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MEMORANDUM

DATE: May 25, 2016

TO: All Members of the Delaware State Senate
and House of Representatives

FROM: Ms. Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: H.B. 310 (Family Court Jurisdiction: Outpatient Treatment)

The State Council for Persons with Disabilities (SCPD) has reviewed H.B. 310, which would expand the jurisdiction of the Family Court. A petition could be filed affecting a youth in Division of Services for Children, Youth and Their Family (DSCYF) custody upon turning 18 with a mental illness diagnosis (lines 8-11, 93-100). The petition could be filed when the respondent is between 17 ½ years of age through 20 ½ years of age (lines 10-11) and court jurisdiction could continue until the youth's 26th birthday (lines 12 and 80-81). A wide array of entities could file the petition, i.e., Department of Health and Social Services (DHSS), DSCYF, the youth, youth's attorney, or current or former guardian ad litem (lines 17-18). The Court would, at least on an annual basis, conduct a review of the youth's circumstances (lines 50-65). The Court would be authorized to order the youth to participate in services or outpatient treatment (lines 66-69). If the youth fails to comply, the youth could be committed to a mental hospital (lines 78-79). The youth could also ostensibly be jailed under the Court's criminal contempt authority. See line 79 and Title 10 Del.C. §925(3). SCPD has the following observations.

First, outpatient mental health commitment is an outdated and disfavored approach in the mental health system. Consistent with the attached April 3, 2013 News Journal article, the federal Court Monitor has been highly critical of Delaware's historical "overuse" of outpatient commitment.

Second, the Family Court has previously been authorized to exercise extended jurisdiction when it would facilitate access to services, i.e., the Court can direct agencies to provide support services to dependent and neglected youth up to age 21 [10 Del.C. §929]. This feature is absent from this bill. Indeed, the bill explicitly eschews any support role of the DSCYF once a youth reaches 18 (lines 90-91). As a result, the bill is purely an autocratic vehicle to promote forced treatment of individuals who happen to have a mental health diagnosis.

Third, recognizing the fundamental liberty interests implicated in analogous civil commitment and guardianship proceedings, the judiciary and Legislature require a host of procedural safeguards. Such safeguards are absent from the bill. Consider the following:

A. There is no right to appointed counsel for the youth in initial proceedings (lines 30-31). It strains credulity to presume that a 17 - 20 year old with mental health limitations will be able to effectively self-represent in covered proceedings. Moreover, initial proceedings are not benign. They involve authorizing Court oversight of every conceivable aspect of the youth's life for an 8-year period (lines 56-65) and the prospect of involuntary orders if the Court disfavors the youth's choices. In later proceedings the Court may offer the youth an attorney rather than appointing counsel (lines 69-71). Query whether a youth with mental health limitations will be able to knowingly and intelligently waive counsel. Contrast 16 Del.C. §5007(3). Cf. Title 12 Del.C. §3901(c) and Chancery Court Rule 176 [Chancery Court automatically appoints counsel for persons subject to involuntary loss of autonomy via guardianship]

B. There is no right to an independent expert witness to contest either the diagnosis or need for involuntary treatment. Contrast 16 Del.C. §5007(3).

C. There is no explicit right to conduct discovery or invoke the right against self- incrimination. Contrast 16 Del.C. §5007(4).

D. The description of initial proceedings omits any reference to the burden of proof or the evidentiary standard . Contrast attached Chancery Court opinion holding that "clear and convincing evidence" standard should apply in civil actions which potentially limit individual rights of self-determination and self-control. At pp. 3-4. The initial proceedings which may culminate in 8-year judicial oversight of a youth's life should require a higher standard of proof.

E. Court oversight is not limited to mental health. The Court may engage in an unlimited inquiry about the youth's choices in finances, education, housing, and clothes (lines 58-65).

Fourth, the bill is manifestly unnecessary. There are extensive procedures in place for involuntary mental health commitments and guardianship proceedings. Adding overlapping Family Court proceedings in anticipation of expanding regressive outpatient treatment orders will complicate rather than improve the mental health system.

Thank you for your consideration and please contact SCPD if you have any questions regarding our observations on the proposed legislation.

cc: The Honorable Rita Landgraf, DHSS
The Honorable Carla Benson-Green, DSCYF
Ms. Tania Culley, Office of the Child Advocate
Mr. Steve Yeatman, DSCYF
Ms. Kathleen MacRae, ACLU
Mr. Robert Bernstein, Bazelon Center for Mental Health Law

Mr. Brian Hartman, Esq.
Governor's Advisory Council for Exceptional Citizens
Developmental Disabilities Council
HB 310 family court jurisdiction 5-25-16

Report: Delaware's reform effort continues

ntinued from Page A1

ate's largest inpatient sychiatric hospital.

