DEMENTIA AND THE FLORIDA MENTAL HEALTH ACT

Effects on provision of medical care impacting vulnerable Floridians who lack medical decision making abilities

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SITUATION: Individuals who have dementia or traumatic brain injury receiving medical care in a hospital who are at risk of wandering or self-neglect, or are otherwise attempting to leave an acute care medical setting against medical advice without the ability to provide informed consent to do so, are at serious risk. There is currently no legal mechanism in the state of Florida to respond to these urgent cases in a timely manner that balances the necessity of medical care against the civil liberties of the individual.

BACKGROUND:

- The Florida Mental Health Act (Baker Act) law asserts that a person may be held for involuntary examination under BA52 if there is reason to believe that he or she has a mental illness which is resulting in risk of suicide, homicide, or neglect, and that he or she either refuses or cannot consent to a voluntary examination (A,B).

- Historically it has been common in acute care medical settings for individuals to have been placed under BA52 by the treating medical service if they were suffering from a mental illness and were at imminent danger to self or others, including lacking the capacity to make decisions regarding healthcare while attempting to leave a safe environment. This act would be based upon the presumption of some underlying psychiatric illness or neurocognitive impairment contributing to incapacity for medical decisionmaking.

- Historically it has also been common in acute care psychiatric settings for individuals diagnosed with dementia who were admitted for involuntary examination under BA52 to be subject to a BA32 petition and subsequent BA8 order for involuntary placement given continued risk of neglect or harm to self or others.

- The Florida Supreme Court Commission on Fairness, organized in 1997 as a structured investigation into the execution of the Florida Mental Health Act, published its report on the Baker Act in December 1999. In this report it was suggested that "*The Florida Legislature should consider whether the definition of mental illness should be amended to exclude dementia, Alzheimer's disease, and traumatic brain injury*" (p. 27). This recommendation was supported by the Commission's findings that potential for misuse of the Baker Act existed as applied to individuals with dementia, in which nursing homes received financial incentives and residents were frequently "dumped" due to behavioral problems or mental illness rather than addressing psychosocial and environmental factors contributing. Furthermore those surveyed by the commission similarly advocated for greater oversight and increased level of protection for older adults in licensed facilities.

- On 01/07/2016 Florida SB 12 (Mental Health and Substance Abuse) was sponsored by Sen. Garcia and co-sponsored by Sens. Galvano and Ring. At Appropriations Subcommittee Garcia submitted amendment 223708, which among other additions added the exclusion that "*The court may not order an individual with traumatic brain injury or dementia who lacks a co-occurring mental illness to be involuntarily placed in a state treatment facility.*" On review of 30 subsequent amendments, no additional changes related to dementia care were introduced.

- On 02/01/2016 HB 7097 (Mental Health and Substance Abuse) was sponsored by Reps. Harrell (R) and Peters (R), and co-sponsored by Reps. Artiles (R), Campbell (D), Dudley (D), and Pilon (R). It was favored unanimously by Health Care appropriations Subcommittee with a single amendment from Harrell unrelated to the present topic.

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During Health and Human Services Committee review, Harrell submitted amendment 668531, which among other additions added the exclusion that "*The court may not order an individual with traumatic brain injury or dementia who lacks a co-occurring mental illness to be involuntarily placed in a state treatment facility.*"

Rep. Smith's (R) amendment 420117 to Harrell's amendment added the following: "*If a person has been diagnosed with Alzheimer's disease or a dementia-related disorder, this condition must be indicated on the ex parte order, written report, or certificate. When initiating transport of such person, a law enforcement officer shall collect any information regarding his or her condition, medications, and needs provided by a health professional, family member, caregiver, or other individual, and shall provide this to the receiving facility immediately upon arrival. As soon as practicable, such person shall be temporarily placed in a secure private area within the receiving facility, if available, and clinically indicated, where the person shall be permitted to be accompanied by a family member or caregiver provided it is safe for him or her to do so.*"

The amendments were approved by unanimously by the Health and Human Services Committee and HB 7097 c1 was placed on the House calendar. On 03/04/2016 companion bill CS/SB 12 was substituted for HB 7097 and passed.

- The above legislation served to include dementia as an excepted diagnosis for the purposes of a BA32 petition and BA8 order. This resulted in both positive and negative change, in that individuals with dementia were now protected from simply being placed in psychiatric units in the absence of a modifiable psychiatric disorder; this protection is similar to the PASRR provisions of the Nursing Home Reform Act, which prevents individuals with serious mental illness simply being warehouse in nursing facilities without additional rehabilitative needs. According to the 2017-2018 Baker Act Reporting Center report, while all cases of involuntary examinations showed year to year continued increases, the overall year over year increase among older adults showed a marginally lower rate of increase, potentially in response to this legislations. However this also prevented medical and psychiatric facilities from restricting the discharge of individuals unable to care for themselves due to cognitive impairment; as a result, many hospitals in the community would fully eliminate psychiatric care for patients with dementia or provide limited services as possible within the guidelines of the BA52.

- On 11/05/2019 SB 7012 (Substance Abuse and Mental Health) was sponsored by Children, Families, and Elder Affairs and co-sponsored by Sen. Rouson (D). Floor amendment 541211 by Rep. Stevenson added "*dementia, traumatic brain injury*" to the list of excepted diagnoses defined by "Mental illness" in Fla. Stat. § 394.455 and 916.106. The amendment passed and the bill was signed by the governor on 06/18/2020 to take effect 07/01/20.

