

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee Judiciary

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BILL: SB 7070

INTRODUCER: Appropriations Committee

SUBJECT: Mental Health and Substance Abuse

DATE: April 6, 2015

REVISED: \_\_\_\_\_

ANALYST

Brown/Crosier

Brown

STAFF DIRECTOR

Kynoch

Cibula

REFERENCE

JU

ACTION

**AP Submitted as Committee Bill**

**Pre-meeting**

**I. Summary:**

SB 7070 integrates the Marchman Act, which provides substance abuse intervention, clinical treatment, and recovery support services, into the Florida Mental Health Act, more commonly known as the Baker Act.

**Marchman Act and Baker Act**

Significant differences between current law and provisions in the bill are as follows:

Current law authorizes persons who are substance-abuse impaired to be held in protective custody for a 72-hour period. The bill extends the 72-hour period an additional 48 hours if a doctor determines that the individual would benefit from detoxification services.

Current law prohibits mentally ill individuals from being detained in a jail setting. The bill authorizes both mentally ill and substance-abuse impaired individuals to be temporarily detained in a jail or other detention facility while awaiting transport to an appropriate facility.

Current law requires individuals to receive an individualized treatment plan within 5 days after admission to a facility. This bill reduces this timeframe to 24 hours.

Current law authorizes minors seeking voluntary admission to a facility to consent to substance abuse treatment themselves, while treatment for mental illness requires the consent of a guardian. The bill requires a guardian and a minor to jointly provide consent, unless the minor is to be admitted to a substance abuse facility. At a treatment facility the minor may consent to treatment for substance abuse impairment upon documentation by a physician that the minor has a substance abuse impairment and that the physician established the ability of the minor to give consent.

The bill also addresses issues that are not addressed in current law. Specifically, the bill requires facilities to report the following to the DCF as soon as is reasonably possible:

- The death of an individual at the facility or that occurs within 72 hours after release;
- An injury sustained, or allegedly sustained by an individual at the facility if it requires medical treatment;
- The unauthorized departure or absence of an individual from a facility under an involuntary placement;
- A natural disaster or crisis situation that jeopardizes individual safety; or
- An allegation of sexual battery on an individual.

Additionally, the role of health care surrogates and proxies is recognized, and the bill provides them with the same ability to advocate as that granted to other representatives of an individual. The bill prohibits certain persons from serving as a representative or a guardian advocate of the individual, including if the person is a professional involved in assessment or treatment of the individual, or is the subject of an injunction in which the individual is the petitioner. Rights of representatives to advocate on behalf of an individual are specified.

### **Advance Directives**

This bill establishes the “Mental Health and Substance Abuse Directives” Act, also known as the Jennifer Act. The purpose of the Jennifer Act is to enable persons at risk of need for future services based on mental illness or substance abuse impairment governed under ch. 394, F.S., to establish directives for care and treatment in advance of becoming incapacitated. The bill grants immunity to providers and facilities who act in good faith in providing treatment in accordance with an advance directive.

### **Forensic Hospital Diversion Pilot Program**

This bill creates the Forensic Hospital Diversion Pilot Program, which replicates the model of the Miami-Dade Forensic Alternative Center into 3 additional counties. In addition to Miami-Dade, the DCF will implement the program in Alachua, Escambia, and Hillsborough Counties. The purpose of the program is to divert incarcerated defendants found mentally incompetent to proceed or not guilty by reason of insanity into a therapeutic setting which offers beds and community outpatient treatment.

## **II. Present Situation:**

### **Baker Act**

In 1971, the Legislature adopted the Florida Mental Health Act, known as the Baker Act.<sup>1</sup> The Act authorized treatment programs for mental, emotional, and behavioral disorders. The Baker Act required programs to include comprehensive health, social, educational, and rehabilitative services to persons requiring intensive short-term and continued treatment to facilitate recovery. Additionally, the Baker Act provides protections and rights to individuals examined or treated for mental illness. Legal procedures are addressed for mental health examination and treatment,

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<sup>1</sup> Chapter 71-131, Laws of Fla.; The Baker Act is contained in ch. 394, F.S.

including voluntary admission, involuntary admission, involuntary inpatient treatment, and involuntary outpatient treatment.

Mental illness creates enormous social and economic costs.<sup>2</sup> Unemployment rates for persons having mental disorders are high relative to the overall population.<sup>3</sup> Rates of unemployment for people having a severe mental illness range between 60 percent and 100 percent.<sup>4</sup> Mental illness increases a person's risk of homelessness in America threefold.<sup>5</sup> Approximately 33 percent of the nation's homeless live with a serious mental disorder, such as schizophrenia, for which they are untreated.<sup>6</sup> Often the combination of homelessness and mental illness leads to incarceration, which further decreases a person's chance of receiving proper treatment and leads to future recidivism.<sup>7</sup>

### **Marchman Act**

In 1993, the Legislature adopted the Hal S. Marchman Alcohol and Other Drug Services Act. The Marchman Act provides a comprehensive continuum of accessible and quality substance abuse prevention, intervention, clinical treatment, and recovery support services. Services must be provided in the least restrictive environment to promote long-term recovery. The Marchman Act includes various protections and rights of patients served.