Overall, Bernstein has raised the state's comehensive work in transrming mental health rvices, providing exanded resources in crisis sponse and communityased care, and helping ng-term patients at DPC nd new homes in the mmunity.

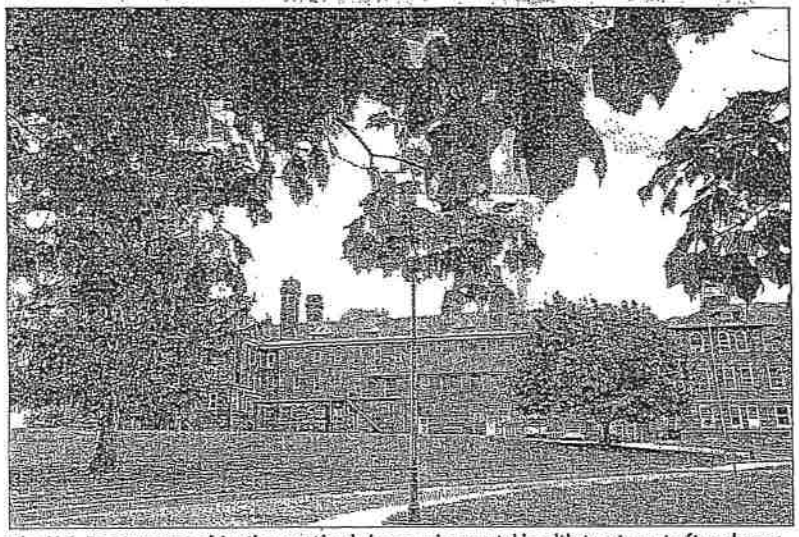
His most recent report the third since the settleent was signed in July 011 – calls the state's ork innovative and dilient and notes "important rogress" on several onts.

Court-ordered treatent is off the charts, ough – more than six mes New York's rate – nd it increased by 28 perent during the last half of 012, he said.

Using the court to orce treatment is an mergency-only approach elsewhere, Bernstein wrote, while the ractice here suggests a ariety of systemic incenives, including financial, onvenience and the belief that discharging omeone might help a proider avoid liability risks, e said.

Bernstein said interiews with court observers showed the commitnent-related court hearngs lasted about five minutes, relied on the ecommendation of a doctor who had not treated he person, and often included an attorney who greed to whatever that loctor said.

Also troubling was Bernstein's report that



The U.S. Department of Justice required changes in mental health treatment after abuses were uncovered at the Delaware Psychiatric Center. SUCHAT PEDERSON/NEWS JOURNAL FILE

patients often were not aware of their rights or what was happening in the hearing.

"They indicated that in some instances involuntary commitment occurred even though they had indicated a willingness to accept treatment voluntarily, and that they were denied opportunities for family members to be present at their hearings," Bernstein wrote.

A study group, which includes specialists in psychiatry, law enforcement, the courts, social work and mental health treatment as well as those in recovery, has been working to review Delaware law and policies and build recommendations for systemic change.

Bryce Hewlett, director of the Delaware Consumers in Recovery Coalition, chairs that study group's subcommittee on outpatient commitment. The practice, he said, relies on a "convalescent" status mentioned in Delaware law that – decades ago – provided care for those who were not considered ready for complete release.

Kevin Huckshorn

"It's highly outdated and it's significantly overused," Hewlett said. "We push for highly limited forced treatment in any capacity because that really isn't what is going to help the person recover. They only recover when they have an investment in their treatment and it takes an awful lot of outreach to communicate with the person, engage with the person and get them to go along with treatment."

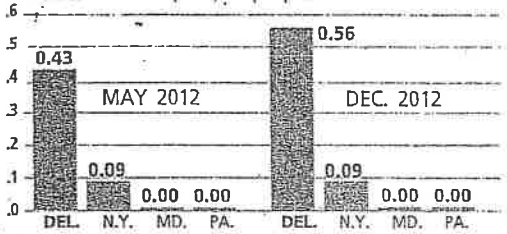
Hewlett said if a person is considered a threat to self or others they should be committed to inpatient care. Otherwise, he said, no one should be forced to submit to treatment.