- As demonstrated by the 2021-2022 Baker Act Reporting Center report, there has been a continual decline in the number of involuntary examinations for adults 65+ since at least 2018, which aligns with that demonstrated for young adults 18-24 years old (p. 7). During the 2020-2021 fiscal year there was a percent change in the number of involuntary examinations of -10.15% for 65+ relative to -7.32% change for adults 25-64 and -1.41% for young adults 18-24. By the 2021-2022 fiscal year these percent decreases were -12.66% (65+), -12.83% (25-64), and -11.64% (18-24). These data suggest that while there was an initial dip in the application of involuntary examinations among older adults 65+ relative to other adults, there has been no lasting and appreciable impact in decreasing the frequency of these involuntary examinations among older adults as a result of the legislation.

- When faced with questions regarding an individual who lacks decisionmaking capacity to participate in medical care, physicians and healthcare facilities refer to Fla. Stat. § 765 (2023). This chapter outlines authority of alternate decisionmakers and immunity from liability (765.109) for health care facilities, providers, or other persons acting under the direction of a health care facility or provider. And while this guidance does provide a facility the authority to provide medical diagnostics and treatment at the discretion of an alternate decisionmaker, it does not provide a healthcare provider or facility with protections related to ensuring that a vulnerable adult remains physically within the care setting.

  In the absence of this guidance and in the absence of liability protections, a healthcare facility will typically develop a policy which aligns with one of the following approaches, neither of which successfully strike a balance between protection of vulnerable individuals and support of constitutional freedoms.

  1) A facility's legal counsel may determine that the healthcare organizations lacks legal protections in preventing a vulnerable adult from leaving, and that individual may be allowed to depart the facility while incapacitated; in this scenario, notification of community law enforcement and adult protective services would generally be indicated, however there is no timely mechanism by which the emergency medical care may be provided.

  2) A facility's legal counsel may determine that by acting at the discretion of a healthcare provider, security personnel are empowered and protected to ensure that the vulnerable adult remains in the setting necessary for emergent medical care; while this approach ensure that the timely provision of medical care may occur, there is no system in place to ensure that this mechanism of detainment is not abused.

ASSESSMENT OF CURRENT STATE OF AFFAIRS: The definition of mental illness cited by form CF MH3052b (BA52) (K) has now added dementia and TBI as exclusions. Patients who appear to meet involuntary criteria, but do so only as a result of dementia or traumatic brain injury, may no longer be placed under BA52. The passing of SB 7012 represented the final element in a series of protections intended to prevent the misuse of the Florida Mental Health Act as it relates to older adults and individuals with dementia, including inappropriate restriction of civil liberties and financial gain and exploitation. However these changes have eliminated mechanisms which were also commonly used to ensure that patients with dementia who are attempting to terminate necessary medical care without understanding their circumstances could be temporarily protected pending further legal processes. There is currently no legal mechanism in the state of Florida to respond to these urgent cases in a timely manner that balances the necessity of medical care against the civil liberties of the individual; without such a mechanism, hospitals are forced to make a choice between facilitating the individual placing themselves at additional risk or inappropriately using other mechanisms for detention which are neither supported nor overseen by the state of Florida.

RECOMMENDATIONS FOR ENHANCEMENT OF CARE AND PROTECTIONS:

- **Summary Recommendation:** Changes to state law have introduced necessary limitations to ensure protection of civil liberties for older adults. However the safety of vulnerable Floridians diagnosed with dementia should continue to be prioritized through consideration of alternative mechanisms to prevent discharge of medically incapacitated patients. Such alternatives should integrate the importance of medical care for these individuals with necessary checks and balances intended to ensure that civil liberties are effectively protected.

- **Specific Recommendation:** Strong consideration should be made for statutory guidance surrounding the management of incapacitated individuals; this guidance should include a system of necessary oversight. A standard, formalized approach must be implemented to ensure equitable application of the law and ensure that the civil liberties of vulnerable older adults are respected.

- **Opportunities for Implementation:**

  Reintroduction of a process within the Florida Mental Health Act for monitoring, treating, and limiting involuntary holds related to caring for individuals diagnosed with dementia, for whom medical or psychiatric treatment is necessary. For the safety of patients, caregivers, and medical facility staff, strategies to optimize behavioral management and effectively eliminate the chances of at-risk patient wandering from the hospital should be prioritized at the state level. This guidance would include, but not be limited to the following:
    - Identify physical locations best suited for necessary levels of observation
    - Optimize staffing and ensure adequate training for management of behavioral disturbances
    - Implement a balanced, effective, least restrictive physical environment to minimize wandering

  As an alternative or adjunct to the above, efforts should be made to outline a standardized process of medical decision-making capacity evaluation that *also* includes consideration for restriction of incapacitated individuals to a facility where necessary medical or psychiatric care may be provided. This must include opportunities for facility oversight and time limits, analogous to the protections afforded by those subject to the Florida Mental Health Act. This process would include, but not be limited to the following:
    - Mandate efforts to expediently identify a surrogate decision-maker in cases of incapacity
    - Outline time limits and required periods for medical capacity to be re-evaluated
    - Implement a standardized review process to maintain continual risk monitoring