity to consent.

Florida law establishes two habeas corpus mechanisms to ensure that patient rights are protected. Individuals detained under the Baker Act may petition for a writ of habeas corpus (1) questioning the cause and legality of such detention, or (2) alleging that the patient is being unjustly denied a right or privilege or that a procedure is being abused. Although these avenues exist for seeking redress, the Subcommittee learned that individuals cannot always avail themselves of habeas corpus protections. The statutes do not provide for appointment of a public defender to represent voluntary mental health patients until after a habeas corpus petition has been filed.

Testimony before the Subcommittee also indicated that some judges defer consideration of habeas corpus petitions until the involuntary placement hearing. In some instances, this delay renders the habeas corpus petition moot and thereby denies the individual's right to judicial review. Further, individuals detained under the Baker Act report that sometimes their habeas corpus petitions are never acknowledged by the court.

Related Recommendations

- Every attorney representing a patient in involuntary placement proceedings must vigorously represent the patient's expressed desires. Every attorney representing patients in involuntary placement proceedings must be bound to the same legal and ethical obligations of any lawyer representing a client.

- To ensure quality representation of patients, each public defender should place a high priority on representing patients in involuntary placement proceedings and ensure that each case to which that office is appointed is adequately prepared prior to hearing. The Florida Legislature should provide adequate resources to enable public defenders to provide quality representation for all patients in involuntary placement proceedings.

- Each public defender should ensure that experienced and trained attorneys are assigned to involuntary placement cases.

- The Florida Public Defenders Association should develop a model curriculum or training videotape on involuntary examination and placement procedures, and associated issues.

- The bar should be educated as to their responsibilities in handling involuntary placement proceedings.

- The Florida Legislature should make funding available to jurisdictions that are willing to coordinate an interdisciplinary exploration of innovative alternatives designed to reduce the traumatic effect of involuntary examinations. Such pilot projects should be monitored and evaluated to determine their effectiveness.

- When involuntary placement hearings are held in receiving facilities, steps should be taken to increase the probability that patients understand that a formal court hearing is taking place:
    - the proceedings should not be conducted by video;
    - courtroom formalities should be observed; and
    - the presiding officer should wear a robe.

- The court should treat petitions for writ of habeas corpus as emergency matters and expeditiously resolve these issues and ensure that the petitioner receives notice of the disposition.

- The Florida Legislature should extend standing to file petitions for writ of habeas corpus to the Statewide Human Rights Advocacy Committee and the local Human Rights Advocacy Committees, to further protect the rights of persons who are voluntarily and involuntarily hospitalized.

- The Florida Statutes should be revised to mandate that the rights pamphlet prepared by the Department of Children and Families be distributed to every mental health patient–both voluntary and involuntary–upon admission. The pamphlet should be available in large print and other accessible formats as required by the Americans with Disabilities Act, as well as English, Spanish, Creole, and other common languages reflective of Florida's population.

- The Department of Children and Families, Department of Elder Affairs, appropriate sections of The Florida Bar, and mental health activists should collaborate on the production of a videotape that explains the rights of individuals with psychiatric disabilities.

- The Florida Legislature should consider authorizing and funding the Statewide Human Rights Advocacy Committee and the local Human Rights Advocacy Committees to meet with patients and make them aware of their rights.

- The Florida Legislature should amend the statutes to clarify that the 72-hour involuntary examination period is not extended over weekends or holidays, unless a petition for involuntary placement will be filed on the next working day.

- The Florida Legislature should provide the Agency for Health Care Administration with adequate funds and staff, and direct the Agency to vigorously enforce regulations in regard to violations by mental health facilities and professionals.

- The Florida Legislature should review rights and protections afforded to individuals with mental illnesses under Chapter 394 and ensure that they are no less than the rights and protections afforded to nursing home residents under Chapter 400.

- The Florida Legislature should consider revising the statutes to specify that violation of a mental health patient's rights constitutes "abuse" within the meaning of the law.

- The Florida Legislature should consider authorizing and adequately funding the Statewide Human Rights Advocacy Committee and local Human Rights Advocacy Committees to assess the ability of all voluntary patients to give express and informed consent to treatment.

- All participants should be mindful that patients must be treated with respect and consideration.

- Judges, general masters, state attorneys, and public defenders should be educated on the financial relationships and incentives that may exist among mental health providers and the situations in which conflict of interest or abuses may occur.

- The Florida Legislature should direct the Statewide Public Guardian to recommend a process and responsible entity to initiate a guardianship evaluation for persons who are mentally incapacitated and need intervention but who do not meet the statutory criteria of the Baker Act.

- The Florida Legislature should consider amending Chapter 394 in regard to petitions for *ex parte* orders, to require a factual recitation of the circumstances that support the finding that the criteria for involuntary examination have been met.

- The Florida Legislature should consider amending the statutes to provide an explicit right for independent examinations in continued involuntary placement proceedings.

- The Division of Administrative Hearings should ensure that hearings on petitions for continued involuntary placement are conducted prior to the expiration of the original placement order.

- The Florida Legislature should amend the statutes to clarify the duties, responsibilities, and authority of patient representatives.

IV. ELIMINATE UNNECESSARY DELAY IN THE PROVISION OF MENTAL HEALTH TREATMENT

Florida law provides that a patient is entitled, with the concurrence of patient's counsel, to at least one continuance of an involuntary placement hearing for a period of up to four weeks. Testimony indicated there are several ways a continuance can be used to the patient's advantage, including allowing the detained individual an opportunity to stabilize, obtain an independent evaluation, or obtain legal representation.

While only the patient is authorized to request a continuance, the Subcommittee learned that some continuances are requested not by the patient or patient's counsel, but by the state attorney, the patient's family, the petitioning institution, or others. Indeed, survey respondents indicated that in some locations, the facilities and prosecutors are requesting the majority of continuances. Other testimony indicated that in some jurisdictions automatic continuances are routinely granted, and sometimes even initiated by the court or clerk to address the five-day hearing requirement.

Martha Lenderman, on behalf of the Department of Children and Families, raised concerns about consent to treatment, particularly if the involuntary placement hearing is continued. If a continuance is granted and the patient lacks the capacity to consent, the individual does not receive needed treatment during the period of delay. Others suggested that some confusion may arise because of the current wording of the statute.

When a person with a psychiatric disability is adjudicated incompetent to consent to treatment, the statutes provide for the appointment of a guardian advocate. The Subcommittee found that when the capacity to consent is lacking, a substitute decision maker should be appointed at the earliest possible time, thus allowing the patient to receive immediate treatment. If the capacity to consent is lacking and the court grants a continuance in the involuntary placement hearing, the court should simultaneously appoint a guardian advocate if there is a pending request.

The Subcommittee learned that there is a lack of available persons who are willing, able, and trained to serve as guardian advocates. The statutes list, in order of preference, persons who are eligible to serve as guardian advocates. Following the health care surrogate, relatives occupy the first four spaces on the list of eligible persons. However, it is well established that many Florida residents, particularly elders, are geographically distant from family members who would normally be available to serve as guardian advocates should the need arise. Survey respondents reported that when no family members or friends are available, there are not enough trained and experienced persons available for appointment as a guardian advocate. Testimony indicated that liability concerns prevent many people from serving as a guardian advocate.

Individuals may designate a surrogate decision maker prior to the need for such a service. However, people may not be aware that this option exists or know how to exercise it. Many activists favor the pre-need designation approach as it allows the individual, not the courts, to decide who is best suited to serve in this capacity.

Another source of potential delay arises when a general master presides over the involuntary placement proceeding and issues a report. The master's report must be confirmed by a circuit court judge. The rule allows parties 10 days from service of the report within which to serve exceptions. Several people expressed concern that a patient may languish unnecessarily during the waiting period. It was the consensus of Subcommittee members and interested persons that everything possible should be done to support an expedited resolution of involuntary placement proceedings.

Related Recommendations

- If a petition for the appointment of a guardian advocate is filed, the court should conduct a hearing and make a finding as to the patient's capacity to consent to treatment at the earliest possible time.

- Family members and persons who are designated as mental health surrogates should participate in guardian advocate training prior to the time their service is needed, to avoid unnecessary delay in the provision of treatment.

- The Florida Legislature should consider providing limited liability protection for family members, friends, and individuals who serve as guardian advocates on a volunteer basis.

- The courts should comply with section 394.467(5), Florida Statutes, and ensure that continuances are granted only when they are requested by the patient with consent of counsel.

- At the time the court considers a motion for continuance, the court should conduct a hearing and make a finding as to the capacity to consent to treatment if there is a pending request. If the court finds that the capacity to consent to treatment is lacking, a guardian advocate should be appointed at the time the involuntary placement hearing is continued.

- The Florida Legislature should consider amending section 394.467(5), Florida Statutes, as indicated hereinafter in this report.

- The Florida Bar Probate Rules Committee and The Florida Bar Civil Procedure Rules Committee should consider amending the rules of procedure to allow parties to waive the waiting period for entry of a court order in Chapter 394 proceedings when no exceptions will be filed, or alternatively allow for procedures similar to those used for hearing officers in family law cases (Rule 12.491).

- The Florida Legislature should fund a guardian advocate system that provides each geographical area with a readily available pool of guardian advocates who have training in mental health issues and psychotropic pharmacology, to serve on behalf of individuals with psychiatric disabilities for whom no family or friends are willing or able to serve.

- The Department of Children and Families, The Department of Elder Affairs, appropriate sections of The Florida Bar, the medical community, and mental health activists should publicize the availability of mental health advance directives, to allow individuals to maximize self determination.

- The Department of Children and Families, The Department of Elder Affairs, local bar associations, and mental health activists should conduct community workshops to educate qualified individuals about mental health issues and the opportunity to volunteer as a guardian advocate.

V. ENSURE PUBLIC SAFETY AND REPRESENT THE STATE'S INTERESTS

Some state attorneys are not fully participating in the Baker Act process. In some instances the state attorney's office is not even represented at involuntary placement hearings. Involuntary mental health examination and placement involve a balancing of individual rights with the state's *parens patriae* authority and police power. The state is the only entity with the authority to restrict a person's liberty. Active participation by the state attorney's office is an integral part of the proceeding, according to Florida statutes and case law. The Subcommittee found that the office of the state attorney must be present at every involuntary placement proceeding in order to comply with the statutory mandate and to appropriately, adequately, and competently represent the state's interests.

Moreover, the Subcommittee learned that state attorneys are not always properly preparing their cases prior to the involuntary placement hearing. In an adversarial proceeding, the state attorney is required to meet a burden of proof for involuntary placement. The state has the responsibility to present evidence and testimony as to the elements and requirements of the applicable statutes.

It appears, however, that state attorneys generally take little action to prepare Baker Act cases. The Subcommittee heard testimony about instances where individuals who were believed to be dangerous were discharged because the state attorney did not subpoena witnesses and conduct other pre-trial preparations necessary to sustain the petition. The court was left with no alternative but to dismiss the petition and discharge the patient. This conduct may place the public's safety at risk. Meanwhile, the individuals do not receive necessary treatment.

The state attorney should gather information independently, and evaluate and confirm the information contained in the petitions. It is incumbent upon the state attorney to vigorously investigate and prosecute the petition. Further, if the state attorney's independent review does not show the statutory criteria are provable, then the state attorney should withdraw the petition.

Chapter 394 specifically authorizes the attorney representing the patient to have access to the clinical record, facility staff, and other pertinent information. However, the law is silent as to whether the state attorney has the authority to access the same information. Thus, a study should be conducted on whether the law should be amended to allow the state attorney access this information in order to evaluate the petition and prepare for the hearing.

Florida Statutes require a law enforcement officer to take a person who appears to meet the criteria for involuntary examination into custody and deliver the person to the nearest receiving facility for examination. Testimony indicated that some law enforcement officers inappropriately arrest persons with mental illnesses rather than taking them to a receiving facility. Near the end of the study, the Subcommittee received reports that improvements are occurring in regard to law enforcement's understanding of and response to mental health matters. Nevertheless, there needs to be more training for them on mental illnesses. It may also be beneficial for state attorneys and public defenders to be provided with training on jail diversion programs for individuals with mental illnesses.

Related Recommendations

The state attorney's office must be represented at and actively participate in every hearing. The court should require the presence of the state attorney's office at every involuntary placement hearing. If a representative of the state attorney's office is not present at the hearing, the court should halt the proceeding while the state attorney is summoned.

Each state attorney's office should independently evaluate and confirm the allegations set forth in the petition for involuntary placement. If the information is found to be correct, the state attorney should vigorously prosecute the petition. If the allegations are not substantiated, the state attorney should withdraw the petition.

Each state attorney should place a high priority on involuntary placement proceedings and properly prepare the cases on behalf of the state. The Florida Legislature should provide adequate resources to enable state attorneys to provide quality representation for the state in involuntary placement.

The Florida Association of Prosecuting Attorneys should develop a model curriculum and/or training videotape on involuntary examination and placement procedures and associated issues.

The Florida Association of Prosecuting Attorneys and The Florida Bar should ensure that continuing legal education programs on elder, mental health, and disability laws and issues are made available on an on-going basis.

Assistant state attorneys representing the state in involuntary placement proceedings must be bound to the same legal and ethical obligations of assistant state attorneys prosecuting other cases.

The bar should be educated as to attorneys' roles and responsibilities in handling involuntary placement proceedings.

Each state attorney should ensure that experienced and trained attorneys are assigned to involuntary placement cases.

- The Florida Legislature should direct and fund an interdisciplinary study on whether state attorneys should be authorized to have access to clinical records, facility staff, and other pertinent information.

- The Florida Department of Law Enforcement and the Department of Children and Families should jointly initiate a comprehensive training program for law enforcement officers, incorporating a minimum:

    - A videotaped orientation to the Baker Act for statewide use, which emphasizes the criteria for initiating an involuntary examination; and

    - Crisis intervention training for appropriate interaction with persons with mental illnesses.

State attorneys and public defenders should be provided with training on jail diversion programs for individuals with mental illnesses.

VI. ENSURE THAT OUR MOST VULNERABLE CITIZENS–ELDERS, CHILDREN, AND WARDS–ARE ADEQUATELY PROTECTED

As noted earlier, patient rights, including notice of rights and habeas corpus protections, may not always be adequately observed or protected in some circumstances. This is particularly true for the more vulnerable members of society: elders, children, and wards (persons adjudicated to be incapacitated).

Persons providing testimony before the Subcommittee expressed concern about the excessive and inappropriate involuntary examination and placement of elders, especially elders who reside in nursing homes and assisted living facilities. Certain misuses of the Baker Act for elders involve financial incentives. Others relate to behavioral problems. Some facilities purposefully use the Baker Act to "dump" residents who are disruptive or require mental health treatment. In those situations, the nursing home or assisted living facility refuses to allow the individual to return when the individual is released from the mental health facility.

The Florida Legislature enacted legislation in 1996 to provide an increased level of protection for certain elders living in licensed facilities. The statute now provides that prior to an elder being sent to a Baker Act receiving facility on a voluntary basis, an initial assessment of their ability to provide express and informed consent to treatment must be conducted by a publicly-funded service. There was a consensus that these increased protections have improved the process. Nevertheless, everyone agreed that further modifications should be made to provide additional protections for vulnerable elders in both voluntary and involuntary admission situations.

Children with mental illnesses are deserving of the full protection of the justice system, but their rights under Florida law remain somewhat unclear. For example, it is not even settled whether children have a right to judicial review of their confinement under the Baker Act.

The Subcommittee learned that there are conflicting statutory provisions and interpretations as to what a "hearing" on the voluntary admission of a child means. Testimony indicated that the Department of Children and Family Services' regulations provided that a hearing consists of a meeting between the facility administrator and the child. Some people expressed the opinion that a court hearing is required. A Florida appellate court recently reviewed the question of whether a Chapter 394 involuntary placement hearing is required when a dependent child is in the legal custody of the Department of Children and Family Services and the Department seeks residential mental health treatment for the child. The appellate court concluded that these facts do not constitute an involuntary commitment requiring a Baker Act hearing. Review of the intermediate appellate court's decision is currently pending before the Florida Supreme Court.

The Broward County Multiagency Service Network for Children with Severe Emotional Disturbance (SEDNET) reported that most complaints in that jurisdiction regarding the admission and treatment of children involve the statute's requirement for consent from someone other than the child. The unfortunate result is that all too often a child who experiences a crisis sufficient to motivate the child to seek admission to a receiving facility is denied treatment for distressingly long periods of time. This is particularly true and troubling, SEDNET said, in the case of dependent children whose biological parents remain their guardians. In those instances, there is a regrettable paradox of a child's pressing need for immediate help being left to the discretion of adults who have a history of neglecting or abusing that same child. Equally disturbing is the scenario of a child who is voluntarily seeking treatment instead being involuntarily admitted because guardians cannot be located or their consent obtained. In all these cases, the statute needlessly forces upon a child the stigma and associated implications of being involuntarily placed. Furthermore, these circumstances sometimes result in the decompensation of the child's condition.

The Subcommittee is deeply concerned about protecting the rights of children. Consent issues are more complex in regard to children. The Subcommittee found there should be some type of oversight of the placement of children in mental health facilities. The Subcommittee also noted that a child's right to seek a writ of habeas corpus should be protected.

Chapter 744 provides for the appointment of a guardian when an individual is adjudicated to be incapacitated. A guardian appointed pursuant to Chapter 744 is not allowed to voluntarily place a ward in a mental health facility; a Baker Act hearing is required. A representative of The Guardianship Committee of The Florida Bar Elder Law Section addressed the Subcommittee on the issue of whether guardians should be allowed to voluntarily consent to placement on behalf of their wards.

