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# FORUM

## Mental Health Laws in Oklahoma: Who Needs Commitment?

M.M. McDougal\*

Having presided over some twenty-five hundred mental health cases during the last six and one-half years, the writer is convinced that Oklahoma judges and lawyers need to be committed. Committed, that is, to protect individuals who are alleged to be mentally ill and in need of treatment, and committed to protect society.

Protection is not a one-way proposition. Any person who is mentally ill and in need of treatment, needs to be protected from harm, be it self-inflicted or otherwise. Society needs protection from overt physical danger, and protection from losing any of its productive members. All persons need to be protected in their constitutionally guaranteed rights so that no person will be committed to an institution, or even involuntarily treated in a less restrictive manner, without due process of law.

Giant strides have been taken in the past few years toward accepting mental illness as being treatable and in developing methods of treatment. Although there still remain a great number of patients who cannot be "cured," Eastern State Hospital, at Vinita, Oklahoma, now reports that the average in-patient time has been reduced to less than thirty days. This is certainly an improvement over the system which prevailed only a few years ago, when a patient could expect to wait months, or even years, before any type of release. Notwithstanding motion pictures and television productions, the general public seems to have accepted the fact that treatment facilities are no longer "snake pits," and that mental illness is a true illness. Courts and legislatures have made progress, too. Many states have remodeled their statutes and procedures to provide safeguards which historically have been ignored. Court decisions have recognized

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this long-forgotten group by requiring both the medical and legal communities to protect and treat patients more humanely.

In keeping with this change of attitude, the Oklahoma Legislature amended the Oklahoma Mental Health Law in 1975,<sup>1</sup> and again in 1977,<sup>2</sup> with emphasis on involuntary commitment procedures.<sup>3</sup> The intent was to improve statutory authority for involuntary treatment of persons who do not recognize their need for treatment, or who refuse to accept needed treatment, while still ensuring the protection of all human and legal rights as guaranteed by our state and federal constitutions. The challenge of balancing the needs and rights of all who are involved in mental health matters tests the ingenuity of any draftsman. The age-old question of Cain, who asked, "Am I my brother's keeper?" is a valid question today. What do we owe an individual who becomes mentally ill to such an extent that he is unable to function productively in society? Who determines the level of productivity that is acceptable? Is the state obligated to assume a parental position under a *parens patriae* theory regardless of the desires or objections of the subject individual? To what degree should the family of a mentally ill person be assured of treatment for that person, merely because of their love and compassion for him? How dangerous must one be before society has a right of protection paramount to the individual's right to freedom? Towards whom must the danger exist? Should the determination of mental illness rest on medical or legal standards?

Obviously, these questions comprise only the visible tips of an enormous iceberg. Several federal district courts have rendered decisions dealing with numerous substantive and procedural questions. Although not having controlling precedential effect in this jurisdiction, they represent a nation-wide trend which can be observed. One of the most comprehensive decisions was in the case of *Suzuki v. Quisenberry*<sup>4</sup> which delineates most of the safeguards to be considered in determining

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1. Act of June 12, 1975, ch. 355, §§ 1, 2, 1975 Okla. Sess. Laws 666 (amending the statutes now found at OKLA. STAT. tit. 43A, §§ 54.1, 55.2 (Supp. 1977)).

2. Act of June 3, 1977, ch. 145, §§ 3, 4, 12, 1977 Okla. Sess. Laws 371 (amending the statutes now found at OKLA. STAT. tit. 43A, §§ 54.1, 55.2 (Supp. 1977)).

3. See OKLA. STAT. tit. 43A, §§ 54.1, 55.2 (Supp. 1977).

4. 411 F. Supp. 1113 (D. Haw. 1976). This case found the following procedural safeguards required by the due process clause in connection with the nonemergency, nonconsensual commitment of persons pursuant to mental health laws: adequate prior notice; prior hearing before a neutral judicial officer; the right to effective counsel; the right to be present at the hearing; right to confront witnesses and offer evidence; adherence to the rules of evidence used in criminal proceedings; the privilege against self-incrimination; a record of the proceedings; appellate review; consideration of the least restrictive alternative; and periodic review of the basis for confinement. *Id.* at 1127.

whether the requirements of due process have been satisfied. The United States Supreme Court has also entered some landmark decisions in the past few years. Possibly the most famous, *O'Connor v. Donaldson*,<sup>5</sup> dealt with the power of a state to confine a person for mental illness and the right to treatment upon confinement. The effect of this decision has been diluted somewhat because a settlement ended litigation after the case was remanded for reconsideration of money damages.

