INVOLUNTARY MENTAL HEALTH COMMITMENT PROCEDURES - BACKGROUND MEMORANDUM

Section 6 of House Bill No. 1435 (2019) provides for a study of the state's civil commitment laws and procedures under North Dakota Century Code Chapters 25-03.1 and 25-03.2 and the behavioral health and civil justice systems to determine whether steps could be taken to prevent and decrease the incidence of violence committed by persons who are mentally ill.

BACKGROUND

Mental Illness Commitment Laws

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

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

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

Chapter 25.03.1 provides for commitment procedures for mentally ill and chemically dependent individuals. Section 25-03.1-02(13), however, specifically exempts an individual with an intellectual disability from the definition of mentally ill person:

> "Mentally ill person" or "person who is mentally ill" means an individual with an organic, mental, or emotional disorder that substantially impairs the capacity to use self-control, judgment, and discretion in the conduct of personal affairs and social relations. The term does not include an individual with an intellectual disability of significantly subaverage general intellectual functioning that originates during the developmental period and is associated with impairment in adaptive behavior, although an individual who is intellectually disabled may also be a person who is mentally ill. A substance use disorder does not per se constitute mental illness, although an individual with a substance use disorder may also be a person who is mentally ill.

Generally speaking, there are three reasons why an individual would be subject to involuntary civil commitment under modern statutes--mental illness, developmental disability, and substance addiction. In the case of mental illness, dangerousness to self or others defines the typical commitment standard, with almost all states construing the inability to provide for one's basic needs as dangerousness to self. In terms of process, every state provides for a hearing, the right to counsel, and periodic judicial review, while most states have statutory quality standards for treatment and hospitalization environment.

Voluntary Commitment Procedures

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

Involuntary Commitment Procedures

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

Petition for Involuntary Treatment

Section 25-03.1-08 provides any adult (the applicant) may present a petition for involuntary treatment of an individual (the respondent) to the state's attorney of the county where the respondent is located or to an attorney

retained by the applicant to represent the applicant through the proceedings. The petition must be verified by affidavit of the applicant and must contain assertions that the respondent requires treatment; detailed facts that are the basis of the assertion; and names, telephone numbers, and addresses of witnesses to those facts. To assist in completing the petition, the state's attorney may direct a qualified mental health professional designated by the regional human service center to investigate and evaluate the specific facts alleged by the applicant. The investigation must be completed as promptly as possible and include observations and conversations with the respondent, if possible. The state's attorney or the retained attorney is required to file a petition with the clerk of court if the information provided by the applicant or by the investigation provides probable cause to believe the respondent requires treatment. If the state's attorney determines insufficient grounds exist for filing a petition with the court, the state's attorney may refer the applicant to other community resources.

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

If the judge determines probable cause has been established, the respondent or the respondent's nearest relative or guardian, or if none, a friend of the respondent must be served with:

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

Court-Ordered Examination

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

Section 25-03.1-11 provides the respondent must be examined within a reasonable time by an expert examiner as ordered by the court. If the respondent is taken into custody under emergency treatment provisions, the examination must be conducted in accordance with Section 25-03.1-26. The examination report must be filed with the court and must contain:

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

Under this section, an evaluation of a respondent's physical condition may be made only by a licensed physician, physician assistant, or an advanced practice registered nurse. An evaluation of a respondent's mental status and an evaluation of whether the respondent is chemically dependent may be made only by a psychiatrist, psychologist, licensed physician, licensed physician assistant, or an advanced practice registered nurse.

If the examiner concludes the respondent does not require treatment, the court may terminate the proceedings and dismiss the petition. If the examiner concludes the respondent requires treatment, the court is to set a date for hearing. If the respondent is in custody and is alleged to be suffering from mental illness or a combination of mental illness and chemical dependency, the preliminary hearing must be within 4 days of the date the respondent was taken into custody. If a preliminary hearing is not required, the treatment hearing must be held within 4 days, exclusive of weekends and holidays, of the date the court received the examiner's report, not to exceed 14 days from the time the petition was served.