### ***Comparison of the Marchman Act to the Baker Act***

While the Baker Act is used to initiate approximately 136,000 involuntary examinations annually, the Marchman Act is used to initiate only an estimated 9,000 involuntary admissions per year.<sup>8</sup> This disparity is likely attributable to two factors:

- The Marchman Act is much more complex and difficult to apply. This leads law enforcement, mental health professionals, and the courts to prefer the Baker Act, even when substance abuse impairment may be the chief presenting problem; and
- The Marchman Act allows facilities to turn clients away for a lack of capacity or lack of payor source, whereas Baker Act receiving facilities must accept any individual brought for involuntary examination.<sup>9</sup>

### ***Individual Bill of Rights***

Both the Marchman Act and the Baker Act provide an individual bill of rights.<sup>10</sup> Rights in common include the right to dignity, right to quality of treatment, right to not be refused

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<sup>2</sup> MentalMenace.com, *Mental Illness: The Invisible Menace; Economic Impact*, <http://www.mentalmenace.com/economicimpact.php> (last visited April 5, 2015).

<sup>3</sup> MentalMenace.com, *Mental Illness: The Invisible Menace: More impacts and facts*, <http://www.mentalmenace.com/impactsfacts.php> (last visited April 5, 2015).

<sup>4</sup> *Id.*

<sup>5</sup> Family Guidance Center for Behavioral Health Care, *How does Mental Illness Impact Rates of Homelessness?*, (February 4, 2014) <http://www.familyguidance.org/how-does-mental-illness-impact-rates-of-homelessness/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Proposal to Streamline Baker Act and Marchman Act: Overview, pg. 1 (on file with the Senate Judiciary Committee).

<sup>9</sup> *Id.*

<sup>10</sup> Section 397.501, F.S., provides "Rights of Individuals" for individuals served through the Marchman Act; s. 394.459, F.S., provides "Rights of Individuals" for individuals served through the Baker Act.

treatment at a state-funded facility due to an inability to pay, right to communicate with others, right to care and custody of personal effects, and the right to petition the court on a writ of habeus corpus. The individual bill of rights also imposes liability for damages on persons who violate individual rights.<sup>11</sup> The Marchman Act bill of rights includes the right to confidentiality of clinical records. The individual is the only person who may consent to disclosure.<sup>12</sup> The Baker Act addresses confidentiality in a separate section of law and permits limited disclosure by the individual, a guardian, or a guardian advocate.<sup>13</sup> The Marchman Act ensures the right to habeus corpus, which means that a petition for release may be filed with the court by an individual involuntarily retained or his or her parent or representative.<sup>14</sup> In addition to the petitioners authorized in the Marchman Act, the Baker Act permits the DCF to file a writ for habeus corpus on behalf of the individual.<sup>15</sup>

### ***Transportation to a Facility***

The Marchman Act authorizes an applicant seeking to have a person admitted to a facility, the person's spouse or guardian, a law enforcement officer, or a health officer to transport the individual for an emergency assessment and stabilization.<sup>16</sup>

The Baker Act requires each county to designate a single law enforcement agency to transfer the person in need of services. If the person is in custody based on noncriminal or minor criminal behavior, the law enforcement officer will transport the person to the nearest receiving facility. If, however, the person is arrested for a felony the person must first be processed in the same manner as any other criminal suspect. The law enforcement officer must then transport the person to the nearest facility, unless the facility is unable to provide adequate security.<sup>17</sup>

The Marchman Act allows law enforcement officers, however, to temporarily detain substance-impaired persons in a jail setting. An adult not charged with a crime may be detained for his or her own protection in a municipal or county jail or other appropriate detention facility. Detention in jail is not considered to be an arrest, is temporary, and requires the detention facility to provide if necessary transfer of the detainee to an appropriate licensed service provider with an available bed.<sup>18</sup> However, the Baker Act prohibits the detention in jail of a mentally ill person if he or she has not been charged with a crime.<sup>19</sup>

### ***Voluntary Admission to a Facility***

The Marchman Act authorizes persons who wish to enter treatment for substance abuse to apply to a service provider for voluntary admission. A minor is authorized to consent to treatment for

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<sup>11</sup> Sections 397.501(10)(a) and 394.459(10), F.S.

<sup>12</sup> Section 397.501(7), F.S.

<sup>13</sup> Section 394.4615(1) and (2), F.S.

<sup>14</sup> Section 397.501(9), F.S.

<sup>15</sup> Section 394.459(8)(a), F.S.

<sup>16</sup> Section 397.6795, F.S.

<sup>17</sup> Section 394.462(1)(f) and (g), F.S.

<sup>18</sup> Section 397.6772(1), F.S.

<sup>19</sup> Section 394.459(1), F.S.

substance abuse.<sup>20</sup> Under the Baker Act, a guardian of a minor must give consent for mental health treatment under a voluntary admission.<sup>21</sup>

When a person is voluntarily admitted to a facility, the emergency contact for the person must be recorded in the individual record.<sup>22</sup> When a person is involuntarily admitted, contact information for the individual's guardian, guardian advocate, or representative, and the individual's attorney must be entered into the individual record.<sup>23</sup> The Marchman Act does not address emergency contacts.

The Baker Act requires an individualized treatment plan to be provided to the individual within 5 days after admission to a facility.<sup>24</sup> The Marchman Act does not address individualized treatment plans.

