PROPOSED LEGISLATION REGARDING ADMISSIONS TO MENTAL-HEALTH INSTITUTIONS

Mary Southwick*

INTRODUCTION

History of the Draft

This draft is the result of an ongoing study which was initiated in October of 1966 by the Wisconsin Legislative Council, a legislative service organization for the State of Wisconsin. The study took two interims between legislative sessions to complete and it served as a basis for a bill which was introduced in the 1969 Session.[1] The bill was amended and passed by the Senate, but did not receive consideration in the Assembly. In the 1971 session a similar bill was introduced. A substitute amendment[2] to this latter bill was introduced in order to increase due process protections in the involuntary commitment procedure. This substitute bill was acted on favorably by the Assembly but did not receive final action by the Senate prior to adjournment. Following adjournment, a three judge federal panel of the Eastern District of Wisconsin found Wisconsin's present commitment procedures to be unconstitutional in Lessard v Schmidt, 71-C-602 (E.D. Wisc. 1972). The substitute amendment

*Staff Attorney, State Bureau of Planning and Budget, Department of Administration, State of Wisconsin.

had suggested some of the procedures outlined by the court in Lessard, supra, and several new procedures were also suggested. This draft has been developed independently of the Legislative Council, but reflects all of the previous drafts prepared by it and also reflects the new requirements of Lessard v. Schmidt supra.

Focus of the Draft

The conditions under which an individual can be deprived of freedom without the protection inherent in the criminal process vary greatly from state to state. All of the state statutes, however, can be analyzed as following either the medical or legal model. Those adhering to the medical model assume the presence of a disease rather than its absence. The assumed presence justifies the administering of treatment and, following commitment, guarantees the right to treatment.[3] The legal model assumes that one is "innocent until proven guilty" -- that one is not found mentally ill until presentation of objective facts; that a hearing weighed by a designated standard of proof justifies the finding.

All statutes authorizing mental commitment incorporate parts of both the medical and legal models. The draft presented here is no exception. The draft does, however, represent a concerted effort to recognize both the need for treatment and the need for

constitutional protections.

Incorporated in the draft is the requirement that an individual must be afforded the essentials of due process before he can be involuntarily treated or committed to an institution. At the same time, a wide range of treatment is required to be available on a voluntary basis. While these two requirements appear at times to be in conflict, an attempt is made in the proposed draft to reconcile the possible conflict by requiring due process protections in the involuntary commitment procedure, by liberalizing the voluntary admission process, and by encouraging the development of a wide range of treatment alternatives.

The proposed draft presented here is part of a Comprehensive Mental Health Act. The comprehensive act (which is over 90 pages) deals with admission procedures; development and administration of mental health services, including out-patient treatment; and funding. All of these elements must exist in a mental health act to have a comprehensive program for mental health services. Each item, however, can be discussed separately. In this draft the admissions procedures to mental health facilities are enumerated.

While statutory authorization for the development of a wide range of treatment alternatives is not in this draft, a range of alternatives is indispensable to the effective use of due process requirements for

mental commitment. Requiring alternatives to institutionalization to be considered prior to commitment has no effect if treatment alternatives do not exist. This draft, therefore, assumes statutory authorization and development of both public and private treatment alternatives to institutionalization.

A procedure for establishing the need for protective services for adults is also needed. Under the proposed draft, the infirm and other persons not capable of caring for themselves cannot be committed to a mental health facility. While these persons are in need of care, it is not appropriate to provide this care in a mental health facility. A separate protective services act dealing with guardianship and the rights of persons must also be developed.

The draft is done in model act form. Along with the other portions dealing with community alternatives, administration and funding, it will be presented for consideration by the Wisconsin 1973-74 session. At the time of this printing, the comprehensive act was in the final drafting stages prior to introduction. A protective services act is also in the process of being developed.

CHAPTER

MENTAL HEALTH

SUBCHAPTER I.

MENTAL HEALTH ACT

SECTION 1. DEFINITIONS.

DEFINITIONS. For purposes of this act:

(1) "Alcoholic" means a person who chronically and habitually consumes alcoholic beverages to the extent that it substantially interferes with his health or with his social or economic functioning.

(2) "Drug dependent" means a person who chronically and habitually uses narcotic or dangerous drugs to the extent that it substantially interferes with his health or with his social or economic functioning.

(3) "Emergency treatment" means medical services administered to sustain life which if not administered are likely to result in death.

