

LEGISLATIVE BILL 206

Approved by the Governor May 31, 2005

Introduced by Byars, 30; Combs, 32; Cunningham, 40; Erdman, 47; Hudkins, 21; Jensen, 20; Price, 26; Raikes, 25; Schimek, 27; Burling, 33

AN ACT relating to developmental disabilities; to amend section 83-1212.01, Reissue Revised Statutes of Nebraska; to adopt the Developmental Disabilities Court-Ordered Custody Act; to change provisions relating to an advisory committee; to repeal the original section; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 34 of this act shall be known and may be cited as the Developmental Disabilities Court-Ordered Custody Act.

Sec. 2. The Legislature recognizes the right of all persons, including individuals with developmental disabilities, to enjoy personal liberty and freedom. It is the public policy of the State of Nebraska to encourage persons with developmental disabilities to voluntarily choose their own services. It is also the public policy of the State of Nebraska to use guardians, preferably family members, to make and support service and placement decisions when a person with developmental disabilities is determined by a court to be incompetent, but there are instances in which the threat of harm to other persons in society is sufficient that a court should balance the rights of such person with the interests of society and place care and custody of such person with the State of Nebraska for appropriate treatment and services.

Sec. 3. The purpose of the Developmental Disabilities Court-Ordered Custody Act is to provide a procedure for court-ordered custody and treatment for a person with developmental disabilities when he or she poses a threat of harm to others.

Sec. 4. For purposes of the Developmental Disabilities Court-Ordered Custody Act, the definitions in sections 5 to 16 of this act apply.

Sec. 5. Court means the district court in which a petition is filed pursuant to the Developmental Disabilities Court-Ordered Custody Act.

Sec. 6. Department means the Department of Health and Human Services.

Sec. 7. Developmental disability means mental retardation or a severe chronic cognitive impairment, other than mental illness, that is manifested before the age of twenty-two years and is likely to continue indefinitely.

Sec. 8. Independent mental health professional means a psychiatrist or psychologist with expertise in treating persons with developmental disabilities who has not previously been involved in the treatment of the subject in a significant way.

Sec. 9. Least restrictive alternative means a placement and services provided in a manner no more restrictive of a subject's liberty and no more intrusive than necessary to provide appropriate treatment and protect society.

Sec. 10. Mental retardation means a state of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which originates in the developmental period.

Sec. 11. Petitioner means the Attorney General or the county attorney who files a petition under section 17 of this act.

Sec. 12. Risk analysis means a comprehensive evaluation of a person's potential for future dangerous behavior towards others, including recommendations to minimize the likelihood of harm to others in the least restrictive alternative.

Sec. 13. Severe chronic cognitive impairment means clinically significant difficulties in the ability to remember, think, perceive, apply sound judgment, and adequately use deductive reasoning not attributable to a mental illness.

Sec. 14. Subject means a person who is named in a petition filed under the Developmental Disabilities Court-Ordered Custody Act.

Sec. 15. Threat of harm to others means a significant likelihood of substantial harm to others as evidenced by one or more of the following: Having inflicted or attempted to inflict serious bodily injury on another; having committed an act that would constitute a sexual assault or attempted sexual assault; having committed lewd and lascivious conduct toward a child;

having set or attempted to set fire to another person or to any property of another without the owner's consent; or, by the use of an explosive, having damaged or destroyed property, put another person at risk of harm, or injured another person.

Sec. 16. Treatment means the support and services which will assist a subject to acquire the skills and behaviors needed to function in society so that the subject does not pose a threat of harm to others and is able to cope with his or her personal needs and the demands of his or her environment.