### ***Involuntary Admission to a Facility***

The Marchman Act provides that a person meets the criteria for involuntary admission if good faith reason exists that the person is substance abuse impaired and because of the impairment:

- Has lost the power of self-control with respect to substance abuse; and either
- Has inflicted, threatened to or attempted to inflict self-harm; or
- Is in need of services and due to the impairment, judgment is so impaired that the person is incapable of appreciating the need for services.<sup>25</sup>

A person who meets the criteria for involuntary admission under the Marchman Act may be taken into protective custody by a law enforcement officer.<sup>26</sup> The person may consent to have the law enforcement officer transport the person to his or her home, a hospital, or a licensed detoxification or addictions receiving facility.<sup>27</sup> If the person does not consent, the law enforcement officer may transport the person without using unreasonable force.<sup>28</sup>

A critical 72-hour period applies under both the Marchman and the Baker Act. Under the Marchman Act, a person may only be held in protective custody for a 72-hour period, unless a petition for involuntary assessment or treatment has been timely filed with the court within that timeframe to extend protective custody.<sup>29</sup> The Baker Act provides that a person cannot be held in a receiving facility for involuntary examination for more than 72 hours.<sup>30</sup> Within that 72-hour examination period, or, if the 72 hours ends on a weekend or holiday, no later than the next working day, one of the following must happen:

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<sup>20</sup> Section 397.601(1) and (4)(a), F.S.

<sup>21</sup> Section 394.4625(1)(a), F.S.

<sup>22</sup> Section 394.4597(1), F.S.

<sup>23</sup> Section 394.4597(2), F.S.

<sup>24</sup> Section 394.459(2)(e), F.S.

<sup>25</sup> Section 397.675, F.S.

<sup>26</sup> Section 397.677, F.S.

<sup>27</sup> Section 397.6771, F.S.

<sup>28</sup> Section 397.6772(1), F.S.

<sup>29</sup> Section 397.6773(1) and (2), F.S.

<sup>30</sup> Section 394.463(2)(f), F.S.

- The patient must be released, unless he or she is charged with a crime, in which case law enforcement will resume custody;
- The patient must be released into voluntary outpatient treatment;
- The patient must be asked to give consent to be placed as a voluntary patient if placement is recommended; or
- A petition for involuntary placement must be filed in circuit court for outpatient or inpatient treatment.<sup>31</sup>

Under the Marchman Act, if the court grants the petition for involuntary admission, the person may be admitted for a period of 5 days to a facility for involuntary assessment and stabilization.<sup>32</sup> If the facility needs more time, the facility may request a 7-day extension from the court.<sup>33</sup> Based on the involuntary assessment, the facility may retain the person pending a court decision on a petition for involuntary treatment.<sup>34</sup>

Under the Baker Act, the court must hold a hearing on involuntary inpatient or outpatient placement within 5 working days after a petition for involuntary placement is filed.<sup>35</sup> The petitioner must show, by clear and convincing evidence all available less restrictive treatment alternatives are inappropriate and that the individual:

- Is mentally ill and because of the illness has refused voluntary placement for treatment or is unable to determine the need for placement; and
- Is manifestly incapable of surviving alone or with the help of willing and responsible family and friends, and without treatment is likely suffer neglect to such an extent that it poses a real and present threat of substantial harm to his or her well-being or substantial likelihood exists that in the near future he or she will inflict serious bodily harm on himself or herself or another person.<sup>36</sup>

### **Mental Illness and Substance Abuse**

According to the National Alliance on Mental Illness (NAMI), about 50 percent of persons with severe mental health disorders are affected by substance abuse.<sup>37</sup> NAMI also estimates that 29 percent of people diagnosed as mentally ill abuse alcohol or other drugs.<sup>38</sup> When mental health disorders are left untreated, substance abuse likely increases. When substance abuse increases, mental health symptoms often escalate as well or new symptoms are triggered. This could also be due to discontinuation of taking prescribed medications or the contraindications for substance abuse and mental health medications. When taken with other medications, mental health medications can become less effective.<sup>39</sup>

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<sup>31</sup> Section 394.463(2)(i)4., F.S.

<sup>32</sup> Section 397.6811, F.S.

<sup>33</sup> Section 397.6821, F.S.

<sup>34</sup> Section 397.6822, F.S.

<sup>35</sup> Sections 394.465(6) and 394.467(6), F.S.

<sup>36</sup> Section 394.467(1), F.S.

<sup>37</sup> Donna M. White, OPCI, CACP, *Living with Co-Occurring Mental & Substance Abuse Disorders*, available at <http://psychcentral.com/blog/archives/2013/10/02/living-with-co-occurring-mental-substance>

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

## **Advance Directive for Mental Health or Substance Abuse Treatment**

Florida law currently allows an individual to create an advance directive which designates a surrogate to make health care decisions for the individual and provides a process for the execution of the directive.<sup>40</sup> Current law also allows an individual to designate a separate surrogate to consent to mental health treatment for the individual if the individual is determined by a court to be incompetent to consent to treatment.<sup>41</sup> A mental health or substance abuse treatment advance directive is much like a living will for health care.<sup>42</sup> Acute episodes of mental illness temporarily destroy the capacity required to give informed consent and often prevent people from realizing they are sick, causing them to refuse intervention.<sup>43</sup> Even in the midst of acute episodes, many people do not meet commitment criteria because they are not likely to injure themselves or others and are still able to care for their basic needs.<sup>44</sup> If left untreated, acute episodes may spiral out of control before the person meets commitment criteria.<sup>45</sup>

## **Miami-Dade Forensic Alternative Center**

The Miami-Dade Forensic Alternative Center (MDFAC) opened in 2009 as a community-based, forensic commitment program. The MDFAC serves adults:

- Aged 18 years old and older;
- Who have been found by a court to be incompetent to proceed at trial due to serious mental illness or not guilty by reason of insanity for a second or third degree felony; and
- Who do not have a significant history of violence.<sup>46</sup>

The MDFAC provides competency restoration and a continuum of care during commitment and after reentry into the community.<sup>47</sup>

Since the 2011-2012 Fiscal Year, all but two of the persons served in the program were adjudicated incompetent to proceed at trial. The Center currently operates a 16-bed facility at a daily cost of \$284.81 per bed.<sup>48</sup>

### **III. Effect of Proposed Changes:**

#### **Marchman Act and Baker Act**

This bill adds concepts from the Marchman Act which relate to the commitment of a person having a substance abuse impairment into the Baker Act. As a conforming change, the bill

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<sup>40</sup> Section 765.202, F.S.