Following Oklahoma's 1977 amendments, many new procedures and practices have developed. It is hoped that a discussion of these procedures and practices, as they are interpreted and used in Tulsa County, may emphasize the areas of the law which have been improved and help point out problems which still exist in Oklahoma.

Any peace officer may now take an individual into "protective custody" and hold him under emergency detention, without first obtaining a court order.<sup>6</sup> The officer must execute an affidavit setting forth the grounds for such detention, which may be based upon personal observation, or upon the affidavit of some third person. The individual must be examined by a doctor within twelve hours, and if the doctor endorses the officer's affidavit, the individual may be held in a medical facility for a period not to exceed forty-eight hours. If a petition is filed within that time limit alleging that the individual is a "person requiring treatment,"<sup>7</sup> regular proceedings will commence and the individual may be detained longer by order of the court. If no petition has been filed within the specified time limit, the individual must be released.

The petition may be filed, with or without the "protective custody" procedure, by certain family members or other specific individuals,<sup>8</sup> asking the district court to determine whether a person is a "person requiring treatment." The court must immediately appoint two qualified examiners to examine the person,<sup>9</sup> and an attorney to represent him.<sup>10</sup> The attorney must meet and confer with the person within one day of such appointment, and he will represent the individual throughout all proceedings unless replaced by privately employed counsel under order of the court. The court also will enter an order setting the time and place of the examination and of the court hearing. Notice will be issued and

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5. 422 U.S. 563 (1975).

6. OKLA. STAT. tit. 43A, § 54.1(A)(2).

7. *Id.* at § 3(s).

8. *Id.* at § 54.1 (A)(1).

9. *Id.* at § 55.2(a).

10. *Id.* at § 55.2(b).

served personally upon the subject individual and upon certain specified persons and relatives.<sup>11</sup>

Detention pending examination is rather indefinite under the language of the statute.<sup>12</sup> A literal reading indicates that a detention order may be issued by the court, based on clear and convincing evidence, after the Examining Commission has executed a certificate of its findings. Such an interpretation negates any benefit to be obtained by detention. No difficulties have been encountered in holding a person for a court hearing following an examination by the commission. The difficulty is in ensuring his appearance at the examination, without permitting the person to harm himself or others, after receiving his notice of examination and court hearing. In Tulsa County, detention orders are issued at the time the petition is filed if necessity is shown. The court requires the sworn affidavit of a doctor or a peace officer, or the personal appearance and testimony of another individual, that clearly shows the necessity of detention. A medical facility must be used for detention unless there is a criminal charge pending against the person. In Tulsa, the Tulsa Psychiatric Center is used whenever possible, with Eastern State Hospital as an alternative place of detention. There have been objections to an interpretation of legislative intent that permits pre-examination detention, but there has yet been no appellate review of these objections.

Examinations are held at any medical facility where the person may be, or at the County Courthouse, but never in a courtroom or jail. The Examining Commission is required to obtain certain information for a statutory report and certificate.<sup>13</sup> They may consider any information coming before them, including statements by the petitioner or other persons appearing at the examination. The statute refers to "testimony under oath,"<sup>14</sup> but this is waived as impractical to administer. The attorney must attend the examination and ensure that the rights of his client are fully protected, but he is instructed not to interfere with the examination. Any objections or motions may be presented to the court after the examination has been completed. The reports of the examiners

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11. *Id.* at § 54.1(B)(8) (requiring that notice be served upon the parent, spouse, or in their absence, the next of kin, and the person with whom the subject resides).

12. *Id.* at § 55.2(a) provides in part that:

By virtue of the petition, certificate and a showing of both probable cause and urgent need of custody and treatment, the person alleged to be a person requiring treatment may be received and detained in a suitable medical facility prior to the hearing on the petition; provided that said period of temporary detention shall not exceed seventy-two hours, excluding Saturdays, legal holidays and other days when the district court is not in session.

13. *See id.* at § 55.2(c), (d).