Hugh Handley, public guardian in the Second Judicial Circuit, clarified that a guardian is authorized to advocate for wards to receive mental health services. Moreover a guardian can initiate the involuntary placement process either by seeking an *ex parte* order or by contacting a professional who can conduct an examination and then issue a certificate if appropriate. The Subcommittee found that the placement of a ward by a guardian is a serious decision that should be subject to judicial review. Screening by the courts is a safeguard and reveals any abuses of the process.

Related Recommendations

The Florida Legislature should direct and fund a comprehensive interdisciplinary study on the legal needs of children under the Baker Act, including but not limited to:

- whether children under the age of 18 should have the right to voluntarily consent to in-patient mental health treatment, without the consent of their guardian.

  - whether the Human Rights Advocacy Committees or another independent entity should have the authority to make contact with a child confined to a mental health facility, to confirm the voluntariness of the child's consent.
- whether a child's right to petition for a writ of habeas corpus pursuant to Chapter 394 is adequately protected and whether legal counsel should be provided.
- whether judicial review of placement of children in mental health facilities should be required, to ensure the appropriateness of involuntary placements and the voluntariness of voluntary admissions.

The Florida Bar Commission on the Legal Needs of Children should study the legal needs of children under the Baker Act.

Judges, general masters, state attorneys, and public defenders should receive training on "dumping" and vigilantly guard against that or other abuses of the Baker Act in situations involving elder residents of nursing homes or assisted living facilities. If dumping or abuse is suspected, it should be immediately reported to the Agency for Health Care Administration and the Long-Term Care Ombudsman.

The Florida Legislature should consider the feasibility and appropriateness of extending the protections of section 394.4625(1)(c), Florida Statutes, to involuntary as well as voluntary examination situations.

The Florida Legislature should direct the Department of Children and Families, the Agency for Health Care Administration, the Long-Term Care Ombudsman, or other appropriate entity to study whether nursing homes and other facilities are "dumping" residents because of a lack of funding to treat conditions not covered by governmental programs and private insurance, as well as for fraudulent financial gain.

The Florida Legislature should consider whether the definition of mental illness should be amended to exclude dementia, Alzheimer's disease, and traumatic brain injury.

- The Florida Legislature should consider expanding the list of professionals in 394.4625(1)(c) to prohibit the involvement of any professional who has a financial interest in the outcome of the assessment.

- The Subcommittee strongly recommends against allowing guardians to voluntarily place a ward in a mental health facility without judicial review.

VII. CONTINUOUSLY MONITOR, STUDY, AND IMPROVE THE FLORIDA MENTAL HEALTH SYSTEM

As noted earlier, limited funding, time, and staff support were obstacles to comprehensively evaluating some of the issues brought to the Subcommittee's attention. In fact, it appears there is a lack of available data which could be analyzed to reveal abuses of the Florida mental health system. In 1996, the Florida Legislature began to address this lack of data by requiring information on involuntary examinations to be submitted and collected.

The Subcommittee concluded that because the potentials for misuse are so numerous and the consequences are so serious, Florida's mental health system should be continuously monitored, studied, and improved. Additional resources should be made available to gather and analyze appropriate data, the Subcommittee found.

Related Recommendations

- Forms related to involuntary examination and placement, including disposition, should be collected, monitored, and analyzed by the Agency for Health Care Administration on an on-going basis in order to detect and address abuses in a timely fashion. All forms should include the patient's date of birth, race, gender, and other demographic information, so that the impact of Chapter 394 on elders, children, racial minorities, and other population groups can be collected and analyzed. The results of this statewide data collection and analysis should be reported to the Florida Legislature, Department of Children and Families, and the State Courts System on an annual basis. Adequate funding should be provided by the Legislature to permit such data collection, research, and analysis.

- The Florida Legislature should direct and fund an interdisciplinary study on the continued involuntary placement process.

- The Florida Legislature should require facilities to provide all petitions and orders for involuntary placement to the Agency for Health Care Administration within one working day.

Report and Recommendations

I. INVOLUNTARY PLACEMENT PROCEEDINGS

A. Judicial Administration

1. The hearing

a. hearings in facilities

Issue:

Should involuntary placement hearings be conducted in the courthouse or at the mental health facility? If the hearings are held in the facilities, are measures being taken to ensure that the patients understand the seriousness of the proceeding?

Discussion:

Wayne Basford, an attorney with the Advocacy Center for Persons with Disabilities, Inc., advised the Subcommittee that involuntary placement hearings are primarily conducted in receiving facilities. The Subcommittee's survey confirmed that most involuntary placement hearings are held in the receiving facilities.

According to testimony, holding hearings in the facilities may confuse patients, particularly elder patients. Because the hearings are often held in the same conference rooms as the treatment planning meetings, patients may be unaware that a court proceeding is being held at which the patients' liberty interests are being determined. The potential for misunderstanding is compounded when there are no formalities consistent with a court hearing. When individuals do not understand that a hearing has been held, they believe that they have not been afforded their rights and are being held contrary to law. Some advocates suggested that all hearings be held at the courthouse, since they believe that is the most integrated setting.

Responses to the Subcommittee's survey indicated that the observance of courtroom formalities at involuntary placement hearings held in receiving facilities varies, depending upon the jurisdiction. Generally, however, it appears that very few courtroom formalities are observed at hearings in the facilities. Judges, general masters, state attorneys, and public defenders who responded to the survey

reported that the presiding judge does not wear a robe about 80[1] percent of the time. Those same survey respondents reported that the room used to conduct involuntary placement hearings at the receiving facilities is set up to reflect a formal courtroom less than 20 percent of the time. United States and Florida flags are reported to be present at less than 11 percent of the hearings. Food and/or drink are reportedly permitted in the hearing room as much as 44 percent of the time. According to two-thirds of the responding judges, general masters, and public defenders, patients are dressed in street clothing at the hearings. At the remaining hearings, the patients appear in hospital garb, which reduces their dignities and gives an appearance that the individual may have diminished capacity.

Survey respondents also indicated that the procedures and formalities are relaxed at hearings in the receiving facilities. Only one-third of the survey respondents reported that formal appearances are made before each hearing, and between 67 and 83 percent reported that if other persons are present in the hearing room, the privilege of confidentiality is not formally waived on the record. Asked whether involuntary placement hearings are conducted according to the Florida Evidence Code, 11 percent of responding judges, 17 percent of responding state attorneys, and 28 percent of responding public defenders report that they are not.

Speakers before the Subcommittee observed that conducting involuntary placement hearings at the courthouse yields its own set of difficulties, including the safety, privacy, and well being of patients and other persons who may be at the courthouse. Transporting patients safely to the courthouse is another concern. Martha Lenderman, who spoke on behalf of the Department of Children and Families, noted that Florida law requires the involuntary placement hearing to take place "as convenient to the patient as may be consistent with orderly procedure and shall be conducted in physical settings not likely to be injurious to the patient's condition." See section 394.467(6)(a)1, Florida Statutes, 1997.

A balanced approach may be the most desirable resolution of this issue. The receiving facility may be the location that is both the most convenient to the patient and the safest. However, all involuntary placement hearings held in receiving facilities should include formalities consistent with a court hearing, to ensure that everyone understands the seriousness of the proceeding. When liberty interests are at stake, they should be addressed in a formal and appropriate manner. Food, drink, and side conversations at hearings, coupled with lax observance of procedures and rules of evidence, give the appearance that the system is trivializing involuntary placement cases.

Many involuntary placement hearings are conducted by general masters. Some doubts were expressed as to whether general masters are allowed to wear robes. The only prohibition against quasi-judicial officers wearing robes appears in rule 6.630, Florida Rules of Traffic Court, which states that "[t]raffic hearing officers shall not wear robes." There is no similar prohibition against robes for general masters in Baker Act proceedings. The Subcommittee acknowledges the hesitancy of the legal community to expand the use of robes for quasi-judicial officers. Often, the use of

[1]For ease of reading, percentages from the survey have been rounded to the nearest whole number throughout this report.

general masters and hearing officers is intended to *lessen* the formality of certain proceedings. However, in Baker Act proceedings, the court system faces the opposite situation: trying to ensure that the patient is made aware, insofar as possible, of the formality and possible consequences of the proceeding. For these reasons, general masters presiding over involuntary placement hearings conducted in receiving facilities should not only be *allowed* to wear robes, but also *required* by their chief judge to do so. A robe should be stored at each facility in which Baker Act proceedings are held and made available for use by the presiding officer, regardless of whether that officer is a judge or a general master.

See Minutes, July 31, 1998, p. 5; Basford memo, p. 8-9; Minutes, November 12, 1998, pp. 6, 10; Lenderman comments, p. 4; Minutes, January 29, 1999, pp. 3, 6; survey results.

Recommendation

The Subcommittee recommends that the chief judge of each circuit court require involuntary placement hearings held at mental health receiving facilities to be conducted in a room that is set up in the manner of a courtroom. If possible, that room should not be used for any other patient purposes. The presiding officer should wear a robe. United States and Florida flags should be present. Formal courtroom decorum should be observed. Patients should be dressed in street clothing. Food, drink, and side conversations should be prohibited. The presiding officer, state attorney, public defender, and other participants should introduce themselves prior to each case. Moreover, rules of evidence and procedure should be observed.

b. video hearings

Issue:

Should involuntary placement hearings be conducted by video?

Discussion:

Some court proceedings are conducted by video. An example is video arraignments, in which the judge remains at the courthouse while the defendant participates by live video link-up from the jail. At the November 12, 1998, meeting it was suggested that video hearings may be a convenient and less costly alternative for involuntary placement hearings. One of the judges who responded to the survey observed that allowing patients to attend hearings by video would alleviate the need for them to be transported to the courthouse.

However, Martha Lenderman pointed out that some individuals' mental health problems include symptoms of paranoia. These persons may react negatively to video hearings. Some individuals with

mental illnesses may be too confused to understand a procedure involving a video hearing. Further, the presiding officer may be limited in observing the situation when confined to viewing only what a camera is focused on. Ms. Lenderman warned that video be used with caution, if at all, for involuntary placement hearings.

Vince Smith, of the Mental Health Program Office in the Department of Children and Families, was concerned that use of video may increase the number of individuals who decline to participate in their involuntary placement hearing. Winifred Sharp, a Judge on the Fifth District Court of Appeal, observed that it would be very difficult to make a video proceeding look or feel like a formal court hearing, and therefore the chance that a patient might not understand a court proceeding is occurring would continue to present a challenge.

See Minutes, November 12, 1998, p. 6.

Recommendation

The Subcommittee strongly recommends <u>against</u> the use of video for involuntary placement hearings.

c. length of hearing

Issue:

Is adequate time devoted to each involuntary placement hearing?

Discussion:

An issue brought to the Subcommittee's attention was whether adequate time is devoted to each involuntary placement hearing. Testimony indicated that hearings commonly last anywhere from 10 minutes to two hours. Patients and their families sometimes feel that judges, masters, and attorneys do not fully explain procedures and rights at the hearings, largely because of time constraints. It was even reported that in rare instances hearings occur so quickly that patients are not aware of what has happened.

The Subcommittee surveyed public defenders and state attorneys to determine whether, in their experience, the presiding officer allows adequate time for them to present their case. All of the responding state attorneys reported that the presiding officer allows adequate time always (about 67 percent) or most of the time (about 33 percent). Public defenders agreed that judges and general masters allow adequate time to present a case (about 56 percent reported always and about 39 percent reported most of the time).

Public defenders reported that the court never imposes a time limit on each hearing or the total time allotted to dispose of all Baker Act cases on the docket. However, nearly 17 percent of the state attorneys reported that the court does impose a time limit. Responses from the clerks of court on this question were mixed: approximately one-third reported that the court imposes a time limit, another one-third reported that the court never imposes a time limit, and the remaining one-third did not respond to this inquiry.

Nevertheless, speakers observed that hearings which are accelerated because of workload pressures may give the impression that the participants lack respect for patients and their families. William Schneider, a mental health activist in Broward County, remarked that it is important to individuals detained under the Baker Act that the judge listens. Generally, advocates and individuals with psychiatric disabilities testified that judges, court staff, and other participants in Baker Act hearings treat individuals and the proceedings with the respect and consideration they deserve.

This perception was supported by findings of the survey. Judges, general masters, clerks of court, state attorneys, and public defenders overwhelmingly reported that patients are treated with dignity and respect. Responding public defenders noted a few concerns with the manner in which hospital staff members, guardians, medical experts, state attorneys, and general masters treat patients and their families. Responding state attorneys noted a small concern with the manner in which general masters treat patients. Responding clerks of court noted a slight concern with the manner in which public defenders, state attorneys, general masters, and guardians treat patients.

The time allotted to each involuntary placement hearing appears to be more a result of the time participants believe is necessary than of available resources. Nevertheless, adequate resources should be made available to the courts, state attorneys, and public defenders to enable them to continue addressing these matters in a legally sufficient manner that also affords respect to individuals with mental illnesses and their families.

See Minutes, November 12, 1998, p. 8, 10; survey results.

Recommendation

The Subcommittee recommends that:

a. The State Courts System, state attorneys, public defenders, and clerks of court should continue to seek, and the Florida Legislature should fund, adequate resources for proceedings under Chapter 394.

b. All participants should be mindful that patients must be treated with respect and consideration.

2. Presiding officer

a. county court jurisdiction

Issue:

Should jurisdiction over ex parte orders and involuntary placement hearings be extended to county courts?

Discussion:

Florida Statutes place jurisdiction for judicial review of Chapter 394 with the circuit court. The Supreme Court confirmed the circuit court's exclusive jurisdiction in *Onwu v. State*, 692 So. 2d 881 (Fla. 1997), when it stated "[w]e note . . . that an involuntary commitment under the Baker Act may only be entered by the circuit court."

The appropriate role of county courts in proceedings on mental health matters is currently under consideration by the Florida Legislature. The Senate Committee on Children, Families and Seniors conducted a study on this issue, including a survey of chief judges, forensic coordinators, and mental health coordinators. The results of that study were summarized in *Interim Project Report 98-06.* According to that report:

> Fifty-seven percent of the chief judges, as opposed to only 26 percent of the forensic coordinators and 20 percent of the mental health providers, believe that county judges should be able to enter ex-parte orders and place persons involuntarily under the Baker Act. . . . Several respondents suggest that allowing county judges to enter ex-parte orders for the involuntary examination under the Baker Act, chapter 394, F.S., would do more to obtain treatment services and divert persons from the criminal justice system. The issue of county court judges committing persons under chapter 394, F.S., was discussed and supported by the community representatives at the site visit in Palm Beach county. Because the survey questionnaire may not have clearly explained this question, additional information is needed on this issue prior to the proposal of any changes to chapter 394, F.S.

See Florida Senate *Interim Project Report 98-06.*

During the 1999 Session the Legislature passed House Bill 2003, which requires additional studies on issues related to mental health services for, and court oversight of, persons with mental illnesses who commit misdemeanor crimes. The Subcommittee hopes the information in this report will be beneficial to the persons responsible for conducting those studies.

Those in favor of extending jurisdiction over Chapter 394 matters to county judges suggest that it would increase chief judges' flexibility in making judicial assignments. Under current law, if a defendant in a county court misdemeanor matter requires involuntary examination or placement under Chapter 394, a case must be filed in circuit court. Transferring the defendant/patient back and forth between county and circuit court necessarily involves a time delay. Allowing the county court to enter an order under Chapter 394 would shorten the process and allow the defendant to receive treatment more quickly. Proponents also noted that a county court judge could enter an order having immediate effect, thereby obviating the required delay permitting the filing of exceptions when a general master presides over the hearing.

Advocates are opposed to extending jurisdiction to county courts which do not have the authority to adjudicate any attendant probate issues for the patient. Some advocates fear that expanding jurisdiction to county courts would result in an increase in involuntary placements and a shift in resources from community services to state institutions at a time when advocates are working to have resources redirected to the community. Other speakers likened the seriousness of involuntary confinement in a mental facility to a felony conviction. Since circuit court judges preside over felony proceedings, they reasoned, circuit courts should likewise preside over involuntary placement proceedings. Opponents also point out that the path of appeal is lengthened if the case originates in county court.

Complicating the matter even further, it has come to the Subcommittee's attention that in some jurisdictions, county court judges are currently presiding over involuntary placement proceedings despite the fact that there may be no jurisdiction for them to do so. Indeed, over 5 percent of those responding to the judges and general masters survey identified themselves as a county court judge handling Chapter 394 Baker Act proceedings and additionally reported that in their jurisdiction there is one designated county court judge who is primarily responsible for Baker Act proceedings.

It is unclear under what circumstances these county court judges are presiding over involuntary examination and placement proceedings. It is possible that those county judges are on temporary assignment to the circuit bench. Article V, section 2(b), of the Florida Constitution allows judges to be assigned "to temporary duty in any court for which the judge is qualified." One county judge who spoke to Subcommittee staff indicated, however, that he had been the only judge hearing Baker Act proceedings in his county for the past 20 years. The Florida Article V Task Force discussed the temporary assignment of county judges to the circuit bench in its December 1995 *Final Report*:

> The operative word "temporary" has been the center of dispute and the subject of intense litigation over the past few years. In some circuits, litigants have asserted that the chief judge of the circuit maintains a standing administrative order that assigns certain county court judges to circuit court duty. The effect of these orders, according to the litigants, is that the chief judge has circumvented or usurped the requirements of the constitution by effectively transforming county court judges into circuit court judges without subjecting them to the selection requirements of the constitution. Several recent judicial opinions relating to temporary assignments have sided with the challengers and have provided guidance relating to temporary judicial assignments.