(4) "Institution" means any facility which provides 24 hour inpatient treatment for alcoholics, drug dependents, mentally ill or retarded persons.

(5) "Mental illness" means an abnormal condition of the mind that substantially interferes with the individual's health or with his social or economic functioning.

(6) "Mental retardation" means mental retardation as defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of

managing himself and his affairs, but does not include mental illness.

(7) "Superintendent" means the person in charge of county hospital, treatment center or approved private facility.

(8) "Treatment" means those psychological, educational, chemical, or physical techniques designed to bring about rehabilitation of a mentally ill, alcoholic drug dependent or mentally retarded person.

SECTION 2. VOLUNTARY ADMISSION.

VOLUNTARY ADMISSION. (1) APPLICATION; PROCEDURE.

(a) Any person desiring admission to a state or county mental hygiene facility may be admitted upon application filed with the superintendent supported by a certificate of a psychiatrist or a licensed clinical psychologist or a physician if psychiatrists or licensed clinical psychologists are not available. The certificate shall be based upon personal observation of the individual and shall be dated not more than 10 days prior to the filing of the application.

(b) At the time of application the individual shall be informed verbally and in writing of his right to leave at any time during the day-shift hours upon written application filed with the superintendent. A copy of patients' rights under section 13 shall be given to the individual at the time of admission.

(c) A person against whom an involuntary petition

has been filed may agree to become a patient under this section. Upon filing of the application with the court the court shall determine if the application is voluntary and upon making the finding shall dismiss the petition.

(2) ADMISSION OF MINORS; SPECIAL PROVISIONS.

(a) Unless otherwise provided under par. (d), the application for voluntary admission of minors over 14 shall be executed by the minor and his parent, guardian or person in loco parentis. If the applicant is a minor under 14 years of age, the application shall be executed by his parent, guardian or person in loco parentis.

(b) A minor may be admitted immediately upon the filing of an application under sub. (1). Within 3 days of the minor's admission, the superintendent shall file a petition for review of the juvenile court in the county of residence of the parent, guardian or person in loco parentis. A copy of the petition shall be served on the minor and his parents, guardian or person in loco parentis. Within 5 days of the application for admission the juvenile court shall determine upon clearly recorded evidence the minor's consent to voluntary admission and his need for institutionalization at that facility. The juvenile court shall appoint a guardian ad litem for the child and may order a hearing to review the application. After

conclusion of the review or hearing held under this paragraph, the court may order voluntary admission, a hearing under section 4, placement in foster care, social service supervision, other outpatient treatment, or dismissal of the application.

(c) If a minor is admitted while under 14 years of age and if upon reaching age 14 is in need of further care and treatment, the superintendent shall request the minor to apply for voluntary admission in his own behalf. This paragraph does not apply to minors admitted under par. (d).

(d) In the case of a minor alleged to be mentally retarded, the application shall be executed by his parent, guardian, or person in loco parentis and shall be made for a facility designated as serving the mentally retarded.

(e) Each application under this subsection shall be accompanied by a report of medical and psychological examination which contains a recommendation that the individual needs care provided by the institution.

SECTION 3. EMERGENCY DETENTION.

EMERGENCY DETENTION

(1) A sheriff or law enforcement official may take into custody for up to 48 hours an individual whom he has probable cause to believe is mentally ill, mentally retarded, an alcoholic or a drug dependent, exhibits conduct which constitutes an extreme likeli-

hood of substantial physical harm to himself or others, and is in immediate need of emergency treatment.

(2) A licensed physician or clinical psychologist may authorize an individual to be taken into custody for up to 48 hours if he has probable cause to believe the individual is mentally ill, mentally retarded, an alcoholic or a drug dependent, exhibits conduct which constitutes an extreme likelihood of substantial physical harm to himself or others and is in immediate need of emergency treatment.

(3) A person who is taken into custody under this section may be detained in the following places:

(a) In a state or county hospital, mental health center or treatment center if suitable facilities are available and the superintendent or his agent determine detention is necessary.

(b) In an approved private facility, if it will agree to detain him and if the county board has contracted for this service.

(c) In the county jail, for 48 hours, if facilities under pars. (a) and (b) do not exist in the county.

(4) Not later than 48 hours after the person is taken into custody, the detaining officer or certifying physician or psychologist shall file a report of the detention with the judge of a court of record. If the person remains in detention 48 hours after being

taken into custody, the detaining officer or certifying physician or psychiatrist shall proceed as provided under section 4. The petition shall be based upon personal knowledge of the detained individual's conduct.

