**MENTAL HEALTH LAW
Kansas Overview**

A Presentation to Members of the Kansas SPTP Task Force

March 11, 2013

Civil Commitment Before 1960

1. Hearings were perfunctory – A physician and his patient with few questions.
2. Need for Treatment.
3. No periodic judicial review – Committed until discharged by the Chief Medical Officer.
4. Commitment for all purposes – Once committed all decisions made by Chief Medical Officer.
5. Whatever happened to Mary?
6. Annual Reports to the Legislature: Gallons of milk, acres of wheat, produce from the garden.
7. Funding!

Enter Kansas Senate Bill 26 in 1976

1. Dangerous as defined by Lessard v. Schmidt (WI, 1972); “Recent Overt Act of Violence.”
2. Need for treatment was still part of the equation but most of the argument was on dangerousness.
3. Hearings with appointed counsel and genuine cross-examination.
4. Periodic Judicial Review – every 90 days and the right to review hearings.
5. Clinical staff was not very fond of the new rules – judges and attorneys spelled trouble.

Larned State Hospital in 1977 when I arrived.

1. Only two distinct hospitals: Larned State Hospital and State Security Hospital.
2. LSH was one of four state psychiatric hospitals – LSH, TSH, OSH, RMHF (primarily children).
3. LSH served both committed and voluntary patients from Western Kansas.
4. LSH had a *children’s*  inpatient program, an *adolescent* inpatient program, a *school*, and a *juvenile detention center* called Youth Center at Larned (YCAL). It also had an *inpatient alcohol and drug abuse* program (ADAS) on Jenkins Hill. None of these programs remain at LSH today.
5. LSH had a security behavioral ward (SBW) for committed patients from all four state psychiatric hospitals who had committed **acts of violence in the hospitals**. This program is still located at LSH but by a different name.

State Security Hospital

1. SSH was contained in the Dillon Building which is now the SPTP.
2. SSH provided evaluation, care, and treatment for district courts and the Secretary of Corrections.
3. There were seven statutes which interfaced the **criminal justice system** and the **public mental health system**.
4. K.S.A. 22-3301 (trial competency evaluation)
5. K.S.A. 22-3303 (trial competency treatment not to exceed six months due to *Jackson v. Indiana*).
6. K.S.A. 22-3219 (insanity evaluation – NGRI).
7. **K.S.A. 22-3428 (NGRI treatment until no longer dangerous – antisocial personality disorder)**.
8. K.S.A. 22-3429 (Pre-sentence evaluation).
9. K.S.A. 22-3430 (Treatment in *lieu* of sentencing).
10. K.S.A. 75-5209 (Administrative transfer from Department of Corrections for short-term treatment and return).
11. There was no Sexual Predator Treatment Program at LSH in 1977.

A Few of the Big Names

1. Dr. Thomas Szasz, a psychiatrist. (Mental illness is a convenient myth consisting of nothing more than the servant of social control over deviant behavior people don’t like.) Quotes from Volume five of Perlin’s treatise.
2. Bruce Ennis, a lawyer. His book, *Prisoners of Psychiatry*, was the first book many young attorneys in the 1970s most likely ever read on mental health law. (The very worst thing society can do to a person is curtail his liberty. It is much better to let a man live with his thought disorders than to take away his freedom.) Quotes from Volume five of Perlin’s treatise.
3. Bill Rein, a less well-known lawyer. (In 1977, NAMI’s Kansas forerunner, *Kansas Families for Mental Health*, was tired of hearing Szasz’s mantra that mental illness was a myth. Kansas families had been told “civil commitment allows parents to commit their unpopular or underachieving adult children.” “You laugh. That was real.”) Quotes from: Issac, Rael Jean and Armat, Virginia C. *Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill* (Free Press: New York, 1990) 267-268.

Where Does Mental Health Law Come From?

1. Primarily the Fourteenth Amendment to the U.S. Constitution, and only one small phrase from there: “. . . **nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .**”
2. How can 17 words generate so much controversy and so many cases in the history of American jurisprudence?
3. What if the Fourteenth Amendment had said no state may deprive any person of life, liberty, or property *without first giving him a dish of ice cream?* (Pretty simple- how many dips do you want and what is your favorite flavor?)
4. What if the Fourteenth Amendment had said no state may deprive any person of life, liberty, or property *without first offering him transportation to the country of his choice?* (Pretty simple again- here’s your parachute, where do you want us to drop you?)
5. However, the Fourteenth Amendments says no state may deprive any person of life, liberty, or property without *due process of law*. (Not so simple- what’s due process of law?)