<sup>41</sup> Section 765.202(5), F.S.

<sup>42</sup> Washington State Hospital Association, *Mental Health Advance Directives* (on file with the Senate Judiciary Committee).

<sup>43</sup> Judy A. Clausen, *Making the Case for a Model Mental Health Advance Directive Statute*, 14 YALE J. HEALTH POL'Y, L. & ETHICS 1, (Winter 2014).

<sup>44</sup> *Id.* at 17.

<sup>45</sup> *Id.*

<sup>46</sup> Department of Children and Families (DCF), *2015 Agency Legislative Bill Analysis* (March 4 2015) (on file with the Senate Judiciary Committee).

<sup>47</sup> Budget Subcommittee on Health and Human Services Appropriations, The Florida Senate, *Interim Report 2012-108, The Forensic Mental Health System* (September 2011).

<sup>48</sup> DCF, *supra* note 46, at 2.

repeals all provisions in current law which provide for the voluntary and involuntary civil commitment of a person for substance abuse impairment under the Marchman Act.

Chapter 394, F.S., will now govern the commitment, treatment, and care of persons with mental illness and substance abuse impairment, as the conditions are presented separately or co-occurring.

### ***Service Providers (Sections 2 and 15)***

The bill recognizes that treatment may be provided not just by a state or local provider but also by a facility, mental health professional, or other health care provider affiliated with the United States Department of Veterans Affairs or the United States Department of Defense. The V.A. may:

- Initiate and conduct involuntary examinations for treatment;
- Provide voluntary treatment;
- Petition for involuntary inpatient placement; and
- Provide involuntary inpatient placement.

Advanced registered nurse practitioners are included in the list of service providers eligible to serve individuals under ch. 394, F.S.

### ***Individual Bill of Rights (Section 5)***

The bill modifies the individual bill of rights.

#### ***Right to Dignity***

Current law prohibits mentally ill persons taken into custody under the Baker Act from being detained in jail. This bill allows persons detained for either or both substance abuse and mental health treatment to be detained temporarily in a municipal or county jail. If a person is detained for purposes of protective custody and transfer, the detention facility must:

- Notify the nearest appropriate facility within 8 hours;
- Notify the nearest relative of a minor or of an adult, unless the adult requests otherwise; and
- Arrange for transport to the hospital or other receiving facility.

#### ***Right to Treatment***

This bill clarifies that individuals must be provided the least restrictive appropriate available treatment.

In addition to a physical examination, individuals must be given a mental health evaluation by a psychiatrist, psychologist, or psychiatric nurse, within 24 hours after arrival if the person has not been released or discharged.

#### ***Right to Express and Informed Consent***

The bill reduces from 5 days after admission to a facility to 24 hours, the time in which an individual treatment plan must be provided in writing to the individual. Service providers are

required to provide information and assist competent and willing individuals complete an advance directive.

The bill also expands the list of people who may be notified of an individual's admission to a facility to include a health care surrogate or proxy. Facilities providing services will be required to review any incidents resulting in an injury or alleged injury, allegations of sexual battery, and death, or unauthorized departure of an individual being held for involuntary examination or involuntary placement. Advance directives already in place must be honored, or the service provider must request a transfer of the individual to another facility.

### ***Quality of Treatment***

As soon as is reasonably possible, facilities must report to the DCF and the entity that manages the facility:

- The death of an individual which occurs while the person is at the facility or which occurs within 72 hours after release;
- An injury sustained, or allegedly sustained by an individual at the facility if it requires medical treatment, whether the injury is caused by an accident, self-inflicted, assault, abuse, neglect, or a suicide attempt;
- The unauthorized departure or absence of an individual from a facility in which he or she has been held involuntarily;
- A natural disaster or crisis situation that jeopardizes individual safety; or
- An allegation of sexual battery on an individual.

### ***Communication, Abuse Reporting, and Visits***

This bill adds to the list of persons authorized immediate access to the individual, unless access would be detrimental, a health care surrogate or proxy.

If access is restricted, the facility must document the reasons in the individual's record. Facility rules on communication must be the least restrictive possible.

### ***Care and Custody of Personal Effects***

Copies of an inventory of clothing and personal effects and the actual clothing and personal effects if appropriate, must be provided to the representative of the individual, including a health care surrogate or proxy.

### ***Advance Directives***

This bill includes advance directives in the individual bill of rights. A mental health or substance abuse treatment advance directive is a written document in which the principal provides instructions or preferences or appoints a surrogate to make decisions on behalf of the principal regarding mental health or substance abuse treatment, or both. The bill requires service providers to provide information on advance directives to individuals and to help competent and willing individuals complete an advance directive. Service providers must honor the advance directive.

***Representatives and Notification in Case of Emergency (Section 6)***

Individuals voluntarily admitted to a facility must be asked to identify a person to be notified in case of emergency. If an individual is involuntarily admitted, a health care surrogate or proxy's contact information is required, if appropriate.

