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Civil Commitment of the Mentally Ill in Kentucky

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NOTES

CIVIL COMMITMENT OF THE MENTALLY ILL IN KENTUCKY

> Experience should teach us to be most on our guard to protect liberty where the government's purposes are beneficient. . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.[1]

Introduction

Involuntary commitment of the mentally ill presents special problems, unparalleled in any other area of the law. As in a criminal proceeding, the state is seeking to confine, but unlike the criminal, the mentally ill individual can be incarcerated without performing any wrongful act. The mere possibility that a person "probably will" cause harm to himself or others is sufficient to justify confinement,[2] sometimes for an indeterminate period.[3] If a sociologist predicts that there is an eighty percent probability that a person will commit a criminal act, he cannot be confined; however, if a psychiatrist testifies that the same person is mentally ill and equally likely to commit the same act,[4] the person can be committed.

The proceeding for commitment is generally classified as civil,[5] but since deprivation of liberty may result, aspects of a criminal trial are present. The commitment hearing itself with the person defending his liberty against the state acting through a prosecutor[6] more closely resembles a criminal trial than a civil trial. However, the proceeding cannot be classified as criminal, since there need be no present violation of the law; but it cannot be correctly categorized as civil because of the potential incarceration. In Kentucky the Court of Appeals, recognizing this inconsistency, has classified the proceeding as quasi-criminal,[7] neither wholly civil nor wholly criminal.[8]

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[1] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[2] *See* KY. REV. STAT. § 202.010 (1972) [hereinafter cited as KRS].

[3] KRS § 202.135.

[4] Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1290 (1966).

[5] Cadden v. Commonwealth, 242 S.W.2d 409 (Ky. 1951).

[6] The statute sometimes calls the proposed patient a defendant. *See, e.g.*, KRS §§ 202.010, 202.136-37.

[7] Sabin v. Commonwealth, 26 S.W.2d 506 (Ky. 1930).

[8] Denton v. Commonwealth, 383 S.W.2d 681 (Ky. 1964).

The confinement in a mental hospital which may result from such a proceeding can be a tragic experience. For example, a visitor to a state mental hospital in Kentucky, although initially impressed by the lack of bars and uniformed attendants, will later discover that these precautions are no longer necessary because of the increased use of tranquilizers. He will also note that, while a serious attempt has been made to remove the sterile, institutional atmosphere, there are still no walls between beds in the wards, and privacy is non-existent. In addition, the danger of attack by periodically violent patients is a constant threat. The effect of these and other elements upon the inhabitants of mental institutions is enormous, and horrifying. This fact was documented in 1966 when it was discovered that while the death rate per 1,000 persons in the United States for that year was 9.5, the rate among resident mental patients was 91.8.[9] In Kentucky the figures were even more alarming: the death rate per 1,000 people in the general population was 10; the rate per 1,000 resident mental patients was 125.8, a ratio of 12.6 to 1.[10]

Even after release from a mental institution, serious consequences may follow, affecting the former patient's entire career. This was amply demonstrated by Senator Thomas Eagleton's withdrawal as Democratic vice-presidential nominee in 1972 as a result of the publicity of his having received mental treatment some years before. Often, former mental patients do not get jobs, an unfortunate reality which has prompted the observation that "in the job market it is better to be an ex-felon than an ex-mental patient."[11]

These tragic results have made the law cautious not to commit, as mentally ill, citizens who are only slightly odd or eccentric, and as a result conflicts have arisen between legal and medical values. The lawyer is concerned with an individual's liberty, his right to remain free to do as he pleases; the doctor often is more concerned with the patient's medical interest. Professor H. A. Ross offers the hypothetical case of an old man who makes a comfortable living on his farm but who is subject to periods of severe depression. According to psychiatric testimony there is a two to one chance that during the next few years he will commit suicide while in a depressed state.

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[9] Furman and Conners, *The Pennsylvania Experiment in Due Process,* 8 DUQUESNE L. REV. 32, 65-66 (1970).

[10] Id. The wide disparity may be explained in part by the different populations being measured. There are no babies and few children in mental hospitals, and many aged patients are hospitalized only because they are suffering the effects of senility.

[11] Testimony of Bruce J. Ennis, *Hearings Before the Senate Subcomm. on Constitutional Rights,* 91st Cong., 2d Sess. (1970), *as cited in* Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972).

The farmer recognizes the risk but would prefer to live on his farm and take his chances.[12] The lawyer would probably seek to allow the man to make his own decision; the doctor's training would probably convince him to seek commitment.

The purpose of this note is to examine how Kentucky case law and statutes attempt to reach a compromise between the patient's legal rights and his medical needs. The following is not a theoretical discussion but rather is an attempt to provide the practicing attorney with a working guide for use in commitment cases. Commitment of the mentally ill is not a particularly well-known area of the law, and the statutes are somewhat intricate. Moreover, although civil commitment is a statutory proceeding, the relevant case law is very important and must be understood before an attorney can knowledgeably try a commitment case. The scope of this note is limited to Kentucky law; there has been no attempt to delineate majority/minority rules nor to examine the commitment laws of other states. Foreign case law and United States Supreme Court decisions are discussed only where relevant to an understanding of Kentucky law.

I. HISTORICAL OVERVIEW OF CIVIL COMMITMENT

For centuries, governmental power has been used to confine mentally ill persons.[13] Under the English statute *De Prærogative Regis* enacted between 1255 and 1290, the King became guardian of the person and goods of a lunatic,[14] and the lunatic was commited to the custody of a friend who received an allowance for his care.[15] This practice was justified not only by the need to prevent the person from injuring others[16] but also by the desire to protect those who could not care for themselves.[17] In addition, it removed the burden of responsibility from the lunatic's family.[18] During lucid moments the incompetent was permitted to manage his own property and to exercise his civil rights, and, on such occasions, was entitled to an accounting from the king.[19]

In Colonial America, parents and family were expected to care for

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[12] Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 957 (1959).

[13] F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 10 (1961) [hereinafter cited as F. LINDMAN & D. MCINTYRE].

[14] 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 473-76 (1927).

[15] S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 4 (1971) [hereinafter cited as S. BRAKEL & R. ROCK].

[16] F. LINDMAN & D. MCINTYRE, *supra* note 13, at 10.

[17] *See* Beverley's Case, 76 Eng. Rep. 1118 (K.B. 1603).

[18] A. DEUTSCH, THE MENTALLY ILL IN AMERICA 42 (2d ed. 1949) [hereinafter cited as A. DEUTSCH].