> The seminal case relating to temporary judicial assignments is *Payret v. Adams*, 500 So. 2d 136 (Fla. 1986) . . . . In response to a certified question, the supreme court . . . provided guidelines to chief judges relating to full-time and part-time assignment of county court judges serving as circuit court judges. . . . The court . . . held that when a county court judge is assigned to perform part-time circuit court matters, the assignment can be for no more than six months. . . .
>
> See Article V Task Force *Final Report*

The Article V Task Force recommended (Proposal #2-3) elimination of the word "temporary" from the Florida Constitution, thereby allowing cross-assignment of judges without restriction. That proposal was considered, but not passed, during the 1996 legislative session. The recommendation was further studied and considered by the Constitution Revision Commission, but did not receive final approval by that body either. Finally, it should be noted that the Florida Supreme Court issued further guidance on the appropriate use of "temporary assignment" in *Wild v. Dozier*, 672 So. 2d 16 (Fla. 1996).

Responses to the Subcommittee's survey were mixed. Three-quarters of the judges and general masters opined that county judges should be allowed to preside over Chapter 394 involuntary placement proceedings, but fewer (about 64 percent) believed county judges should be allowed to determine competency to stand trial pursuant to Chapter 916. Over 61 percent of the public defenders believe county judges should *not* be allowed to preside over Chapter 394 involuntary placement proceedings, while half believe that county judges should be allowed to determine competency to stand trial pursuant to Chapter 916. State attorneys responding to the survey favored allowing county judges to preside over Chapter 394 involuntary placement proceedings (nearly 78 percent), as well as determine competency to stand trial pursuant to Chapter 916 (over 72 percent).

Because complex legal issues are involved, the Subcommittee supports and commends the continued research, debate, and consideration by the courts, legislature, and other interested parties of the appropriate roles of county courts and county court judges in mental health proceedings.

See Minutes, July 31, 1998, pp. 3, 8; Basford, memo, p. 3; Stopp report, section 4; Minutes, November 12, 1998, p. 6; Lenderman comments, p. 4; survey results.

Recommendation

The Subcommittee recommends that:

a. The trial courts presently allowing county judges to preside over mental health proceedings, including Chapter 394, should review their practices to ensure that those practices comply with current Florida law.

b. The Florida Legislature should consider amending Chapter 394 to allow county courts to issue *ex parte* orders for involuntary examination, but maintain exclusive circuit court jurisdiction over involuntary placements.

b. general masters

Issue:

Should general masters continue to preside over involuntary placement proceedings?

Discussion:

Rule 1.490, Florida Rules of Civil Procedure, authorizes judges of the circuit court to appoint general masters. General masters can preside over involuntary placement hearings and issue reports, which must be confirmed by a circuit court judge. The rule allows parties 10 days from service of the report within which to serve exceptions. If no exceptions are filed, the rules require the court to enter an order confirming the recommendation of the general master. The use of general masters in involuntary placement hearings is also expressly authorized by section 394.467(6)(1)2, Florida Statutes.

The survey reveals that general masters are presiding over involuntary commitment hearings in at least eight of the twenty circuits (the 6th, 11th, 12th, 13th, 15th, 17th, 18th, and 19th circuits). It was noted by speakers that if the parties object to a general master hearing the case, a circuit court judge will preside over the proceeding.

Michael Lederberg, assistant public defender in the Eleventh Judicial Circuit; Alan Methelis, general master in the Seventeenth Judicial Circuit; and Martha Lenderman, appearing for the Department of Children and Families, expressed concern that a patient may languish unnecessarily due to the waiting period for the filing of exceptions when a general master presides over the case. If no exceptions will be filed and the recommendation is that the patient be involuntarily placed, delaying treatment results in continued confinement with no opportunity for the individual to improve. If no exceptions will be filed and the recommendation is that the patient be discharged, delaying the discharge causes the individual to be detained unnecessarily, which not only unjustly curtails the detained person's civil rights, but also costs the patient, taxpayers, and others unnecessary hospitalization fees, and may subject the state to liability concerns.

Testimony indicated that in some jurisdictions parties are informally agreeing that, if no exceptions will be taken, treatment may begin immediately or the patient may be discharged immediately, as appropriate. It was the consensus of Subcommittee members and interested persons that everything possible should be done to support an expedited resolution of involuntary placement proceedings.

Rule 12.491, Florida Family Law Rules of Procedure, governs child support enforcement matters that are heard by hearing officers. Section (f) states that "the court shall review the recommended order [by the hearing officer] and shall enter an order promptly . . . . Any party affected by the order may move to vacate the order by filing a motion to vacate within 10 days from the date of entry." A similar approach to reducing or eliminating waiting periods for filing of

exceptions may serve mental health patients well and should be studied further for possible application to involuntary placement proceedings.

Individuals with psychiatric disabilities, advocates, and justice system participants appearing before the Subcommittee seem to generally favor the use of general masters in involuntary placement proceedings. General masters often have or develop expertise in the subject matter. Several speakers recommended that additional resources be allocated in order to increase the availability of general masters to preside over involuntary placement proceedings.

Currently, there is no state funding for general masters to hear mental health cases; the counties are underwriting the service where it is available. Some jurisdictions, particularly those in less populated or rural areas, lack the resources for general masters. This creates an inequity of services available to Florida citizens from jurisdiction to jurisdiction. In November 1998, Florida voters approved a constitutional amendment (Revision 7) requiring the state to assume a greater share of responsibility for funding of the State Courts System. Under the new funding system, the state would be responsible for court personnel including general masters. This shift in funding will occur over a period of several years. It is unknown at this time what the impact of this shift will be on the availability of general masters for Baker Act proceedings.

See Minutes, July 31, 1998, pp. 6, 8; Minutes, November 12, 1998, p. 13; survey results.

Recommendation

The Subcommittee recommends that:

a. The use of adequately trained and qualified general masters in involuntary placement proceedings should be continued.

b. The State Courts System should request, and the Legislature should approve, additional funding to allow the establishment of general masters for involuntary placement proceedings in every jurisdiction that needs and wants such a resource.

c. The Florida Bar Probate Rules Committee and The Florida Bar Civil Procedure Rules Committee should consider amending the rules of procedure to allow parties to waive the waiting period for entry of a court order in Chapter 394 proceedings when no exceptions will be filed, or alternatively allow for procedures similar to those used for hearing officers in family law cases (Rule 12.491).

c. education and training

Issue:

Do judges and general masters receive training and education to adequately prepare them to preside over Baker Act proceedings?

Discussion:

A concern expressed by Subcommittee members and presenters was the amount of knowledge that judges have about mental illnesses, prior to being assigned to involuntary examination and placement matters. Judges responding to the survey concurred that additional training for presiding officers would improve the process.

Judges are legal experts. Most of them possess no special knowledge or training about mental illnesses prior to assuming the bench. Thus, they may be ill-prepared to address many of the treatment and capacity issues that arise under Chapter 394. For example, they may be unaware that some psychotropic drugs administered to individuals detained under the Baker Act may have deadly side effects or cause permanent damage. The Subcommittee heard testimony that this lack of knowledge often results in judges relying heavily upon the recommendations of mental health professionals, rather than making a truly independent judgment.

Compounding the lack of previous knowledge about mental illnesses is the fact that in many jurisdictions Baker Act matters are handled by the duty judge. A duty judge is one who is on call to address any emergency or time-urgent matters that may arise. It was reported that in some jurisdictions, no judge wants to be assigned to involuntary placement cases. In those and other circuits Chapter 394 proceedings rotate among the judges, so while many gain a little knowledge about mental illnesses none develop a special expertise.

There is a public perception that most judges do not want to hear Baker Act cases. However, some judges were commended by persons appearing before the Subcommittee, for treating individuals with psychiatric disabilities with respect, sensitivity, and compassion. Training for presiding officers needs to go beyond a clear understanding of the applicable laws and procedures. It should also include an understanding of the problems and circumstances that often face individuals with psychiatric disabilities.

Responses to the survey revealed a wide range of opinions in regard to whether judges are provided with sufficient training and educational opportunities to adequately prepare them to preside over Baker Act proceedings. It is interesting to note that over 47 percent of the judges and general masters reported that judges are rarely or never provided with sufficient training opportunities.

Do you believe judges are provided with sufficient training and education to adequately prepare them to preside over Baker Act proceedings?

	always	most of the time	rarely	never	no response
Judges and Masters	11.1%	38.9%	44.4%	2.8%	2.8%
State Attorneys	50.0%	44.4%	5.6%		
Public Defenders	5.3%	42.1%	42.1%	5.3%	5.3%
Clerks of Court	36.2%	22.4%	5.2%	3.4%	32.8%

It was reported that Baker Act general masters are oftentimes selected for their mental health expertise. Furthermore, because their assignment does not rotate from division to division, as do judges' assignments, they have a better opportunity to develop expertise on the job. Nevertheless, there is no formal training system for general masters. General masters presiding over cases involving involuntary examinations and placements should receive specialized training prior to assuming their responsibilities and on an on-going basis. Survey results in regard to whether respondents believe general masters receive adequate training and education to adequately prepare them to preside over Baker Act proceedings was split, and some respondents did not reply to this inquiry due to the fact that many circuits do not have general masters for these matters.

See Minutes, January 29, 1999, p 4; Minutes, November 12, 1998, pp. 8, 11; survey results.

3. Timely hearings

The Subcommittee recommends that:

a. The Executive Office of the Governor and the Florida Supreme Court should jointly sponsor a statewide interdisciplinary summit on mental health issues related to Chapter 394. The objectives of the summit should include (1) educating participants on mental health issues; (2) sharing information on "best practices" in regard to Baker Act cases; and (3) providing a forum for the participants to discuss new and emerging mental health issues. Participants should include chief judges, probate judges, general masters, state attorneys, public defenders, clerks of courts, administrative law judges, law enforcement officers, service providers, individuals with psychiatric disabilities, advocates, public and private guardians, and others involved in Baker Act proceedings.

b. Each chief judge should ensure continuity and consistency of the judges and general masters assigned to Baker Act proceedings.

c. Judges and general masters should be adequately trained and educated on general mental health and elder issues, including community resources and issues identified in this report, <u>prior</u> to being assigned to preside over Baker Act proceedings. The Subcommittee recommends that the Florida Court Education Council develop a model training curriculum in this regard, including consideration of videos and other alternative teaching methods.

d. Educational programs on elder and mental health issues should be made available to all Florida judges and quasi-judicial officers on an on-going basis.

a. probable cause procedure

Issue:

Should a probable cause hearing be conducted for every person who is involuntarily examined under Chapter 394?

Discussion:

Testimony before the Subcommittee often touched on the timeliness of judicial review pursuant to the Baker Act. Many speakers pointed out that persons charged with a crime are brought before a judge in less time than a person who is detained under Chapter 394. Individuals with psychiatric disabilities and advocates also pointed out that most involuntary examinations are not subject to judicial review, although patients are detained against their will for several days.

Some people expressed the opinion that persons with mental illnesses should be entitled to at least the same protections as criminal defendants, prior to further restrictions on their liberties. It was pointed out that Chapter 394 contains the only provisions in Florida law that allow restriction of liberties for an extended period of time with no judicial review. Individuals with psychiatric disabilities have less access to freedom under Chapter 394 than criminal defendants do, since mental health patients have no right to bail or other type of pretrial release.

It was suggested that a probable cause hearing be held within 24 to 48 hours of an individual being detained for involuntary examination, whether the examination is initiated by a law enforcement officer, mental health professional, or an *ex parte* petition. At the hearing, a judge would make a finding as to whether there is probable cause that the individual meets the statutory criteria for involuntary examination. The state attorney should represent the state and the public defender should represent the patient.

Judicial review early in the process would increase the public's trust and confidence in the involuntary examination and placement processes. In situations where there is fraud or abuse, the probable cause hearing may result in a patient being released without further delay thereby reducing the intrusiveness and inconvenience. In situations where involuntary examination is appropriate, a probable cause proceeding within 24 to 48 hours may strike the proper balance between the need for timely judicial review and the need for adequate time to prepare for a meaningful involuntary placement hearing (see following sections of this report in regard to timely involuntary placement hearings).

Subcommittee members expressed concern about the increased workload associated with conducting a probable cause hearing for every involuntary examination patient. It was noted that in 1997, there were over 70,000 involuntary mental health examinations in the State of Florida. Probable cause hearings within 24 to 48 hours will require a substantial increase in judicial, state attorney, public defender, and clerk of court resources. However, it was suggested that the amount of money currently expended by the federal government, state government, and insurance companies for fraudulent involuntary examinations could offset the cost of probable cause hearings.

Some people expressed the opinion that a probable cause hearing would hold the participants to a higher level of accountability. They believe facilities may be less inclined to file petitions and abuses of the system would decline if all participants know that each case will be subject to judicial review. Others felt that probable cause hearings would result in few people being released, because the only information available to the judge would be the physician's recommendation. Some members questioned what evidence would be available to the judge, to assist the judge in making an informed decision. Possible evidence includes a recitation of specific behavior and facts on the form, submission of a sworn affidavit with the petitioner subject to perjury charges, and presentation of witnesses.

The questions of whether probable cause hearings should be available to all individuals who are being involuntarily examined under Chapter 394 and whether adequate state resources exist to fund these hearings are policy issues properly within the domain of the Florida Legislature. Therefore, the

Subcommittee respectfully requests that the Legislature consider these important issues within the context of the overall Florida mental health system.

Recommendation

The Subcommittee recommends that the Florida Legislature direct and fund an interdisciplinary study on whether probable cause hearings should be held for all individuals who are involuntarily examined pursuant to Chapter 394.

b. five-day requirement

Issue:

Are the hearings on involuntary placement being conducted within the five-day period required by Florida law?

Discussion:

Section 394.467(6)(a)1, Florida Statutes, states: "the court shall hold the hearing on involuntary placement within 5 days, unless a continuance is granted." However, in 1997, patients began contacting the Statewide Human Rights Advocacy Committee (SHRAC) to complain that they were being held for as long as 11 days without any judicial review.

Created by section 402.165, Florida Statutes, SHRAC is charged with preventing abuse or deprivation of the constitutional and human rights of clients of the Department of Children and Family Services, including individuals who are held under the Baker Act. At the July 31, 1998, meeting Lewis Killian, then chair of SHRAC, and Margarett Stopp, a member of SHRAC, advised the Subcommittee that SHRAC conducted a survey of the twenty judicial circuits and found that courts differed in their interpretation as to whether holidays and weekends were included or excluded in calculating the five-day period. SHRAC requested an opinion from Florida's Attorney General, who concluded that the five-day provision did not allow the time to be tolled for weekends and holidays.

Persons appearing before the Subcommittee observed that involuntary placements involve a weighing of liberty rights with the need for treatment. Involuntary placement under the Baker Act results in a profound deprivation of liberty. Until or without a court hearing, there is no due process. The seriousness of delaying the hearing was reiterated by Doug Jones, the current chair of SHRAC, at the January 29, 1999, meeting. According to Mr. Jones, failing to hold hearings in a timely manner results in confining a person without providing treatment, which is contrary to the health and welfare of the patient. And, in cases where the Baker Act is being abused, the failure to hold timely hearings exacerbates the abuse by allowing it to continue for a prolonged period of time. Mr. Jones advised the Subcommittee that the United States Supreme Court has held that confining a person without providing treatment is unconstitutional.

Irrespective of the attorney general opinion, mental health activists and advocates continued to observe that some courts interpret the five-day requirement as excluding holidays and weekends. As one judge responding to the survey noted, "we are aware of the attorney general opinion, but with respect, feel it is incorrect. This is a judicial proceeding, and not a 'discharge procedure.' The Rules of Civil Procedure should govern." That view is shared by other jurisdictions, including the Seventeenth Judicial Circuit. A December 19, 1997, order by the administrative judge of the probate division of the Seventeenth Circuit, while acknowledging that the "eloquent argument concerning the rights guaranteed to the citizens of this State through our Constitution deserves serious attention and consideration," found that "it is impossible to ignore the plain language of 1.010 of the Florida Rules of Civil Procedure and the related case law." The administrative judge went on to decide that "the proper time computation for involuntary placement under the Baker Act is to exclude intervening Saturdays, Sundays, and legal holidays."

It should be noted that there is no Florida appellate case law dispositive of these conflicting legal viewpoints. Rule 1.090, Rules of Civil Procedure, requires that when "computing any period of time prescribed or allowed by . . . any applicable statute, . . . [w]hen the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." However, several persons noted that it is not clear whether the Rules of Civil Procedure or the Probate Rules apply to proceedings under Chapter 394, Florida Statutes.

Survey respondents supported testimony indicating that hearings were not being held within five consecutive days. When asked to approximate the percentage of involuntary placement hearings in their respective jurisdictions that are held within five consecutive days of the filing of the petition, participants responded as follows:

Percentage of Involuntary Placement Hearings
Held within Five Consecutive Days

	less than 10%	10 to 25%	25 to 50%	50 to 75%	more than 75%
State Attorneys	11.1%	5.6%	5.6%	5.6%	61.0%
Public Defenders	22.2%	0%	27.8%	11.1%	38.9%
Clerks of Court	13.4%	0%	0%	7.7%	46.2%

Judges, public defenders, and state attorneys acknowledged the importance of timely hearings. However, many of them were of the opinion that five consecutive days within which to conduct the hearing was an unrealistic standard. One judge summed it up by stating "you are creating a monumentally difficult, if not impossible, task if you mandate a hearing within five days but demand the normal written notice of hearing and notice of anticipated witnesses, and strictly apply the rules of evidence regarding hearsay." Another judge remarked "either delete the five-day rule or delete the notice requirements–we can't do both. If you keep the five-day rule, we need more judicial resources to be able to visit four hospitals twice a week."

