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TO: LAM Kat Yanke
FROM: Legal Counsel Jaclyn Shelton
DATE: April 30, 2021
RE: Ex Parte Forced Blood Draw in Chapter 51 Matters pre-admission.

LAM Yanke,

Per your request, I have drafted this memorandum regarding the legality and practice of requesting ex parte blood draws in Chapter 51, mental health matters, for medical clearance purposes. As I understand it, Corporation Counsel and police officers in Marathon County have standard forms to request that the Court order a blood draw when the detained person refuses in order to medically clear the person prior to their admission at a mental health facility and prior to a probable cause finding.

First, I will note that we as an agency are not aware of any other county engaging in this practice. Further, I have discussed this matter with Legal Counsel for the Wisconsin Department of Health Services (DHS), Corporation Counsel for two counties with mental health facilities, and our Milwaukee Mental Health Manager, and all agree that their facilities do not ever force a blood draw and they do not believe they have the authority. DHS indicated that Winnebago Mental Health Institute (WMHI) is required to take anyone being held pursuant to Chapter 51 in the state and that they will never force someone to take a blood draw. WMHI must accept the person even if the person refuses a blood draw preadmission.

Now turning to the legality of the blood draw:

1. The County argues this policy is legal pursuant to Wis. Stat. s. 51.61(1)(g)1 and that it does not violate *Missouri v. McNeely,* 569 U.S. 141 (2013).

    a. *Missouri v. McNeely,* 569 U.S. 141 (2013) does not apply to this situation as this is not a criminal matter. Therefore, the applicable law is Wisconsin Statute Chapter 51.

2. This practice is in contrast to the overall policy of Wis. Stat. Chapter 51.

    a. Policy is to protect civil liberties and ensure that individuals have access to the least restrictive treatment alternative appropriate to the needs of the individual. Wis. Stat. s. 51.001.

    b. Persons detained or committed under Ch. 51 are not presumed to be incompetent. Wis. Stat. s. 51.59.

3. It is problematic because detained individuals have the right to refuse all medication and treatment.

    a. An individual's right to refuse unwanted medical treatment "emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, [S]ection 1 of the Wisconsin Constitution." *In re Melanie L.*, 2013 WI 67, ¶ 42, 349 Wis. 2d 148, 168, 833 N.W.2d 607, 617 (quoting *Lenz v. L.E. Phillips Career Dev. Ctr.,* 167 Wis.2d 53, 67, 482 N.W.2d 60 (1992); *see also Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (competent individuals have a protected Fourteenth Amendment liberty interest in refusing unwanted medical treatment)).

    b. Treatment can only be given if the person consents or under specified circumstances. See. Wis. Stat. ss. 51.15(8), 51.61(1)(g) and (h).

4. Nothing in Wis. Stat. s. 51.61(1)(g)1 allows this practice.

    a. There are two ways treatment can be forced over someone's refusal.

        i. By Court Order

            1. The Court can only order treatment after a hearing. See Wis. Stat. 51.61(1)(g)1 and 2. The Court does not have the authority to order treatment ex parte.

            2. There must be a finding that the person is incompetent to refuse medication in an adversarial setting to ensure the person is not "declared incompetent for the sake of mere convenience, control or expense." *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 746–47, 416 N.W.2d 883 (1981).

            3. Hearings are " required to be held under this chapter shall conform to the essentials of due process and fair treatment" Wis. Stat. s. 51.20(5)

        ii. A doctor can force treatment "necessary to prevent serious physical harm to the patient or to others." Wis. Stat. s. 51.61(1)(g)1.

            1. There is nothing in the affidavit or this policy that explains why a blood draw will prevent serious physical harm to the patient or others.

    b. Also, it should be noted that the Supreme Court recently found Wis. Stat. s. 51.61(1)(g)3 facially unconstitutional because "[i]ncompetence to refuse

> medication alone is not an essential or overriding State interest and cannot justify involuntary medication," there must also be a showing of dangerousness. *Matter of Commitment of C.S.*, 2020 WI 33, ¶ 5, 391 Wis. 2d 35, 40, 940 N.W.2d 875, 877.

Overall, the issue with this policy is you can only override someone's right to refuse treatment if there is a finding that it is necessary to prevent serious physical harm. While I understand the County's and the hospital's desire to have drug screen information prior to admission, there is nothing in Chapter 51 that allows the doctor or the court to override the individual's right to self-determination as a blanket policy when a person refuses. There may be specific cases where a blood draw is necessary to determine what is in someone's system to save their life and the statute clearly allows the doctor to take a blood draw in that circumstance. However, the statute is clear that it is not allowed as part of regular medical clearance or treatment, that is not a large enough state interest to override individual determination and constitutional rights.

Please let me know if you need anything else or have any other questions.