Sec. 17. The Attorney General or county attorney may file a petition in the district court of the county in which a subject resides or the county in which an alleged act constituting a threat of harm to others occurs. The petition shall allege that the subject is a person in need of court-ordered custody and treatment and shall contain the following:

- (1) The name and address of the subject, if known;
- (2) A statement that the subject is believed to be eighteen years of age or older or that the subject is a juvenile who will become eighteen years of age within ninety days after the date of filing the petition;
- (3) The name and address of the subject's guardian or closest relative, if known;
- (4) The name and address of any other person having custody and control of the subject, if known;
- (5) A statement that the subject has a developmental disability and poses a threat of harm to others;
- (6) The factual basis to support the allegation that the subject has a developmental disability; and
- (7) The factual basis to support the allegation that the subject poses a threat of harm to others.

The Nebraska Evidence Rules shall apply to proceedings under the Developmental Disabilities Court-Ordered Custody Act unless otherwise specified.

Sec. 18. A subject has the following rights pursuant to the Developmental Disabilities Court-Ordered Custody Act:

- (1) The right to be represented by legal counsel and to have counsel appointed if the subject cannot afford to pay the cost of counsel;
- (2) The right to have a guardian ad litem appointed to act on the subject's behalf if the court determines that he or she is unable to assist in his or her own defense;
- (3) The right to have a timely hearing on the merits of the petition before a district court judge;
- (4) The right to have reasonable continuances, for good cause shown, in order to properly prepare for a hearing on the petition;
- (5) The right to testify, subpoena witnesses, require testimony before the court, and offer evidence;
- (6) The right to confront and cross-examine witnesses;
- (7) The right to have an expert witness of the subject's own choice evaluate the subject, testify, and provide recommendations to the court and to have such expert paid for by the county if the subject cannot afford the costs of such expert; and
- (8) The right to have a transcript prepared for the purpose of an appeal, to appeal a final decision of the court, and to have the costs of such transcript and appeal paid by the county if the subject cannot afford such costs.

Sec. 19. (1) The petitioner may apply to the court to have the subject taken into emergency custody and held pending a hearing on the petition and disposition pursuant to sections 22 to 26 of this act. The application for emergency custody shall be supported by affidavit or sworn testimony which establishes probable cause to believe that (a) the subject is eighteen years of age or older or will become eighteen years of age within ninety days after the date of filing the application, (b) the subject is a person with a developmental disability, (c) the subject poses a threat of harm to others, and (d) if the application is not granted, substantial harm to others is likely to occur before a trial and disposition of the matter can be completed.

(2) If the court concludes that there is probable cause to grant the application pursuant to subsection (1) of this section, the court may issue an ex parte order granting the application. The department shall provide a recommendation of an appropriate treatment program for the subject which has available space and is willing to hold the subject in emergency custody. The court shall direct the sheriff or any other peace officer to take the subject into emergency custody and deliver him or her to the program ordered by the court to be held pending further hearing and order of the court. The order shall establish terms and conditions of the emergency placement as appropriate

under the Developmental Disabilities Court-Ordered Custody Act. The department shall evaluate the subject within seven days after the date the application is granted to determine if the subject is a person with one or more developmental disabilities and poses a threat of harm to others. The results of the evaluation shall be provided to the court and all parties.

Sec. 20. If an emergency custody order is issued by the court under section 19 of this act, the subject has a right to an expedited hearing to challenge the order. At such hearing, the petitioner has the burden of showing that there is probable cause to continue the emergency custody order. Such hearing shall be held within ten days after the date the subject is taken into emergency custody unless such requirement is waived by the subject or the subject is granted a continuance based upon his or her request. The Nebraska Evidence Rules do not apply at a hearing under this section. Upon conclusion of such hearing, the court may continue, modify, or vacate the emergency custody order.

Sec. 21. The petitioner shall cause notice of the petition and summons to be served on the subject, the subject's attorney, if any, the subject's guardian, if any, the subject's closest relative, if known, any other person having custody and control of the subject, if known, and the department.