The bill prohibits from serving as a representative or guardian advocate:

- A professional providing clinical services to the individual;
- The licensed professional who initiated the involuntary examination of the individual, if initiated by professional certificate;
- An employee, administrator, or board member of the facility providing examination or treatment;
- A person providing any substantial professional services to the individual;
- A creditor of the individual; and
- A person subject to a repeat violence, sexual violence, dating violence, or domestic violence injunction in which the individual is the petitioner.

The bill specifies rights of representatives, including the right to receive certain notices, have immediate access to the individual, and petition on behalf of the individual for a writ of habeus corpus or change of venue.

***Clinical Records (Section 9)***

The bill maintains the confidentiality of clinical records and adds a health care surrogate or proxy to the list of representatives who have access to the records and who may waive consent to confidentiality. The bill adds as another basis for release of records that a petition for involuntary placement is filed and the state attorney needs access to the records, solely to evaluate the allegations in the petition or to prosecute the petition, not for a criminal investigation or prosecution.

***Transportation to a Facility (Section 10)***

This bill requires the nearest receiving facility to accept a person who has engaged in either noncriminal behavior of a felony other than a forcible felony.

If the person has been arrested for a forcible felony, the law enforcement officer must first process the person the same as any other person arrested. The nearest receiving facility may not accept the person if the facility does not have adequate security.

A person who meets the criteria for voluntary admission may request transport to a mental health receiving facility, addictions receiving facility, or a detoxification facility.

***Voluntary and Involuntary Admissions, Examinations, and Placement (Sections 6, 11, 12, 13, 14 and 16)******Admission and Transfer***

To receive treatment, an adult must provide and be competent to provide express and informed consent.

Current law authorizes minors who seek voluntary admission for treatment under the Marchman Act to consent to treatment. Under the Baker Act, a guardian of a minor must provide consent for voluntary admission.

A minor may only be admitted for treatment if the minor's guardian gives express and informed consent along with the minor. A minor may, however, be admitted to an addictions receiving facility or detoxification facility by giving consent without consent of a guardian, if a physician documents in the record that the minor has a substance abuse impairment and that the minor is capable of giving consent. The bill establishes criteria for a clinician to establish consent of a minor. If a minor's consent is not verified, a petition for involuntary inpatient placement must be filed within the court within 1 court working day after arrival or the minor must be released to his or her guardian.

The bill also allows an individual on involuntary status in a facility who has been assessed and certified competent to provide express and informed consent to be transferred to voluntary status immediately. If the individual is on voluntary status and meets the criteria for involuntary placement, he or she must be transferred to a designated receiving facility.

A request for discharge by an individual on voluntary status must be conveyed to a physician, psychologist, or psychiatrist within 12 hours. If the individual meets the criteria for involuntary placement and is transferred to a receiving facility, the facility must file a petition with the court for involuntary placement within 2 court working days. Otherwise, the individual must be discharged.

### ***Involuntary Examination***

The bill directs the court to include specific facts in an ex parte order that support its findings that the required criteria for involuntary examination has been met and to designate the most appropriate type of facility for treatment. Any behavior that provides the basis for the order must have occurred within the preceding 7 calendar days. Additionally, specified medical personnel may execute a certificate that finds an individual meets the criteria for involuntary examination, and the certificate must specify the most appropriate facility.

Current law allows a person to be held for involuntary examination for 72 hours. The bill extends the 72-hour period an additional 48 hours if a physician determines, under specific criteria, that the individual has ongoing symptoms of substance intoxication or substance withdrawal and would likely experience significant clinical benefit from detoxification services. One of the following actions must happen within the time period specified:

- The individual will be approved for release by an appropriate professional;
- The individual will be asked to consent to voluntary admission; or
- The receiving facility for involuntary inpatient or outpatient treatment will file a petition in circuit court.

Within 12 hours after a physician documents that an individual's emergency medical condition has stabilized or does not exist, the individual:

- Must be examined by a medical professional, and if found not to meet criteria for involuntary examination, must be released directly from the hospital providing the emergency medical services; or
- Must be transferred to a receiving facility if appropriate medical and mental health treatment is available, with 2-hours' notice provided to the receiving facility.

### ***Crisis Stabilization Units***

This bill lifts the cap in current law on the number of beds authorized in a crisis stabilization unit. A crisis stabilization unit provides emergency response regardless of ability to pay to persons are involuntarily placed or who voluntarily seek help in stabilizing themselves. Current law limits the number of beds per facility to 30 beds.

### ***Involuntary Outpatient Placement***

An individual in an involuntary outpatient placement proceeding has the right to counsel, appointed by the court within 1 court working day after the petition is filed. The attorney must advocate the individual's expressed desires or must advocate for liberty and if outpatient treatment is ordered, the least restrictive treatment possible. At a hearing on involuntary outpatient placement, the state attorney has access to the individual's clinical records and witnesses in order to determine the sufficiency of the allegations contained in the petition. The court must notify the individual or his or her representative of the right to an independent expert examination.

### ***Involuntary Inpatient Placement***

An individual may be retained or involuntarily placed in a mental health receiving facility, an addictions receiving facility, or a detoxification facility, upon recommendation of two psychiatrists or a psychiatrist and a psychologist. If a petition seeks placement for substance abuse impairment only and an addictions receiving facility or a detoxification facility conducts the examination, recommendation may be made by a physician and a substance abuse professional.

The individual has the same right to counsel and level of advocacy as that which apply to individuals facing a petition for involuntary outpatient placement. The court must hold a hearing after a petition is filed within 5 court working days. The individual may waive his or her presence if the court establishes that waiver is knowing, intelligent, and voluntary. The bill clarifies that the state attorney in the case represents the state and not the facility that initiated the petition. The bill grants the state attorney access to the individual's clinical record.