[19] S. BRAKEL & R. ROCK, *supra* note 15, at 4.

their own mentally ill.[20] The first mental hospital in this country was not constructed until 1773,[21] and the second one, built in Lexington, Kentucky, was not completed until 1824.[22] The burden of caring for the mentally ill shifted from private to public in 1845 when the Massachusetts Supreme Court incorporated the ancient common law doctrine of *parens patriae* into its law on commitment.[23] Under this doctrine which views the state as the parent or guardian of the mentally incompetent person,[24] the Massachusetts Court justified the total deprivation of one such individual's liberty in *Matter of Josiah Oakes.* Therein the Court demonstrated the almost limitless extent of the *parens patriae* doctrine when it declared:

> The right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to *themselves* or others. . . . And that necessity which creates the law, creates the limitations of the law. The question must then arise in each particular case, whether a person's own safety or that of others requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration or will be conducive thereto. *The restraint can continue as long as the necessity continues.* This is the limitation and the proper limitation.[25]

The Court also concluded that no procedural due process need be afforded because the state is acting for the individual's good and therefore is not an adversary.[26]

It did not take long for reformers to attack the *parens patriae* doctrine. In 1860 a Mrs. Packard was committed under an Illinois statute which allowed married women and infants to be committed on the request of a husband or guardian.[27] After her release, she and others were instrumental in establishing commitment safeguards and in improving hospital conditions.[28] However, as late as 1962 the

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[20] *Id.*

[21] *Id.* at 5. This hospital was constructed in Williamsburg, Virginia. As early as 1751, Pennsylvania had established a general hospital which would treat the mentally ill as well as other patients. *Id.*

[22] *Id.* This hospital, established as Eastern Lunatic Asylum, later became Eastern State Hospital.

[23] Matter of Josiah Oakes, 8 Law Rep. 123 (Mass. 1845).

[24] *See* BLACK'S LAW DICTIONARY 1269 (4th ed. rev. 1968).

[25] 8 Law Rep. 123, 125 (Mass. 1845) (emphasis added).

[26] The *parens patriae* doctrine has also been largely responsible for denial of due process in juvenile cases. *See In re* Winship 397 U.S. 358 (1970). *See also* Stamm, *Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law,* 62 KY. L.J. 122, 132-64 (1974) for a discussion of *parens patriae* in juvenile cases in Kentucky.

[27] The Kentucky statute seems to allow this procedure for minors. Commitment is regarded as voluntary, and none of the safeguards of involuntary commitment apply. *See* KRS § 202.015(1).

[28] S. BRAKEL & R. ROCK, *supra* note 15, at 8.

Supreme Court of the United States still seemed to support this doctrine, at least in dicta.[29] *Parens patriae* has found limited support in Kentucky where the Court of Appeals has stated that the inquest for commitment is for the good of the person whose mental state is in question[30] and that commitment statutes are generally thought of as having a benevolent purpose.[31] As will be discussed below, however, procedural safeguards are available to guarantee that a defendant in a commitment proceeding will receive his constitutional rights.

As for the history of statutory law, it is impossible to generalize among the states, for the statutes are as varied as the legislatures that promulgated them. In Kentucky, the first statute concerning the mentally ill was passed in 1893[32] and was superceded by a more comprehensive law in 1918 which provided for the commitment, care and treatment of epileptic, feeble minded, and insane persons.[33] In 1928 the General Assembly again revised the law;[34] subsequent revisions have been enacted, the most recent being in 1968.[35] Through this process of statutory evaluation, the Kentucky commitment statute has consistently been improved and presently ranks as one of the best in the United States.

II. CASE LAW OF CIVIL COMMITMENT

An analysis of the applicable case law is necessary before a full and critical understanding of the Kentucky commitment statute can be achieved.[36] As in criminal law, many constitutional protections

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[29] Robinson v. California, 370 U.S. 660, 666 (1962). *But see* Specht v. Patterson, 386 U.S. 605 (1967) and *In re* Gault, 387 U.S. 1 (1967).

[30] Cadden v. Commonwealth, 242 S.W.2d 409 (Ky. 1951).

[31] Sabin v. Commonwealth, 26 S.W.2d 506, 509 (Ky. 1930).

[32] KY. ACTS ch. 147 (1893).

[33] KY. ACTS ch. 54 (1918).

[34] KY. ACTS ch. 16 (1928).

[35] KY. ACTS ch. 90 (1968).

[36] It should be noted here that the case and statutory law applies outside the area of involuntary civil commitment. The same safeguards which apply to commitment proceedings also are applicable to incompetency hearings. Incompetency, other than that due to a bodily infirmity, is classified by the Kentucky Court as a "species of insanity, for it is a weakness of mind or mental abnormality." Sabin v. Commonwealth, 26 S.W.2d 506, 508 (Ky. 1930). Further, the safeguards given to people being committed civilly must be given to convicted criminals who, judged to be insane, are committed after their jail sentence has been completed. *Baxstrom v. Herold,* 383 U.S. 107 (1966), is a case in which an ex-felon was given no right to jury trial though the right was granted to normal civil commitment defendants. The case held that once the state made this right available for some mental patients, it could not, consistent with the equal protection clause of the fourteenth amendment, arbitrarily deny it to others, *i.e.* all mental patients must be treated alike. The state cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others. Jackson v. Indiana, 406 U.S. 715 (1972).

are involved, and the state and federal constitutions as interpreted through case law can limit a statute or even negate it. Furthermore, an attorney may wish to attack a statute on constitutional grounds and, under Kentucky case law, such an attempt may meet with success.

The most important case in the field of commitment for mental illness in Kentucky, and one of the most important nationally, is *Denton v. Commonwealth.*[37] In 1964 *Denton* became a landmark in the United States by greatly expanding the rights of prospective mental patients and has perhaps gone as far in that direction as any other case to date. The case involved an appeal from a judgment in which Mrs. Denton was found to be "mentally ill, dangerous, uncontrollable and incompetent to manage her own affairs."[38] She had completed a temporary thirty-five day hospitalization for observation, when two staff physicians of Kentucky State Hospital, seeking an order for her continued confinement, filed a certificate stating that she was mentally ill.[39] At the ensuing inquest the only evidence introduced concerning her mental state was the affidavits of the two physicians. Mrs. Denton's court-appointed counsel objected to the reading of the affidavits on the ground that it violated the right to confrontation guaranteed in the United States[40] and Kentucky[41] constitutions, but his objection was overruled by the Boyle Circuit Court. The Court of Appeals reversed.