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

Notice of Hearings

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

Right to Counsel

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

Preliminary Hearing

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

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

Court-Authorized Involuntary Treatment

Section 25-03.1-18.1 authorizes the treating Tier 1b mental health professional (licensed physician, physician assistant, or advanced practice registered nurse), upon notice and hearing, to request authorization to treat a person under a mental health treatment order with prescribed medication. The treating psychiatrist and another licensed physician or psychiatrist not involved in the current diagnosis or treatment of the patient are required to certify the proposed prescribed medication is clinically appropriate and necessary to effectively treat the patient and the patient is a person requiring treatment, the patient was offered that treatment and refused it or the patient lacked the capacity to make or communicate a responsible decision about the treatment, the prescribed medication is the least restrictive form of intervention necessary to meet the treatment needs of the patient, and the benefits of the treatment outweigh the known risks to the patient.

Guardian Authorized Involuntary Treatment

Section 25-03.1-18.2 authorizes a treating physician assistant, psychiatrist, or advanced practice registered nurse to treat a patient with prescribed medication upon consent of the patient's guardian if the patient refuses treatment. The guardian's consent for involuntary treatment with prescribed medication may not be in effect for more than 90 days without receiving another recommendation. The patient also has the right to be free of the effects of medication at the preliminary or treatment hearing by discontinuing the medication no later than 24 hours before the hearing unless, in the opinion of the prescriber, the need for the medication still exists or discontinuation would hamper the patient's preparation for and participation in the proceedings.

Involuntary Treatment Hearing

Section 25-03.1-19 provides the involuntary treatment hearing, unless waived by the respondent, must be held within 14 days of the preliminary hearing. If the preliminary hearing is not required, the involuntary treatment hearing must be held within 4 days, exclusive of weekends and holidays, of the date the court received the examiner's report. The hearing must be held in the respondent's county or in the county where the State Hospital or treatment facility treating the respondent is located. At the hearing, evidence in support of the petition must be presented by the state's attorney, private counsel, or counsel designated by the court. The petitioner and the respondent must be afforded an opportunity to testify and to present and cross-examine witnesses. The court may receive the testimony of any other interested person. There is a presumption in favor of the respondent and the burden of proof in support of the petition is upon the petitioner. If, upon completion of the hearing, the court finds the petition has not been sustained by clear and convincing evidence, the court is to deny the petition, terminate the proceeding, and order the respondent to be discharged if the respondent was hospitalized before the hearing.

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

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

Alternatives to Hospitalization

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

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

Emergency Commitment Procedures

Section 25-03.1-25 provides when a peace officer, physician whether in person or directing an emergency medical services professional, psychiatrist, physician assistant, psychologist, advanced practice registered nurse, or mental health professional has reasonable cause to believe an individual requires treatment and there exists a serious risk of harm to that person, other person, or property of an immediate nature that considerations of safety do not allow preliminary intervention by a judge, the peace officer, physician, psychiatrist, psychologist, or mental health professional, using the screening process set forth in Section 25-03.1-04, may cause the person to be taken into custody and detained at a treatment facility, which includes any hospital, including the State Hospital, and any public or private treatment facility without an immediate examination and without following hearing requirements for a transfer.

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

Transportation Expenses

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

RESIDENTIAL TREATMENT CENTERS FOR CHILDREN

Chapter 25-03.2 was enacted in 1989 and revised by Senate Bill No. 2130 (2007) to specify the chapter relates to psychiatric residential treatment facilities. Section 25-03.2-01(7) provides a definition of a "psychiatric residential treatment facility for children" as:

> [A] facility or a distinct part of a facility that provides to children a total, twenty-four hour, therapeutic environment integrating group living, educational services, and a clinical program based upon a comprehensive, interdisciplinary clinical assessment, and an individualized treatment plan that meets the needs of the child and family. The services are available to children in need of and able to respond to active psychotherapeutic intervention and who cannot be effectively treated in their own family, in another home, or in a less restrictive setting. The facility must meet the requirements of a psychiatric residential treatment facility as set out in title 42, Code of Federal Regulations, part 483.352.