Also, when the petition is for inpatient placement for substance abuse impairment and the individual is examined by an addictions receiving facility or a detoxification facility, a physician may provide the first opinion and a substance abuse qualified professional the second opinion needed to support the petition.

When a hearing is held on a petition to continue involuntary inpatient placement, the Division of Administrative Hearings must inform the individual of the right to an independent examination, provided by the court if the individual is unable to pay.

**Jennifer Act (Sections 20 through 27)**

Part IV of ch. 765, F.S. is redesignated from “Absence of Advance Directive” to “Mental Health and Substance Abuse Directives,” also known as the Jennifer Act.

A mental health or substance abuse treatment advance directive is a written document in which the principal provides instructions or preferences or appoints a surrogate to make decisions on behalf of the principal regarding mental health or substance abuse treatment, or both.

The Act emphasizes the need to allow individuals with capacity to control decisions relating to his or her own treatment. The Act recognizes that substance abuse and mental illness cause individuals to fluctuate between capacity and incapacity. An individual in a crisis situation may be unable to provide informed consent in the midst of the crisis to prevent the need for involuntary treatment.

An adult who qualifies for advance directives is an individual who has reached majority or an emancipated minor.

A principal is a competent adult who executes a mental health or substance abuse treatment advance directive and on whose behalf treatment decisions are made.

A directive executed under the terms of the Act is presumed valid. However, an inability to honor one or more of the provisions of the advance directive does not invalidate the remaining provisions. The directive may address an individual’s:

- Preferences and instructions for mental health or substance abuse treatment;
- Refusal to consent to specific types of mental health or substance abuse treatment;
- Consent to admission to and retention in a facility for mental health or substance abuse treatment for up to 14 days, provided that consent is conveyed through an affirmative statement contained in the directive clearly stating whether the consent is revocable by the individual during a mental health or substance abuse crisis;
- Descriptions of situations which may cause the individual to experience a mental health or substance abuse crisis;
- Suggested alternative responses that may supplement or be in lieu of direct mental health or substance abuse treatment, such as treatment approaches from other providers;
- Appointment of a surrogate to make mental health or substance abuse treatment decisions on the individual’s behalf; and
- Nomination of a guardian, limited guardian, or guardian advocate.

The directive may be independent of or combined with a nomination of a guardian or other durable power of attorney.

The bill addresses the execution, effective date, and expiration of a mental health or substance abuse advance directive.

Advance directives must:

- Be in writing;

- Clearly indicate that the individual intends to create a directive;
- Clearly indicate whether the individual intends for the surrogate to have the authority to consent to the individual's voluntary admission to inpatient mental health or substance abuse treatment and whether consent is revocable;
- Be dated and signed by the individual or, if unable to sign, dated and signed at his or her direction;
- Be witnessed by two adults who declare they were present when the individual dated and signed the directive and that the individual did not appear incapacitated or acting under fraud, undue influence, or duress. The surrogate named in the directive cannot witness execution of the directive and at least 1 witness must not be the spouse or blood relative of the individual executing the directive.

The directive is valid upon execution, but all or part may take effect at a later date as designated in the directive. A directive may be revoked in whole or in part or expire under its own terms. But, an individual may revoke an advance directive only if, at the time of execution he or she elected to be able to revoke when incapacitated. A directive that would have otherwise expired but is effective because the individual is incapacitated remains effective until the individual is no longer incapacitated.

An advance directive executed properly in another state is considered valid in this state.

The bill imposes several restrictions on directives. A directive may not create an entitlement to mental health, substance abuse, or medical treatment or supersede a determination of medical necessity. A directive does not obligate a health care provider, professional person, or facility to incur costs associated with requested treatment or to be responsible for the non-treatment or personal care of the individual outside a facility's scope of services. Directives may not replace or supersede wills, testamentary documents, or the provision of intestate succession.

An individual's family, the health care facility, attending physician, or other interested person may seek expedited judicial intervention on a surrogate's decision if a surrogate has acted improperly or abused his or her powers or the individual has sufficient capacity to make his or her own health care decisions.

This bill provides immunity from civil and criminal liability to surrogates, health care facilities, and providers who execute mental health care or substance abuse treatment decisions pursuant to the Jennifer Act, on advance directives. Health care facilities and providers who comply with the Act are also deemed not to have engaged in unprofessional conduct. Immunity from liability applies unless a proponent can show by a preponderance of the evidence that the person or entity did not act in good faith.

### **Forensic Hospital Diversion Pilot Program (Section 28)**

This bill creates the Forensic Hospital Diversion Pilot Program (Program). The purpose of the program is to divert incarcerated defendants who are found mentally incompetent to proceed at trial from state forensic mental health treatment facilities to locked residential treatment facilities, and eventually community outpatient treatment. Goals of treatment are restoration of competency and community reintegration.

Under the bill, the Department of Children and Families (DCF) is required to implement the Program in Alachua, Escambia, Hillsborough, and Miami-Dade counties, in conjunction with the court circuits in those counties. The model for the Program is the Miami-Dade Forensic Alternative Center, which is currently in operation.

In establishing the individual programs, the DCF must consider local needs and available local resources. The bill allows the DCF and the affected judicial circuits to implement these provisions within available resources. Additionally, the Legislature may provide a specific appropriation to support the Program.

Participation in the Program is limited to persons who:

- Are 18 years of age and older;
- Are charged with a second or third degree felony;
- Do not have a significant history of violent criminal offenses;
- Have been adjudicated either incompetent to proceed to trial or not guilty by reason of insanity;
- Meet safety and treatment criteria established by the DCF for placement in the community; and
- Would otherwise be admitted to a state mental health treatment facility.

