

## Executive Summary

### Introduction

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

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

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

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

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

## Provisions of the Baker Act

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

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

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

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

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

- The person has a mental illness and because of the mental illness:
  - The person has refused voluntary placement for treatment or is unable to determine whether placement is necessary; and
  - The person is incapable of surviving alone or refuses to care for himself or herself and such neglect poses a real and present threat of substantial harm; or there is substantial likelihood that in the near future the person will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior; and
- All available less restrictive treatment alternatives which would offer an opportunity for improvement of the person's condition have been judged to be inappropriate.

## Reasons for this Study

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

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

There is a sizeable population in Florida directly affected by the Baker Act. There are 601,206 Floridians with mental illnesses and 302,700 with Alzheimer's disease. In fact, the combined population of Florida residents with mental illnesses and Alzheimer's disease (903,906) is greater than the entire population of Alaska (614,010), Delaware (743,603), the District of Columbia (523,124), Montana (880,453), North Dakota (638,244), South Dakota (738,171), Vermont (590,883), and Wyoming (480,907) (Source: Population Estimates Program, Population Division, U.S. Bureau of the Census, Washington, DC 20233).

The need for this study was additionally identified through:

- C *Horizon 2000, The 1998-2000 Operational Plan for the Florida Judicial Branch*, Objective II-D, Enhance the Timely Processing and Management of Cases, which states that “the Fairness Committee is asked to develop and submit a report and recommendations on case processing issues as they relate to vulnerable elders;”
- C The January 1, 1994, *Action Plan* of the Florida Supreme Court Committee on Court-Related Needs of the Elderly and Persons with Disabilities;
- C House Bill 1705, enacted during the 1998 Legislative Session; and
- C Advocacy by the Department of Elder Affairs, Statewide Human Rights Advocacy Committee, and other individuals and groups.

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

### The Study

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

- Reviewed judicial administration procedures and forms.

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

## Findings, Conclusions, and Recommendations

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

### I. Increase the Availability of Quality Community Mental Health Services and the Use of Less-Restrictive Alternatives

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

According to Wayne Basford, an attorney with the Advocacy Center for Persons with Disabilities,

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

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

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

Participants in the process agreed with the activists' assessment. A general master in southern Florida who responded to the Subcommittee's survey posed the rhetorical question, "how meaningful is an inquiry into whether the least restrictive alternative has been determined appropriate if there is no alternative but involuntary hospitalization?" That general master went on to lament the "woeful lack of services for juveniles, at least those juveniles who must rely on public resources for their treatment."

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

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

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

Furthermore, the Subcommittee adds its voice to those who are pleading with the Florida Legislature

and other policymakers to divert additional resources to quality community supports and services that will enable citizens with mental illnesses to lead full and meaningful lives and avoid unnecessary institutionalization.

#### Related Recommendations

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

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

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

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

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

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

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

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

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

The Florida Legislature should consider amending Chapter 394 to permit Chapter 744 guardians and Chapter 393 guardian advocates to participate in alternative placement decisions and receive adequate

notice of the decision-making process.

## II. Improve the Administration of Justice in Baker Act Cases

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

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

Florida statutes require involuntary placement hearings to be conducted within five days. There are differing interpretations as to whether that provision means five working days or five consecutive days. Even more troubling was the allegation that some courts ignore the five-day requirement altogether. In some jurisdictions, involuntary placement hearings are reportedly conducted only every other week.

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

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

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

Individuals with psychiatric disabilities, advocates, and justice system participants appearing before the Subcommittee seemed to generally favor the use of general masters in involuntary placement

proceedings. General masters are currently presiding over involuntary placement hearings in at least 8 of the 20 circuits. They often have or develop expertise in the subject matter. However, some courts, particularly those in less populated or rural areas, lack the resources for general masters. This creates an inequity of services available to Florida citizens from jurisdiction to jurisdiction.

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

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

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

#### Related Recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

involuntary placements.

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

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

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

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

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

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

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

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

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

### III. Protect Individuals with Psychiatric Disabilities and Ensure that their Rights are Observed

It is incumbent upon society in general and the justice system in particular to safeguard the rights of individuals who are detained under the Baker Act. Moreover, due process rights demand that detained individuals receive adequate representation at involuntary placement hearings. In Florida, individuals for whom involuntary placement is sought are almost exclusively represented by public

defenders. Even so, there is reportedly no consistency in the quality of public defender representation in Baker Act proceedings from jurisdiction to jurisdiction.

The Subcommittee learned that some individuals who were detained under the Baker Act reported they had not met with counsel prior to the hearing, received no advice about their testimony, and had no opportunity to plan a defense with counsel. However, public defenders reported routinely undertaking considerable preparations prior to the hearing. They were also given high marks for their preparedness by presiding officers and their state attorney counterparts. Nearly 94 percent of the state attorneys responding to the survey said it appears the public defender's office has prepared its case ahead of time. Quality of public defender representation in Baker Act proceedings seems to hinge on two factors: (1) the priority placed on such cases by each public defender; and (2) the resources available to the public defenders.

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

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

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

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

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

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

Problems exist as well in regard to voluntary admissions. In 1996, the Florida Legislature amended the Baker Act to strengthen patient rights. Despite these enhanced protections, the Subcommittee learned that because in-patient treatment is extremely profitable mental health facilities and professionals sometimes abuse the voluntary admission process. Moreover, some patients deemed to be “voluntary” may in reality lack the capacity to consent.

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

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

#### Related Recommendations

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

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

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

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

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

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

When involuntary placement hearings are held in receiving facilities, steps should be taken to increase the probability that patients understand that a formal court hearing is taking place:

- the proceedings should not be conducted by video;
- courtroom formalities should be observed; and
- the presiding officer should wear a robe.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### IV. Eliminate Unnecessary Delay in the Provision of Mental Health Treatment

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

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

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

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

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

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

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

#### Related Recommendations

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

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

The Florida Legislature should consider providing limited liability protection for family members,

friends, and individuals who serve as guardian advocates on a volunteer basis.

Community workshops should be conducted to educate qualified individuals about mental health issues and the opportunity to volunteer as a guardian advocate.

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

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

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

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

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

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

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

## V. Ensure Public Safety and Represent the State's Interests

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

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

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

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

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

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

#### Related Recommendations

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

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

Each state attorney should place a high priority on involuntary placement proceedings and properly

prepare the cases on behalf of the state. The Florida Legislature should provide adequate resources to enable state attorneys to provide quality representation for the state in involuntary placement.

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

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

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

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

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

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

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

- A videotaped orientation to the Baker Act for statewide use, which emphasizes the criteria for initiating an involuntary examination; and
- Crisis intervention training for appropriate interaction with persons with mental illnesses.

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

## VI. Ensure that Our Most Vulnerable Citizens—Elders, Children, and Wards—Are Adequately Protected

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

Persons providing testimony before the Subcommittee expressed concern about the excessive and inappropriate involuntary examination and placement of elders, especially elders who reside in nursing homes and assisted living facilities. Certain misuses of the Baker Act for elders involve financial incentives. Others relate to behavioral problems. Some facilities purposefully use the Baker Act to

“dump” residents who are disruptive or require mental health treatment. In those situations, the nursing home or assisted living facility refuses to allow the individual to return when the individual is released from the mental health facility.

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

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

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

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

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

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

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

#### Related Recommendations

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

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

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

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

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

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

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

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

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

## VII. Continuously Monitor, Study, and Improve the Florida Mental Health System

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

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

### Related Recommendations

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

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

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