

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL.

When person fails to comply with court-ordered involuntary outpatient treatment, full commitment hearing must be conducted and renewed finding that person meets commitment criteria before judge may revoke order of outpatient treatment and impose inpatient hospitalization. Outpatient treatment order may be revoked either by entry of order directing person to show cause why order should not be revoked and replaced by order of involuntary commitment for treatment at hospital, or by entry of new petition for involuntary commitment in hospital.

The Honorable William J. Howell

Member, House of Delegates

April 8, 1996

Your inquiry concerns the nature of the involuntary commitment hearing required pursuant to § 37.167.3 of the *Code of Virginia*.¹ When a person fails to comply with involuntary outpatient treatment as ordered by a court, you ask whether a show cause hearing to revoke such order or a full commitment hearing and a renewed finding of dangerousness to self or others or substantial inability to care for oneself due to mental illness must be held prior to entry of an order of temporary detention.

Section 37.167.3 authorizes a judge to order outpatient treatment with or without antipsychotic medication, day or night treatment in a hospital, or such other treatment as is necessary to meet the needs of the individual subject to the involuntary commitment process. The judge first must find, however, that the person meets the involuntary commitment criteria and that alternatives to institutional confinement and treatment are suitable.² Moreover, the judge must make additional specific findings that outpatient treatment can appropriately be provided.³

The Supreme Court of the United States repeatedly has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."⁴ The principal basis for involuntary commitment is that the person presents an imminent danger to himself or others.⁵ The statutory commitment criteria establish preconditions to commitment that must be present at the time of adjudication.⁶ Moreover, an involuntarily committed person's constitutional rights are violated if his confinement continues after he ceases to exhibit the commitment criteria.⁷

The involuntary commitment criteria specified in § 37.167.3, and the evidence required to support a finding that the criteria have been met, ensure compliance with constitutional requirements. Before finding that the person meets commitment criteria, the judge must obtain positive certification from a Virginia-licensed psychiatrist or clinical psychologist, or if either is not available, a Virginia-licensed physician or psychologist qualified to diagnose mental illness, that the person (1) is so seriously mentally ill as to be unable to care for himself, or (2) presents an imminent danger to himself or others, and (3) requires involuntary hospitalization or treatment.⁸ The judge may accept written certification of the examiner's findings if such examination has been made personally within five days preceding the hearing.⁹ In addition, the judge also must require the community services board in the jurisdiction where the person resides to provide a prescreening report stating, among other things, whether there is any less restrictive alternative to institutional confinement and what the recommendations are for the person's care and treatment.¹⁰

A well-recognized principle of statutory construction requires that statutes dealing with the same subject be read together to give effect to the legislative intent.¹¹ Section 37.167.1 requires that a

temporary detention order becomes void if "not executed within twenty-four hours of its issuance," and that before issuing a subsequent order, the "magistrate must again obtain the advice of an employee of the local community services board or its designee who is skilled in the diagnosis or treatment of mental illness."¹² Furthermore, § 37.167.6 mandates the procedures for appeal of commitment orders. "The appeal shall be heard de novo. An order continuing the commitment shall be entered only if the criteria in § 37.167.3 are met *at the time* the appeal is heard."¹³

There is a significant liberty interest that exists in a person's seeking to avoid involuntary institutional confinement and treatment. In addition, the contemporaneous preadjudication reports required by § 37.167.3, and the clear language in § 37.167.6 requiring a finding that the commitment criteria be met at the time an appeal is heard, lead me to conclude that a full commitment hearing must be conducted, which requires a renewed finding that the person meets the commitment criteria before the judge may revoke an order of outpatient treatment and impose inpatient hospitalization.

Furthermore, I am of the opinion that the outpatient treatment order may be revoked either by entry of an order directing the person to show cause why the order should not be revoked and replaced by an order of involuntary commitment for treatment at a hospital, or by entry of a new petition for involuntary commitment. An order directing the person to show cause why the order for outpatient treatment should not be revoked is in the nature of a proceeding for contempt. The sole remedy specified under § 37.167.3 for failure to comply with the outpatient treatment order, however, is either modification of the outpatient order, or revocation of the order and imposition of a new order of involuntary commitment in a hospital.¹⁴

¹The provision of § 37.167.3 about which you inquire provides: "Upon failure of the patient to adhere to the terms of the outpatient treatment, the judge may revoke the same and, upon notice to the patient and after a commitment hearing, order involuntary commitment for treatment at a hospital. . . . [T]he person's failure to comply with involuntary outpatient treatment as ordered by the court may be admitted into evidence in subsequent hearings held pursuant to the provisions of this section."

²See § 37.167.3, which provides that "[a]fter observing the person and obtaining the necessary positive certification and other relevant evidence," the judge must find specifically (i) that the person is imminently dangerous to himself or others because of mental illness, or (ii) that he is so seriously mentally ill as to be substantially unable to care for himself, "and (iii) that less restrictive alternatives to institutional confinement and treatment have been investigated and are deemed suitable."

³Section 37.167.3 requires the judge to find specifically that "(i) the patient has the degree of competency necessary to understand the stipulations of his treatment, (ii) the patient expresses an interest in living in the community and agrees to abide by his treatment plan, (iii) the patient is deemed to have the capacity to comply with the treatment plan, (iv) the ordered treatment can be delivered on an outpatient basis, and (v) the ordered treatment can be monitored by the community services board or designated providers."

⁴*Addington v. Texas*, 441 U.S. 418, 425 (1979).

⁵Section 37.167.3; see *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980); *Project Release v. Prevost*, 551 F. Supp. 1298 (E.D.N.Y. 1982), *aff'd*, 722 F.2d 960 (2d Cir. 1983).

⁶See *Foucha v. Louisiana*, 504 U.S. 71, 7576 (1992).

⁷*O'Connor v. Donaldson*, 422 U.S. 563, 57476 (1975).

⁸Section 37.167.3.

⁹§ 37.1-67.3*Id.*

¹⁰§ 37.1-67.3*Id.*

¹¹See *Prillaman v. Commonwealth*, 199 Va. 401, 40506, 100 S.E.2d 4, 78 (1957); 1992 Op. Va. Att'y Gen. 97, 99.

¹²Section 37.167.1 provides, in part: "If an order of temporary detention is not executed within twenty-four hours of its issuance, or within such shorter period as is specified in the order, the order shall be void and shall be returned unexecuted to the office of the clerk of the issuing court or if such office is not open, to any judge or magistrate thereof. Subsequent orders may be issued upon the original petition within ninety-six hours after the petition is filed. However, a magistrate must again obtain the advice of an employee of the local community services board or its designee who is skilled in the diagnosis or treatment of mental illness prior to issuing a subsequent order upon the original petition." See also 1983-1984 Op. Va. Att'y Gen. 235 (concluding that magistrate may issue new temporary detention order upon original petition but must again obtain advice of person skilled in diagnosis and treatment of mental illness before its issuance).

¹³Section 37.167.6 (emphasis added).

¹⁴A finding of contempt in this context would be civil in nature, because it is designed to be remedial in effect and to benefit the individual rather than to vindicate the authority of the court. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 428 (1911); *Steelworkers v. Newport News Shipbldg.*, 220 Va. 547, 260 S.E.2d 222 (1979). In the case of a person who is alleged to be mentally ill, the powers of the court to punish for contempt through fine or imprisonment may be ineffectual. See, e.g., 1983-1984 Op. Va. Att'y Gen. 232, 234.