(5) Only emergency treatment may be provided during detention. The individual may consent to other treatment but only after he has been informed of his right to refuse treatment and has signed a written consent to such treatment.

SECTION 4. INVOLUNTARY COMMITMENT.

INVOLUNTARY COMMITMENT FOR INSTITUTIONALIZATION OR OTHER TREATMENT.

(1) PETITION FOR EXAMINATION.

(a) Every written petition for examination shall allege that the individual to be examined is:

1. Mentally ill, mentally retarded, an alcoholic or a drug dependent;

2. Exhibits conduct which constitutes an extreme likelihood of immediate substantial physical harm to himself or to others; and

3. Is a proper subject for treatment.

(b) Except for petitions signed under section 3, each petition for examination shall be signed by 3 persons 18 years of age or older, having personal knowledge of the conduct of the individual, at least one of whom shall be a resident of this state and one of the following:

1. A person with whom the individual resides or at whose home he may be;

2. A parent or guardian, custodian, person in loco parentis, child, spouse, brother, sister or friend of the individual; or

3. A public welfare or health officer if none of the persons specified in subds. 1 and 2 are present within the state.

(c) The petition shall contain the names and post office addresses of the petitioners and their relation to the individual, the individual's spouse, adult children, parents or guardian, custodian, brothers, sisters, person in loco parentis and person with whom the individual resides or lives. If this information is unknown to the petitioners, the petition shall so state. The petition may be to the county court either of the county in which the individual is a resident or of the county where he is present. If the judge of the county court is not available, the application may be made to any court of record of the county. The petition shall contain a clear and concise statement of the facts which give rise to probable cause to believe the allegations of the petition. The petition shall contain personal knowledge and shall be sworn to be true.

(d) A petition under section 3 need be signed only by the detaining officer or certifying physician or

clinical psychologist.

(2) PETITIONERS; REPRESENTATION. The district attorney or, if designated by the county board the corporation counsel, shall represent the interests of the public and the petitioners in the conduct of all proceedings under this chapter. When a probable cause determination has been made after a hearing under sub. (6), the district attorney or corporation counsel shall proceed with the petition.

(3) RECORDS OPEN. The files and records of the court proceedings under this chapter shall be open unless the individual, his attorney or guardian ad litem request them to be closed.

(4) NOTICE; GROUNDS FOR COMMITMENT.

(a) Prior to the probable cause hearing, the individual shall be informed of the basis for his detention, his right to an attorney, right to a jury trial and the standard upon which he may be committed under this section. He shall also be given a copy of the petition.

(b) Within a reasonable time after the probable cause hearing, the district attorney or the corporation counsel shall notify the individual, his attorney, and guardian ad litem of persons who may testify in favor of his commitment and the substance of their proposed testimony. Counsel shall have access to all psychiatric and other reports and failure to

provide access to these reports shall result in their exclusion at the hearing under sub. (8).

(5) NOTICE OF PROCEEDINGS. The individual, his counsel and guardian ad litem shall receive notice of all proceeding under this section. The guardian ad litem appointed under par. (6)(c) shall receive notice of his appointment at least 72 hours prior to the day set for hearing under sub. (8). The court shall designate one or more of the persons mentioned in sub. (1) or any person the individual may designate to receive notice of the hearing. The notice may be served either personally at least 24 hours prior to the hearing or by registered mail, mailed at least 4 days prior to the hearing.

(6) PROBABLE CAUSE HEARING; EXAMINATION.

(a) After the filing of the petition under sub. (1), if the individual is detained under section 3, within 48 hours of the detention the court shall hold a hearing of record to determine whether there is probable cause to believe the allegations made under par. (1)(a). At the request of the individual, his counsel or guardian ad litem, the hearing may be postponed for three days and may be postponed for an additional four days, but in no case shall the postponement exceed seven days.

(b) If the individual is not detained, the court shall hold a hearing of record within a reasona-

ble time of the filing of the petition, to determine whether there is probable cause to believe the allegations made under par. (1)(a).

(c) At the time of the filing of the petition the court shall appoint counsel if the individual is indigent. At the probable cause hearing the court shall appoint a guardian ad litem for the individual if he is not represented by counsel.

(d) If the court determines that there is probable cause to believe such allegations, it shall schedule the matter for a hearing of record within ten days. If the individual is not detained under sub.(7), the hearing may be scheduled within a reasonable time of the probable cause hearing. The hearing shall be held at the courthouse unless waived by the individual, his counsel and guardian ad litem.