The system participants informed the Subcommittee that a balancing of due process rights is involved. While no citizen should be detained without judicial review, that review loses its meaning

without proper notice and effective representation, they said. Effective representation includes time for both the state attorney and public defender to properly prepare for the hearing. Such preparations may include reviewing the medical chart; interviewing the patient, personal representative, guardian, professionals, and witnesses; and exploring less restrictive alternatives. The Subcommittee heard repeatedly that most judges, clerks of court, state attorneys, and public defenders currently lack the resources necessary to adequately prepare for and conduct meaningful hearings within five consecutive days.

The Subcommittee was further advised that it is difficult to conduct involuntary placement hearings within five consecutive days and also comply with the statutory requirement to provide timely written notice to the parties and interested persons. Some family members already report not receiving notice until after the hearing is over. Strict adherence to five consecutive days between filing the petition and conducting the hearing decreases the opportunity for the parties and interested persons to receive timely notice. Moreover, it was pointed out that the calculation of time does not ordinarily start the day the petition is filed, it begins the following day.

Even more troubling was the allegation was that some courts ignore the five-day requirement altogether. Speakers reported that in some jurisdictions involuntary placement hearings are only conducted every other week. According to testimony, in jurisdictions where hearings are held on a weekly basis, if all of the hearings are not completed in the time allotted the patients are held over to the following week. Survey respondents seemed to confirm that these practices may exist in some jurisdictions. These practices, which are contrary to both the spirit and letter of the law, result in individuals being confined for extended periods of time with no judicial review of the appropriateness or legality of their detention. Advocates and individuals with psychiatric disabilities believe that some courts are more interested in judicial convenience than statutory compliance. Such careless disregard of liberty interests must not be tolerated.

There were varied and even conflicting survey responses to the question of when involuntary placement hearings are held in the respective circuits. Nevertheless, the respondents seemed to support activists' allegations that, in some instances, patients are not receiving timely judicial review, as the following survey results show:

When Are Involuntary Placement Hearings Held?

	Judges/Masters	State Attorneys	Public Defenders	Clerks of Court
Within 5 days, including holidays and weekends	33.3%	5.6%	16.7%	5.8%
Within 5 days, excluding holidays and weekends	27.8%	27.8%	38.9%	26.9%
Twice a week	19.4%	27.8%	38.9%	17.3%
Weekly	38.9%	44.4%	33.3%	26.9%
Every other week	2.8%	0%	0%	0%
Other	16.7%	0%	5.6%	15.4%

Subcommittee research showed that many other states allow between 7 and 21 days between filing of the petition and the hearing.

Because substantial liberty interests are adversely affected, the Subcommittee recommends that the five-day calculation of time should be construed in the manner most favorable to the detained individual insofar as is reasonable and practical, until the issue of whether holidays and weekends are included or excluded in the time calculation is resolved through either legislative action or case law.

See Minutes, July 31, 1998, pp. 5-6; Stopp report, sections 1-4; Minutes, January 29, 1999, pp. 6-7;Attorney General Opinion 97-81; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should amend the statutes to clarify whether the five-day requirement includes or excludes weekends and holidays. If the Legislature determines that involuntary placement hearings must be held within five consecutive days, adequate additional funding must be provided to the courts, clerks, state attorneys, and public defenders to enable them to conduct meaningful, as well as timely, proceedings.

b. While the five-day issue is being clarified by the Legislature, the Chief Justice of the Florida Supreme Court should contact every chief judge and probate judge to encourage them to ensure that involuntary placement hearings are conducted within at least five working days from the date the petition is filed, unless a continuance is requested by the patient with consent of counsel, and granted. In order to comply with the statute, in most jurisdictions hearings would have to be held at least twice a week.

c. The chief judge of every judicial circuit should immediately implement procedures to ensure that involuntary placement hearings are conducted within five working days, unless a continuance is granted. In order to comply with the statute, most circuits will need to hold hearings at least twice a week.

d. The Probate Section of the Florida Conference of Circuit Judges should immediately address the five-day issue with its members, as well as consider whether probate or civil rules apply to Chapter 394.

e. The Probate Rules Committee and the Civil Procedure Rules Committee of The Florida Bar should determine whether probate or civil rules apply to Chapter 394 proceedings. Then the appropriate rules committee should consider whether to propose rules to clarify the procedures in regard to involuntary placement hearings.

c. continuances

Issue:

Are continuances of involuntary placement hearings being used appropriately?

Discussion:

Section 394.467(5), Florida Statutes, provides that: "a patient is entitled, with the concurrence of the patient's counsel, to at least one continuance of the hearing . . . for a period of up to 4 weeks."

According to Wayne Basford, a continuance can be used by counsel for the benefit of the detained individual, who may be more stable after additional time has elapsed. William Schneider observed that there is an inherent tension in regard to the timing of hearings: patients want and deserve a timely hearing; however, that does not always allow them sufficient time to retain their own legal representation. Michael Lederberg noted that sometimes additional time is needed for the patient to obtain an independent evaluation.

Representatives of the Statewide Human Rights Advocacy Committee (SHRAC) pointed out that only patients are authorized by the statutes to request a continuance. They expressed concern that patient consent is not always obtained prior to a continuance being requested or granted. Public defenders reported that prior to requesting a continuance they consult with the patient always (66.6 percent), most of the time (27.8 percent), or sometimes (5.6 percent).

Some continuances are requested not by the patient or patient's counsel, but by the state attorney, the patient's family, the petitioning institution, or others. Indeed, respondents to the Subcommittee's survey indicate that in some locations, the facilities and prosecutors are requesting the *majority* of continuances. The Subcommittee notes that there is no statutory authorization for the facility or the state attorney to request a continuance, and likewise no authority for a judge to grant a continuance requested by anyone other than the patient with the concurrence of counsel. Other testimony indicated that in some jurisdictions, automatic continuances are routinely granted, and sometimes even *initiated* by the court or clerk to address the five-day hearing requirement. Survey respondents generally agreed that when a continuance is sought it is nearly always approved by the court.

Martha Lenderman raised concerns about consent to treatment, particularly if the involuntary placement hearing is continued. If a continuance is granted and the patient lacks the capacity to consent, the individual does not receive needed treatment during the period of delay. The Department of Children and Families recommended that simultaneous with considering a request for continuance, the court conduct a hearing and make a determination of the capacity to consent to treatment. If the court finds that the capacity to consent is lacking, a substitute decision maker should be appointed whenever a continuance is granted, thus allowing the patient to receive immediate treatment. Some Subcommittee members questioned whether that approach would necessitate a second hearing and thereby require additional judicial resources. However, Ms. Lenderman suggested that if the patient received treatment, the individual may improve sufficiently to alleviate the need for the involuntary placement hearing altogether.

It was suggested that some of the confusion may arise because of the current statutory language. The Subcommittee asked Michael Lederberg to propose alternative language, which follows:

Current language:

> CONTINUANCE OF HEARING.–The patient is entitled, with the concurrence of the patient's counsel, to at least one continuance of the hearing. The continuance shall be for a period of up to 4 weeks.

Proposed language:

> CONTINUANCE OF HEARING.–The patient is entitled to at least one continuance of the hearing for a period of up to 4 weeks. If the continuance requested is for a period of more than 1 week, the court shall, after continuing the hearing, hold a hearing on the patient's competence to consent to treatment if a petition requesting such hearing has previously been filed as provided for in 394.4598.

A change in the involuntary placement provisions of Chapter 394 to the language proposed above would provide a balance between the facility's/physician's desire to begin treatment as soon as possible and the individual's right to privacy and the accompanying right to refuse medical treatment. A continuance of up to a week should allow the patient's counsel sufficient opportunity to prepare a defense to the involuntary placement petition and to obtain an independent examination if desired. A continuance could be sought for this relatively short period of time without having to worry about whether the patient's right to refuse treatment would be overridden even though there had been no judicial determination that the patient meets the legal criteria for involuntary placement. The need to wait an additional week before starting treatment is not onerous enough to warrant holding a hearing on competency to consent to treatment before there is a determination of whether the patient meets the criteria for involuntary placement.

See Minutes, July 31, 1998, p. 3; Stopp report, section 4; Minutes, November 12, 1998, pp. 3-4, 8; Minutes, January 29, 1999, pp. 4, 10; survey results.

Recommendation

The Subcommittee recommends that:

a. The courts should comply with section 394.467(5), Florida Statutes, and ensure that continuances are granted only when they are requested by the patient with consent of counsel.

b. At the time the court considers a motion for continuance, the court should conduct a hearing and make a finding as to the capacity to consent to treatment if there is a pending request. If the court finds that the capacity to consent to treatment is lacking, a guardian advocate should be appointed at the time the involuntary placement hearing is continued.

c. The Florida Legislature should consider amending section 394.467(5), Florida Statutes, as indicated hereinabove.

4. Less restrictive treatment alternatives

Issue:

Are all available less restrictive treatment alternatives adequately explored and judged to be inappropriate, prior to involuntary placement?

Discussion:

Florida law permits a person to "be involuntarily placed for treatment upon a finding of the court by clear and convincing evidence that: . . . [a]ll available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate." See section 394.467(1)(b), Florida Statutes, 1997. The Subcommittee sought confirmation that less restrictive alternatives were being appropriately explored and utilized.

Upon passage of the Baker Act in 1971, Representative Maxine Baker, for whom the law is named, told the *Times-Miami Herald Service* "we have learned that short and intensive treatment is very important, yet we still hospitalize too many past the point of no return." She went on to say that "there are so many people who are better treated in the community, through group therapy and other methods of treatment. With this bill, we can treat more persons with less money without subjecting many of them to institutionalization." Sadly, Representative Baker's vision has never been fully realized in Florida. The Subcommittee heard repeatedly that in Florida there is a critical shortage of community mental health resources.

According to Wayne Basford, the Department of Children and Families acknowledges that approximately 60 percent of the individuals in South Florida State Hospital could be discharged if adequate community-based support existed. He reported that the mental health facility recidivism

rate is substantially impacted by the availability of community services and supports, such as psychotropic drugs and assertive community treatment (ACT) teams. Richard Durstein, a professional guardian and member of the Human Rights Advocacy Committee in Pinellas County, and others spoke to the Subcommittee about the new generation of medications for individuals with mental illnesses. These new drugs, although excellent, are extremely expensive and thus beyond the financial reach of many persons. The question that may need to be addressed is whether providing services to persons with mental illnesses who are unable to afford treatment and medication is more cost effective than rotating these individuals in and out of hospitals and the justice system.

Participants in the process agreed with the advocates' assessment. A general master in southern Florida who responded to the Subcommittee's survey posed the rhetorical question, "how meaningful is an inquiry into whether the least restrictive alternative has been determined appropriate if there is no alternative but involuntary hospitalization?" That general master went on to lament the "woeful lack of services for juveniles, at least those juveniles who must rely on public resources for their treatment." One judge suggested that the Subcommittee review "whether the funding is present or sufficient for better drug treatment of patients who need subsidized mental health treatment. We have a revolving door–there is very little between the state hospital and sending the patient home." Another judge pleaded for "some treatment options for indigents and juveniles. There are very few options available and so the system just becomes a revolving door and the patient loses."

A related issue brought to the Subcommittee's attention is that the Florida laws are unclear as to whether the court has the authority to order individuals to participate in less restrictive alternatives, such as outpatient commitment. Again, it was reported that some courts are ordering outpatient commitment, even though their jurisdiction to do so is unclear. One judge who completed the survey noted that "we do not believe the current law permits court-ordered outpatient commitment, and there are no designated outpatient facilities in this circuit."

As long as the critical shortage of community mental health resources continues in Florida, judicial consideration and determination of less restrictive alternatives lacks the full significance it was intended to have. Nevertheless, the community supports and services that are available should be explored and utilized to the fullest extent possible and appropriate; thereby ensuring compliance with the letter and spirit of the laws governing involuntary inpatient placement.

Another issue on which the Subcommittee heard testimony was the quality of some less restrictive alternatives. Hugh Handley, public guardian in the Second Judicial Circuit, expressed deep concern about the poor conditions that exist in some assisted living and other facilities. Wayne Basford spoke of the ethical and moral concerns when society confines individuals to substandard treatment.

Further, the mental health facility, which may have a financial interest in whether an individual is involuntarily examined or placed, is often responsible for exploring less restrictive alternatives. Given this potential conflict of interest, the Subcommittee questioned whether it would be more appropriate to implement a formal process whereby the Department of Children and Families was responsible for identifying quality, less restrictive alternatives and matching those resources with the needs of individuals.

Many survey respondents and speakers also noted the relationship between ability to pay and the length and quality of confinement. They said the system is a revolving door for indigent patients, who are back on the street quickly. It is an issue of fairness in regard to the allocation of services. There should be equal protection under the law for persons with and without insurance or private funds, some persons believe.

Moreover, Hugh Handley told the Subcommittee that in some instances the system is being misused to channel incapacitated persons into facilities against their will. He explained that sometimes after a petition for involuntary placement is filed, the social worker, state attorney, and public defender agree on a placement for the individual. The petition is dismissed prior to the hearing, precluding judicial review of the placement. One assistant public defender estimated this may occur in up to 75 percent of the cases in which a petition for involuntary placement is filed.

Mr. Handley is particularly concerned about this "make do," *de facto* involuntary placement process when it is employed for people who are incapacitated but for whom no guardian has been appointed. When the individual is incapable of consenting to the placement but has no guardian, the decision is being made by persons who have no authority to do so. He believes there should be a mechanism for referring these individuals to a state agency that could explore the need for guardianship. The Subcommittee urges that the Legislature and the newly-authorized Statewide Public Guardian study this issue and make a recommendation as to the appropriate entity to petition for guardianship in these situations.

One criteria for involuntary placement which must be found by a court by clear and convincing evidence is that “all available less restrictive treatment alternatives which would offer an opportunity for improvement of his or her condition have been judged to be inappropriate.” See section 394.467(1)(b), Florida Statutes. The Baker Act requires that prior to being considered for placement in a state hospital, the person must first be evaluated by a community mental health center to determine appropriateness of the placement, specifically whether a less restrictive community-based alternative may be appropriate and available. Before a court hearing for involuntary placement in a state treatment facility, the court shall receive and consider this information.

However, there is no requirement for independent review of less-restrictive alternatives for persons for whom involuntary placement is sought in a private or public facility other than a state hospital. Generally, the only witness in support of involuntary placement is one of the professionals associated with the receiving facility who signed the petition for involuntary placement. This clinical expert may not have expertise in the array of suitable community-based alternatives to involuntary inpatient care.

The Subcommittee also learned that facilities considered to be "less restrictive" may not be less restrictive in practical terms. For example, some state institutions allow patients more freedom than do receiving facilities. Another concern with less restrictive alternatives is whether the necessary treatment is available in those facilities. Without treatment that offers an opportunity for improvement of the patient's condition, placement in less restrictive alternatives merely warehouses individuals with mental illnesses.

Paul Stiles, of the Department of Mental Health Law and Policy at the University of South Florida, reported that the Department of Children and Families is seeking legislative approval and funding for two pilot projects for a community team approach to address the mental health needs of elders. The Subcommittee applauds and supports the Department's efforts to address the needs of individuals with psychiatric disabilities, particularly vulnerable elders, in a manner that is more likely to preserve their dignity while being less disruptive and more cost effective. Furthermore, the Subcommittee adds its voice to those who are pleading with the Florida Legislature and other policymakers to divert additional resources to quality community supports and services that will enable citizens with mental illnesses to lead full and meaningful lives and avoid unnecessary institutionalization.

See Minutes, July 31, 1998, pp. 3-8; Basford memo, p. 8; Stopp report, section 4; Minutes, November 12, 1998, p. 9, 12-13; Minutes, January 29, 1999, p. 7; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature, the Department of Children and Families, and other policy makers should adequately fund quality community supports and services for persons with mental illnesses.

b. The Florida Legislature should fund positions within the Department of Children and Families for the purpose of exploring less restrictive alternatives to involuntary placement and require the Department to report to the court on same.

c. At involuntary placement hearings, judges and general masters should require the state attorneys to comply with the statutory requirement to prove that all less restrictive alternatives have been investigated and found to be inappropriate.

d. Judges and general masters should ensure that the evaluation of less restrictive treatment alternatives (section 394.467(1)(b)) are given equal weight under the law with the criteria found in section 394.467(1)(a).

e. The Florida Legislature should consider amending Chapter 394 to permit Chapter 744 guardians and Chapter 393 guardian advocates to participate in alternative placement decisions and receive adequate notice of the decision-making process.

f. The Florida Legislature should review the statutes and regulations to ensure that community facilities are adequately regulated. The Florida Legislature should also require community facilities that house people who require mental health treatment to facilitate those person's access to such treatment by qualified professionals.

g. The Florida Legislature should adequately fund the Agency for Health Care Administrative and require the Agency to actively monitor and vigorously enforce regulations related to community facilities, such as assisted living and other facilities, to improve the quality of care and services for residents.

h. Judges, general masters, state attorneys, and public defenders should be educated on the financial relationships and incentives that may exist among mental health providers and the situations in which conflict of interest or abuses may occur.

i. Judges, general masters, public defenders, and state attorneys should have a working knowledge of community mental health resources and visit the less restrictive alternatives available within their community.

j. The Florida Legislature should direct the Statewide Public Guardian to recommend a process and responsible entity to initiate a guardianship evaluation for persons who are mentally incapacitated and need intervention but who do not meet the statutory criteria of the Baker Act.