The Court of Appeals, basing its holding on the equal protection doctrine, recognized the basic injustice of depriving an individual of his constitutional guarantees in a commitment hearing.[42] The opinion by Justice Moremen noted the similarity of the commitment proceeding to the criminal proceeding in that, although specific elements such as criminal intent need not be proved, the potential result of the commitment proceeding is the same as that of a criminal trial—the deprivation of liberty.[43] Justice Moremen then emphasized the guarantees available to a defendant in a commitment proceeding:

> We recognize that the constitutional command to guarantee "equal protection of the laws" means equal rights for all those similarly situated and that some classification is permitted. But we cannot assume that the bare *accusation* of insanity acts as a proper classi-

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[37] 383 S.W.2d 681 (Ky. 1964).

[38] *Id.* at 682.

[39] [1928] KY. ACTS: ch. 16 (repealed 1968). The closest existing provision is KRS § 202.100 which provides for a sixty-day observation period.

[40] U.S. CONST. amend. VI.

[41] KY. CONST. § 11.

[42] Denton v. Commonwealth, 383 S.W.2d 681, 682 (Ky. 1964).

[43] The Kentucky Court of Appeals has classified the commitment proceeding as quasi-criminal. Cadden v. Commonwealth, 242 S.W.2d 409 (Ky. 1951).

> fication so that a person so accused may be deprived of his liberty . . . without granting to him his *full* constitutional guarantees.[44]

To ensure these guarantees "the defendant should be afforded the same constitutional protection as is given to the accused in a criminal prosecution."[45] To delineate the rights of the accused the Court quoted § 11 of the Kentucky Constitution, which sets a high standard:

> In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him, to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.[46]

The implications of *Denton* are far reaching. No other court has so explicitly stated that defendants in a commitment proceeding are entitled to their full constitutional guarantees, and a cursory look at the Kentucky statutory provisions will indicate that even they do not fully comply with this mandate.

When an individual has been adjudged mentally ill and is receiving treatment, many of his constitutional rights must be denied,[47] but merely being *accused* of being a danger to one's self or to others[48] does not mean that a defendant *is* such a danger. A man does not become guilty by mere accusation; he is entitled to a fair and impartial hearing. In short, a person should not be deprived of an adequate opportunity to defend himself merely because someone has accused him of being insane instead of being criminal.

Denton did not specifically involve *all* constitutional protections, so the strict jurist can argue that only so much of the language as is absolutely necessary to support the specific holding is law. As previously stated, the objection of counsel in this case was based on the fact that affidavits of doctors were admitted into evidence without the doctors being present. The Court noted that it had always been "assumed"[49] that it was not necessary for the examining physicians to appear in court to testify but held the admission of the evidence by certificate or affidavit to be error, because the right to confrontation was denied.[50]

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[44] Denton v. Commonwealth, 383 S.W.2d 681, 683 (Ky. 1964) (emphasis added).

[45] *Id.*

[46] KY. CONST. § 11.

[47] There is no greater invasion of personality than involuntary treatment of mental illness. The widespread use of drugs makes possible a complete rearrangement of personality and physical functions.

[48] KRS § 202.135(6)(b).

[49] Denton v. Commonwealth, 383 S.W.2d 681, 683 (Ky. 1964).

[50] *Id.* at 683. The Court also considered the burden of proof in the proceeding. This part of the opinion discussed in some detail the statutory provision on burden of proof which was KRS § 204.140, *repealed* KY. ACTS ch. 90 (1968). The present provision is KRS § 202.135(5).

Denton is a logical extension of Kentucky law and is supported by an examination of prior Kentucky case law as well as cases from other jurisdictions. As early as 1930 the Kentucky Court commented on the commitment proceeding, expressly noting its grave consequences.[51] A subsequent opinion noted that "[t]he most sacred rights of the individual are involved . . . ."[52] To protect individual rights, the Kentucky Court has held that unless statutory requirements for commitment are strictly complied with,[53] the judgment is void.[54]

Foreign courts have not read *Denton* narrowly. The Ohio Supreme Court, for example, has read *Denton* as guaranteeing a defendant the right to counsel.[55] Although the right to counsel is guaranteed by statute in Kentucky,[56] this interpretation of the case is consonant with reading it as guaranteeing *all* constitutional rights to a defendant. The Oregon Supreme Court also has cited *Denton* as guaranteeing right to counsel.[57] One federal district court read *Denton* as requiring proof beyond a reasonable doubt on questions relating to civil commitment,[58] while another cited it as holding that the commitment procedure and safeguards should be the same as those in criminal proceedings.[59] This last and most liberal view, strict construction of the case notwithstanding, is completely justified by the language of the *Denton* opinion. Why would the Court cite Kentucky Constitution § 11 in full if it was not to be followed? In applying *Denton* to statutory law, this note will proceed on the assumption that the last reading, which guarantees full constitutional rights in commitment proceedings, is correct.

Denton has been subsequently discussed by the Court of Appeals only in *Settle v. Triplett*,[60] which involved not a commitment proceeding, but rather a circuit court appointment of a guardian for an allegedly incompetent person. In *Settle*, proper notice was not sent to the parties as required by statute, but at a later hearing on a motion to vacate the original order all interested parties were before the Court and were given opportunity to present their objections.[61] *Denton* was interpreted as holding it to be reversible error to admit

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[51] Sabin v. Commonwealth, 26 S.W.2d 506 (Ky. 1930).
[52] McFarland v. Commonwealth, 60 S.W.2d 360, 361 (Ky. 1933).
[53] Taylor v. Moore, 65 S.W. 612 (Ky. 1901); Stewart v. Taylor, 63 S.W. 783 Ky. 1901); Menifee v. Eads, 30 S.W. 881 (Ky. 1895).
[54] Turpins Adm'r v. Stringer, 14 S.W.2d 189 (Ky. 1929).
[55] *In re* Popps, 292 N.E.2d 330 (Ohio. 1972).
[56] KRS § 202.135.
[57] State v. Collman, 497 P.2d 1233 (Ore. 1972).
[58] Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972).
[59] Dixon v. Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971).
[60] 426 S.W.2d 423 (Ky. 1968).
[61] *Id.*

evidence of doctors by certificate or affidavit in an inquest *over the objection of counsel.* The Court distinguished *Denton* on two grounds: first, that in *Denton* there was a direct appeal; and second, that in *Denton,* the objection was made by counsel whereas in *Settle,* the counsel did not make, and therefore waived, the objection. As an alternate ground, the Court held that the subsequent hearing provided an opportunity for all parties to make objections and that since this cured the defect, no further hearing was necessary.[62] The fact that all parties did eventually appear and that a further hearing would have been repetitious clearly influenced the Court. *Settle* is wholly consistent with the view that construes *Denton* as requiring the constitutional protections in commitment proceedings to be the same as those in criminal proceedings. The objection in *Settle* was waived by counsel; and neither the facts nor the language of *Settle* otherwise affect *Denton* in any substantial degree.[63]