(e) Not later than the probable cause hearing the court shall appoint two licensed psychiatrists, clinical psychologists, or physicians if neither psychiatrists or psychologists are available, to personally examine the individual, one of whom may be selected by the individual. The court may deny the selection by the individual if the selected physician, psychiatrist or psychologist is not available. The examiners shall not be related to the individual by blood or marriage. Prior to the examination the individual shall be informed that his statement can be

used as a basis for commitment and that he does not have to speak to the examiners. The examiners shall personally observe and examine the individual at any suitable place and satisfy themselves as to his condition, and shall make independent reports to the court within seven days of their appointment. Each report shall contain the examiners' conclusions, the reasons for them and other relevant information that he has acquired.

(7) DISPOSITION PENDING HEARING. If after presentation at the probable cause hearing, it appears that the individual exhibits conduct which constitutes an extreme likelihood of immediate substantial physical harm to himself or to others, and is in immediate need of emergency treatment, the court may issue a detention order and the individual may be detained in the following places:

(1) In a state or county hospital, mental health center, or other public facility or other treatment center;

(2) In an approved private facility, if the facility agrees to detain the individual;

(3) If no facilities under subds. 1 and 2 exist in the county, the court may direct detention in a county jail, approved by the department for that purpose, for no longer than 48 hours.

(8) HEARING REQUIREMENTS. The hearing required

to be held under this section shall conform to the essentials of due process and fair treatment including the right to an open hearing, the right to counsel, the right to confront petitioner, present and cross-examine witnesses and a jury if requested under section 6.

(9) JUVENILES; PLACE OF HEARING. For minors, the hearing held under this section shall be in the juvenile court.

SECTION 5. COURT'S DECISION

COURT'S DECISION. At the conclusion of proceedings under section 4, the court shall determine if beyond a reasonable doubt the individual:

(1) Is mentally ill, mentally retarded, an alcoholic or a drug dependent;

(2) Exhibits conduct which conducts an extreme likelihood of immediate substantial physical harm to himself or to others; and

(3) Is a proper subject for treatment.

SECTION 6. JURY TRIAL

JURY TRIAL.

(1) If before involuntary commitment a jury is demanded by the individual against whom a petition has been filed under section 4 or by his counsel or guardian ad litem, the court shall direct that a jury of six people be drawn to determine if the individual:

(a) Is mentally ill, mentally

retarded, an alcoholic or drug dependent;

(b) Exhibits conduct which constitutes an extreme likelihood of immediate substantial physical harm to himself or to others; and

(c) Is a proper subject for treatment.

(2) The procedure shall be substantially like a jury trial in a civil action. No verdict shall be valid or received unless agreed to and signed by at least five of the jurors.

The court shall submit to the jury the following form of verdict:

STATE OF _____

. . . . . County

Members of the Jury:

(a) Do you find from the evidence beyond a reasonable doubt that the individual . . . (Insert his name) . . . is mentally ill, mentally retarded, an alcoholic or a drug dependent? Answer "Yes" or "No."

Answer: . . . (Signatures of jurors who agree)

(b) Do you find from the evidence that the individual . . . (insert his name) . . . beyond a reasonable doubt exhibits conduct which constitutes an extreme likelihood of immediate substantial physical harm to himself or others? Answer "Yes" or "No."

Answer: . . . "Signatures of jurors who agree)

(c) Do you find from the evidence that the individual beyond a reasonable doubt is a fit subject

for treatment: Answer "Yes" or "No."

Answer: . . . (Signatures of jurors who agree)

SECTION 7. DISPOSITION

DISPOSITION.

(1) At the conclusion of proceedings under section 4 or 5 the court shall:

(a) Dismiss the petition if the allegations under section 4 sub. (1) have not been proven beyond a reasonable doubt.

(b) Order commitment in a private or public institution authorized by the department to receive and treat either alcoholics, drug dependents, mentally ill or mentally retarded persons for up to one year if the allegations under section 4, sub. (1) are proven beyond a reasonable doubt and if the court finds beyond a reasonable doubt:

1. All reasonable alternatives to institutionalization have been considered; and

2. Alternatives to institutionalization for up to one year if the allegations under section 4, sub. (1) are proven beyond a reasonable doubt.