5. Model forms

Issue:

Should the model forms be used in every jurisdiction?

Discussion:

The Subcommittee received testimony indicating that some abuses of the involuntary examination and placement processes might be alleviated through the use of the model forms released by the Department of Children and Families in November 1998.

Typical abuses of the involuntary examination process, the Subcommittee was told, include initiation of the *ex parte* process by estranged spouses, dishonest neighbors, and other persons who may harbor a grudge. The new model affidavit form captures the information a state attorney would need in order to pursue perjury charges against a petitioner making false allegations. The professional certification forms also clarify the types of evidence provided, the type of professional completing the form, and the professional identification number of the person signing the form. These forms will enable information to be collected, monitored, and analyzed.

Judge Mark Speiser advised the Subcommittee that the Seventeenth Judicial Circuit recently modified its forms, with great success. The Seventeenth Circuit's new forms are based on the model forms and provide substantially more details than before, which allows the judge to make a more informed decision.

The Subcommittee felt strongly that all forms should include the patient's date of birth and other demographic information to reflect any trends or abuses related to elders, children, racial minorities, and other population groups.

Moreover, no mechanism exists at this time to monitor the disposition of cases on a statewide basis. Currently, there is no way to know how many of the tens of thousands of persons who are involuntary examined every year are released, released for outpatient treatment, or voluntarily placed. Again, collection and analysis of these data may reveal trends and abuses of the system.

See Minutes, July 31, 1998, pp. 4, 9; Basford memo, p. 3; Minutes, November 12, 1998, pp. 6, 11; Lenderman comments, p. 5; Minutes, January 29, 1999, p 10.

Recommendation

The Subcommittee recommends that:

a. Each judicial circuit, which has not already done so, should review and consider adapting and adopting the model forms prepared by the Department of Children and Families.

b. All forms should include the patient's date of birth, race, gender and other demographic information, so that the impact of Chapter 394 on elders, children, racial minorities, and other populations groups can be collected and analyzed.

c. The Florida Legislature should consider amending Chapter 394 in regard to petitions for *ex parte* orders, to require a factual recitation of the circumstances that support the finding that the criteria for involuntary examination have been met.

d. The Florida Legislature should require facilities to provide all petitions and orders for involuntary placement to the Agency for Health Care Administration and the Clerk of Court within one working day.

e. Forms related to involuntary examination and placement, including disposition, should be collected, monitored, and analyzed by the Agency for Health Care Administration on an on-going basis in order to detect and address abuses in a timely fashion. The results of this statewide data collection and analysis should be reported to the Florida Legislature, Department of Children and Families, and the State Courts System on an annual basis. Adequate funding should be provided by the Legislature to permit such data collection, research, and analysis.

6. Continued involuntary placement

Issue:

Should petitions for continued involuntary placement continue to be adjudicated by the Division of Administrative Hearings or should there be judicial review? Should other changes be made to the continued involuntary placement process?

Discussion:

If the circuit court concludes at the initial hearing that involuntary placement is necessary, the patient can be placed for a period of up to six months. If the patient continues to meet the criteria for involuntary placement, the facility must file a petition requesting continued involuntary placement prior to the expiration of the authorized treatment period. In accordance with section 394.467(7), Florida Statutes, continued involuntary placement proceedings are to be held before the Division of Administrative Hearings (DOAH). This creates a unique situation insofar as there are no other circumstances in Florida where DOAH presides over liberty interests.

Margaret Stopp and Wayne Basford raised the question of jurisdiction at the July 31,1998, meeting. It was suggested by Ms. Stopp that continued involuntary placement hearings often deny patients due process rights, including access to an independent examination and testimony. Others noted that judicial review of every petition for continued involuntary placement would substantially increase judicial workload.

While the statutes direct that the petition for continued involuntary placement be filed prior to the expiration of the initial period of confinement, they are silent as to when the hearing must be held. Additionally, Hugh Handley noted that because of a shortage of beds in state institutions, some patients continue to be held in receiving facilities for up to two years. It was reported that in some circumstances, patients in receiving facilities (rather than state institutions) may be denied the right to a hearing on continued involuntary placement.

Further, the statutes do not provide an explicit right to an independent examination, in regard to proceedings on continued involuntary placement. Funding for independent examinations is also a concern. Currently, the state does not provide funding for independent examinations, it is a county obligation. Some counties do not have state institutions, and patients from those areas are sent to other counties. In some instances, the host county has been financially obligated for independent examinations. This situation creates a funding inequity and undue hardship for the counties where large state institutions are located.

Judges and general masters generally seem to believe that petitions for continued involuntary placement should be decided by state court judges rather than administrative law judges. State attorneys are split on this issue, and a majority of the public defenders opined that state court judges should not decide these matters.

Should Petitions for Continued Involuntary Placement
be Decided by State Court Judges
Rather than Administrative Law Judges?

	Yes	No	Don't Know	No Response
Judges/Masters	44.4%	25.0%	27.8%	2.8%
State Attorneys	44.4%	50.0%	5.6%	
Public Defenders	15.8%	53.2%	21.1%	

If the statutes were amended to require that continued involuntary placement hearings be held before state court judges, decisions would have to be made as to whether the presiding judge would be in the jurisdiction in which the facilities are located, or whether the patient would be transferred back to the originating county.

As currently written, the statutes do not clearly state a time requirement as to when DOAH must hold the hearing. Because of its limited resources, the Subcommittee was unable to determine whether timely hearings are being conducted or whether there are other concerns related to the involuntary placement process. Nevertheless, the Subcommittee recommends that the hearing be conducted prior to the expiration of the original placement order.

Insufficient funding and inadequate data were obstacles for the Subcommittee to comprehensively identify and evaluate the issues associated with continued involuntary placement hearings. Additional resources should be made available to gather and analyze appropriate data.

See Minutes, July 31, 1998, p. 3; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should direct and fund an interdisciplinary study on the continued involuntary placement process.

b. The Florida Legislature should consider amending the statutes to provide an explicit right for independent examinations in continued involuntary placement proceedings.

c. The Florida Legislature should review and correct any funding inequities that are created when residents of one county are involuntarily placed in another county.

d. The Division of Administrative Hearings should ensure that hearings on petitions for continued involuntary placement are conducted prior to the expiration of the original placement order.

B. Effective Representation of the Patient

1. Appointment of counsel

Issue:

Is the public defender appointed in a timely manner?

Discussion:

When a petition for involuntary placement is filed, section 394.467(4), Florida Statutes, requires that the public defender's office be appointed within one court working day if the patient is not represented by private counsel. That section also provides that the clerk of court shall immediately notify the public defender of such appointment.

The public defenders, in responding to the Subcommittee's survey, report that they are usually appointed and notified of their appointment in a timely manner.

See Minutes, July 31, 1998, p. 7; survey results.

Recommendation

The Subcommittee finds that public defenders are being appointed within one court working day and are notified of their appointment in a timely manner. Therefore, no recommendation is necessary.

2. Education and training

Issue:

Do assistant public defenders receive training and education to adequately prepare them to represent patients in Baker Act proceedings?

Discussion:

Subcommittee members sought information on whether assistant public defenders receive education and training to effectively represent patients in Baker Act proceedings. The complexities of mental illnesses and involuntary confinement under the Baker Act require a high level of understanding of and competency on the issues. Given these complexities, it is important to ensure that patients receive high quality representation during involuntary placement proceedings. Adequate training and experience on mental health and disability law for the attorneys

who represent patients in Baker Act proceedings is a critical component in ensuring quality representation.

Survey respondents generally reported that public defenders seem to be adequately trained on Baker Act issues. State attorneys responding to the survey had high marks for their adversaries, with nearly 95 percent reporting that the assigned assistant public defender appears to be adequately trained all or most of the time. It should be noted that public defenders received higher marks for training in this area of law than did the state attorneys (see following sections of this report).

Do the Assistant Public Defenders Receive Prior Training or Appear to be Adequately Trained in this Area of Law?

	Always	Most of the Time	Rarely	Never	No Response
Judges/Masters	41.7%	33.3%	16.7%	2.8%	5.6%
State Attorneys	44.4%	50.0%			5.6%
Public Defenders	42.1%	15.8%	15.8%	15.8%	10.5%
Clerks of Court	20.7%	17.2%	10.3%	3.4%	48.3%

Consistency and continuity go hand-in-hand with training to ensure effective representation. Public defenders responding to the survey reported that in over half of the circuits there is an assistant public defender assigned on a full-time basis to represent individuals at involuntary placement proceedings. The reported length of tenure in this assignment is as follows:

- less than one year: 16.7 %
- one to two years: 16.7 %
- two to four years: 16.7 %
- four to six years: 25.0 %
- eight to ten years: 8.3 %

However, the Subcommittee received testimony indicating that in some jurisdictions, junior assistant public defenders are assigned to involuntary placement proceedings. And, as with judges, the Subcommittee found that in some jurisdictions involuntary placement cases are rotated among the assistant public defenders, so while many gain a little knowledge about mental illnesses, none develop a special expertise.

See Minutes, July 31, 1998, pp. 4-7; Minutes, November 12, 1998, p. 10; Minutes, January 12, 1999, p. 6; survey results.

Recommendation

The Subcommittee recommends that:

a. Each public defender should ensure continuity and consistency of the attorney assigned to represent patients in involuntary placement proceedings.

b. Assistant public defenders should be adequately trained and educated on general mental health and elder issues, including community resources and issues identified in this report, prior to being assigned to represent patients in Baker Act proceedings.

c. The Florida Public Defenders Association should develop a model curriculum or training videotape on involuntary examination and placement procedures, and associated issues.

d. The Florida Public Defenders Association and The Florida Bar should ensure that continuing legal education programs on elder, mental health, and disability laws and issues are made available to assistant public defenders on an on-going basis.

e. The Executive Office of the Governor and the Florida Supreme Court should jointly sponsor a statewide interdisciplinary summit on mental health issues related to Chapter 394. The objectives of the summit should include (1) educating participants on mental health issues; (2) sharing information on "best practices" in regard to Baker Act cases; and (3) providing a forum for the participants to discuss new and emerging mental health issues. Participants should include chief judges, probate judges, general masters, state attorneys, public defenders, clerks of courts, administrative law judges, law enforcement officers, service providers, individuals with psychiatric disabilities, public and private guardians, advocates, and others involved in Baker Act proceedings.

3. Appropriate role of counsel

Issue:

What is the appropriate role of the patient's counsel in involuntary placement proceedings?

Discussion:

The Subcommittee heard considerable testimony on the appropriate role of the public defender in involuntary placement proceedings. Section 394.467(4), Florida Statutes, states that "any attorney representing the patient . . . shall represent the interests of the patient, regardless of the source of payment to the attorney." Opinions on the appropriate role of counsel were primarily divided into two viewpoints: to advocate for the patient's rights and expressed desires versus to advocate for the patient's best interest.

Proponents of the view that counsel's duty is to advocate for the patient's rights and expressed desires presented case law to support their position. See *Handley v. Dennis*, 642 So. 2d 115 (Fla. 1st DCA 1994). They believe it is an ethical violation for counsel not to vigorously defend the client's rights and force the state to meet its burden of proof. Absent a diligent defense, there is no adversarial system. Proponents of this approach likened defense counsel's obligations in involuntary placement hearings to their obligations in criminal cases, because liberty interests are at stake in both situations.

Persons favoring the patient's best interest approach are concerned that an individual may be discharged without receiving necessary treatment and thereby come to harm. One judge who responded to the survey felt that a strict adherence to a position of advocating for the patient's expressed desires in some instances may result in a callous disregard for the welfare of the client and even constitute a violation of the Rules of Professional Conduct. He cited a situation where an assistant public defender made a motion to dismiss the petition, which the judge believed, if granted, would have resulted in extremely dangerous and potentially lethal consequence to the attorney's client.

The Subcommittee noted that the guardian and certain other participants are responsible for advocating for the patient's best interest. Therefore, the public defender can fully represent and advocate for the patient's rights and expressed desires while the system ensures that the patient's best interests are also addressed. These system safeguards strike the appropriate balance to ensure that both the detained individual and the public are protected, which is the primary intent of the Baker Act.

A majority of survey respondents in each category (judges/general masters, state attorneys, and public defenders) report that the public defenders' primary position in involuntary placement hearings is to advocate for the patient's rights and to advocate for the patient's expressed desires.

In Involuntary Placement Hearings,
What is the Public Defender's Primary Position?

	Judges/Masters	State Attorneys	Public Defenders
Advocate for the patient's rights	66.7%	66.7%	68.4%
Advocate for the patient's expressed desires	58.3%	61.1%	68.4%
Advocate for the patient's best interests	38.9%	38.9%	15.8%
Other	11.1%	16.7%	0.0%

While private counsel rarely appear, it seems their primary position may occasionally differ from that of a public defender.

Does the Primary Position of Legal Counsel Change When the Patient is Represented by Private Counsel Instead of the Public Defender?

	Always	Most of the time	Rarely	Never	No response
Judges/Masters	8.3%	16.7%	38.9%	19.4%	16.7%
State Attorneys		11.1%	16.7%	22.2%	50.0%
Public Defenders		15.8%	15.8%	21.1%	47.4%

Testimony before the Subcommittee and results of the survey indicated that the role of private counsel sometimes depends on who is paying their fees. A judge responding to the survey noted that usually a private attorney is not retained by the family or guardian; but when one is, the attorney may attempt to advocate for continued commitment. The judge reported when the patient retains the attorney, the attorney almost always advocates for the patient's expressed desires. A general master who responded to the survey commented that private counsel represent the best interests of the client rather than the patient.

Do the Goals of the Representation by Private Attorneys Appear to Change, Depending on Who is Paying their Fees?

	Always	Most of the time	Rarely	Never	No response
Judges/Masters		16.7%	30.6%	16.7%	36.1%
State Attorneys		11.1%	22.2%	16.7%	50.0%
Public Defenders		21.1%	10.5%	5.3%	63.2%

See Minutes, July 31, 1998, p. 4, 7; Minutes, January 29, 1999, pp. 4; survey results.

Recommendation

The Subcommittee recommends that:

a. Every attorney representing a patient in involuntary placement proceedings must vigorously represent the patient's expressed desires.

b. Every attorney representing patients in involuntary placement proceedings must be bound to the same legal and ethical obligations of any lawyer representing a client.

c. The bar should be educated as to their responsibilities in handling involuntary placement proceedings.

4. Case preparation

Issue:

Are attorneys who represent patients at involuntary placement hearings adequately preparing and presenting their cases?

Discussion:

Due process rights demand that detained individuals receive adequate representation at involuntary placement hearings. This was affirmed in *Jones v. State of Florida*, 611 So. 2d 577 (Fla. 1st DCA 1992), when the court stated "it is well settled that the seriousness of the deprivation of liberty which, of necessity, occurs when one is subject to involuntary placement in a mental health treatment facility, cannot be accomplished without due process of law. At a minimum, this due process contemplates . . . the right to effective assistance of counsel at all significant states of the proceedings." (citations omitted)

Wayne Basford reported that in 1995 and 1996, the Advocacy Center for Persons with Disabilities, Inc. received a number of complaints about the quality of legal representation at involuntary placement hearings. Individuals who were detained under the Baker Act told the Advocacy Center that they had not met with counsel prior to the hearing, received no advice about their testimony, and had no opportunity to plan a defense with counsel.

Patients in involuntary placement hearings are almost exclusively represented by public defenders, according to both testimony and the results of the surveys. Even so, there is reportedly no consistency in the quality of public defender representation in involuntary placement proceedings from jurisdiction to jurisdiction. One public defender responding to the survey noted that these cases are not a priority item for their office, since they are drastically underfunded in other cases. Richard Durstein, who has attended more than 1,600 involuntary placement hearings in two counties, observed that patients in one of those counties seem to receive better representation from the public defender's office than patients in the other county.

Public defender representation works well in some circuits, the Subcommittee heard. Michael Lederberg reported that in Dade County, every morning the public defender's office reviews the list of any new individuals for whom an involuntary placement petition has been filed. The secretary then calls every facility to obtain preliminary information such as age, medications, and other pertinent data. The attorney visits the patient, reviews medical records, and interviews staff. During the visit, the patient is provided with a letter containing information on rights, the hearing process, statutory criteria, and other issues. The attorney also discusses the option of an independent evaluation with the patient. The attorney remains available to the patient by telephone prior to the hearing.

Several of the survey questions were designed to capture information on case preparations. Nearly 89 percent of the public defenders responded that they always meet with their client prior to

the hearing, and about 11 percent report that they do so most of the time. The length of the typical pre-hearing meeting with the client was reported as follows:

- less than 15 minutes: 10.5 %
- 15 to 30 minutes: 52.6 %
- 30 to 45 minutes: 21.1 %
- 45 to 60 minutes: 10.5 %

Public defenders also reported routinely undertaking additional preparations prior to the hearing, including:

- review the medical chart: 94.7 %
- meet with family members: 47.4 %
- meet with the personal representative: 21.1 %
- meet with the patient's friends: 10.5 %
- meet with the guardian, if any: 31.6 %
- meet with the attending physician: 57.9 %
- meet with institution/facility personnel: 84.2 %
- meet with service providers: 15.8 %
- explore less-restrictive alternatives: 52.6 %
- other preparations: 26.3 %

Several people appearing before the Subcommittee said clients sometimes meet their attorney moments before the hearing. The Subcommittee encourages public defenders and private counsel to meet with their clients as early in the process as possible and advise them of their rights.

The survey also sought to identify what impact, if any, the availability of resources has on quality representation of patients in Baker Act proceedings. Nearly 28 percent of the public defenders responding to the survey do not believe that sufficient time and resources are available to permit their offices to adequately represent these clients. Almost 17 percent said that concern about the availability of resources within their office affects their decisions on how to represent individuals in Baker Act proceedings, always or most of the time.