Denton is not only supportable as a logical extension of Kentucky case law, but also conforms with the trend of decisions of other jurisdictions. If chronological sequence is ignored, most of these foreign cases, although decided after *Denton,* are logical steps by other courts toward the *Denton* guarantee of full constitutional rights. A key case in this development is *Heryford v. Parker,*[64] which establishes a definite link between mental incompetency hearings and juvenile hearings. Although at first blush these two proceedings appear unrelated, a comparison of the statutes concerning juvenile proceedings and involuntary hospitalization reveals important similarities. Both hearings have traditionally been regarded as civil, and in both the application of the *parens patriae* doctrine is paramount. Neither has been regarded as punitive, for cure and guidance are provided to the defendant by the benevolent state. In a juvenile proceeding, furthermore, the hearing is to be informal, and the presence of the child may be waived.[65] Likewise, in the commitment proceeding the hearing may be informal, and the presence of the defendant may be waived.[66]

The United States Supreme Court held in *In re Gault*[67] that juveniles must be afforded due process of law, quickly dispensing with the argument that the proceeding was non-criminal in nature. The Court said, just as did the Kentucky Court in *Denton,* that the

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[62] *Id.*
[63] *Id.*
[64] 396 F.2d 393 (10th Cir. 1968).
[65] KRS § 208.060.
[66] KRS § 202.135.
[67] 387 U.S. 1 (1967).

central consideration is that the proceeding results in deprivation of liberty. This doctrine has been expanded in subsequent cases such as *In re Winship*,[68] which held that proof beyond reasonable doubt is required in juvenile proceedings. The Court also dismissed the *parens patriae* argument saying: ". . . the admonition to function in a parental relationship is not an invitation to procedural arbitrariness."[69] The similarities between these two areas of the law are obvious, since the same reasoning leads to similar conclusions in both types of cases. Several courts, noting the similarity, have cited juvenile cases as authority in commitment cases.[70]

The Supreme Court has never decided the specific issue of whether defendants in civil commitment proceedings must be afforded full constitutional rights. The Court's consideration of this issue heretofore has been confined to the situation where doctors or prison officials have attempted to confine a prisoner, who they believed insane, beyond the period of his original sentence. Often this confinement was the result of an administrative decision which afforded the prisoner no right to a hearing.[71] This practice was held unconstitutional in *Baxstrom v. Herold*,[72] which requires that all commitment patients be treated similarly. The state cannot withhold from a few the procedural protection or the substantive requirements for commitment that are available to others.[73]

Even though the Supreme Court has never directly decided the issue of full constitutional rights in a commitment proceeding, some of its dicta is very illuminating. In 1940 Chief Justice Hughes stated:

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity . . . and the special importance of maintaining the basic interests of liberty in a class of cases where the law though "fair on its face and impartial in appearance" may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the person charged are not adequately safeguarded at every stage of the proceeding. But we have no occasion to consider such abuses here. . . .[74]

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[68] 397 U.S. 358 (1970).

[69] Kent v. United States, 383 U.S. 541, 555 (1966).

[70] Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); Dixon v. Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971).

[71] *See generally* L. LUCY & L. HOFFMAN, THE TRAGIC ORDEAL OF STEPHEN DENNISON (1970), for the tragic story of a man who spent fifty-eight years of his life in a mental institution for the original crime of stealing candy and fruit at age seventeen.

[72] 383 U.S. 107 (1966).

[73] Jackson v. Indiana, 406 U.S. 715 (1972).

[74] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 276-77 (1940).

The spirit of this statement is clearly present in *Denton* and cases like it. More recently, in a case involving compulsory treatment for drug addiction, the Supreme Court noted that a state has the right to determine that the general health and welfare could require compulsory treatment,[75] including involuntary hospitalization. The full nature and scope of the rights the defendant has in his defense to the proceeding however remains unanswered.

The closest the Supreme Court has come to a holding on the specific issue of civil commitment procedure was in *Specht v. Patterson*,[76] a criminal case dealing with the Colorado Sex Offenders Act.[77] The statute provided that a person convicted of a criminal sexual act may be punished by imprisonment of one day to life if, in the opinion of the court, the accused constitutes a threat to the public or is mentally ill. The statute provided only a rudimentary hearing to determine if a person did indeed constitute such a threat or is mentally ill. The Supreme Court, in an opinion by Justice Douglas, painted with a broad brush: "These commitment proceedings, whether denominated civil or criminal are subject . . . to the Equal Protection Clause of the Fourteenth Amendment. . . ."[78] However, the decision is of limited impact, since it relies upon *Baxstrom*, which as discussed above held only that a criminal whose confinement for mental health reasons was to extend beyond the expiration of his criminal sentence must be afforded the same rights as a defendant in a civil commitment case. The case did not consider the constitutional guarantees applicable to civil commitment,[79] and parts of the opinion indicate that the Court did not intend to direct its decision to that question. Justice Douglas compared the Colorado statute with recidivist statutes and specifically noted that the purpose of the statute is not to treat but to punish.[80] Justice Harlan, concurring, cited as controlling authority *Pointer v. Texas*,[81] a case dealing with an accused's rights in a robbery case. Even though Justice Douglas' dicta is perhaps not authoritative, it is fully supportive of *Denton*:

> Due process in other words requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-

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75 Robinson v. California, 370 U.S. 660 (1962).
76 386 U.S. 605 (1967).
77 COLO. REV. STAT. ANN. § 40-2-32 (1963).
78 Specht v. Patterson, 386 U.S. 605, 608 (1967).
79 383 U.S. 107 (1966).
80 Specht v. Patterson, 386 U.S. 605 (1967).
81 380 U.S. 400 (1965).

> examine, and to offer evidence of his own and there must be findings adequate to make meaningful any appeal that is allowed.[82]

In short, the defendant should be given his full constitutional rights.

II. STATUTORY LAW IN KENTUCKY

> The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of their's or to impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest.[83]

The preceding analysis of case law is primarily introductory, since in all states today statutes, rather than the common law, regulate the mechanics of commitment. Consequently, in most situations the practicing attorney will look to statutes rather than to case law for the procedures and the substantive law involved. The purpose of this section is to simplify the Kentucky statutes and provide a practical guide to commitment proceedings, by analyzing in detail the statutory provisions and relevant case law.