Hewlett's view is controversial. Some psychiatrists and specialists argue that it is better to force a person into treatment – helping them get stabilized – than to let them get sicker until they must be hospitalized.

Kevin Huckshorn, director of the state Division of Substance Abuse and Mental Health, said the state is asking providers to identify those who are unnecessarily on outpatient commitment and to take them off the list.

ACTIVE OUTPATIENT COMMITMENT ORDERS

Outpatient commitment is a court order for treatment of a mental illness. It is involuntary, as is inpatient commitment. Unlike three neighboring states, court-appointed monitor Robert Bernstein says Delaware's use of outpatient commitment is both far more common and increasing. Below are outpatient commitment orders per 1,000 people.



SOURCE: Robert Bernstein, Third Report of the Court Monitor on Progress Toward Compliance with the Agreement: U.S. v. State of Delaware THE NEWS JOURNAL

She said Horizon House was able to get 70 people off those lists.

Overall, more than 2,000 people were on such commitments at some point or another last year, Huckshorn said, with 500 to 600 at any given time.

The problem is worsened when someone is ordered, for vague reasons, into unspecified treatment without additional assistance to promote compliance.

"There is an assumption that there was oversight or special treatment," she said, "when in truth, there really isn't. Only that in some specified time – two weeks, a month, six months – they must come back to court."

When they don't show up in court – either because they don't realize they must or because they are still sick – their problems get worse.

Huckshorn said she was not surprised that Bernstein flagged the issue. It has been apparent to her since she arrived in the state in 2009 to work on systemic reform.

"Not until we started drilling down on the numbers and Bob was able to find data on the rates in other states did we become aware of how out of whack we were," she said. "The chart was kind of shocking."

The state will address the problem, she said. Likely changes would require that only treating psychiatrists can petition a court on behalf of their patients, would require clear descriptions of behaviors that demonstrate a danger to self or others and include clearly defined time periods.

The state's reform effort continues, largely with Bernstein's endorsement and applause.

"We're in a good place, working together," Huckshorn said. "It's a messy, slow process. But that's the way system change happens."

Contact Beth Miller at 324-2784 or bmiller@delawareonline.com. Follow on Twitter @BMiller57.

Not Reported in A.3d, 2014 WL 7455749 (Del.Ch.)
(Cite as: 2014 WL 7455749 (Del.Ch.))

Court of Chancery of Delaware.
In the Matter of J.T.M., A disabled person

C.M. No. 17901–S
Date Submitted: October 24, 2014
Date Decided: December 31, 2014

MEMORANDUM OPINION

GLASSCOCK, Vice Chancellor

*1 This Opinion involves whether a guardianship should be imposed for the benefit of J.T.M., an eighteen-year-old man resident in Delaware. Following a hearing on October 24, 2014, I imposed a guardianship appointing D.S., Mr. M.'s great-grandmother, and W.M., his father, as co-guardians. An Order was entered on that date; this Opinion supplements that Order.

Our country was founded on principles of individual rights, self-governance and self-determination. This is embodied in our founding documents, including the Declaration of Independence [FN1] and the Bill of Rights. [FN2] The Delaware Constitution of 1897 also makes clear the importance of such rights. [FN3] An entire branch of our jurisprudence, the criminal law, is dedicated to achieving a balance between the exercise of these rights and the interest of the State in protecting persons and property. That body of law, together with its governing constitutional provisions, [FN4] allows restriction or termination of those rights through incarceration or execution, but only with significant procedural safeguards and after determination of guilt beyond a reasonable doubt. [FN5] Outside of the criminal arena, imposition of a guardianship represents the most significant deprivation of the right to self-determination a court can impose. [FN6] This case represents a first chance to address the proper standard by which evidence of the need for a guardianship must be established. [FN7]

FN1. The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.").

FN2. *See, e.g.*, U.S. Const. amend. V, XIV.

FN3. *See, e.g.*, Del. Const. pmbl. ("Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government.")

FN4. *See, e.g.*, U.S. Const. amend. V, V, VI, VIII, XIV; Del. Const. art. I, §§ 6, 7, 8, 11, 12.

FN5. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

every fact necessary to constitute the crime with which he is charged."); *see generally Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.")

