S T A T E O F T E N N E S S E E
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Opinion No. 08-82

Tenn. Code Ann. § 37-1-128(e)

QUESTIONS

1. Does Tenn. Code Ann. § 37-1-128(e) require a court in a juvenile proceeding to first order an outpatient evaluation to determine whether a child is suffering from mental illness or is not competent to participate in juvenile justice proceedings before ordering the child to undergo inpatient evaluation?

2. Is a determination by the person or entity performing an outpatient evaluation that the child cannot be properly evaluated on an outpatient basis required before the court may order an inpatient evaluation?

OPINIONS

1. Tenn. Code Ann. § 37-1-128(e) is silent with regard to a child's competence to participate in juvenile justice proceedings. However, Tenn. Code Ann. § 37-1-128(e) does require a court in a juvenile proceeding to first order an outpatient evaluation to determine whether a child is suffering from mental illness before ordering the child to undergo inpatient evaluation unless the child poses an immediate substantial risk of serious harm to self or others due to the mental illness.

2. Yes, unless the child poses an immediate substantial risk of serious harm to self or others due to the mental illness.

ANALYSIS

1. Tenn. Code Ann. § 37-1-128(e)(1) provides in pertinent part as follows:

> If, during the pendency of any proceeding under this chapter, there is reason to believe that the child may be suffering from mental illness, the court may order the child to be evaluated on an outpatient basis by a community mental health center, mental health institute or licensed private practitioner. . . . If the professional attempting to perform the evaluation for mental illness . . . determines that the

> evaluation cannot be performed properly on an outpatient basis, the court may order the child placed in a hospital or treatment resource, as defined in § 33-1-101, for the purposes of evaluation and for treatment necessary to the evaluation, for not more than thirty (30) days. If the court determines that there is reason to believe that the child: (A) [i]s mentally ill; and (B) [p]oses an immediate substantial likelihood of serious harm, as defined in Title 33, Chapter 6, Part 5, because of the mental illness; the court may order the child placed in a hospital or treatment resource, as defined in § 33-1-101, for the purposes of evaluation and for treatment necessary to the evaluation, for not more than thirty (30) days.

In Op. Tenn. Att'y Gen. 91-36 (Apr. 26, 1991) (copy attached), this Office interpreted Tenn. Code Ann. § 37-1-128(e) to authorize a juvenile court to order an inpatient evaluation of a juvenile without first obtaining an outpatient evaluation only in an emergency situation. Op. Tenn. Att'y Gen. 91-36, 1991 WL 535124. Such an emergency situation would exist only when the court has reason to believe that a child is mentally ill, there is a "substantial likelihood of serious harm" as defined in § 33-6-104(a) [now § 33-6-501 (2007)], the "substantial likelihood of serious harm" is caused by the mental illness, and the "substantial likelihood of serious harm" is immediate. *Id*. at *4. The analysis set forth in Op. Tenn. Att'y Gen. 91-36 remains valid.[1]

2. Op. Tenn. Att'y Gen. 91-36 also addressed whether a determination by the person or entity performing an outpatient evaluation that the child cannot be properly evaluated on an outpatient basis is required before the court may order an inpatient evaluation. *Id*. at *1-2. The opinion concluded that "under ordinary circumstances, the court's authority to order an inpatient evaluation is contingent upon the mental health professional's determination of a need for the evaluation to be done on an inpatient basis." *Id*. at *1. However, "[a] juvenile court may order an inpatient evaluation without the recommendation of a mental health professional only when there is an immediate need, because of the child's suspected mental illness, to place the child in an inpatient setting." *Id*. at *2. As previously stated, this occurs when there is a "substantial likelihood of serious harm" as defined in § 33-6-501 (2007) (formerly § 33-6-104(a) (1984 & 1991 Supp.)), the "substantial likelihood of serious harm" is caused by the mental illness, and the "substantial likelihood of serious harm" is immediate. The analysis of this point set forth in Op. Tenn. Att'y Gen. 91-36 also remains valid.

[1]The portion of Tenn. Code Ann. § 37-1-128(e)(1) quoted above has not changed since 1991 except for the location of the definition of "substantial likelihood of serious harm," which was formerly in § 33-6-104(a) (1984 & 1991 Supp.) but is now in Title 33, Chapter 6, Part 5 (§ 33-6-501 (2007)).

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