State attorneys responding to the survey give public defenders high marks for their preparedness, with 94 percent indicating it appears the public defender's office has prepared their case ahead of time.

Quality of public defender representation in Baker Act proceedings seems to hinge on two factors: (1) the priority placed on such cases by each public defender; and (2) the resources available to the public defenders. In order to assure the effective representation to which patients are legally entitled, the legislature must adequately fund public defenders' offices and the public defenders must allocate sufficient resources to involuntary placement proceedings.

See Minutes, July 31, 1998, pp. 4-5, 7; Basford memo, p 4; Minutes, November 12, 1998, p. 10; Minutes, January 29, 1999, p. 6; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should provide adequate resources to enable public defenders to provide quality representation for all patients in involuntary placement proceedings.

b. Each public defender should place a high priority on representing patients in involuntary placement proceedings.

c. Each public defender should ensure that experienced and trained attorneys are assigned to involuntary placement cases.

d. Each public defender should ensure that each case to which that office is appointed is adequately prepared prior to hearing.

5. Habeas corpus

Issue:

Are petitions for writ of habeas corpus being used to protect patients' rights?

Discussion:

Florida law establishes two habeas corpus mechanisms to ensure that patient rights are protected. Section 394.459(8)(a), Florida Statutes, provides that: "at any time, and without notice, a person held in a receiving or treatment facility, or a relative, friend, guardian, guardian advocate, representative, or attorney, or the department, on behalf of such person, may petition for a writ of habeas corpus **to question the cause and legality of such detention** . . . ." Emphasis supplied.

Section 394.459(8)(b), Florida Statutes, provides that: "at any time, and without notice, a person who is a patient in a receiving or treatment facility, or a relative, friend, guardian, guardian advocate, representative, or attorney, or the department, on behalf of such person, may file a petition in the circuit court . . . . **alleging that the patient is being unjustly denied a right or privilege granted herein or that a procedure authorized herein is being abused**." Emphasis supplied.

Although these avenues exist for seeking redress for inappropriate detention or violation of rights, the Subcommittee learned that individuals detained under the Baker Act cannot always avail themselves of habeas corpus protections. The statutes do not provide for appointment of a public defender to represent voluntary mental health patients until after the habeas corpus petition has been filed. It was noted, however, that all patients receive notice of their habeas corpus rights and the habeas corpus form must be made available to them. Moreover, facility staff are required to assist patients completing the form. Nevertheless, some adult patients may lack the skills and knowledge necessary to prepare and file a habeas corpus petition during their confinement. That task would be even more overwhelming for patients who are under the age of 18.

Testimony before the Subcommittee also indicated that some judges defer consideration of habeas corpus petitions until the involuntary placement hearing. In some instances, this delay renders the habeas corpus petition moot and thereby denies the individual's right to judicial review of his or her alleged inappropriate confinement.

Further, individuals detained under the Baker Act who file petitions for writ of habeas corpus report that sometimes their petitions are never acknowledged by the judge. This is most commonly reported in jurisdictions in which the state institutions are located. These individuals should be advised of the disposition of their petitions.

The public defenders, in responding to the Subcommittee's survey, report that if a petition for writ of habeas corpus is filed by the patient or someone other than the public defender, the court appoints the public defender's office to represent the patient around 70 percent of the time. Also, from the survey results, it appears that more habeas corpus petitions are filed alleging inappropriate confinement than alleging violations of patients' rights.

The Subcommittee heard testimony and discussed whether additional entities should be granted the right to file habeas corpus petitions on behalf of individuals detained under the Baker Act. As discussed above, many patients lack the ability to file a petition without assistance, and public defenders have no authority to represent individuals who are hospitalized on a voluntary basis unless and until a habeas corpus petition is filed and the court appoints the public defender.

See Minutes, July 31, 1998, p. 7; survey results.

Recommendation

The Subcommittee recommends that:

a. The court should treat petitions for writ of habeas corpus as emergency matters and expeditiously resolve these issues and ensure that the petitioner receives notice of the disposition.

b. The Florida Legislature should extend standing to file petitions for writ of habeas corpus to the Statewide Human Rights Advocacy Committee and the local Human Rights Advocacy Committees, to further protect the rights of persons hospitalized on both a voluntary and an involuntary bases.

C. Effective Representation of the State

1. Presence at the hearing

Issue:

Is the state attorney's office represented at every involuntary placement hearing?

Discussion:

According to section 394.467, "Upon filing, the clerk of the court shall provide copies to . . . the state attorney . . . of the judicial circuit in which the patient is located. . . . The state attorney for the circuit in which the patient is located shall represent the state, rather than the petitioning facility administrator, as the real party in interest in the proceeding."

The state is the only entity with the authority to restrict a person's liberty. Involuntary mental health examination and placement involves a balancing of individual rights with the state's *parens patriae* authority[2] and police power. Under Florida law, involuntary placement is clearly a state action; therefore, the facility and its attorneys have no authority to prosecute the petition. Nevertheless, the Subcommittee repeatedly heard that in some jurisdictions the state attorney's office never participates in involuntary placement proceedings. It was further reported that at some hearings the facility's attorney appears to prosecute the petition. It was even reported that in some instances the court takes on the prosecutorial role, because the state attorney is not available.

Active participation by the state attorney's office is an integral part of the proceeding. In *Jones v. State*, 611 So. 2d 577 (Fla. 1st DCA 1992), the court found that "in the instant case, it appears the absence of the state was a contributing factor in the due process deficiencies attendant upon the proceeding." In *Jordan v. State*, 597 So. 2d 352 (Fla. 1st DCA 1992), the court discussed the need for the mandatory presence of the state attorney. While acknowledging "the additional demands that such a requirement would make on the already overtaxed financial and staffing resources of the state . . . the gravity of the matters considered at a Baker Act hearing requires the trial court to conduct the proceedings in a fair and neutral manner. . . . We believe that the better practice is for the state to be represented by an attorney from the Office of the State Attorney." The Subcommittee finds that the office of the state attorney must be present at every involuntary placement proceeding in order to comply with the statutory mandate and to appropriately, adequately, and competently represent the state's interests.

Survey respondents reported a fairly high rate of participation by the state attorney's office, with 83 percent of public defenders, 83 percent of judges and general masters, and 89 percent of state

[2]According to Waters' Dictionary of Florida Law, *parens patriae* is the doctrine that the state has a paramount interest over children and persons under disability. *Hancock v. Dupree*, 100 Fla. 617, 129 So. 822 (1930).

attorneys reporting that the state attorney is represented at every hearing. However, that means that the state attorney is *not* represented at more than 10 percent of the involuntary placement proceedings.

See Minutes, July 31, 1998, p. 7; Minutes, November 12, 1998, pp. 4, 6; Lenderman comments, p. 5; survey results.

Recommendation

The Subcommittee recommends that:

a. Each state attorney should ensure that an assistant state attorney is present at every involuntary placement hearing.

b. The court should require the presence of the state attorney's office at every involuntary placement hearing. If a representative of the state attorney's office is not present at the hearing, the court should halt the hearing while the state attorney is summoned to immediately appear before the court.

2. Education and training

Issue:

Do assistant state attorneys receive training and education to adequately prepare them to represent the state in Baker Act proceedings?

Discussion:

Subcommittee members sought information on whether assistant state attorneys receive training to prepare them to effectively represent the state's interests in Baker Act proceedings.

As with judges and public defenders, most assistant state attorneys are primarily schooled in the law, not mental health.

Do the Assistant State Attorneys Receive Prior Training or Appear to be Adequately Trained in this Area of Law?

	Always	Most of the Time	Rarely	Never	No Response
Judges/Masters	33.3%	38.9%	16.7%	5.6%	5.6%
State Attorneys	5.6%	11.1%	44.4%	33.3%	5.6%
Public Defenders	15.8%	31.6%	26.3%	15.8%	10.5%
Clerks of Court	20.7%	17.2%	10.3%	3.4%	48.3%

Consistency and continuity go hand-in-hand with training to ensure effective representation. Around 40 percent of the state attorneys responding to the survey reported that in their jurisdiction an assistant state attorney is assigned on a full-time basis to represent the petitioner in involuntary placement proceedings. The reported length of tenure in this assignment is as follows:

- one to two years: 28.6%
- four to six years: 14.3 %
- six to eight years: 28.6 %
- eight to ten years: 14.3 %
- more than ten years: 14.3%

There was testimony that in some jurisdictions the most junior assistant state attorney is assigned to involuntary placement proceedings. And, as with judges and public defenders, the Subcommittee found that in some jurisdictions assignment to involuntary placement cases is rotated among the assistant state attorneys, so while many gain a little knowledge about mental illnesses, none develop a special expertise.

See Minutes, January 12, 1999, pp. 3-4; survey results.

Recommendation

The Subcommittee recommends that:

a. Each state attorney should ensure continuity and consistency of the attorney assigned to represent the state in involuntary placement proceedings.

b. Assistant state attorneys should be adequately trained and educated on general mental health and elder issues, including community resources and issues identified in this report, <u>prior</u> to being assigned to represent the state in involuntary placement

c. The Florida Association of Prosecuting Attorneys should develop a model curriculum and/or training videotape on involuntary examination and placement procedures and associated issues.

d. The Florida Association of Prosecuting Attorneys and The Florida Bar should ensure that continuing legal education programs on elder, mental health, and disability laws and issues are made available on an on-going basis.

e. The Executive Office of the Governor and the Florida Supreme Court should jointly sponsor a statewide interdisciplinary summit on mental health issues related to Chapter 394. The objectives of the summit should include (1) educating participants on mental health issues; (2) sharing information on "best practices" in regard to Baker Act cases; and (3) providing a forum for the participants to discuss new and emerging mental health issues. Participants should include chief judges, probate judges, general masters, state attorneys, public defenders, clerks of courts, administrative law judges, law enforcement officers, service providers, individuals with psychiatric disabilities, public and private guardians, advocates, and others involved in Baker Act proceedings.

3. Appropriate role of counsel

Issue:

What is the appropriate role of the state attorney's office in involuntary placement proceedings?

Discussion:

According to section 394.467, Florida Statutes, "the state attorney for the circuit in which the patient is located shall represent the state, rather than the petitioning facility administrator, as the real party in interest in the proceeding." It is important to remember that while the facility is the petitioner, the state is the real party of interest and must prosecute the petition.

The state is the only entity with the authority to restrict a person's liberty. In an adversarial proceeding, the state attorney is required to meet a burden of proof for involuntary placement. The state attorney should gather information independently, and evaluate and confirm the information contained in the petitions. In involuntary placement proceedings, the state has the responsibility to present evidence and testimony as to the elements and requirements of the applicable statutes.

As discussed previously in this report, participation by the state attorney's office is an integral part of the proceeding. In *Jones v. State*, 611 So. 2d 577 (Fla. 1st DCA 1992), the court found that "in the instant case, it appears the absence of the state was a contributing factor in the due process deficiencies attendant upon the proceeding." Thus, the role of the state attorney is critical to the process. It is incumbent upon the state attorney to vigorously investigate and prosecute the petition, just as the public defender must protect the patient's rights and represent the patient's expressed desires. Further, if the state attorney's independent review does not show the statutory criteria are provable, then the state attorney should withdraw the petition.

Chapter 394 specifically authorizes the attorney representing the patient to have access to the clinical record, facility staff, and other pertinent information. However, the law is silent as to whether the state attorney has the authority to access the same information. Thus, a study should be conducted on whether the law should be amended to allow the state attorney access this information in order to evaluate the petition and prepare for the hearing.

See Minutes, November 12-14, 1998, p. 6; January 29, 1999, pp. 3-4, 9.

Recommendation

The Subcommittee recommends that:

a. Each state attorney's office should independently evaluate and confirm the allegations set forth in the petition for involuntary placement. If the information is found to be correct, the state attorney should vigorously prosecute the petition. If the allegations are not substantiated, the state attorney should withdraw the petition.

b. Assistant state attorneys representing the state in involuntary placement proceedings must be bound to the same legal and ethical obligations of assistant state attorneys prosecuting other cases.

c. The bar should be educated as to attorneys' roles and responsibilities in handling involuntary placement proceedings.

d. The Florida Legislature should direct and fund an interdisciplinary study on whether state attorneys should be authorized to have access to clinical records, facility staff, and other pertinent information.

4. Case preparation

Issue:

Are assistant state attorneys adequately preparing and presenting their involuntary placement cases?

Discussion:

The Subcommittee sought to learn the manner in which the state attorneys' offices prepare for involuntary placement hearings. Regrettably, it appears they generally take little action to prepare these cases.

The Subcommittee heard testimony about instances where individuals who were believed to be dangerous were discharged because the state attorney did not subpoena witnesses and conduct other pre-trial preparations necessary to sustain the petition. The court was left with no alternative but to dismiss the petition and discharge the patient. This conduct may place the public's safety at risk. Meanwhile, the individuals do not receive necessary treatment.

Perhaps most telling was that only 22 percent of the responding state attorneys report that they routinely review the medical chart prior to the hearing. By comparison, 94 percent of the public defenders report that they routinely do so. Subcommittee members noted that the statutes do not explicitly authorize the state attorney to review a patient's clinical records. This issue should receive further study and consideration.

Fifty percent of the responding state attorneys say they never contact the petitioning psychiatrist prior to the day of the hearing and 50 percent say they do so only rarely. Less than 17 percent of the public defenders who responded to the survey said it appears the state attorney's office has always or most of the time prepared its case in advance, while over 72 percent said it rarely or never appears the state attorney's office has prepared its case in advance.

When asked what other preparations they routinely conduct prior to the hearing, the state attorneys answered as follows:

- meet with family members: 38.9 %
- meet with the personal representative: 27.8 %
- meet with the patient's friends: 11.1 %
- meet with the guardian, if any: 44.4 %
- meet with institution/facility personnel: 66.7 %
- meet with service providers: 22.2 %
- explore less-restrictive alternatives: 16.7 %
- other preparations: 27.8 %

Nearly 28 percent of the state attorneys responding to the survey indicate they do not believe sufficient time and resources are available to permit their offices to adequately represent the state in Baker Act proceedings. Nevertheless, only 11 percent said that concern about the availability of

resources within their offices always or most of the time affects their decisions on how to handle these cases. Nearly 90 percent said concern about resources rarely or never affects their decisions.

See survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should provide adequate resources to enable state attorneys to provide quality representation for the state in involuntary placement proceedings.

b. Each state attorney should place a high priority on involuntary placement proceedings and properly prepare the cases on behalf of the state.

c. Each state attorney should ensure that experienced and trained attorneys are assigned to involuntary placement cases.

d. The Florida Legislature should direct and fund an interdisciplinary study on whether state attorneys should be authorized to have access to clinical records, facility staff, and other pertinent information.

D. Guardian Advocates

1. Timely appointment

Issue:

Are guardian advocates being appointed at the optimum time?

Discussion:

If a person with a psychiatric disability is adjudicated incompetent to consent to treatment, section 394.4598, Florida Statutes, provides for the appointment of a guardian advocate.

As discussed previously in this report, the Department of Children and Families raised concerns about consent to treatment, particularly if the involuntary placement hearing is continued. If a continuance is granted and capacity to consent is lacking, the detained individual does not receive treatment during the period of delay. The Department recommended that simultaneous with considering a request for continuance, the court conduct a hearing and make a determination of the individual's capacity to consent to treatment.

In responding to the survey, participants reported that a guardian advocate is most likely to be appointed at the involuntary placement hearing, but may be appointed at other times:

When is the decision made on whether to appoint a guardian advocate?

	Judges/Masters	State Attorneys	Public Defenders
Prior to involuntary placement hearing	2.8%	22.2%	15.8%
At involuntary placement hearing	86.1%	77.8%	63.2%
Following involuntary placement hearing	11.1%	11.1%	26.3%
At the time continuance is granted	13.9%	16.7%	5.3%

See, Minutes, November 12, 1998, pp. 3-4; survey results.

Recommendation

The Subcommittee recommends that:

a. If a petition for the appointment of a guardian advocate is filed, the court should conduct a hearing and make a finding as to the patient's capacity to consent to treatment at the earliest possible time.

b. At the time the court considers a motion for continuance, the court should conduct a hearing and make a finding as to the patient's capacity to consent to treatment if there is a pending request. If the court finds that the capacity to consent to treatment is lacking, a guardian advocate should be appointed at the time the involuntary placement hearing is continued.

2. Availability

Issue:

Is there a sufficient number of persons who are adequately trained and willing to serve as guardian advocates?

Discussion:

In accordance with section 394.4598, Florida Statutes, a guardian advocate must agree to the appointment and generally meet the qualifications of a guardian contained in Chapter 744. Prior to exercising his or her authority, the guardian advocate must attend a court-approved training course of not less than four hours.

Following the health care surrogate, the statutes list, in order of preference, the following persons who may serve as a guardian advocate:

1. the spouse
2. an adult child
3. a parent
4. the adult next of kin
5. an adult friend
6. an adult trained and willing to serve

It is well established that many Florida residents, particularly elders, are geographically distant from family members who would normally be available to serve as guardian advocates should the need arise. Individuals may designate a surrogate decision maker prior to the need for such a service; however, people may not be aware that this option exists or know how to exercise it. Many activists favor the pre-need designation approach as it allows the individual, not the courts, to decide who is best suited to serve in this capacity.

According to testimony, a potential problem with a family member or friend serving as a guardian advocate is that the guardian advocate may be put into the position of forcing treatment on the patient against the patient's will. That may create a conflict with the patient's only community support system, upon which the patient may need to rely after discharge.