The bill encourages the Florida Supreme Court, in conjunction with the Task Force on Substance Abuse and Mental Health Issues in the Courts, to develop educational training for judges in the pilot program counties on the community forensic system.

The DCF is authorized to adopt rules to facilitate to facilitate the provisions of the bill relating to the Program. The bill requires the Office of Program Policy Analysis and Government Accountability (OPPAGA) to submit a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives by December 31, 2016. The report must examine the efficiency and cost-effectiveness of the program, including its effect on public safety.

The bill takes effect July 1, 2015.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

This bill does not appear to require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 10 of the Florida Constitution.

Although the Forensic Hospital Diversion Pilot Program envisions the availability of local resources as a type of support for the program, the bill does not require local funding.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

**The Fourth Amendment and Due Process**

The bill authorizes law enforcement officers to detain in a jail setting a mentally ill person. Detention in jail is approved as a form of protective custody, not because the individual has committed a crime. The bill qualifies that the jail detention is not considered an arrest and that no record of an individual's detention or entry of a crime in the record is permitted.

The Fourth Amendment of the federal constitution prohibits unreasonable search and seizure. Section 12, Article I, of the state constitution embodies the Fourth Amendment and guarantees to all Floridians:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . .

Although the term “arrest” does not appear in either constitution, the courts consider an arrest as a seizure of a person for purposes of constitutional analysis.<sup>49</sup>

In *Terry v. Ohio*, the U.S. Supreme Court articulated that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”<sup>50</sup> The Court recognized that a law enforcement officer can effect two types of detentions. The first, a temporary detention that has come to be known as a “Terry Stop and Frisk” requires a law enforcement officer to have an articulable suspicion of criminal activity. Still, the detention must be temporary and brief.<sup>51</sup>

Although a law enforcement officer may purport a stop to be a temporary detention, the U.S. Supreme Court has indicated that at some point a stop becomes a de facto arrest.<sup>52</sup> In determining whether a stop evolves into a de facto arrest, the Court will consider not just the amount of time the person is detained, but the purpose of the detention as legitimate.<sup>53</sup> In this case, the Court approved a 20-minute detention of a suspect during which time the

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<sup>49</sup> Jonathan M. Purver, *Lack of Probable Cause for Warrantless Arrest*, 44 AM. JUR. PROOF OF FACTS 2d 229 (2015).

<sup>50</sup> *Terry v. Ohio*, 392 So. 2d 1, 16 (1968).

<sup>51</sup> *Id.* at 9 -10.

<sup>52</sup> *United States v. Sharpe*, 470 U.S. 675, 685-686 (1985).

<sup>53</sup> *Id.* at 685-687.

police acted diligently to conclude their investigation of criminal activity, as constituting a temporary detention.<sup>54</sup>

The second type of detention, a warrantless arrest, requires a law enforcement officer to have probable cause that the person has committed a crime. In the absence of probable cause, the U.S. Supreme Court found unconstitutional the actions by a law enforcement officer of transporting a person under the threat of arrest to a police station for the purpose of fingerprinting him.<sup>55</sup>

This bill expressly defines the taking of a mentally ill person into police custody and detaining the person in a jail setting as protective custody, and not as an arrest. Additionally, although the bill requires the officer in charge to notify the nearest appropriate facility within the first 8 hours that the person is detained, the bill does not impose a time limit on the detention. Based on case law, these provisions appear constitutionally suspect. In no circumstance would a court consider the holding of a person in jail for potentially an undefined period of time a temporary detention. Still, even a Terry stop requires some indicia of criminal activity.

Holding mentally ill persons in jail who have not committed a crime leaves them without the whole host of due process protections afforded to persons charged with a crime. These protections include the requirement for law enforcement to issue Miranda warnings, and the rights to arraignment, speedy trial, and appointed counsel during the time that the person remains confined in the jail setting.

### **Public Providers and Sovereign Immunity**

Sovereign immunity originally referred to the English common law concept that the government may not be sued because “the King can do no wrong.” Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents unless the public entity expressly waives immunity.

Article X, s. 13, of the Florida Constitution recognizes sovereign immunity and authorizes the Legislature to provide a waiver of immunity. Section 768.28(1), F.S., provides a broad waiver of sovereign immunity. But by law, liability to pay a claim or judgment is limited to \$200,000 per plaintiff or \$300,000 per incident.<sup>56</sup>

This bill appears to provide absolute immunity to surrogates, health care facilities, and providers who execute in good faith mental health care or substance abuse treatment decisions pursuant to the law on advance directives. Accordingly, this bill creates an exception to the broad waiver of sovereign immunity under s. 768.28, F.S.

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<sup>54</sup> *Id.* at 688.

<sup>55</sup> *Hayes v. Florida*, 470 U.S. 811, 812, 817-818 (1985).

<sup>56</sup> Section 768.28(5), F.S.

### **Private Providers and Access to Courts**

The grant of immunity does not specify application to public providers or both public and private providers.

The Florida Supreme Court in *Kluger v. White* reviewed the constitutionality of a statute which abolished the traditional right of action for property vehicle damage in tort from the law unless a narrow exception applied.<sup>57</sup> In striking down the statute, the court held:

where a right of action to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State...the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people...unless the Legislature can show an overpowering public necessity...and no alternative of meeting such public necessity can be shown.<sup>58</sup>

If this bill abolishes a cause of action that existed before the Declaration of Rights was adopted in 1968 by extending immunity to a private provider or facility, this bill may create an access to courts issue.