FN6. *See, e.g.*, Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for A System of Principled Decision-Making in Long Term Care*, 41 Emory L.J. 633, 736 (1992) ("The restriction of liberty created by appointment of a substitute decision-maker is severe. The rights enjoyed by all competent adults to associate with persons of their choice, to engage in recreational, political, and religious activities, and to choose their care providers can be controlled by the substitute decision-maker."); Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 33 Real Prop. Prob. & Tr. J. 215, 227 (1998) ("The constitutionally protected individual interests implicated in a guardianship proceeding include: the right to choose where to live and with whom to associate; the right to make medical decisions regarding one's body; the right to marry and to associate freely; the right to travel or pursue in privacy the activities of daily living; and the right to be free from unwanted constraints or incarceration."); Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 Elder L.J. 53, 71 (2004) ("A guardianship results in the reduction of the protected person to the status akin to that of a minor child. The protected person loses the right to determine where he or she will live, whom he or she will see, where he or she will go, and how he or she will live his or her life.") (footnote omitted).

FN7. I do not mean to imply this is a case of first impression. Out of respect for the privacy rights of individuals potentially subject to guardianships as disabled persons, these proceedings are confidential. Accordingly, judicial decisions in these cases are not publicly disseminated or, as in the public version of this Opinion, the names of the participants are redacted. This is, therefore, the first public Opinion to address the proper standard of review under our current guardianship statute. I am indebted to Vice Chancellor Noble, whose careful scholarship as expressed in a non-public decision of this Court has served me as a guide.

*2 Because it involves fiduciary relationships, guardianship has traditionally fallen within the jurisdiction of this court of equity, both with respect to its English common-law antecedents and in its current statutory incarnation. Today, all guardianships imposed in Delaware over disabled adults are pursuant to statute. The Court of Chancery is empowered by 12 *Del. C.* § 3901(a) "to appoint guardians for the person or property, or both, of any person with a disability." A "person with a disability" is one who

> [b]y reason of mental or physical incapacity is unable properly to manage or care for their [sic] own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering person's own health, or of becoming subject to abuse by other persons or of becoming the victim of designing persons[.] FN8

FN8. 12 *Del. C.* § 3901(a)(2).

The Petition here was filed by W.M. ("W.") and D.S. ("D."),[FN9] the father and great-grandmother of Mr. M., respectively. In compliance with Court of Chancery rules, the Petition was accompanied by an affidavit from Mr. M.'s treating physician.[FN10] According to that affidavit, Mr. M. suffers from "a disability that interferes with the ability to make or communicate responsible decisions regarding health care, food, clothing, shelter or administration of property," caused by autism, attention deficient hyperactive disorder, and encephalopathy.[FN11] As a result of this disability, Mr. M. "is unable to perform the following functions: (1) Activities of daily living; (2) Cognitive activities, e.g. needs help with dressing, brush[ing] teeth and hygiene, poor judgment."[FN12] In the opinion of the physician, despite his disability, Mr. M. has sufficient mental capacity to understand the nature of guardianship and to consent to the appointment of a guardian.

FN9. I use the first names of the Petitioners to differentiate them from the proposed ward, Mr. M. No disrespect is intended.

FN10. *See* Ct. Ch. R. 175(d).

FN11. Aff. of Thiele Anthony, MD.

FN12. *Id.*

Consistent with the procedures established by Rule 176,[FN13] an attorney was appointed *ad litem* for Mr. M. That attorney, Andrew A. Whitehead, Esquire, interviewed his client, Mr. M., at his office in Georgetown on October 8, 2014. He also reviewed the physician's affidavit and met with the Petitioners. In a thoughtful report to the Court, Mr. Whitehead opined that his client was a disabled person under the provisions of 12 *Del. C.* § 3901(a). He reported that Mr. M. consented to and supported the appointment of his father and great-grandmother as his guardians. The Petitioners disclosed to Mr. Whitehead that Mr. M. receives Social Security Disability benefits in cash each month as well as benefits under Medicaid. He lives with D. during the week, as he has for many years, and attends a day program to educate those with autism spectrum disorder. During weekends, Mr. M. lives with W. At both residences, he has his own room and feels "at home." He also spends one weekend a month with his mother, who lives in another state. The report explains that Mr. M. "was diagnosed with autism at a very young age and has been in [an academic autism program] since he was three years old." The guardians explained to the attorney *ad litem* that Mr. M. could not comprehend the value of money, that he has been tricked out of toys and other property by children in his neighborhood, that he could not grasp budgeting and struggles with counting money, and that he suffers from anxiety under stress. Further, he is unable to take his required medications except under direction of others. Mr. Whitehead supports appointment of W. and D. as guardians for Mr. M.