Section 25-03.2-01(8) further defines "residential treatment" as "a twenty-four hour a day program under the clinical supervision of a mental health professional, in a community residential setting other than an acute care hospital, for the active treatment of mentally ill persons." For purposes of Chapter 25-03.2, "child" or "children" means "a person or persons under the age of twenty-one."

Licensure

Sections 25-03.2-02 and 25-03.2-03 set forth the licensing requirements for the operator and operation of a psychiatric residential treatment facility for children. Section 25-03.2-05 dictates a license to operate a psychiatric residential treatment facility for children must specify the name of the licensee, the premises to which the license is applicable, the number of children who may be received in the premises at any one time, and the date of expiration of the license.

Section 25-03.2-08 authorizes the Department of Human Services (DHS) to revoke a license or deny an application if:

1. Any requirement and condition of this chapter for the issuance of a license is not met, or has ceased to be met;
2. The license was issued or requested upon fraudulent or untrue representations;
3. The owner or operator has violated any rule of DHS; or
4. The owner, operator, or an employee of the facility is or has been found guilty of an offense determined by DHS to have a direct bearing on the person's ability to serve as an owner, operator, or employee, or DHS determines, following conviction of an offense, that the person is not sufficiently rehabilitated under Section 12.1-33-02.1.

Section 25-03.2-09 requires written reasons for a revocation or denial and entitles a licensee or applicant a hearing, upon request, before DHS within 10 days after the charges are provided.

Moratorium

Section 25-03.2-03.1 sets forth a moratorium on bed capacity of psychiatric residential treatment facilities for children unless a needs assessment conducted by DHS indicates a need for the licensing of additional bed capacity.

Method of Providing Services

Section 25-03.2-07 requires a psychiatric residential treatment facility for children to provide for the development of an individual treatment plan, based upon a comprehensive interdisciplinary diagnostic assessment, which includes the role of the family, identifies the goals and objectives of the therapeutic activities and treatment, provides a schedule for accomplishing the therapeutic activities and treatment goals and objectives, and identifies the individuals responsible for providing services, consistent with the individual treatment plan, to children.

PREVIOUS STUDIES

1991-92 Through 1997-98 Interims

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

2001-02 Interim

During the 2001-02 interim, the interim Judiciary A Committee studied commitment procedures for individuals with mental illness. The committee recommended Senate Bill No. 2045 (2003) to reduce the number of days within which a mental health preliminary hearing or a treatment hearing is to be held from 7 to 4. The bill was passed.

2003-04 Interim

The 2003-04 interim Budget Committee on Government Services studied the needs of individuals with mental illness, drug and alcohol addictions, and physical or developmental disabilities. The committee reviewed services available for individuals with developmental disabilities, the community-based system of care for persons with mental illness or substance abuse disorders, and in the impact of methamphetamine use on state programs. The committee made no recommendation as a result of this study.

2007-08 Interim

During the 2007-08 interim, the Commission on Alternatives to Incarceration received reports from DHS regarding substance abuse treatment programs and mental health intervention programs provided by the department. The commission also received reports regarding the progress of implementation of the Cass County Justice and Mental Health Collaboration Project. The report indicated the program was intended to provide a mental

health assessment of an individual who has been arrested to determine if a mental health issue may be an underlying cause of the individual's criminal behavior.

The commission encouraged the Governor and DHS to allow the Robinson Recovery Center to address treatment needs for addictions other than the treatment of methamphetamine addiction. The commission expressed its support for the efforts of DHS and encouraged the department to provide broader residential treatment services for addictions and mental health issues on a statewide basis.