14. *Id.* at § 55.2(c).

should include sufficient explanation to enable the court to determine the "least restrictive alternative for treatment which is appropriate."<sup>15</sup> For the first time, out-patient treatment may now be ordered, giving the court a most important tool. Until the 1977 amendments, there were only two possible orders: commitment and confinement in a hospital; or dismissal and release without treatment.

The alleged "person requiring treatment" has two choices if the examiners determine that he does require treatment. He may accept the diagnosis and recommendation of the examiners and submit to treatment; or, he may request a trial by jury. Non-jury trials are not conducted; it would seem incongruous for a judge to appoint two "qualified examiners" and then question their opinions and recommendation by conducting a non-jury trial. The deliberations and decision of a jury remove the possibility or even the appearance of judicial bias.

Juries are selected in the same manner and from the same panel as for other cases. Five concurring jurors may render a verdict. The trial is conducted under the Rules of Civil Procedure,<sup>16</sup> except the burden is on the state to prove beyond a reasonable doubt that the individual is a person requiring treatment.<sup>17</sup> Witnesses for the state and for the respondent, including the respondent, may be called, examined, and cross-examined as in other civil cases. On this basis, there can be no justification for a right to remain silent, such as exists in criminal proceedings. Also, what better witness could the examiners or jury have than the respondent himself? The state is represented by the district attorney, but until the present time his participation has been limited to actual trials. It is anticipated that in the near future he will assume his statutory role of interviewing petitioners and preparing petitions.<sup>18</sup>

If the respondent is found, by the jury, to be a person requiring treatment, or upon his waiver of a jury trial, the court must consider and select the least restrictive form of treatment which is appropriate.<sup>19</sup> This procedure presents a problem since the statutes do not define nor provide any methods of enforcement. The best procedure, so far devised, is to order out-patient treatment and to continue the case for some stated period of time. If, at the end of that time, the treating agency reports that the respondent has improved so that additional treatment is not required, the case can be dismissed. If the report shows progress but additional

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15. *Id.* at § 54.1(F).

16. OKLA. STAT. tit. 12, §§ 1-1771 (1971 & Supp. 1977).

17. OKLA. STAT. tit. 43A, § 54.1(C).

18. *Id.* at § 55.1.

19. *Id.* at § 54.1(F).

treatment needed, the case can be continued for another period. Should the respondent fail or refuse treatment, the court can then order commitment in a hospital. A necessary part of such procedure is the consent of the respondent and his attorney, and a waiver of any additional hearings in the event of an unfavorable report from the treating agency. In five attempts in Tulsa County, there have been two dismissals, two orders for continued treatment with the cases passed to later dates, and one hospital confinement.

In cases requiring hospitalization, relatives or friends may arrange for treatment in a local private hospital which has facilities for the care and treatment of the mentally ill.<sup>20</sup> If such arrangements are not requested, commitment will be in Eastern State Hospital at Vinita, Oklahoma.

Persons committed to the hospital will remain there until the superintendent determines that further hospitalization will not be beneficial. The patient may be released under several elections available to the superintendent. He may be released on convalescent leave, out-patient aftercare,<sup>21</sup> or by discharge with a Certificate of Competency executed by the superintendent.<sup>22</sup> If a patient is released on convalescent leave or out-patient aftercare, he must be given a new hearing before he can be returned to the hospital involuntarily. In *Lewis v. Donohue*,<sup>23</sup> section 73 of title 43A was declared unconstitutional. The decision in *Donohue* was apparently intended to invalidate only the lack of notice or opportunity to be heard in the reinstitutionalization procedure so as to require a totally new proceeding for commitment, almost as if the patient had never been hospitalized.<sup>24</sup> The language in *Donohue*, however, strikes down the entire section as unconstitutional, leaving a question as to the proper procedure for releasing a patient as well as for recommitting him. An interpretation of the opinion may now be that the only manner in which a patient may be released is under section 392 of title 43A; this raises another problem. Sections 391 through 394, deal with discharging a patient as mentally competent when there has been no determination of mental incompetency. Is it possible that the federal court, in its zeal to

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20. *Id.*

21. *Id.* at § 73.

22. *Id.* at § 392.

23. 437 F. Supp. 112 (W.D. Okla. 1977). This case involved a patient who had been involuntarily committed to a state hospital, was placed on outpatient after-care status and whose outpatient status was then revoked. The patient sought declaratory and injunctive relief challenging the recommitment on the grounds that she had a constitutionally protected interest in her conditional liberty, and the statute providing for revocation of outpatient or convalescent leave without notice or an opportunity to be heard prior to reinstitutionalization denied her due process.