A. *Voluntary Commitment*

Although the primary subject of this note is involuntary commitment, the law of voluntary commitment must also be considered, for if it is not complied with, a voluntary commitment can become involuntary. Any person over the age of eighteen may commit himself in Kentucky,[84] but a parent or guardian must apply for commitment of anyone under eighteen.[85] A minor cannot validly sign his own admission papers unless there is a medical emergency, and the parent or guardian is unavailable.[86] The application by a parent or guardian must be signed in the presence of two witnesses[87] which helps to ensure that no child is committed simply because he is a behavior problem or does not get along well with the parent.

If a voluntarily committed patient requests release it must be granted immediately,[88] but he cannot be released on anyone's consent but his own.[89] A minor may be released upon the consent of a parent or guardian, but after age eighteen the patient must be released at

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[82] 383 U.S. 107 (1966).
[83] J. MILL, ON LIBERTY 18 (Gateway ed. 1962).
[84] KRS § 202.015(1).
[85] *Id.*
[86] 68 OP. KY. ATTY. GEN. 486.
[87] KRS § 202.015(1).
[88] KRS § 202.015(3).
[89] *Id.*

his request.[90] A staff physician also may discharge *any* voluntary patient who he deems to have recovered or who no longer needs hospitalization. In addition, this doctor has power to discharge a patient to make more effective use of the hospital, *i.e.*, to make room for someone more in need of treatment.[91]

A voluntary commitment may become involuntary if a voluntary patient is denied his request for release. If two staff physicians (who are not required to have training in psychiatry)[92] believe that the patient will "cause injury to himself or others" *and* that the individual lacks capacity to make his own decisions, they may have him held for forty-eight hours after receipt of his request for release.[93] After forty-eight hours the patient must be released unless involuntary commitment proceedings have been instituted; however, the patient may be held until the proceeding has been terminated by an order of court.[94]

B. *Involuntary Commitment*

The Kentucky Revised Statutes provide for three periods of temporary involuntary commitment ranging from forty-eight hours to sixty days and for indeterminate involuntary commitment. Since the procedures differ according to the type of commitment, each must be discussed separately.

1. *Forty-Eight Hour Admission*

The forty-eight hour temporary admission[95] can be ordered in three situations. The first occurs as noted above when a voluntary patient who is still sick applies for release. The second situation arises when a person in need of immediate treatment and care because of mental illness or retardation is brought to the mental hospital without the proper papers required for compulsory hospitalization. Two staff physicians at the hospital may authorize the person's admittance if they certify that in their opinions he will probably cause injury to himself or others if not restrained and that he does not have the capacity to realize his need for hospitalization.[96]

The third use of the forty-eight hour confinement occurs when a person's "relative, spouse, friend, guardian" or doctor in a hospital where the person is a patient applies for an involuntary commitment.[97]

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[90] *Id.*
[91] KRS § 202.015(2).
[92] KRS § 202.010(5).
[93] KRS § 202.015(4). The forty-eight hour period excludes weekends and holidays. KRS § 202.117(2).
[94] KRS § 202.117(2).
[95] KRS § 202.117.
[96] KRS § 202.117(1)-(3).
[97] KRS § 202.117(4).

If one of these people can obtain the certification of two physicians that they have examined the person and have found him to be "in need of care and treatment in a mental hospital" and without the capacity to realize his need for hospitalization, the person may be confined for forty-eight hours.[98] The doctor's examination must have occurred within three days of initial confinement, and an involuntary hospitalization proceeding must be instituted "without delay."[99] The forty-eight hour commitment is a temporary measure designed to allow a very short confinement of a sick person until a judicial proceeding can be commenced. Although this and the foregoing types of forty-eight hour commitment may not be valid under the *Denton* requirements, the period of confinement is short and the requirement to immediately initiate a court proceeding provides some protection for the confinee. In commitment proceedings there must be some balancing of freedom and need, and when, as here, the need is great and the restraint on freedom minimal, the former probably outweighs the latter. The important safeguard is that judicial hearings must be instituted without delay.

2. *Seven Day Detention*

The next-longest period of temporary confinement in Kentucky is the seven-day detention. Three classes of persons may institute this proceeding: peace officers;[100] any person filing a complaint in a circuit, county, or police court;[101] and health officers[102]—defined as any person "charged with enforcing the health law of the state. . . ."[103]

When the proceeding is initiated by a police officer or any person filing a complaint, a hearing is required prior to commitment. A peace officer may restrain any person, with or without a warrant if he has "reasonable grounds to believe" that the person is mentally ill and likely to cause injury to himself or others if not immediately taken into custody.[104] Prior to the hearing the police officer is required to take the person to a doctor for an examination as soon as practical.[105]

A seven-day commitment order may also be obtained by any citizen who files a complaint which states under oath that he believes the accused is mentally ill and will probably cause injury to

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[98] *Id.*
[99] *Id.*
[100] KRS § 202.027(1).
[101] KRS § 202.027(2).
[102] KRS § 202.245.
[103] KRS § 202.010(11).
[104] KRS § 202.027(1).
[105] *Id.*

himself or others if not immediately restrained. In addition the complaining party must furnish to the judge the facts on which he bases his opinion, in accordance with the Rules of Criminal Procedure.[106] If probable cause is shown the judge is required to issue an arrest warrant,[107] and upon arrest the person must be taken to a doctor for examination.[108] If the physician certifies in writing that the individual probably will cause injury to himself or others if not restrained and that he lacks the insight or capacity to realize his need for hospitalization, the person may be lodged in a hospital rather than a jail pending a hearing[109] before a circuit judge, county judge or police court judge.[110] In such situations, Kentucky Rule of Criminal Procedure 3.02 applies, and the hearing must be held without unnecessary delay. The defendant's presence may be waived if the court believes that it will be harmful to him.[111] If the court finds that the defendant should be observed and treated, it may order him hospitalized for seven days with release only by writ of habeas corpus.[112] This statute is well drafted and, except for waiving the presence of the defendant at the hearing, is within the *Denton* rule of constitutionality. Although the waiver of appearance rule will be discussed in detail below, it is not premature to note that it denies a defendant the right "to meet all witnesses face to face" as required by the Kentucky Constitution and *Denton*.[113]