2009-10 Interim

In its study of the state's mental health commitment procedures and the availability of psychiatric services in the state, the Judicial Process Committee received extensive testimony from the State Hospital, regional human service centers, Mental Health America of North Dakota, the Protection and Advocacy Project, psychiatrists, psychologists, state's attorneys, a district judge, a private attorney, law enforcement, and private citizens who have been involved in the mental health commitment process. The committee's deliberations focused on two issues--statutory time limitations on patient holds and related issues and the availability of psychiatric services in the state.

The committee recommended two bills, Senate Bill No. 2040 (2011) clarified an evaluation of a respondent's mental health status can be done by an expert examiner and Senate Bill No. 2041 (2011) ensured services could be provided through telemedicine. Both bills were passed.

INVOLUNTARY COMMITMENT CASE LAW

Olmstead v. L.C., 527 U.S. 581 (1999), is a United States Supreme Court case regarding discrimination against people with mental disabilities. In this case, the Court held under the federal Americans with Disabilities Act, 42 U.S.C. 126, individuals with mental disabilities have the right to live in the community rather than in institutions if, in the words of the opinion of the Court, "the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." The case was brought by the Atlanta Legal Aid Society, Inc.

In this case the Court decided mental illness is a form of disability and "unjustified isolation" of a person with a disability is a form of discrimination under Title II of the Americans with Disabilities Act. The Court held community placement is only required and appropriate when "[a] the State's treatment professionals have determined that community placement is appropriate, [b] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and [c] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities."

About 10 years after the Olmstead decision, the State of Georgia and the United States Department of Justice (DOJ) entered a settlement agreement to cease all admissions of individuals with developmental disabilities to state-operated, federally licensed institutions ("State Hospitals") and, by July 1, 2015, "transition all individuals with developmental disabilities in the State Hospitals from the Hospitals to community settings," according to a DOJ fact sheet about the settlement. The settlement also called for serving 9,000 individuals with mental illness in community settings.

Other entities and jurisdictions also have reached settlement agreements with DOJ regarding the Olmstead decision, including United Cerebral Palsy of Oregon and Southwest Washington (2015), Marion County Nursing Home District in Missouri (2013), Laguna Honda Hospital and Rehabilitation Center in San Francisco (2008), Rhode Island (2014), New Hampshire (2014), New York (2013), Texas (2013), Virginia (2012), Delaware (2010), North Carolina (2012), Nebraska (2008), and Puerto Rico (1999). The settlement agreements were reached as a result of complaints or suits filed in the various jurisdictions while others were the result of findings letters issued directing the entity or jurisdiction to comply with the Olmstead decision. On May 2, 2016, DOJ issued a letter to the Governor of South Dakota with the results of an investigation of South Dakota's system of care for individuals with disabilities who receive services and supports in nursing facilities does not comply with Title II of the Americans with Disabilities Act of 1990 as interpreted in *Olmstead v. L.C.* On July 1, 2019, closing arguments were made in the United States District Court for the Southern District of Mississippi in *United States v. Mississippi*, a case in which DOJ asserts the State of Mississippi is in violation of *Olmstead v. L.C.* for failing to ensure the state's mental health system upholds the civil rights of those with mental illnesses.

In 2010, in the case of *In re F.C. III,* 2 A.3d 1201 (PA 2010), a minor sought the review of a county court order committing him to involuntary drug and alcohol treatment. The Pennsylvania Supreme Court held the statute permitting a parent or guardian to petition for commitment of a minor to involuntary drug and alcohol treatment

services did not violate due process protections required by the 14th Amendment and the minor's due process rights were not violated by virtue of his shackling, restraint, and detention during the hearing on the petition.

SUGGESTED STUDY APPROACH

In its study of the state's civil commitment laws and procedures under Chapters 25-03.1 and 25-03.2 and the behavioral health and civil justice systems, the committee may consider inviting representatives of DHS and the State Hospital, the judiciary, the North Dakota State's Attorneys' Association, and mental health professionals to provide testimony regarding the involuntary commitment procedures and whether steps could be taken to prevent and to decrease the incidence of violence committed by persons who are mentally ill. The committee should prepare recommendations, together with any legislation required to implement the recommendations, to the 67th Legislative Assembly.