24. *Id.* at 114.

protect against re-hospitalization under an already existing valid commitment order, has eliminated all provisions for the release or discharge of an involuntarily committed patient? Unless these uncertainties are resolved the system can be analyzed to have been better with the state courts exercising a little discretionary authority.

More confusion exists because of the language in the amended statute pertaining to competency.<sup>25</sup> In an effort to clarify rather hazy language in the prior statute, the legislature provided that "[n]o person admitted to any medical facility under a court order for treatment shall be considered or presumed to be mentally or legally incompetent"<sup>26</sup> by such admission. Legal competency, among other things, deals with one's ability to contract, to vote, and to transact business; the legislature intended to distinguish such competency from mental illness. One may suffer from a particular type of mental illness, yet be fully competent to handle his own affairs. It has been alleged that a patient, now presumed to be competent, has a right to refuse treatment. In a recent case in Tulsa County, it was held that the patient did not have the right to refuse, and the hospital was ordered to proceed with treatment. Since that decision is being appealed, it would be improper for the writer to discuss the matter further.

Still more confusion has arisen over the newly enacted confidentiality provision which states that mental health records "shall be open to public inspection only by order of the court to persons having a legitimate interest therein."<sup>27</sup> Abstractors, in particular, have been affected. Under a recent Attorney General opinion it now appears that abstractors have a "legitimate interest,"<sup>28</sup> and may have access to any cases filed prior to June 3, 1977, since incompetency was a matter included in those cases. Inasmuch as competency is no longer a part of mental health matters,<sup>29</sup> there appears to be no need for abstractors to certify to such matters after June 2, 1977, and they should now be allowed access only by special order of the court.

In summary, many improvements have been included in the latest amendments to Oklahoma's Mental Health Law. Some of the more important improvements are:

1. Emergency detention procedures have been provided and defined.<sup>30</sup>

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25. OKLA. STAT. tit. 43A, § 64 (Supp. 1977).

26. *Id.*

27. *Id.* at § 54.1 (H).

28. OKLA. ATTY. GEN. OP. 77-214, Oct. 24, 1977).

29. OKLA. STAT. tit. 43A, § 64 (Supp. 1977).

30. *Id.* at § 54.1(A)(2).

2. The definition of a "mentally ill person" has been changed to eliminate former vague and indefinite language.<sup>31</sup>
3. The basis for commitment for treatment is that the individual must be a "person requiring treatment"; a phrase that has been defined to require some element of danger.<sup>32</sup>
5. The court may order treatment without confinement and commitment to a hospital.<sup>33</sup>
6. Mental health court files are now confidential.<sup>34</sup>

Other major changes, which may be considered as improvements are:

1. A person admitted for treatment does not necessarily lose his competency.<sup>35</sup>
2. The burden of proof is now "beyond a reasonable doubt."<sup>36</sup>

Some of the remaining problems are:

1. The provisions for detention prior to examination are vague and incomplete.<sup>37</sup>
2. Time restrictions are too limited to be practical.<sup>38</sup>
3. The requirement for testimony to be given under oath at the examination by the Examining Commission is impractical.<sup>39</sup>
4. Provisions for enforcement of treatment other than commitment are lacking.
5. The right to refuse treatment by reason of competency, is questionable under present language.<sup>40</sup>
6. The expense of detaining persons in medical facilities and transporting them to and from such facilities is an ongoing problem.
7. The problems of convalescent leave, out-patient treatment and re-commitment remain unanswered.

Hopefully these problems will be solved in some future legislative session, but in spite of these weaknesses, Oklahoma can be proud of having one of the best Mental Health Laws in the nation, providing generally adequate protection for the individual and for society.

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31. *Id.* at § 3(c).

32. *Id.* at § 3(s).

33. *Id.* at § 54.1(F).

34. *Id.* at § 54.1(H).

35. *Id.* at § 64.

36. *Id.* at § 54.1(c).

37. *Id.* at § 55.2(a).

38. *Id.* at §§ 54.1(c), 55.2(b).

39. *Id.* at § 55.2(c).

40. *Id.* at § 64.