Testimony also indicated that liability concerns prevent many people from serving as a guardian advocate. Guardian advocates have no statutory protection from lawsuits, and some medications can be deadly or cause permanent damage. Some persons suggested that Good Samaritan language be incorporated into the statutes to clarify the standards and offer protection for family members, friends, and volunteers who are willing to serve as a guardian advocate.

Survey respondents reported that training is generally provided for guardian advocates, but not always. Some persons appearing before the Subcommittee indicated that the delay for the required training may delay the exercise of the guardian advocate's authority and the beginning of treatment.

Survey respondents indicated that guardian advocates are oftentimes necessary. They reported that the individual's spouse, adult child, or adult next of kin routinely serve as guardian advocates. However, state attorneys and public defenders reported an even higher rate of service by another adult trained and willing to serve. Unfortunately, over one-half of the judges and general masters, more than one-third of the public defenders, and about a quarter of the state attorneys reported that when no family members or friends are available, there are not enough trained and experienced persons available in their jurisdiction for appointment as a guardian advocate.

It was unclear from the survey responses what role, if any, financial resources play in the appointment of guardian advocates. Some circuits compensate individuals for their service as guardian advocates. According to testimony, in the Eleventh Judicial Circuit, there are five specially-trained attorneys who serve as guardian advocates for a fee of $150 per case. In the Twelfth Judicial Circuit, the Department of Children and Families contracts with a person who serves as a guardian advocate for a flat fee of $2,970 per month. Some persons expressed concern about financial incentives for surrogate decision makers. The use of volunteers was suggested as was the development of community resources, to alleviate profit motives.

Further, it was noted that another adult trained and willing to serve is last on the statutory list. Some people believe that current law may not allow the court to appoint another adult unless and until the list has been exhausted.

See Minutes, July 31, 1998, pp. 7-8; Minutes, November 12, 1998, pp. 3-4; survey results.

Recommendation

The Subcommittee recommends that:

a. The Department of Children and Families, The Department of Elder Affairs, appropriate sections of The Florida Bar, the medical community, and mental health activists should publicize the availability of mental health advance directives, to allow individuals to maximize self determination.

b. Family members of individuals with mental illnesses and persons who are designated as mental health surrogates should participate in guardian advocate training prior to the time their service is needed, to avoid unnecessary delay in the provision of treatment.

c. The Florida Legislature should consider providing limited liability protection for family members, friends, and individuals who serve as guardian advocates on a volunteer basis.

d. The Department of Children and Families, The Department of Elder Affairs, local bar associations, and mental health activists should conduct community workshops to educate qualified individuals about mental health issues and the opportunity to volunteer as a guardian advocate.

e. The Florida Legislature should fund a guardian advocate system that provides each geographical area with a readily available pool of guardian advocates who have training in mental health issues and psychotropic pharmacology. These guardian advocates could serve on behalf of individuals with psychiatric disabilities for whom no family or friends are willing or able to serve or for whom the appointment of a friend or family member has been found by the court to be inappropriate.

E. Patient Representatives

1. Role

Issue:

What is the appropriate role of a patient representative?

Discussion:

Section 394.4597, Florida Statutes, provides that "at the time a patient is admitted to a facility for involuntary examination or placement . . . the names, addresses and telephone numbers of the patient's . . . representative if the patient has no guardian . . . shall be entered in the patient's clinical record." If the patient is unwilling or unable to designate the representative, the statute sets forth a process for the designation of a representative from the following list of persons, in preference order:

1. health care surrogate
2. the spouse
3. an adult child
4. a parent
5. the adult next of kin
6. an adult friend
7. the appropriate human rights advocacy committee

Richard Durstein, an active member of the District 5 Human Rights Advocacy Committee (HRAC), has monitored involuntary placement hearings over the past ten years and has personally attended more than 1,600 hearings. He advised the Subcommittee that in their region, HRAC is almost always appointed as the representative. However, Mr. Durstein pointed out that according to the statutes HRAC is last on the list of entities who may be appointed. HRAC members do not always have time to do an adequate job, Mr. Durstein noted. Further, he felt the statutory provisions did not adequately explain the duties and responsibilities of the patient representative.

The definitions section of the Baker Act (section 394.455) does not define the role of a representative. While there is some legislative guidance, the rights and responsibilities of a representative are scattered throughout the statutes. For example, section 394.4599(2)(a) requires notice to be given to the representative whenever notice is required under that section. The representative may apply for a change of venue (section 394.4599(2)(c)(4)); petition for writ of habeas corpus on the patient's behalf (section 394.459(8)); and have immediate access to the patient, subject to the patient's right to deny or withdraw consent (section 394.459(5)). A copy of the inventory of the patient's personal effects is to be provided to the representative (section 394.459(6)).

The Subcommittee found that there is confusion among activists and system participants about the appropriate role of a patient representative. Therefore, the Subcommittee recommends that the Florida Legislature clarify the rights and responsibilities of a patient representative.

See Minutes, January 29, 1999, pp. 4, 6.

Recommendation

The Subcommittee recommends that the Florida Legislature amend the statutes to clarify the duties, responsibilities, and authority of patient representatives.

II. INVOLUNTARY EXAMINATIONS

A. Less Restrictive Alternatives

1. Availability and appropriate use

Issue:

Do adequate alternatives to involuntary examination exist? Are they being properly explored and utilized?

Discussion:

The statutory criteria for involuntary examination is found in section 394.463, Florida Statutes. Basically, to meet the criteria for involuntary examination, persons must be mentally ill, refuse voluntary examination or be unable to determine for themselves whether examination is necessary, and without treatment are likely to harm themselves or cause serious bodily harm to others.

The legislative intent of the Baker Act requires that the least restrictive means of intervention be employed, based on the individual needs of each person within the scope of available services. Numerous survey respondents lamented the deficit of less restrictive alternatives. They pleaded for additional community mental health services and case management, to alleviate the "revolving door" syndrome.

The Seventeenth Judicial Circuit (Broward County), in collaboration with the Henderson Mental Health Clinic, has implemented an innovative approach to make the involuntary examination process less intrusive and disruptive for the patient. Whenever an *ex parte* order is issued, a mobile unit is dispatched. The mobile unit reviews any medical history contained in its database, takes appropriate medications to the site, interviews the individual, and attempts to stabilize the individual on the spot. An in-patient involuntary examination is utilized only if absolutely necessary.

Mental health activists in Broward County report that the mobile unit has resulted in a substantial reduction of in-patient involuntary examinations in that jurisdiction. They said many elders had previously been involuntarily examined due to behavioral problems, rather than mental illness, and credited the Henderson mobile unit with reducing that abuse.

Noting the Subcommittee's concerns in regard to some of the statutory authority for and operational procedures of the mobile unit, judicial officers of the Seventeenth Judicial Circuit expressed a willingness to modify the process if additional resources were made available. As with any new process, adjustments to the mobile unit may be required. However, there seems to be a consensus in the Broward community that the mobile unit is a less restrictive alternative that should continue to be explored and evaluated.

The Subcommittee was advised that the statutes do not specifically authorize the use of less-restrictive alternatives in involuntary examination situations. The Legislature should consider amending the statutes to expressly permit the use of innovative alternatives, such as the mobile unit.

Funding should also be made available to jurisdictions that are willing to coordinate an interdisciplinary exploration of innovative alternatives designed to reduce, insofar as possible, the traumatic effect of involuntary examinations. Such pilot projects should be monitored and evaluated by independent entities, to determine their effectiveness.

See Minutes, July 31, 1998, p. 4; Minutes, November 12, 1998, pp. 9, 10-14; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should amend the statutes to expressly permit the use of less-restrictive alternatives to involuntary in-patient examinations.

b. The Florida Legislature should make funding available to jurisdictions that are willing to coordinate an interdisciplinary exploration of innovative alternatives designed to reduce the traumatic effect of involuntary examinations. Such pilot projects should be monitored and evaluated by independent entities, to determine their effectiveness.

B. Patient Rights

1. Notice

Issue:

Are individuals with psychiatric disabilities receiving adequate notice of their rights?

Discussion:

The rights of individuals with psychiatric disabilities are set forth in section 394.459, Florida Statutes. The statutes require that each facility post a notice listing and describing patients' rights. Survey respondents reported that patients' rights are also included on many legal documents that the patient receives.

The recently promulgated rules governing the Baker Act (Chapter 65E-5.140, Florida Administrative Code), require that every person admitted to a designated receiving or treatment facility be provided with a written description of their rights at the time of admission. The rules also require that a copy of the pertinent statutes and rules be available in every receiving and treatment facility for review by any patient, guardian, guardian advocate, representative, or health care surrogate/proxy, upon request.

The Subcommittee learned, however, that some patients have difficulty reading documents because their vision is blurred from medications or their glasses are not available in the facility. It was also reported that notice of the rights is not provided in large print or other accessible format, as required by the Americans with Disabilities Act of 1990 (ADA). Communication barriers exist for non-English speaking patients, as well. There are also a variety of other reasons why patients may not understand their rights, including developmental or cognitive disabilities. Not being able to understand the notice, regardless of the reason, is no notice at all. Videotapes, audio cassettes, and orientation sessions were suggested as additional methods to inform patients, families, friends, guardian advocates, guardians, and representatives about patient rights.

See Minutes, July 31, 1998, p. 4; Minutes, November 12, 1998, p. 9; Minutes, January 29, 1999, pp. 6, 9; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Statutes should be revised to mandate that the rights pamphlet prepared by the Department of Children and Families be distributed to every mental health patient—both voluntary and involuntary—upon admission. The pamphlet should be available in large print and other accessible formats as required by the Americans with Disabilities Act, as well as English, Spanish, Creole, and other common languages reflective of Florida's population.

b. The Department of Children and Families, The Department of Elder Affairs, appropriate sections of The Florida Bar, and mental health activists should collaborate on the production of a videotape that explains the rights of individuals with psychiatric disabilities.

c. The Florida Legislature should consider authorizing and funding the Statewide Human Rights Advocacy Committee and the local Human Rights Advocacy Committees to meet with patients and make them aware of their rights.

C. Examinations Initiated by Law Enforcement Officers

1. Training

Issue:

Are law enforcement officers adequately trained to identify persons meeting the criteria for involuntary examination?

Discussion:

Section 394.463, Florida Statutes, requires a law enforcement officer to take a person who appears to meet the criteria for involuntary examination into custody and deliver the person to the nearest receiving facility for examination.

Testimony before the Subcommittee indicated that some law enforcement officers inappropriately arrest persons with mental illnesses rather than taking them to a receiving facility. Aware of the shortage of mental health treatment resources, these officers reportedly believe that imprisonment will result in the person being off the streets longer, thereby increasing public safety. The Subcommittee also heard that law enforcement officers report that an arrest results in less paperwork and puts the officer back on patrol more quickly than does transporting an individual to a receiving facility. Moreover, an arrest counts in an officer's statistics while an involuntary mental health examination may not.

Near the end of the study, the Subcommittee received reports that improvements are occurring in regard to law enforcement's understanding of and response to mental health matters. Nevertheless, mental health activists told the Subcommittee that there needs to be more training for law enforcement officers on mental illnesses. Some survey respondents noted the same concern. One respondent said police and deputies should receive more training not only on mental health generally but also on the initiation of involuntary examinations specifically.

During the 1999 Session, the Florida Legislature passed House Bill 2003 directing the Florida Department of Law Enforcement and the Department of Children and Family Services to jointly evaluate the extent and effectiveness of current training curricula and training efforts for law enforcement officers in identifying mental illnesses. The Subcommittee applauds this initiative but finds that sufficient evidence already exists to show there are deficiencies that require change.

Subcommittee members also suggested that it may be beneficial for state attorneys and public defenders to be provided with training on jail diversion programs for individuals with mental illnesses.

See Minutes, July 31, 1998, pp. 8-9; Minutes, November 12, 1998, pp. 10-11.

Recommendation

The Subcommittee recommends that:

a. The Florida Department of Law Enforcement and the Department of Children and Families should jointly initiate a comprehensive training program for law enforcement officers, incorporating at a minimum: (1) a videotaped orientation to the Baker Act for statewide use, which emphasizes the criteria for initiating an involuntary examination; and (2) crisis intervention training for appropriate interaction with persons with mental illnesses.

b. State attorneys and public defenders should be provided with training on jail diversion programs for individuals with mental illnesses.

D. Examinations Initiated by Professionals

1. Elders residing in nursing homes and assisted living facilities

Issue:

Are involuntary examinations being excessively and inappropriately used for elders who reside in nursing homes and assisted living facilities?

Discussion:

Persons providing testimony to the Subcommittee expressed concern about the excessive and inappropriate involuntary examination of elders, especially elders who reside in nursing homes and assisted living facilities.

The Subcommittee learned that the law is being misused in several ways in regard to nursing home and assisted living facility residents. First, the diagnosis of some elders with dementia or Alzheimer's disease may be shown as mental illness, because Medicare and some private insurance companies will not reimburse treatment for persons with a diagnosis of dementia.

Second, when a Medicare patient is involuntarily examined and/or placed, the nursing home is eligible to receive reimbursement for holding the bed empty for a period of time, while providing no actual services. The financial incentive for abusing the Baker Act is compounded when there is a relationship between the nursing home and the Baker Act receiving facility. Sometimes mental health beds are within the same facility as the nursing home, but the facility receives a higher rate of compensation for individuals hospitalized under the Baker Act than for ordinary nursing home residents.

Third, testimony indicated that some elders are inappropriately involuntarily examined because of behavioral problems rather than mental illnesses. Furthermore, some facilities purposefully use the Baker Act to "dump" residents who are disruptive or require mental health treatment. In those situations, the nursing home or assisted living facility refuses to allow the individual to return when the individual is released from the mental health facility. State and federal laws require 30 days advance notice of nursing home discharges, except in emergencies. Some nursing homes are reportedly using the Baker Act to get around this requirement.

Again, survey respondents confirmed the testimony. Some respondents said there needs to be more protection for elders. One judge noted that many of the elder patients are in the courtroom because of dementia. A general master suggested that Florida's legal definition of mental illness be revised to exclude those persons whose primary diagnosis is some form of dementia. A general master recommended that the doctor or staff of a nursing home or assisted living facility should be prohibited from issuing a mental health certificate for involuntary examination of a resident of the facility. A public defender suggested that, with the exception of a life-threatening event, there should

be more than one incident to precipitate the initiation of an involuntary examination, i.e. a nursing home resident who has just one incident with staff.

Florida law broadly defines mental illness, but in-patient examination and confinement at a mental health facility should be the last resort, especially for vulnerable elders. These abusive practices regarding elders are clearly contrary to the Baker Act's requirement that involuntary examination and placement be utilized only after all less restrictive alternatives are considered and judged to be inappropriate. If additional resources are required to treat conditions other than mental illness among the elders, those funds should be made available through the appropriate channels.

Section 394.4625(1)(c), Florida Statutes, was created in 1996 to provide an increased level of protection for certain elders living in licensed facilities. The statute provides that prior to such an elder being sent to a Baker Act receiving facility ***on a voluntary basis***, an initial assessment of their ability to provide express and informed consent to treatment must be conducted by a publicly-funded service. There was a consensus that these increased protections have improved the process. Nevertheless, everyone agreed that further modifications should be made to provide additional protections to vulnerable elders in both voluntary and involuntary admission situations.

The Subcommittee heard testimony that there needs to be increased oversight of individuals being transferred from nursing homes to mental health facilities. Currently, the process is fragmented. The rights of nursing home residents are monitored by the Long-Term Care Ombudsman Committee. The rights of mental health patients are monitored by the Human Rights Advocacy Committees. There is no advocacy group authorized to follow an individual on both sides of transfers between nursing homes and mental health facilities. There needs to be an increased continuity of the investigation, review, and oversight of the process. A front-end assessment prior to an individual's discharge from a nursing home to a mental health facility may oftentimes result in more appropriate services at a lower cost, according to Vince Smith.

General master Alan Methelis reported that the Seventeenth Judicial Circuit is considering whether to require a prior independent assessment for involuntary transfers from nursing homes and assisted living facilities to psychiatric facilities, in addition to the statutorily-required review of voluntary transfers. It was proposed to the Subcommittee that the law should be amended to require judicial review of all requests to transfer an individual from a nursing home to a psychiatric facility.

See Minutes, July 31, 1998, pp. 7-9; Minutes, November 12, 1998, pp. 9, 13-14; Minutes, January 29, 1999, pp. 6, 10.

Recommendation

The Subcommittee recommends that:

a. Judges, general masters, state attorneys, and public defenders should receive training on "dumping" and vigilantly guard against that or other abuses of the Baker Act in situations involving elder residents of nursing homes or assisted living facilities. If dumping or abuse is suspected, it should be immediately reported to the Agency for Health Care Administration and the Long-Term Care Ombudsman.

b. The Florida Legislature should consider the feasibility and appropriateness of extending the protections of section 394.4625(1)(c), Florida Statutes, to involuntary as well as voluntary examination situations.

c. The Florida Legislature should direct the Department of Children and Families, the Agency for Health Care Administration, the Long-Term Care Ombudsman, or other appropriate entity to study whether nursing homes and other facilities are "dumping" residents because of a lack of funding to treat conditions not covered by governmental programs and private insurance, as well as for fraudulent financial gain.

d. The Florida Legislature should consider whether the definition of mental illness should be amended to exclude dementia, Alzheimer's disease, and traumatic brain injury.

2. Abuse for financial gain

Issue:

Are some professionals abusing the involuntary examination process for financial gain?