(2) Prior to issuance of an order under pars. (1)(b) & (c) the court may order an investigation into the treatment available for the individual and may order the individual detained for up to 48 hours pending a decision under this section.

(3) Before a private institution can be used for treatment under par. (1)(b) the county board shall have contracted with that institution to provide such services.

SECTION 8. APPEAL

APPEAL.

(a) FROM COUNTY COURT. Within five days after the date of mailing of notice of entry of judgment, as indicated in the case docket, an appeal from any final judgment under this chapter may be taken to the circuit court by any party to the action or proceedings, upon filing with the clerk of court which tried the case a notice of appeal signed by appellant or his attorney, and serving a copy of such notice on all parties bound by the judgment who appeared in the action or their attorneys. Execution may be stayed under ch. 274. Within 40 days after notice of appeal is filed the appellant shall file with the clerk of court a transcript of the reporter's notes of the hearing. The appellant shall pay the costs of preparing the transcript.

(2) WHERE HEARD IN CIRCUIT COURT. If the action was heard in circuit court under section 4, par. (1)(b), appeals shall be taken to the supreme court.

(3) CLERK TO MAKE RETURNS. Within ten days after the transcript is filed with the clerk, the clerk shall return the case file and transcript to the

circuit court and shall notify the parties of such filing.

(4) CIRCUIT COURT POWER ON APPEAL. On appeal, the circuit court has power similar to that of the supreme court to review and to affirm, reverse or modify the judgment appealed from. In addition, the circuit court may order a new hearing in whole or in part, which shall be in the county court.

(5) MOTIONS IN APPELLATE COURT. At any time after the filing in the circuit court of the return on an appeal, any party to the action or proceeding, upon notice, may move that the judgment appealed from be affirmed, or modified and affirmed as modified, or that the appeal be dismissed, or may move for a new hearing or a reversal. This motion shall state concisely the grounds upon which it is made and shall be heard on the record.

SECTION 9. HEARING ON CONTINUED COMMITMENT.

HEARING ON CONTINUED COMMITMENT. Prior to the expiration of a commitment order the superintendent shall determine if the individual is in further need of treatment and a fit subject for commitment under section 4. If so, he shall file a petition under section 4. The individual shall be afforded the same rights as provided in sections 4 to 8 except that a probable cause hearing need not be held. If a petition is filed under this section, the hearing under section

4. sub (8) shall be held prior to the expiration of the commitment order.

SECTION 10. RIGHT TO REEVALUATION

RIGHT TO REEVALUATION.

(1) Every patient institutionalized under section 7 shall be reevaluated by the medical staff or visiting physician for the purpose of determining whether the patient has made sufficient progress to be entitled to release or discharge:

(a) Within 30 days after admission; and

(b) Within 6 months after initial reevaluation;

(2) The findings of each reevaluation shall be written and placed with his hospital record and a copy sent to the committing court. The court shall review each report submitted to it and may on its motion hold a hearing under section 7.

SECTION 11. DISCHARGE AND RELEASE

DISCHARGE AND RELEASE.

(1) If an individual is no longer: mentally ill, mentally retarded, an alcoholic or a drug dependent; exhibits conduct which constitutes an extreme likelihood of immediate substantial physical harm to himself or others; and an appropriate subject for treatment, the superintendent shall discharge the individual.

(2) The superintendent shall issue a release for treatment other than institutionalization if other

suitable treatment is available. A release shall contain reasonable conditions of release.

(3) An order for release shall be supported by a certificate from a licensed psychiatrist, clinical psychologist or physician if psychiatrists or psychologists are not available. A copy of the order shall be filed with the court of commitment.

(4) A release can be withdrawn if the superintendent finds after administrative hearing, the terms of the release have been violated. A copy of the order withdrawing a release shall be filed with the court of commitment.

(5) The court shall hold a hearing on withdrawal of a release if the individual files a petition under section 12. The court may hold a hearing on withdrawal of a release on its own motion.

SECTION 12. COURT REVIEW

COURT REVIEW

(1) Any individual involuntarily committed for institutionalization or other treatment under this chapter may petition the court for modification of the order or for review of the withdrawal of a release.

(2) The person providing the treatment ordered under section 7, par. (1)(c) may petition the court for modification of the order. The court shall proceed as provided in section 7.

(3) The court shall hold a hearing on all

petitions filed under this section except for petitions filed less than 30 days after a prior petition for review of the same order. The court may hold a hearing on any petitions filed under this section.

