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Mental Disability Law

Cases and Materials

Second Edition

Michael L. Perlin

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Dedication

This book, like all my other books, is dedicated to my family...for their love, their support, their patience, their humor and their inspiration. To my wife Linda, my children, Julie and Alex, and my mother-in-law, Mrs. Vivian Mason, I dedicate this book with love, thanks and appreciation. And, of course, I dedicated it to the memory of my parents, Jacob W. and Sophie Perlin, and my father-in-law, Nathaniel J. Mason.

March 28, 2005

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Introduction to the Second Edition

I published the first edition of *Mental Disability Law: Cases and Materials* in the spring of 1999, a generation ago by casebook standards. Since that time, the explosion of case law and legislation that I sought to document in that volume has continued unabated. United States Supreme Court decisions have restructured the law as it applies, *inter alia*, to the relationship between the Americans with Disabilities Act (ADA) and institutionalized persons with mental disabilities (see *Olmstead v. L.C.*, p. 659) and with questions involving access to the courts (see *Tennessee v. Lane*, p. 680), to persons charged under Sexually Violent Predator Acts (SVPA) (see, e.g., *Kansas v. Crane*, p. 252), to persons incompetent to stand trial who wish to resist the imposition of antipsychotic medication (see *Sell v. United States*, p. 491), and to the relationship between mental disability and the death penalty (see *Atkins v. Virginia*, p. 1071). Other courts have continued to fine-tune the law of involuntary civil commitment, of institutional rights (especially the right to refuse treatment in *civil* cases), of community care, and of all aspects of the criminal trial process. State legislatures have enacted—not without controversy—new sorts of outpatient commitment laws (now mostly known as AOT (“assisted outpatient treatment”) acts), and state judiciaries have expanded—again, not without controversy—the role of “mental health courts,” a very specific sort of “problem-solving court” (drug courts and domestic violence courts are its forerunners). And, as in so many other areas of the law, litigators and advocates have begun—perhaps somewhat tardily—to look at questions of international human rights law in a mental disability law context. The bulk of newly-reported mental disability law litigation has come in three areas—SVPA cases, ADA cases, and criminal procedure cases—but virtually every area covered in the first edition of this Casebook has seen unprecedented growth in the past five years.

New York Law School, where I teach, has significantly and dramatically expanded its mental disability law course offerings to respond to these changes. We have created a distance learning mental disability law program, and, through that program, are offering on-line versions of our basic mental disability law courses and a course in ADA law, and are currently developing an international human rights/mental disability law course (and I will be one of several co-editors of a casebook in that area that will be published by Carolina Academic Press in 2006), as well as one in Lawyering Skills in the Representation of Persons with Mental Disabilities. We are also developing new courses in other areas of mental disability law (e.g., Competency and the Civil Law: Guardianship, Wills, Trusts and Estates; Mental Illness, Dangerousness, the Police Power and Risk Assessment; Forensic Reports and the Role of Experts; Mental Health Issues in Jail and Prisons; Sex Offenders), all of which will eventually be part of a new Masters program in mental

disability law studies that we hope to launch in the 2006–07 school year. In short, this is a vibrant and growing area of the law and of academic interest and importance.

Of course, when there is so much that needs to be added to a casebook, there must be some cuts as well. Although I have always found the two decisions by the Fourth Circuit in *United States v. Charters* (829 F.2d 479, 493 (4th Cir. 1987), *vacated* 863 F.2d 302, 306 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990)), to be wonderful “teaching cases,” the Supreme Court’s decision in *Sell* requires a change of focus in that area of the law. Other changes reflect consumer interest (or lack of interest); my informal poll of professors who have adopted this Casebook reveals that none teaches the material on family law, wills, and contracts, and I have thus—with some regrets—decided to cut that section as well. I hope that these decisions were good ones on my part, and I expect I will find that out over the next several years.

In addition to those that I thanked in my introduction to the first edition, I have many others to thank this time around. My student assistants—many of whom have helped me prepare some of the more recent law review articles that are excerpted here, and all of whom have helped me with the pocket parts to my Treatise, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (2d ed. 1998–2002), which I draw on for many of the ideas that I incorporate here—have been of invaluable help: those who have graduated (Jenna Anderson, Jeannie Bliss, Marissa Costales and Betsy Fiedler), and those who are still students at NYLS (Jackie Halpern, Ryan Hild, Nikki Hirsch, Zev Holzman, Danielle Horowitz, Diana Moss and Naomi Schneidmill), I thank you all. Christopher Porter, my faculty assistant, has been of phenomenal help over the past several years, and I can’t adequately express my gratitude for what he has done. In addition to the colleagues that I named in the first edition, I also want to thank Pam Cohen, Henry Dlugacz, Steve Ellmann, Rick Friedman, Eric Rosenthal, Richard Sherwin, Eva Szeli, and Karen Owen Talley for their help and encouragement and inspiration. Finally, I wish to thank NYLS Dean Rick Matasar for the faith he has shown in me and his on-going support. These words are not enough to reflect my appreciation.

Trenton, NJ
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