Sec. 22. When a petition is filed under the Developmental Disabilities Court-Ordered Custody Act, the court shall ensure that the subject is represented by legal counsel and shall set a time and date for a hearing on the petition. The clerk of the court shall provide notice of the date and time of such hearing to the subject, the subject's legal counsel, the subject's guardian, if any, the subject's closest relative, if known, any other person having custody and control of the subject, if known, the petitioner, and the department. The notice of hearing on the petition shall state the date, time, and location of the hearing and shall contain a list of the subject's rights under section 18 of this act. The court may order an examination and evaluation of the subject to be completed by the department prior to the hearing, and the results shall be provided to all parties. The hearing on the petition shall be held within ninety days after the date of filing the petition or, if the subject is in emergency custody pursuant to section 19 of this act, as soon as practicable but not later than forty-five days from the date when the subject was taken into emergency custody unless continuances are granted by the court upon the subject's motion.

Sec. 23. The subject may admit or deny the allegations of the petition or choose to not answer. If the subject denies the allegations of the petition, the court shall proceed to conduct a hearing on the petition. If the subject is unable to understand the nature and possible consequences of the proceedings or chooses to not answer, the court shall enter a denial of the allegations of the petition on the subject's behalf and shall proceed to conduct a hearing on the petition. If the subject admits to the allegations of the petition, the court shall determine whether the admission is free and voluntary and, if the court finds a factual basis to support the admission, may find the subject to be a person in need of court-ordered custody and treatment.

Sec. 24. The petitioner has the burden to prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment. The court shall make specific findings of fact and state its conclusions of law.

If after the hearing is complete the court finds that the subject is not a person in need of court-ordered custody and treatment, it shall dismiss the petition and immediately release the subject from any emergency custody order.

If after the hearing is complete the court finds that the subject is a person in need of court-ordered custody and treatment, the court shall order the department to evaluate the subject and submit a plan for custody and treatment of the subject in the least restrictive alternative within thirty days and provide a copy to all parties in interest. The court shall set the matter for dispositional hearing within fifteen days after receipt of the department's plan, unless continued for good cause shown.

Sec. 25. The plan submitted by the department pursuant to section 24 of this act shall include the evaluation and recommendations of an independent mental health professional. The independent mental health professional may have been previously involved in evaluating the subject and advising the court pursuant to the Developmental Disabilities Court-Ordered Custody Act and may also be an employee of or a contractor with the department. The plan shall include: A history of the subject's past treatment, if any; a comprehensive evaluation of the subject's developmental disabilities; a risk analysis; the treatment and staffing requirements of the

subject; appropriate terms and conditions to provide custody and treatment of the subject in the least restrictive alternative; and an appropriate treatment program that is capable of providing and willing to provide treatment in accordance with the plan.

Sec. 26. At the dispositional hearing, the court shall consider the plan submitted pursuant to section 25 of this act, the arguments of the parties, and any other relevant evidence. The Nebraska Evidence Rules shall not apply at the dispositional hearing. The plan shall be approved by the court unless it is shown by a preponderance of the evidence that the plan is not the least restrictive alternative for the subject. After the hearing is completed, the court shall issue an order of disposition placing custody of the subject with the department and setting forth the treatment plan for the subject. The court shall establish the duration of the court-ordered custody and treatment of the subject, but such duration under the initial order shall not be longer than one year.

Sec. 27. The court shall hold annual review hearings of each order of disposition issued under section 26 of this act prior to the expiration date of such order. Prior to the annual review hearing, the department shall submit an updated plan for custody and treatment of the subject. It shall be the burden of the state to show by clear and convincing evidence that court-ordered custody and treatment continues to be necessary. The court shall determine whether the evidence supports continuing the court-ordered custody and treatment of the subject. At the review hearing, the court shall consider the evidence received at the original and any subsequent hearings, the plan and updates submitted by the department, progress reports and recommendations from the treatment program, and any other relevant evidence. Following the review hearing, the court may continue or modify the court-ordered custody and treatment or may vacate such custody and treatment and dismiss the matter.

Sec. 28. (1) If at any time it appears that the subject no longer poses a threat of harm to others, any party may file a motion for a review hearing to be held as soon as practicable. The party filing the motion under this subsection shall have the burden of showing by a preponderance of the evidence that the subject no longer poses a threat of harm to others. If it is shown that the subject no longer poses a threat of harm to others, the court shall enter an order dismissing the case and immediately release the subject.