(4) The hearing held under this section shall be as provided in section 4, par. (8) and section 7.

SECTION 13. PATIENTS RIGHTS

PATIENTS RIGHTS.

(1) Each patient admitted or committed under this chapter shall:

(a) Upon admission or commitment be informed orally and in writing of his rights under this section;

(b) Have all communications addressed by him to the governor, attorney general, judges of courts of record, district attorneys, the department or attorneys forwarded at once to the addressee without examination. Communications from such officials and attorneys shall be delivered to the patient without examination;

(c) Have the right to petition the court for review of the commitment order or withdrawal of a release.

(d) Have the right to receive treatment;

(e) Have the right to refuse treatment;

(f) Consent in writing to lobotomy or electro-shock treatment;

(g) Have reasonable access to telephones and letter writing materials, including stamps;

(h) Be permitted to send and to receive letters and to make and receive telephone calls within reasonable limits;

(i) Be permitted to use and wear his own clothing and personal articles;

(j) Be provided with individual storage space for his private use;

(k) Have reasonable protection of his privacy in such matters as toileting and bathing; and

(l) Be permitted to see visitors each day.

(2) Except for rights guaranteed under par. (1)(a) to (f) a patients rights may be denied after review by the superintendent and a hearing held within the institution.

(3) Before rights under par. (1)(e) and (f) can be denied, the superintendent shall apply to the court for a hearing on the need for a specific treatment. The court shall schedule a hearing of record as soon as is practicable.

SECTION BY SECTION ANALYSIS

SECTION 1.

The definitions used in the act are intended to make the maximum number of individuals eligible for treatment and apply to both inpatient and outpatient

treatment. The due process protection against involuntary treatment or commitment are dealt with separately in section 4.

The intent of Paragraph (1) is to define any person as an alcoholic if the person has a drinking problem. The stage at which drinking becomes a problem is defined using critical words of degree which include: "chronically" and "habitually" and "substantially interferes."

In Paragraph (2) a drug dependent person is defined with the same standards as used for alcoholics.

In Paragraph (3) emergency treatment is defined and authorized during emergency detention pending a commitment hearing. The definition is very restrictive for two reasons: first, the individual has neither consented to nor been found, after court hearing, to require treatment; and, second, much of the chemical treatment provided dulls the senses, which can cause a problem if the individual wishes to oppose commitment and prepare a defense at the commitment proceeding.

Paragraph (4) is self-explanatory.

Paragraph (5) defines mental illness in terms of a condition that interferes with the individual's functioning in society. The requirement that the condition "substantially interfere" guarantees that those persons whose health, social or economic functioning is impaired to some <u>significant degree</u> are eligible to

receive treatment.

Paragraph (6) is self-explanatory.

Paragraph (7) is self-explanatory.

The intent of paragraph (8) is to define treatment in terms of a wide variety of mental health services provided on both an inpatient, outpatient and clinical service basis which, in the appropriate circumstance, can include social services. Conspicuous by its absence, is a reference to detention which alone does not constitute treatment. Institutionalization can be a form of treatment, but only when alternatives to institutionalization are not suitable or available. (See section 7) Emergency treatment is defined separately in paragraph (3).

SECTION 2.

The general intent of this section is to encourage voluntary rather than involuntary admissions to mental health facilities. There are, therefore, no legal consequences of admission such as presumptions of incompetency or elaborate legal procedures to effect a release. The purpose of this section is also to encourage the use of the best treatment source available for the individual and to use inpatient treatment sparingly. To accomplish this the section requires certain medical certificates and in some instances, judicial review of the voluntary admission application.

In Paragraph (1) the general procedure followed

in a voluntary application is enumerated. An application must be accompanied by a certificate of psychiatrist or clinical psychologist or other physician if neither the psychiatrist or clinical psychologist is available. The certificate is intended to act as a screening mechanism to guarantee that the individual will benefit from the treatment provided by voluntary admission to the institution.

In sub-paragraph (1)(b) the individual must be notified at the time of application of his rights. The intent of this sub-paragraph is to guarantee that an individual is making an informed consent to admission. The informed consent along with the ease of release is especially important because of the increased use of voluntary admissions as the due process protection for involuntary commitment has also increased (See section 4). This sub-paragraph tries to guarantee an informed consent requiring that the applicant, at the time of admission, be given all the necessary information on release and rights while in the institution.