Health officers compose the third class of persons who may procure a seven-day commitment order for an alleged mentally ill person.[114] If the health officer's request which must be based upon a personal examination made within the preceding three days[115] alleges that the person probably will injure himself or others if not immediately restrained, a warrant may be issued. If, in the county where the person is arrested, hospital facilities are available,[116] the person must be taken there; otherwise he may be confined in the county jail.[117] The staff of the hospital where the individual is taken must decide within seven days if the patient requires further treat-

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106 KRS § 202.027(2).
107 *Id.*
108 KRS § 202.027(1).
109 *Id.*
110 KRS § 202.027(3).
111 *Id.*
112 KRS § 202.027(5).
113 KY. CONST. § 11.
114 KRS § 202.245.
115 KRS § 202.245(1).
116 The staff of a state mental hospital is required to receive and treat any person who is said to need emergency care. KRS § 202.245(1).
117 KRS § 202.245(1).

ment; if so, the regular involuntary hospitalization procedure must be followed.[118]

The seven-day detention at the request of a health officer is invalid under *Denton* as a violation of due process. Although the object of of this seven-day detention is identical to that of the commitment hearing—to get a dangerously sick person off the street—it makes no provision for a court hearing or probable cause requirements which are necessary to protect the defendant's constitutional rights. In fact, no hearing of any kind is held within the seven days and the confinee's only appeal is to the hospital staff.[119] Moreover, the statute defines a health officer as *anyone* working for the state health department charged with enforcing the health laws of the state[120] and requires no specialized training in psychiatry; in reality, he may be no more qualified to diagnose mental illness than an ordinary citizen. A health officer can easily get a warrant based on probable cause as a private citizen if he has grounds on which to base his belief. In light of the foregoing considerations, it appears that the special proceeding for a complaining health official is not only unconstitutional but also unnecessary.

The only other instance under the commitment laws when a health official has special functions occurs when a resident has been returned to Kentucky after being adjudged mentally ill or incompetent in another state. In this situation the person may be admitted into a Kentucky state mental hospital at the request of any health officer,[121] or the staff at the hospital may receive the patient directly if a health officer is unavailable.[122] After the seven-day period, the staff must institute involuntary hospitalization procedures if they believe the patient requires further treatment.[123] In this situation the health official is merely a conduit and makes no substantive decision affecting the rights of the confined person. It may be assumed that if a state returns a citizen of Kentucky because he has been adjudged mentally ill, the person had a judicial hearing, but if the hearing has not been in accordance with *Denton* and Kentucky law, the judicial hearing after seven days will cure the defect.

3. *Sixty Day Observation Order*

The longest period allowed for temporary observation is sixty

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[118] KRS § 202.245(2).
[119] KRS § 202.245(2).
[120] KRS § 202.010(11).
[121] KRS § 202.252(1).
[122] *Id.*
[123] KRS § 202.252(2).

days.[124] Since this is a much longer confinement than is provided by any of the other temporary observation orders, additional protections are provided. The procedure is instituted by the filing of a petition by any resident of the county where the alleged mentally ill person is living or by a staff physician of a hospital located within the county.[125] The petition must be filed in the circuit court if it is in session[126] or with the county judge if the circuit court is not in session;[127] a proceeding held by the county judge while the circuit court is in session is void for lack of jurisdiction.[128] The petition must set forth the facts, verified by affidavit, on which the petitioner bases his belief[129] and must contain the name, residence, and location (if known) of the accused;[130] the name and address of his parents or guardian,[131] his spouse,[132] and any near relatives;[133] and, if another person has custody of the accused, the name and address of that person.[134]

Actual notice must be sent to the defendant, to his legal guardian if he has one, and to his spouse, parent or "nearest other known relative or friend."[135] Although in Kentucky the right to notice is expressly provided by statute, it has long been held that basic due process also requires that fair notice be given in commitment proceedings.[136] The statute provides several classes of persons to whom notice must be provided and seeks to ensure that some person having a close relationship with the defendant will have an opportunity to be present at the hearing and, if necessary, protect the defendant's rights.

The requirement of actual notice can generate problems, as illustrated by the facts of *Cadden v. Commonwealth*.[137] The defendant, Mrs. Cadden, did not receive actual notice because the sheriff, in an effort to be "more humane," served the summons on the hospital doctor.[138] Whether a defendant should receive actual notice of a confinement hearing has been a subject of heated debate by phy-

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124 KRS § 202.100.
125 KRS § 202.030.
126 KRS § 202.030.
127 KRS § 202.020.
128 Crouch v. Cameron, 414 S.W.2d 408 (Ky. 1967).
129 KRS § 202.030.
130 KRS § 202.040(2)(a).
131 KRS § 202.040(2)(b).
132 KRS § 202.040(2)(c).
133 KRS § 202.040(2)(d)(2).
134 KRS § 202.020(2)(d)(1).
135 KRS § 202.020.
136 Simon v. Craft, 182 U.S. 427 (1901).
137 242 S.W.2d 409 (1951).
138 *Id.* at 413.

sicians.[139] Here as in so many other areas concerning mental health, the disciplines of medicine and law are in conflict. The doctor usually is willing to forego notice if it will upset the patient, but the lawyer will insist that no person should be confined after a hearing of which he had no notice. In Kentucky, the controversy has been resolved in favor of the legal view, and the requirement of actual notice to the above enumerated parties must be complied with fully or the proceeding will be held void.[140]

Compulsory confinement of a defendant pending the hearing is dependant upon the allegations of the petition. After the petition has been filed, the defendant may be taken to a hospital by a relative or friend, or he may go voluntarily, but it is not ordinarily required that he be confined in the hospital pending the hearing. However, if the petition alleges that the defendant will "probably" cause injury to himself or others if not restrained and that the defendant does not have the "capacity or insight" to authorize his own hospitalization, a warrant may be issued. After arrest the person is to be transported immediately to a mental hospital where he will be examined by two staff physicians or psychiatrists who may order the person restrained pending the hearing.[141]

The next step in the sixty-day order procedure is the appointment by the court of two physicians[142] to examine the proposed patient.[143] Whenever possible, the physician chosen should have made a special study of mental diseases; however, specialists in psychiatry are not required.[144] Certainly, it would be better if the two doctors were required to be psychiatrists, but most rural counties do not have such specialists available. To avoid transporting the proposed patient long distances for an examination, he may be evaluated by a regular physician.

If the examining physicians state that the defendant appears in good mental health, the court may terminate the proceedings at that

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[139] *See* Weihofer & Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307, 340 (1946); Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1194 (1947).

[140] Cadden v. Commonwealth, 242 S.W.2d 409 (Ky. 1951).

[141] KRS § 202.060.