FN13. *See* Ct. Ch. R. 176(a).

I. STANDARD OF REVIEW

*3 To impose a guardianship, I must find that, by reason of mental or physical incapacity, the proposed ward is "unable to properly manage or care for [his] own person or property," and that as a result, he is "in danger of dissipating or losing such property or of becoming the victim of designing persons or, in the case where a guardian of the person is sought, such person is in danger of substantially endangering the person's own health...."[FN14] The statute, however, is silent as to the standard by which this finding must be made. As described above, the criminal law requires proof beyond a reasonable doubt before substantial deprivations of personal liberty interests may be imposed by the Court; at least one state imposes this standard to guardianship as well.[FN15] The United State Supreme Court, on the other hand, has held that certain governmental actions that limit individual rights of self-determination and self-control, such as termination of parental rights, civil commitment,

deportation, and denaturalization, must be supported by evidence that is clear and convincing.[FN16] The imposition of guardianship is, I find, even more restrictive of substantial liberty interests than those actions. Indeed, the majority of states impose a clear and convincing evidentiary standard for establishing a guardianship by statute.[FN17] While Delaware's cases have not been consistent in the application of a standard, I find that imposition of a guardianship must be supported by evidence that is clear and convincing, and not merely by a preponderance of the evidence.

FN14. 12 *Del. C.* § 3901(a)(2).

FN15. *See* Sally Balch Hurme and ABA Comm'n on Law and Aging, *Conduct and Findings of Guardianship Proceedings (2013), available at* http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_CHARTConduct.authcheckdam.pdf; *see, e.g.*, *In re Kapitula*, 899 A.2d 250, 253 (N.H.2006) (Findings justifying imposition of a guardianship must be "in the record and must have been based upon evidence supporting them beyond a reasonable doubt.").

FN16. These decisions have been made in the context of the due process clause of the Fifth and Fourteenth Amendments. *See Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."); *Addington v. Texas*, 441 U.S. 418, 424 (1979) ("We noted earlier that the trial court employed the standard of 'clear, unequivocal and convincing' evidence in appellant's [civil] commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the Texas Supreme Court."); *Woodby v. INS*, 385 U.S. 276, 286 (1966) ("We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) ("[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue in doubt.' ") (citation omitted).

FN17. Sally Balch Hurme and ABA Comm'n. on Law and Aging, *Conduct and Findings of Guardianship Proceedings*, *supra* note 15.

At the hearing on October 24, 2014, I was able to question Mr. M. as well as D. and W. I reached the same conclusion as did the attorney *ad litem* on behalf of Mr. M. All the evidence indicates that Mr. M. has cognitive disabilities that make him unable to manage his own property, make him subject to designing persons and place him at risk of serious physical harm if his consumption of medication is unsupervised. Although he is disabled, Mr. M. can comprehend the nature of a guardianship and supports its imposition here as in his best interest. He clearly loves and trusts the Petitioners, and they in turn love him. Mr. M.'s mother supports the guardianship, which is in all respects uncontested. Mr. M., who is by all accounts a pleasant and likeable young man, is indeed fortunate to have a loving family to support and assist him. I find, by clear and convincing evidence, that Mr. M. is a disabled person subject to guardianship under 12 *Del. C.* § 3901(a)(2).

II. CONCLUSION

For the reasons above, the Petition for Guardi-

anship is granted. I further find that that the Petitioners are the appropriate persons to serve as Mr. M.'s guardians and that the guardianship is plenary.[FN18] In this particular instance, the record indicates clearly that Mr. M. is unable to manage his property or health care and that it is appropriate, consistent with the discussion above, that the use of his resources and his place of residence and living conditions be as decided by his guardians in his best interest. However, Mr. M. is a very young man still in school and, I expect, learning and growing intellectually and emotionally. As a result, I direct the Office of the Public Guardian to provide me with a report in one year concerning Mr. M.'s condition and whether any aspects of the guardianship should be modified.[FN19] An Order consistent with this Opinion has already been placed on the docket.

FN18. *See* 12 *Del. C.* § 3922.

FN19. The required report from the Office of the Public Guardian shall not relieve the guardians of providing a yearly physician's report in twelve months as required by Court Rule. *See* Ct. Ch. R. 180–B.

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Not Reported in A.3d, 2014 WL 7455749 (Del.Ch.)

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