(2) If at any time it appears that (a) the plan submitted under section 24 or 27 of this act is not sufficient to protect society or the subject or (b) the circumstances upon which the plan was based have changed significantly, any party may file a motion, to be granted for good cause shown, for a review hearing to be held as soon as practicable. The party filing the motion under this subsection shall have the burden of showing by clear and convincing evidence that the court-ordered custody and treatment of the subject should be modified or vacated.

Sec. 29. A court which finds a subject to be in need of court-ordered custody and treatment shall have concurrent jurisdiction to hear and decide issues regarding appointment or replacement of a guardian for as long as the subject is in court-ordered custody and treatment.

Sec. 30. No findings under the Developmental Disabilities Court-Ordered Custody Act, including a finding that a person is in need of court-ordered custody and treatment, shall lead to a presumption that such person is incompetent to stand trial.

Sec. 31. If the subject cannot afford to pay, the county shall pay court costs, costs of emergency custody, and related expenses for a petition filed pursuant to the Developmental Disabilities Court-Ordered Custody Act, including the costs of legal counsel appointed to represent the subject and any expert hired to evaluate and testify on behalf of the subject. In counties having a public defender, the court may appoint the public defender as legal counsel for the subject. The county shall be responsible for the cost of transporting the subject to and from court hearings under the act and to any emergency custody or other custody ordered under the act. The department shall pay the costs of the department's evaluations of the subject, the costs of the plans completed by the department and the independent mental health professional, and the costs of the court-ordered custody and treatment of the subject following an order of disposition, except as provided by sections 83-363 to 83-380.

Sec. 32. Jurisdiction of the court under the Developmental Disabilities Court-Ordered Custody Act does not prohibit a subject or a subject's guardian from consenting to medical care or to a more restrictive setting, on a temporary basis, than that ordered by the court to satisfy the treatment needs of the subject.

Sec. 33. In the case of a juvenile in need of court-ordered custody and treatment, a petitioner may file a petition and begin proceedings under the Developmental Disabilities Court-Ordered Custody Act within ninety days before the juvenile's eighteenth birthday. No order under the act shall be effective until the subject reaches his or her eighteenth birthday.

Sec. 34. The department in collaboration with the Advisory Committee on Developmental Disabilities established under section 83-1212.01 shall submit quarterly reports to the court, all parties of record, and the guardian of any subject in court-ordered custody.

The department shall submit an annual report to the Legislature regarding the implementation of the Developmental Disabilities Court-Ordered Custody Act. Such reports shall not contain any name, address, or other identifying factors or other confidential information regarding any subject.

Sec. 35. Section 83-1212.01, Reissue Revised Statutes of Nebraska, is amended to read:

83-1212.01. (1) There is hereby created the Advisory Committee on Developmental Disabilities. The advisory committee shall consist of a representative of a statewide advocacy organization for persons with developmental disabilities and their families and not more than fifteen additional members, at - ~~At least one-third of the membership whom shall be persons with developmental disabilities, at least one-third of the membership whom shall be families of persons with developmental disabilities, and no more than one-third of the membership whom shall be elected officials or interested community persons.~~

(2) The members shall be appointed by the Governor for staggered terms of three years. Any vacancy shall be filled by the Governor for the remainder of the term. One of the members shall be designated as chairperson by the Governor. Members shall be reimbursed for their actual and necessary expenses as provided in sections 81-1174 to 81-1177.

(3) The advisory committee shall advise the department regarding all aspects of the funding and delivery of services to persons with developmental disabilities.

(4) The advisory committee shall provide sufficient oversight to ensure that persons placed in the custody of the department under the Developmental Disabilities Court-Ordered Custody Act are receiving the least restrictive treatment and services necessary.

Sec. 36. Original section 83-1212.01, Reissue Revised Statutes of Nebraska, is repealed.

Sec. 37. Since an emergency exists, this act takes effect when passed and approved according to law.