[142] These doctors are authorized a fee of ten dollars for each examination, KRS § 202.139(1). The fee is extremely low, but it seems probable that many doctors will conduct the examination as a public service. The real danger here lies in the fact that a doctor may examine the patient without doing a thorough job.

[143] KRS § 202.100. If the person is already hospitalized, the court may waive this and accept the certification of two staff physicians at the hospital where the person is a resident. *Id.*

[144] KRS § 202.139(1).

point.[145] On the other hand, if they state that the defendant requires further observation or treatment, a hearing will be held at which the defendant must be represented by counsel.[146] Note that the statute requires that the defendant *"shall"* have appointed counsel.[147] This requirement of counsel, the ramifications of which will be fully explained below,[148] must also be met in an indeterminate hospitalization hearing.[149] In addition, a duty is imposed on the prosecuting attorney to prevent the involuntary hospitalization of any sane person.[150]

At the hearing, the defendant or his attorney may summon witnesses and present evidence as in any other type of case.[151] Although a statute allows the certificates of the doctors to be accepted into evidence under certain circumstances[152] contrary to the *Denton* rule of personal presence, it could easily be held that if the defendant does not subpoena the doctors as witnesses he has waived the right of confrontation. The court may, at its discretion on its own motion, require other evidence in addition to the petition and the examination of the doctors.[153] Thus it appears that the judge, as well as the defense attorney and the prosecutor, is expected to guard against hospitalization of a sane person.

The presence of the defendant at the hearing may be waived if two regular practicing physicians state that they have examined the defendant and that they believe his condition would make it "unsafe or unwise to bring him into court."[154] This statute is unconstitutional under the *Denton* rule of full constitutional rights, which expressly guarantees the defendant the right to "meet all witnesses *face to face.*"[155] Once again the conflict between medical and legal values arises. The medical advocates have a strong argument, as one commentator has noted: "[o]ne of the most objectionable features in the commitment laws in many states is that concerning the compulsory presence of the prospective patient at the hearing. . . . The traumatic effect of the hearing on the patient is readily apparent."[156] It cannot be doubted that the impact of hearing a judge, attorneys,

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145 KRS § 202.115(2).
146 KRS § 202.136.
147 *Id.*
148 *See* notes 163 to 166 and accompanying text, *infra.*
149 KRS § 202.136(5).
150 KRS § 202.136.
151 KRS § 202.115(1).
152 KRS § 202.138.
153 KRS § 202.115(1).
154 KRS § 202.130.
155 KY. CONST. § 11. (emphasis added)
156 Curran, *Hospitalization of the Mentally Ill,* 31 N.C.L. REV. 274, 282 (1953).

doctors, and perhaps witnesses from the community discuss one's sanity with a view toward involuntary commitment to a mental hospital would be considerable. However, once a person arrives at the mental hospital and is told he will not be permitted to leave, will he not be equally upset? Would it not be more inherently just if the patient realized that he was in the hospital only after a hearing at which his defense was presented? Once again the reasoning of *Denton* provides the answer. The *Denton* Court, after expressly discussing the burden of proof in commitment cases, decided that the burden is on the prosecution to prove the defendant's insanity. Denying the defendant the right to be present assumes his insanity and preempts the very issue that the hearing is supposed to resolve. Unless the state is entitled to a presumption of insanity, which *Denton* expressly denies, the defendant should be afforded his full rights including the right to confrontation.

4. *Indeterminate Involuntary Hospitalization*

The proceeding for indeterminate involuntary hospitalization is basically the same as the proceeding for a sixty-day order although there are a few significant differences. This proceeding is initiated by the filing of a petition with the circuit court[157] or, if the circuit court is not in session, with the county court.[158] The same information must be alleged in the petition,[159] and actual notice is required as in a sixty-day commitment hearing.[160] After the petition has been filed, if two examining physicians state that the patient is not mentally ill, he may be released without proceeding further; otherwise a hearing must be held within fifteen days.[161]

Kentucky's indeterminate commitment law adequately protects the defendant, but in order to fulfill the spirit of *Denton*, perhaps more than bare notice of the hearing should be required. Although not

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[157] KRS § 202.135(1).

[158] KRS § 202.135(2). A question has arisen concerning whether allowing a county judge to hear commitment cases was unconstitutional in Kentucky. The argument reasoned that allowing a county judge to perform duties normally delegated to the circuit judge made the county judge a special circuit judge. This would be invalid under Kentucky's constitution § 130 which requires all circuit judges to be attorneys, since only a few county judges are attorneys. The Court rejected this argument, holding that allowing county judges to hear commitment cases in the absence of a circuit judge is only the granting of *authority* to the county judge and that this authority does not make him a special circuit judge. Sabin v. Commonwealth, 26 S.W.2d 506 (Ky. 1930). If the county judge accepts a petition and holds a hearing while the circuit court is in session, the judgment is void.

[159] KRS § 202.135(1).

[160] KRS § 202.135(2).

[161] KRS § 202.135(4).

specifically required by *Denton*, information such as the basis of any detention, the standard which must be satisfied before the defendant can be detained, and the names of examining physicians and all persons who will testify against him should be provided. This information is essential before counsel can prepare a full defense.[162]

The most meritorious provision of the Kentucky statute is the requirement that the defendant *shall* be represented at the hearing by counsel in every case.[163] This right is unconditional and may be neither denied nor waived.[164] The patient has also an absolute right to communicate by sealed mail with his attorney at all times[165] which may not be denied under any circumstances.[166] Although no one can be forced to cooperate with an attorney, the attorney at least can act as *amicus curiae*, bringing to the judge's attention any information about the alleged incompetent's rights and condition that would not otherwise be heard.

According to a literal reading of the statute, the defendant has the right to appear and testify in all cases.[167] However, from a careful reading it appears that the defendant is in fact, *required* to be present unless two physicians state that they believe it would be unsafe or unwise to bring the defendant into court.[168] If this latter interpretation is correct it represents a distinction from the sixty-day commitment procedure for which there is no apparent rational explanation.