What’s Due Process of Law?

1. In the 1960s, a number of “poverty or low cost legal clinics” were established by young, idealistic attorneys. These attorneys accepted cases which were not profitable for most law firms. They handled housing complaints, consumer rights, criminal, juvenile, and other low fee producing cases. Among that mix was civil commitment.
2. Remember earlier we talked about how perfunctory civil commitment hearings were before the 1960s? “Doctor, do you believe the proposed patient needs psychiatric treatment?” “Your Honor, I have an order here. . .”
3. This new bunch of attorneys had questions by the truck load. They eventually succeeded in convincing the U. S. Supreme Court that involuntary hospitalization results in a “massive curtailment of liberty.” Therefore, the Fourteenth Amendment required **procedural** due process of law. And, unlike ice cream, procedural due process of law came in only one flavor:
	1. Notice
	2. Meaningful Hearing (personal presence, counsel, cross-examination)
	3. Compulsive process (the right to subpoena witnesses)
4. Impartial Finder of Fact (judge or jury).

So, due process means that certain legal procedures must go before a deprivation of life, liberty, or property? Not so fast!

1. Here is the problem these poverty law clinics faced. What if the state followed all of the right procedures, but nothing happened in the hospital? What good did that do their clients?
2. Enter Bruce Ennis and his book, *Prisoners of Psychiatry*. Ennis argued that due process meant more than following the right procedures. As important as procedural due process is, he saw a *quid pro quo* at work in involuntary anything- criminal or civil- when it came to life, liberty, or property. Procedures only got his clients part of the way to the city of “due process.”
3. If a state deprived a person of liberty because it said the person needed treatment, then the state had to provide the treatment it said the person needed.
4. In other words, due process involved not only procedure but something substantive as well. In the case of involuntary commitment to a psychiatric hospital, that “something substantive” was treatment.
5. So, what’s treatment?

Due process of law does come in more than one flavor.

1. There’s ***procedural due process*** and then there’s ***substantive due process***. And the same person gets to have both flavors in one bowl (or perhaps good climate and plenty of jobs in one parachute drop to use our earlier analogy).
2. Who gets to define treatment- the hospital’s chief medical officer, the legislature, or the courts?
3. Somewhat like public education. Who gets to define education- local boards, state board, the legislature, or the courts?
4. Civil Commitment in Kansas underwent two phases of mental health reform in 1986 (HB 2050) and 1990 (the Mental Health Reform Act).
5. HB 2050
	1. Changed the definition of dangerousness (often interpreted as a recent overt act of violence) to “lack of ability to make treatment decisions due to a thought disorder (not a personality disorder) which made it reasonably likely that the person would harm self, others, or the property of others. This was one of the main goals of Kansas Families for Mental Health.
	2. Authorized out-patient commitment orders.
	3. Clarified judicial review hearings by requiring an attorney-client discussion at least every 90 days.
	4. Began the process of melding CMHCs and state hospitals into one public mental health system.
6. Comprehensive Mental Health Reform in 1990
	1. Made CMHCs the gatekeepers to public mental health system.
	2. Everyone had to be screened by a CMHC QMHP before accessing state hospitals.
	3. Established a free-flow of information between CMHCs and state hospitals.
	4. Carefully defined QMHPs (conflicts among private mental health professionals and CMHC screeners).
	5. Established a new state hospital/CMHC client privilege for the release of information not based upon who a client’s therapist was- psychologist, social worker, physician, nurse.

Prepared by Bill Rein, Chief Counsel for KDADS. He prepared this overview for a current Task Force that is working on some recommendations for Secretary Sullivan; however, the details seem relevant to this project. Bill states that “the slides in this presentation reflect my personal experience in mental health law over a period of 13 years from 1977 to 1990. I’m sure other attorneys drew different conclusions. However, no one can underestimate the challenges of those reformative years. With respect to the history of mental health law in Kansas, actual papers, memos, bill drafts, newspaper articles, recordings, etc. concerning HB 2050 are available at KU in its Spencer Library, Kansas Collection.