Discussion:

Section 394.463, Florida Statutes, authorizes certain specified medical or mental health professionals to execute a certificate stating that the professional has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for involuntary examination. A law enforcement officer then takes the person into custody and delivers the person to the nearest receiving facility.

Testimony before the Subcommittee indicated there are two main opportunities for mental health professionals to abuse the involuntary examination process for personal financial gain: 1) when the doctor has a stake in the facility to which an individual is sent, or 2) when the doctor has a stake in the facility that is trying to "dump" a disruptive or difficult person.

The Florida Legislature partially addressed these issues in 1996 by adopting section 394.4625(1)(c), Florida Statutes. The statute provides that prior to admission to a Baker Act receiving facility ***on a voluntary basis***, an initial assessment of the individual's ability to provide

express and informed consent to treatment must be conducted by a publicly-funded service. If such an assessment cannot be performed by the designated service in a timely fashion, the requesting facility may arrange for an assessment by an authorized professional ***who is not employed by or under contract with, and does not have a financial interest in, either the facility initiating the transfer or the receiving facility to which the transfer may be made***. However, this statutory protection applies only to elders living in state-approved facilities. Furthermore, these statutory provisions do not restrict the involvement of a professional who would provide the treatment in the hospital. The statute should be amended to prohibit the involvement of any professional who has a financial interest in the outcome of the assessment.

Many people recommended that a similar restriction be statutorily adopted to protect all persons in both voluntary and involuntary examination situations that may be inappropriately initiated for financial gain. While this proposal would protect persons from exploitation, it was noted that such a restriction could significantly delay treatment in instances where a person who meets the involuntary examination criteria is presented to an authorized professional at a receiving facility.

See Minutes, July 31, 1998, pp. 7-9; Minutes, November 12, 1998, pp. 9, 13-14; Minutes, January 29, 1999, pp. 6, 10.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should consider the feasibility and appropriateness of extending the protections of section 394.4625(1)(c), Florida Statutes, to involuntary as well as voluntary mental health examination situations.

b. The Florida Legislature should consider expanding the list of professionals in 394.4625(1)(c) to prohibit the involvement of any professional who has a financial interest in the outcome of the assessment.

E. *Ex Parte* Petitions

1. Inappropriate use

Issue:

Are adequate protections in place to prevent the abuse of ex parte petitions for involuntary examination?

Discussion:

A person who does not meet the statutory criteria for involuntary examination can be unduly deprived of liberty and confined in a receiving facility without any opportunity to object, if the *ex parte* process is abused. Abuse of the process places every person at risk of being the victim of estranged spouses, dishonest neighbors, or any other person who may be harboring a grudge.

The Subcommittee also learned that some people seeking an *ex parte* order do not understand the purpose of an involuntary examination. Clerks of court responding to the survey indicated that a lack of understanding about the statutory criteria is a substantial issue. Concerned friends or family members may seek to invoke the *ex parte* process for loved ones who need mental health treatment but who are not dangerous.

Clerks of court suggested a number of possible improvements to the *ex parte* process, including:

- Broader implementation of a pre-screening process such as the one in Marion County wherein petitioners first go to Marion-Citrus Mental Health Center to obtain a "report to court." At the center, the petitioners are interviewed by a specially-trained evaluator. Petitioners then take the "report to court" to the clerk's office where the petition is prepared.
- Conducting a hearing prior to issuance of an *ex parte* order.
- Amendments to the statutes to require more than one petitioner.
- Amendments to the statutes to clarify within what period of time the behavior in question must be observed.
- Broader implementation of the process such as the one in Okeechobee County whereby the clerk's office checks felony, misdemeanor, injunction, and divorce records to determine if there is anything pending for the respondent and/or petitioner. If there is, the files are presented to the judge together with the *ex parte* petition. This process alerts the judge to any ulterior motives that may be involved.
- Creation and distribution of a pamphlet, to clarify and explain the *ex parte* process and its purpose.

See Minutes, July 31, 1998, pp. 4, 9; Minutes, November 12, 1998, pp. 6, 11; Basford memo, pp. 3-4; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should consider improvements to the *ex parte* provisions of section 394.463, Florida Statutes, including but not limited to: (1) requiring and funding a pre-screening process; (2) requiring a hearing prior to the issuance of an *ex parte* order; and (3) clarifying the time frame within which the behavior in question must be observed.

b. The Florida Legislature should direct the Department of Children and Families to create a pamphlet that explains the purpose and statutory requirements of the *ex parte* process. The Department should provide copies of the pamphlet to the clerks of court for distribution to everyone seeking to file an *ex parte* petition. The Department should make the pamphlet available in large print and other accessible formats as required by the Americans with Disabilities Act, as well as in English, Spanish, Creole, and other common languages reflective of Florida's population.

c. Clerks of court and judges should implement a system whereby the clerk's office checks felony, misdemeanor, injunction, abuse, neglect, exploitation, and divorce records to determine if there are any cases pending within the jurisdiction for the respondent and petitioner. If there are any pending cases, the relevant files should be presented to the judge together with the *ex parte* petition.

F. Release from Involuntary Examination

1. Timeliness

Issue:

Are patients being inappropriately detained past the 72-hour period if a petition for involuntary placement will not be filed?

Discussion:

Section 394.463, Florida Statutes, states that a patient shall be examined at a receiving facility without unnecessary delay. A patient may not be detained in a receiving facility for involuntary examination for more than 72 hours. Within that 72 hours, or the next working day thereafter if that time expires on a weekend or holiday, one of the following four actions must be taken, based on the needs of the individual:

1. The individual shall be released, unless the patient is charged with a crime; or
2. The individual shall be released for outpatient treatment; or
3. The individual shall be asked to give express and informed consent to placement, and if such consent is given, the individual shall be admitted as a voluntary patient; or
4. A petition for involuntary placement shall be filed in the appropriate court by the facility administrator when treatment is deemed necessary.

Martha Lenderman addressed the amount of time a person can be legally detained for involuntary examination. She reported that the Department of Children and Families believes that if the facility has no intention of filing a petition for involuntary placement and the 72-hour period will expire on a weekend or holiday, the individual should be released within 72 hours and not unnecessarily detained until the following working day.

Public defenders who responded to the survey also expressed concern about this issue. One respondent said there needs to be a stricter interpretation of the 72-hour examination period. Another expressed concern that many times receiving facilities detain individuals beyond 72 hours if a doctor intends to file a petition but has not yet done so. That public defender believed the statute needs to be more specific about when the 72-hour period ends, in cases where no medical emergency exists.

It is noted that Attorney General Opinion 97-81 interprets the statute as allowing patients to be held until the following day if the 72-hour period expires on a weekend or holiday. The Attorney General's opinion is silent as to whether this applies in all instances or is limited to only those instances when a petition for involuntary placement will be filed.

The Subcommittee found that to remain within the spirit and intent of the Baker Act, patients for whom no petition for involuntary placement will be filed should be released at the earliest possible

time. If the 72-hour examination period allowed by the law will expire on a weekend or holiday, patients for whom no petition will be filed should be released immediately and not held over until the following day.

See Minutes, November 12, 1998, p. 4; Attorney General Opinion 97-81; survey results.

Recommendation

The Subcommittee recommends that the Florida Legislature amend the statutes to clarify that the 72-hour involuntary examination period is not extended over weekends or holidays, unless a petition for involuntary placement will be filed on the next working day.

III. VOLUNTARY ADMISSIONS

A. Express and Informed Consent

1. Oversight

Issue:

Is there adequate oversight to ensure that voluntary admissions are made only with the express and informed consent of the patient?

Discussion:

Chapter 394 governs voluntary as well as involuntary admissions to mental health receiving and treatment facilities. Testimony before the Subcommittee indicated that the voluntary process is sometimes abused. One such abuse is when patients are said to have voluntarily agreed to placement but are incapable of providing express and informed consent.

Section 394.455(9), Florida Statutes, says that:

> "Express and informed consent" means consent voluntarily given in writing, by a competent person, after sufficient explanation and disclosure of the subject matter involved to enable the person to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion.

In contrast, section 394.455(15), Florida Statutes, states:

> "Incompetent to consent to treatment" means that a person's judgment is so affected by his or her mental illness that the person lacks the capacity to make a well-reasoned, willful, and knowing decision concerning his or her medical or mental health treatment.

In 1996, the Florida Legislature amended the Baker Act to strengthen patient rights. Despite these enhanced protections, the Subcommittee learned that the voluntary process is still vulnerable to abuse because in-patient treatment is extremely profitable. The Subcommittee was advised that there is no oversight of in-patient placement if the patient is deemed to have given "express and informed consent."

The Agency for Health Care Administration (AHCA) is authorized to impose fines and administrative penalties for violations by mental health facilities and professionals, in regard to both voluntary and involuntary placements. However, it was reported that AHCA lacks the funds and staff necessary to take vigorous and proactive enforcement action in regard to mental health facilities and professionals.

Testimony before the Subcommittee indicated that in some ways Chapter 394 does not provide protections for individuals with psychiatric disabilities that are equal to protections provided under Chapter 400 for nursing home residents.

Moreover, individuals admitted to mental health facilities on a voluntary basis whose rights are violated have little recourse, mental health activists, public defenders, and general masters advised the Subcommittee. Attorneys are unlikely to accept these civil cases, because most patients lack the resources to pay legal fees, the statutes do not authorize the award of attorney fees, and the complainant may be difficult to work with.

The Subcommittee considered the benefits and costs associated with judicial review of all voluntary placements. Requiring judicial review of all voluntary mental health placements would result in a tremendous impact on court, state attorney, and public defender resources.

See Minutes, July 31, 1998, p 6-7; Minutes, January 29, 1999, pp. 5, 10; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should provide the Agency for Health Care Administration with adequate funds and staff, and direct the Agency to vigorously enforce regulations in regard to violations by mental health facilities and professionals.

b. The Florida Legislature should review rights and protections afforded to individuals with mental illnesses under Chapter 394 and ensure that they are no less than the rights and protections afforded to nursing home residents under Chapter 400.

c. The Florida Legislature should consider revising the statutes to specify that violation of a mental health patient's rights constitutes "abuse" within the meaning of the law.

d. The Florida Legislature should consider authorizing and adequately funding the Statewide Human Rights Advocacy Committee and local Human Rights Advocacy Committees to assess the ability of all voluntary patients to give express and informed consent to treatment.

B. Guardian Consent

1. Guardians appointed pursuant to Chapter 744

Issue:

Should guardians be allowed to voluntarily consent to placement of their wards in a mental health facility?

Discussion:

A guardian appointed pursuant to Chapter 744 is not allowed to voluntarily place a ward in a mental health facility. A Chapter 394 involuntary placement hearing is required.

Attorney Joan Nelson Hook addressed the Subcommittee on the issue of whether guardians should be allowed to voluntarily consent to placement on behalf of their wards. Ms. Hook's remarks were offered on behalf of The Florida Bar Elder Law Section. The Guardianship Committee of the Elder Law Section feels this change is necessary to obviate what they consider to be a cumbersome involuntary placement process.

Martha Lenderman noted that in 1996 the Florida Legislature revisited the issue of who may initiate involuntary examinations without judicial review. The legislature considered limiting the initiation of involuntary examinations to law enforcement officers in emergency situations and courts in non-emergency situations. That is, the legislature considered whether mental health professionals' authority to initiate involuntary examination should be removed altogether. The legislative decided against making those changes. At the same time, the legislature considered and rejected expanding the list to include guardians or others.

Hugh Handley clarified that a guardian is authorized to advocate for wards to receive mental health services. Furthermore, a guardian can initiate the involuntary commitment process, when appropriate, either by seeking an *ex parte* order or by contacting a professional who can conduct an examination and then issue a certificate if appropriate. He indicated that as a guardian he welcomes judicial review of such serious decisions.

The Subcommittee found that commitment of a ward by a guardian should not be automatic, but rather should be subject to judicial review. Screening by the courts is a safeguard and reveals abuses of the process.

See Minutes, January 29, 1999, pp. 7-8.

Recommendation

The Subcommittee strongly recommends <u>against</u> allowing guardians to voluntarily place a ward in a mental health facility without judicial review.

2. Guardians of children

Issue:

Should judicial review of admissions of children to mental health facilities be required?

Discussion:

Section 394.4625(1)(a) authorizes voluntary admissions to a mental health facility, without the necessity of a hearing, for "any person age seventeen or under for whom such application is made by his or her guardian."

Martha Lenderman expressed concern that Chapter 394 does not adequately address consent to treatment and voluntary admission to facilities for children. There has been no statewide policy on children's mental health services. Foster parents are allowed to commit dependent children, without judicial review or oversight. It has been the Department of Children and Families' position that if the child is agreeable and the guardian makes application, then the child can be admitted without a court hearing.

In a memorandum dated March 29, 1999, Larry Rein, Coordinator of the Broward County Multiagency Service Network for Children with Severe Emotional Disturbance (SEDNET), reported that most complaints in that jurisdiction regarding the admission and treatment of children involve the statute's requirement for consent from someone other than the child. Mr. Rein believes that rigorous enforcement of section 394.459(3)(a) precludes a child from genuine voluntary admission to a receiving facility. According to Mr. Rein, the unfortunate result is that all too often a child who experiences a crisis sufficient to motivate the child to seek admission to a receiving facility is denied treatment for distressingly long periods of time.

This is particularly true and troubling, Mr. Rein said, in the case of dependent children whose biological parents remain their guardians. In those instances, there is a regrettable paradox of a child's pressing need for immediate help being left to the discretion of adults who have a history of neglecting or abusing that same child. Equally disturbing is the scenario of a child who is voluntarily seeking treatment instead being involuntarily admitted because guardians cannot be located or their consent obtained. In all these cases, Mr. Rein reported, the statute needlessly forces upon a child the stigma and associated implications of being involuntarily placed. Furthermore, these circumstances sometimes result in the decompensation of the child's condition, he said.

Persons appearing before the Subcommittee testified that there are conflicting provisions in the statutes and conflicting interpretations as to what a "hearing" on the voluntary admission of a child means. They indicated that Department of Children and Families regulations provide that a hearing consists of a meeting between the facility administrator and the child. Some people expressed the opinion that a court hearing is required. However, the new Department regulations do not define, regulate, or set up a procedure that effectively avoids requiring substantial judicial resources. Ms. Lenderman noted there is an opinion by Judge Shames in the Sixth Judicial Circuit wherein the judge

determined that the Legislature did not intend for the court to conduct a hearing on every voluntary admission of a child.

Michael Lederberg noted that thousands of children are committed in Dade County; however, only two to three are represented by the public defender's office. He was concerned about assuring the voluntariness of consent by children when there is no legal representation or judicial review.

Alan Methelis reported that the United States Supreme Court has ruled there has to be some kind of hearing when a child is placed in a mental facility, but the Florida statute is not worded clearly in that regard. Previously, Florida law required consent by the minor, now it just requires consent. He informed the Subcommittee that the Seventeenth Judicial Circuit began conducting hearings on the voluntariness of a child's consent. The public defender's office is appointed to represent the child.

In *M.W. v. Davis*, 722 So. 2d. 966 (Fla. 4th DCA, Jan. 6, 1999), the Fourth District Court of Appeal reviewed the question of whether a Chapter 394 involuntary placement hearing is required when a dependent child is in the legal custody of the Department of Children and Family Services and the Department seeks residential mental health treatment for the child. The appellate court concluded, from its review of chapters 394 and 39 together, that these facts do not constitute an involuntary commitment requiring a Baker Act hearing. Review of the intermediate appellate court's opinion is currently pending before the Florida Supreme Court.

Winifred Sharp was concerned that children who behaviorally act out may be inappropriately examined or placed against their will. Staff members of the Henderson Mobile Unit confirmed that they receive referrals of children in cases that seem more behavioral than mental. The Mobile Unit frequently sees situations where parents want to commit the child, but the child refuses treatment. Henderson Clinic, which is associated with the Mobile Unit, has a family intervention team that can meet with the entire family on a weekly basis to address problems. The Subcommittee was informed that schools also attempt to have children involuntarily examined. The Mobile Unit's policy in those circumstances is for the parents to be present.

The Subcommittee is deeply concerned about protecting the rights of children. Members noted that under the current system, it appears that no one is advocating for the welfare of the child. The Subcommittee observed that consent issues are more complex in regard to children. The Subcommittee found there should be some type of oversight of the placement of children in mental health facilities. It was suggested that HRAC or another independent entity could make contact with the child to confirm the voluntariness of the child's consent.

The Subcommittee also found that a child's right to seek a writ of habeas corpus should be protected. As noted previously in this report, it is highly unlikely that a child would know how to seek a writ of habeas corpus on his or her own, and the public defender has no authority to represent a child until appointed by the court after the petition is filed.

See Minutes, November 12, 1998, pp. 5 -6, 12, 15; survey results.

Recommendation

The Subcommittee recommends that:

a. The Florida Legislature should direct and fund a comprehensive interdisciplinary study on the legal needs of children under the Baker Act, including but not limited to:

- **whether children under the age of 18 should have the right to voluntarily consent to in-patient mental health treatment, without the consent of their guardian.**
- **whether the Human Rights Advocacy Committees or another independent entity should have the authority to make contact with a child confined to a mental health facility, to confirm the voluntariness of the child's consent.**
- **whether a child's right to petition for a writ of habeas corpus pursuant to Chapter 394 is adequately protected and whether legal counsel should be provided.**
- **whether judicial review of placement of children in mental health facilities should be required, to ensure the appropriateness of involuntary placements and the voluntariness of voluntary admissions.**

b. The Florida Bar Commission on the Legal Needs of Children should study the legal needs of children under the Baker Act.