The proceeding for an indeterminate confinement is the only commitment proceeding which allows a jury trial,[169] and the problem of whether or not to take advantage of this opportunity is often a difficult one for counsel. While some commentators have found that juries are more likely to commit unjustly than are judges sitting alone,[170] others have found that the jury trial operates in favor of the defendant, often meaning the difference between freedom and commitment.[171] The only general statement that may be made here is that the attorney, in making his choice, must take note of all the

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[162] Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).
[163] 34 KY. B.J. 136, 137 (1970).
[164] KRS § 202.135(5).
[165] KRS § 202.272(4).
[166] KRS § 210.220.
[167] KRS § 202.135(5).
[168] *Id.*
[169] *Id.* It can be argued that under the *Denton* guarantee of full constitutional rights any confinement requires a jury trial. *See* text accompanying footnotes 37 to 82 *supra*.
[170] Wiehofen, *Improving Legal Procedure for Hospitalizing the Mentally Ill*, 31 DICTA 81, 85 (1954).
[171] Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 447 (1966).

factors involved, including the appearance of his client, the client's ability to testify in his own behalf, the weight of the medical evidence, and any facts peculiar to the case at hand.

The hearing is not required to be held in a courtroom and may be conducted in an informal manner in "a physical setting not likely to have a harmful effect on the mental health of a patient."[172] There is no reason why due process of law cannot be afforded the defendant in a hospital room or in any other location that will make the proceedings less difficult for the proposed patient. This provision of the indeterminate hospitalization statute is one of the most humane and should be incorporated into the short-term commitment proceedings as well.

In *Denton* the Court considered at some length the then-existing Kentucky statute on burden of proof. The statute, since repealed,[173] appeared to place the burden on the defendant to prove his sanity. The Court, however, noting that the commitment procedure is "quasi-criminal"[174] held that the burden of proof must be borne by the prosecution. Today, the prosecution must prove that the defendant "probably will"[175] cause injury to himself or others if not restrained and that the defendant lacks the capacity to make responsible decisions regarding his hospitalization.[176] Two of society's interests combine here: the police power by which society protects itself, and the power of the state to care for those who cannot care for themselves.[177] Must the prosecution prove its case beyond a reasonable doubt? Although the literal language of *Denton* seems to require this, it is probably impossible to prove that the defendant is dangerous "beyond a reasonable doubt." Perhaps the best standard is "by clear and convincing evidence," which is higher than the "preponderance of the evidence" standard and more practical than the "beyond a reasonable doubt" standard.[178]

III. *Release*

Any discussion of commitment must include the release procedures. Release is important not only because it terminates confinement but also because unjustified denial of release, in effect, results in an involuntary commitment. This problem is particularly acute in the

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[172] KRS § 202.135(5).
[173] KRS § 202.140 was repealed by *Ky. Acts* ch. 90, § 63 in 1968.
[174] Denton v. Commonwealth, 383 S.W.2d 681, 683 (Ky. 1964).
[175] KRS § 202.135(6)(b).
[176] KRS § 202.135(6)(c).
[177] Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1293 (1966).
[178] *Id.* at 1291.

case of a patient who was voluntarily committed. The problems regarding release of voluntary or involuntary patients arise in two general situations. First, there is the patient who feels himself sane and desires release against the wishes of his doctors. Second, there is the case of the patient who was committed while mentally ill and is now cured and generally recognized as ready for release.

A. *Release Without the Consent of Treating Doctors*

The patient who desires release against the wishes of his doctors has three avenues open to him. First, the patient, his guardian, spouse, relative, or any "friend of the circuit court" can petition the circuit court of the county where the patient resides or where he is hospitalized for a rehearing on the commitment order. On receipt of this petition the circuit judge or a special commissioner appointed by him will hold a new involuntary commitment hearing.[179] This course of action has the advantages of permitting a new hearing and possibly having a different judge preside. However, serious time limitations are imposed: the petition will not be allowed until the patient has been hospitalized for six months, and, if release is denied, subsequent petitions may not be made more often than once a year.[180]

Second, the patient can request the hospital staff to release him. If they refuse and certify their reasons in writing, the county judge of the county in which the hospital is located, may, apparently at his discretion, hold a new hearing at which the hospital staff must be afforded an opportunity to be heard. If the county judge finds the person sane, he may order his discharge.[181] The reasoning behind such a statute is unclear. It seems to provide the same type of review as provided by the circuit judge in the above described procedure but with a county judge presiding and without the time limitations. The county judge may not conduct an original hearing while the circuit judge is present in the county,[182] but this statute allows the county judge in effect to review the circuit judge's order of commitment.

Finally if the above two procedures fail, any involuntarily hospitalized patient may petition for a writ of habeas corpus. The patient or any "friend" may file the writ in circuit court in the county where the patient is held.[183] It is expected that this procedure will be used only after other appeals fail to obtain a release.

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179 KRS § 202.265(2).
180 *Id.*
181 KRS § 265.360.
182 KRS §§ 202.020, .135(2).
183 KRS § 202.275.

B. *Release by the Hospital Staff*

The staff of a hospital may, upon a determination that the condition of a patient has improved to the point that his release would not be injurious to himself or to the public, release the patient without further proceedings.[184] The only restriction placed on this right is that before release the hospital staff is required to determine if the person is able to financially care for himself. If so, he may be released immediately; if not, release is conditioned on the hospital staff's finding friends or relatives of the person who are willing to care for him.[185]

Release may also be on convalescent status.[186] The basic premise of such a release is that the person, while not sick enough to be in the hospital, is still in need of care. If this is the case, the hospital staff may release him on an outpatient basis, provided that the court which committed him is notified.[187] This procedure achieves a number of goals, the most important of which are that the individual remains free in society and that the social stigma of being a mental patient is lessened considerably. The hospital also benefits because the task of caring for an outpatient is much easier than that of caring for the person full time, and the state benefits from the decreased expense. In short, this approach operates to the benefit of all concerned and should be used whenever possible. Under the Kentucky statute, the patient on convalescent status must be examined every six months,[188] and if the doctor finds that the patient is not responding to this type of care, he may readmit him without judicial proceedings.[189] If he finds the patient no longer in need of care, he may release him completely.[190]

Conclusion

The note has attempted to discuss in some detail all facets of Kentucky's mental commitment procedure required by the statutes and relevant case law. Kentucky has made a concerted effort through the General Assembly and the Court of Appeals to adequately compromise between the individual's right to freedom and his suspected need for treatment. Compromises in this area are not easy, and

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184 KRS § 202.340(1).
185 KRS § 202.340(2).
186 KRS § 202.242.
187 *Id.*
188 KRS § 202.242(1).
189 KRS § 202.242(2).
190 KRS § 202.242(1).

problems remain for which a final solution has yet to be found. The Kentucky statute, read in the light of *Denton*, does an excellent job of protecting the rights of the individual. If this law is not enforced, if it is sidestepped, the people in the mental commitment process, not the law, are to blame. Suffice it to say that attorneys who know the law and are willing to force its application can effectively end abuses in the mental commitment process.

Paul R. Keen