### **V. Fiscal Impact Statement:**

#### **A. Tax/Fee Issues:**

None.

#### **B. Private Sector Impact:**

None.

#### **C. Government Sector Impact:**

### **Marchman and Baker Act**

SB 7070 has an indeterminate fiscal impact on the Department of Children and Families (DCF). The bill could result in more persons having access to substance abuse treatment by including provisions of the Marchman Act in emergency behavioral health care that providers must deliver under the Baker Act. However, some unknown number of persons with substance abuse disorders may already be receiving emergency behavioral health care under the Baker Act. Some costs of those who receive treatment for substance abuse under the bill may already be reflected in the current expenditures for behavioral health care, but the extent is indeterminate.

<sup>57</sup> *Kluger v. White*, 281 So. 2d 1, 2 (Fla. 1973).

<sup>58</sup> *Id.* at 4.

The bill expands the use of involuntary outpatient care. The state could experience cost savings for behavioral health care if services are diverted from inpatient settings to outpatient settings under the bill.

The Office of the State Courts Administrator (OSCA) indicates that the fiscal impact of the bill is indeterminate due to the unavailability of data needed to quantifiably establish the bill's impact on court and judicial workload. Merging the provisions of the Marchman and Baker Acts addressing voluntary and involuntary intervention may increase judicial workload. More ex-parte orders, appointments for guardian advocates, involuntary placement hearings, and writ of habeas corpus filings may increase workload. The bill authorizes an individual or his or her representative to request an independent expert examination for involuntary outpatient placement, which may also increase expert witness fees for the judicial branch. The addition of the advance directive language may result in fewer filings of guardianship petitions, which may reduce state courts revenues. However, an increase in revenues could result from an increase in the number of petitions for the determination of incompetency.<sup>59</sup>

### **Forensic Hospital Diversion Pilot Program**

This bill replicates the Miami-Dade Forensic Alternative Center Program as a pilot program in 3 other counties.

The program's current contract with the DCF is \$1.596 million. Funding this model for the four programs will require \$6.38 million. The DCF anticipates that the redirection of \$6.38 million from the department's budget for this program could impact or decrease the provision of services to other clients of the department.<sup>60</sup>

Cost savings may be realized, however, based on the success of the program. The program is able to keep individuals whose competency has been restored in the program rather than in jail while awaiting trial. Doing so may shorten the process, as defendants are less likely to decompensate, or lose competency again from the stress and the less-than-optimal treatment provided in a jail setting. Commitment bed and court cost savings are expected through this bill. Competency is restored more quickly through the program, which requires 103 days on average, than at state facilities, which requires 146 days on average.

In the 2011-12 Fiscal Year, the average cost for a secure forensic bed was \$333 per day. A bed at the program cost much less, at \$229 a day in 2011-12.<sup>61</sup> However, the current cost per bed per day at the program is \$285 a day.<sup>62</sup>

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<sup>59</sup> Office of the State Courts Administrator, *2015 Judicial Impact Statement* (April 5, 2015).

<sup>60</sup> Email correspondence from John Bryant, Assistant Secretary for Substance Abuse and Mental Health, DCF (April 2, 2015) (on file with the Senate Judiciary Committee).

<sup>61</sup> Budget Subcommittee on Health and Human Services Appropriations, *supra* note 47.

<sup>62</sup> Department of Children and Families (DCF), *2015 Agency Legislative Bill Analysis on SB 1452* (March 4 2015) (on file with the Senate Judiciary Committee).

The bill authorizes, rather than requires the pilot projects to be implemented based on available resources including local resources and resources the bill authorizes the DCF to reallocate from specified forensic programs. The extent to which local resources are available in the designated pilot areas and the amount of funding the DCF can reallocate is unknown.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Section 14 of the bill provides, in instances of involuntary inpatient placement for an individual with mental illness or substance abuse impairment, that the Division of Administrative Hearings (DOAH) must inform the individual or his or her guardian, guardian advocate, health care surrogate or proxy, or representative, of the right to an independent expert examination, and, if the individual cannot afford the examination, the court must provide one. Which court is being referenced is unclear, as the case is being handled by the DOAH.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 39.407, 394.453, 394.455, 394.457, 394.4573, 394.459, 394.4597, 394.4598, 394.4599, 394.4612, 394.4615, 394.462, 394.4625, 394.463, 394.4655, 394.467, 394.4672, 394.875, 394.495, 394.496, 394.499, 394.67, 394.674, 394.9085, 395.0197, 395.1051, 397.311, 397.431, 397.702, 397.94, 402.3057, 409.1757, 409.972, 456.0575, 744.704, 765.101, 765.104, and 790.065.

This bill creates the following sections of the Florida Statutes: 765.4015, 765.402, 765.403, 765.405, 765.406, 765.407, 765.410, 765.411, and 916.185.

This bill transfers and renumbers the following sections of the Florida Statutes: 765.401 and 765.404.

This bill repeals the following sections of the Florida Statutes: 397.601, 397.675, 397.6751, 397.6752, 397.6758, 397.6759, 397.677, 397.6771, 397.6772, 397.6773, 397.6774, 397.6775, 397.679, 397.6791, 397.6793, 397.6795, 397.6797, 397.6798, 397.6799, 397.681, 397.6811, 397.6814, 397.6815, 397.6818, 397.6819, 397.6821, 397.6822, 397.693, 397.695, 397.6951, 397.6955, 397.6957, 397.697, 397.6971, 397.6975, and 397.6977.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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