In sub-paragraph (1)(c) a person who has been proceeded against under the involuntary commitment section (section 4) can file a voluntary application. The intent of this sub-paragraph is to facilitate voluntary applications and at the same time guarantee that they are not coerced. This sub-paragraph, therefore, requires the court at the time of a voluntary

application, following an involuntary petition, to make a determination that the application is made without coercion.

In paragraph (2) the special admissions provisions for minors are required. The intent of this paragraph is to allow those minors who are capable of participating in the admission decision to do so.

Sub-paragraph (2)(a) is self-explanatory.

The intent of sub-paragraph (2)(b) is to require a disinterested third party, the juvenile court, to make a decision as to the best treatment source available for the minor and to authorize the court to make a variety of alternative dispositions. This is done because it is assumed that a parent, especially in the case of a retarded child or a disruptive adolescent, may choose admission to a mental health facility because they cannot handle the problem and are not aware of available alternatives.

SECTION 3.

The purpose of this section is to allow the immediate detention of an individual for up to 48 hours if an emergency requires it. The court in Lessard v. Schmidt, supra, pp. 37 and 38, stated that an emergency measure can be justified only for the length of time necessary to arrange a hearing and in no case can the detention exceed 48 hours.

Paragraphs (1) and (2) are self-explanatory.

The intent of (3) is to establish a preference for detention in a facility which provides mental health services.

Sub-paragraphs (3)(a) and (b) are self-explanatory.

Sub-paragraph (3)(c) allows for detention in a county jail for up to 48 hours only if other facilities do not exist in the county. This provision is necessitated in Wisconsin because counties in rural areas do not have any medical facilities at which the individual could be detained and therefore, the provision for use of the county jail for a limited period is inserted to allow alternative arrangements to be made. If mental health facilities are available uniformily thoughout a state, this sub-paragraph should be omitted because detention in a jail is inconsistent with the principal of providing treatment on an emergency basis.

The intent of paragraph (4) is to guarantee that emergency detention is not preventive detention or detention related to the criminal process. Every detention under this paragraph, therefore, must be reported to the court.

The intent of the paragraph (5) is to authorize the providing of emergency treatment and also to require the individual to be informed of his right to refuse other than emergency treatment. The right to refuse treatment is discussed in section 1, paragraph (3) and section 8, paragraph (2).

SECTION 4.

In paragraph (1) those elements which must be proven before an individual can be committed involuntarily are listed. The three elements are discussed in Lessard v. Schmidt, supra, in which the court notes that relaxed procedures on the basis of a subsequent right to treatment ignores the fact that no person should be subjected to "treatment" against his will without procedural due process. The word treatment is defined in section 1.

The requirements of an involuntary petition are listed in sub-paragraphs (1)(b) and (c). The intent of these sub-paragraphs is to guarantee that the best information relating to the person against whom the petition has been filed is available and therefore, the petition must be based upon personal knowledge; be sworn to be true; be signed by at least one person who knows the individual well; and contain sufficient information about the individual's address and relatives so that they can be contacted.

Sub-paragraph (1)(d) is self-explanatory.

The district attorney or in some cases the corproation council is required in paragraph (2) to represent the interest of the public and the petitioners. The intent of this paragraph is to create an adversary proceeding in a mental health commitment.

The files and records of all proceedings in

paragraph (3) are required to be open. The intent of this paragraph is to guarantee that the individual has sufficient information with which to defend against a petition and also to guarantee that malicious petitions will not be filed.

The notice requirements are enumeraged in paragraphs (4) and (5). The court in the Lessard case, supra at page 43, stated that the notice of date, time and place is not satisfactory and notes five items the individual must be notified of: The basis for the dentention, a right to jury trial, the standard upon which an individual can be detained, the names of the examining physician, and persons who may testify in favor of his continued detention, and the substance of proposed testimony.

Under paragraph (6) a probable cause hearing must be held within 48 hours of the detention or within a reasonable time of the filing of a petition if the individual is not detained prior to the filing of the petition. At the probable cause hearing, the court is to determine whether there is sufficient evidence to proceed to a hearing. The hearing is required to be held within ten days of the probable cause hearing if the individual is detained pending the hearing.

In sub-paragraph (6)(c) the appointment of council for an individual who is indigent is required.

Under sub-paragraph (6)(e) examiners must be

appointed. In the sub-paragraph it is specifically noted that the individual must be informed of his right to remain silent during an examination. This is required in the Lessard case supra at pages 69 to 75.

