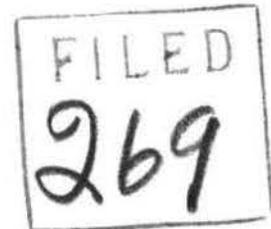


PROBATE COURTS: Section 202.807 RSMo 1959, in respect to judicial proceedings for hospitalization of the
WITNESSES: mentally ill, does not require that the physician be physically present at the hearing.
MENTALLY ILL: Evidence in affidavit form meets the requirements of the statute if all parties to whom notice is required to be given expressly agree and the Court concurs. Without complete agreement of the parties and the Court, the evidence of the physician must be adduced by deposition or by his oral testimony at the hearing.

OPINION NO. 269

September 28, 1965

Honorable Bill Burlison
Prosecuting Attorney
Cape Girardeau County
708 Broadway
Cape Girardeau, Missouri



Dear Mr. Burlison:

This is in response to your request for an opinion of this office in reference to Section 202.807 RSMo 1959 relating to judicial procedure for hospitalization of the mentally ill.

Your question is as follows:

"The statute above referred to states in part:
'At least one of the witnesses at the hearing shall be a licensed and reputable physician. . .'

"The question is whether this statute means that the physician must be in actual presence at the hearing or whether an affidavit of the physician would suffice."

Section 202.807 states in part:

"2. Upon receipt of an application the court shall give notice thereof, and of the time of hearing thereon, to the proposed patient, and to his legal guardian or, if he has no legal guardian, to his spouse, parent or nearest known relative or friend.

"3. The proposed patient, the applicant, and all other persons to whom notice is

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required to be given shall be afforded an opportunity to appear at the hearing, to testify, and to present and cross-examine witnesses, and the court in its discretion may receive the testimony of any other person. The proposed patient shall not be required to be present. At least one of the witnesses at the hearing shall be a licensed and reputable physician who has examined the individual within twenty days prior to the hearing. If an order of hospitalization is made, such medical witness shall make out a detailed history of the case, as far as practicable, stating the diagnosis or nature of the mental illness, its duration, former treatment of the patient, and all other particulars relating to the patient, and his disease on forms acceptable to the division of mental diseases. Such history shall be attached to the order of hospitalization to be delivered to the hospital. The court in its discretion may order further examination as to the mental condition of the proposed patient and may continue the hearing until the report of such further examination is made to the court."

In phrasing this section it was recognized that historically for a judicial determination as to the sanity and appointment of a guardian the legislature did not undertake to regulate the quantum or the quality of proof. The quality and sufficiency of the evidence to make a case has been considered to be a court function as long as the alleged incompetent was guaranteed a hearing by a court of record and there was felt to be no reason why the Legislature should spell out in great detail the evidence and procedure necessary for an adjudication and commitment to a state hospital. The due process requirements were recognized as met by notice and opportunity to defend.

"The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights are denied, we are governed by the substance of things and not mere form." *Simon v. Craft*, 182 U.S. 427, 1.c. 436 (1901).

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It appears therefore that at least basically, as far as due process is concerned, the requirement that one of the witnesses be a physician is not a prerequisite. The question remains, however, whether or not the Legislature in enacting Section 202.807 undertook to make the physical presence of the physician a substantive evidentiary element without which the hearing would lack validity.

This section, however, does not undertake to define the term "witness" which is a generally descriptive term and does not necessarily import physical presence in the court. It seems reasonable to conclude that the Legislature intended solely that testimony of or evidence by a physician be required in order to reach a proper adjudication.

Section 202.807, paragraph 2, requires notice to the proposed patient and to other specified persons. Section 202.807, paragraph 3, requires that the proposed patient, the applicant, and all other persons to whom notice is required to be given shall be afforded an opportunity to appear at the hearing, and to testify, and to present and cross-examine witnesses, and that the court in its discretion may receive the testimony of any other person. Likewise, it appears inherently within the province of the court to personally cross-examine such witnesses.

We recognize the application of the Rules of Civil Procedure relating to the taking of depositions and note that Rule 57.29 provides that depositions taken in conformity with the Rules under certain circumstances may be read and used as evidence in the cause in which they were taken, as if the witnesses were present and examined in open court on the trial thereof. Rule 57.29 (b) (5) authorizes reading of the deposition of a physician engaged in the discharge of his official or professional duties at the time of the trial.

Notice and opportunity to defend are basic to due process and may not be waived by the alleged mentally ill person or by his attorney. Section 202.807, paragraph 4, provides that the court shall not be bound by the rules of evidence and that an opportunity to be represented by counsel shall be afforded to every person alleged to be mentally ill and if neither he nor others provide counsel, the court shall appoint counsel. Such counsel may follow his professional discretion insofar as the conduct of the trial is concerned and as noted in *In Re Moynihan*, 62 S.W. 2d 410, 332 Mo. 1022, (1933), this provision is designed to allow counsel to enforce the rights of one who is unable to do it for himself.

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It would appear therefore that the forensic discretion of counsel for the allegedly ill person would encompass a right of determination respecting the acceptance into evidence, of an affidavit by the physician. In this respect we believe the following quotation from 2 C.J.S. Affidavits #28a(2) to be a correct statement of the law:

"In the absence of an authorizing statute or rule of court, ex parte affidavits may not be read in evidence in the determination of material issues of fact, although they are part of the files in the case; such matters are to be proved or controverted by the testimony of competent witnesses taken at the trial or by deposition, so as to permit cross-examination; but the impropriety of such a course may be waived expressly or by failure object, and when waived, the one who waived it cannot thereafter take advantage of it. * * * "

Whether or not such affidavit should be admitted into evidence would however be dependent upon the concurrence of all the required parties and the Court. By such concurrence or stipulation therefore the affiant physician may have his testimony heard at the hearing and meet the evidentiary requirements of the statute. We are strengthened in this conclusion by the reflection that the Legislature could have made it patently clear if they intended that nothing less than the personal physical presence of the physician would suffice.

It is obvious however that the Court or any party to whom notice is required to be given may require the physician to present oral testimony either at the hearing or by deposition.

CONCLUSION

It is the opinion of this office that Section 202.807 RSMo 1959, in respect to judicial proceedings for hospitalization of the mentally ill, does not require that the physician be physically present at the hearing. Evidence in affidavit form meets the requirements of the statute if all parties to whom notice is required to be given expressly agree and the Court concurs. Without complete agreement of the parties and

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the Court, the evidence of the physician must be adduced by deposition or by his oral testimony at the hearing.

The foregoing opinion which I hereby approve was prepared by my assistant, John C. Klaffenbach.

Very truly yours,


NORMAN H. ANDERSON
Attorney General