The intent of paragraph (7) is to establish a preference for detention in a mental health facility.

The due process requirements of the commitment hearing are enumerated in paragraph (8).

Paragraph (9) is self-explanatory.

SECTION 5.

The intent of this section is to require the court to find beyond a reasonable doubt that the allegations in section 4, paragraph (1) have been proven. This standard is specifically required in the Lessard case supra.

SECTION 6.

An individual may request a jury as a matter of right in an involuntary commitment proceeding under this section. The jury is a six-man jury.

SECTION 7.

The intent of this section is to encourage the ordering of treatment outside an institution when such treatment is available.

Sub-paragraph (1)(a) is self-explanatory.

In sub-paragraph (1)(b) an individual can be committed to an institution for up to one year if the court has determined that alternatives to institution-

alization have been considered and are not suitable. The major thrust of the whole commitment process suggested by this draft is that institutionalization should be used only as a last resort and treatment alternatives in the community should be encouraged.

The court in paragraph (2) is authorized to make an investigation into available treatment sources prior to its decision and therefore, an individual may be detained for up to 48 hours pending this decision. The intent of this paragraph is to guarantee that the court has an opportunity to make an informed decision regarding available treatment alternatives.

Paragraph (3) is self-explanatory.

SECTION 8.

The procedures for appeal of a commitment are enumerated in this section. The appeal is from the lower court to the intermediate court and is designed to affect speedy determination on appeal.

In paragraph (1) a commitment order may be suspended pending appeal.

Paragraph (2) through (5) are self-explanatory.

SECTION 9.

The intent of this section is to allow for continued commitment after the expiration of the original commitment order. Due process guarantees afforded in the original commitment are again afforded the individual.

SECTION 10.

The intent of section 10 is to guarantee periodic review of a patients condition.

SECTION 11.

Paragraph (1) is self-explanatory.

In paragraph (2) the superintendent is required to issue a release for treatment other than institutionalization if alternative treatment sources are available. The intent of this paragraph is to create a preference for outpatient treatment sources.

The intent of paragraph (3) is to inform the court of dispositions following commitment and thereby guarantee some type of third party review.

Paragraph (4) is self-explanatory.

The intent of paragraph (5) is to provide an opportunity for judicial review when the individual's freedom is being further restricted by withdrawal of a release.

SECTION 12.

The intent of this section is to provide for court review and modification of an order for involuntary institutionalization or other treatment on the premise that a condition of mental illness and dangerousness is a dynamic one subject to constant change and as circumstances change so should the commitment order.

In paragraph (1) the individual involuntarily committed for institutionalization or other treatment

has the right to petition for review of the order.

The intent of paragraph (2) is to allow for change of the commitment order and thereby encourage the use of the best treatment alternative. In section 7, the court is required to find beyond a reasonable doubt that no suitable alternatives to institutionalization exist. In many instances this can be an ongoing process. Outpatient treatment may and should be considered prior to institutionalization and only after it is found not to be appropriate should institutionalization be ordered. If the original order can be modified, the court and the outpatient service are more likely to agree to consider this type of treatment first.

Paragraphs (3) and (4) are self-explanatory.

SECTION 13.

The purpose of this section is to enumerate certain patients rights, some of which cannot be withdrawn, others of which can be withdrawn after a procedure within the institution has been followed, and still others of which can be withdrawn only after application to the court. A copy of these rights are required to be given to all voluntary and involuntary patients. (See section 2, par. (1)(b) and section 12, par. (1)(a).)

The rights in sub-paragraphs (1)(a) through (d) cannot be withdrawn. The rights in sub-paragraphs (1)(e) and (f) can be withdrawn after court hearing. The rights in sub-paragraph (1)(g) through (1) can be

withdrawn by the superintendent after in-institution hearing. The intent of these sub-paragraphs is to catagorize rights according to a scale of importance; the more important the right, the more difficult it is to withdraw it.

Sub-paragraphs (1)(a) and (b) are self-explanatory.

In sub-paragraph (1)(c) it is noted that the individual has the right to petition the court for review (See section 11).

In sub-paragraph (1)(d) the right to treatment is recognized.

Paragraphs (2), (3) and (4) are self-explanatory.

FOOTNOTES

1. 1969 Senate Bill 61
2. 1971 Senate Bill 51, Assembly Substitute Amendment 1
3. See Wyatt v. Stickney, 325 F. Supp. 781 and 334 F. Supp. 1341 (M.D. Ala. 1971).