

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Introduced

Senate Bill 363

BY SENATOR TRUMP

[Introduced January 24, 2018; Referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §27-5-2 of the Code of West Virginia, 1931, as amended, relating
2 to making a technical correction by removing a requirement of a finding of professional
3 negligence as it concerns involuntary hospitalizations.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5. INVOLUNTARY HOSPITALIZATION.

§27-5-2. Institution of proceedings for involuntary custody for examination; custody; probable cause hearing; examination of individual.

1 (a) Any adult person may make an application for involuntary hospitalization for
2 examination of an individual when the person making the application has reason to believe that
3 the individual to be examined is addicted, as defined in §27-1-11 of this code, or is mentally ill
4 and, because of his or her addiction or mental illness, the individual is likely to cause serious harm
5 to himself, herself or to others if allowed to remain at liberty while awaiting an examination and
6 certification by a physician or psychologist.

7 Notwithstanding any language in this subsection to the contrary, if the individual to be
8 examined under the provisions of this section is incarcerated in a jail, prison or other correctional
9 facility, then only the chief administrative officer of the facility holding the individual may file the
10 application and the application must include the additional statement that the correctional facility
11 itself cannot reasonably provide treatment and other services for the individual's mental illness or
12 addiction.

13 (b) The person making the application shall make the application under oath.

14 (c) Application for involuntary custody for examination may be made to the circuit court or
15 a Mental Hygiene Commissioner of the county in which the individual resides or of the county in
16 which he or she may be found. When no circuit court judge or Mental Hygiene Commissioner is
17 available for immediate presentation of the application, the application may be made to a
18 magistrate designated by the chief judge of the judicial circuit to accept applications and hold
19 probable cause hearings. A designated magistrate before whom an application or matter is

20 pending may, upon the availability of a Mental Hygiene Commissioner or circuit court judge for
21 immediate presentation of an application or pending matter, transfer the pending matter or
22 application to the Mental Hygiene Commissioner or circuit court judge for further proceedings
23 unless otherwise ordered by the chief judge of the judicial circuit.

24 (d) The person making the application shall give information and state facts in the
25 application as may be required by the form provided for this purpose by the Supreme Court of
26 Appeals.

27 (e) The circuit court, Mental Hygiene Commissioner or designated magistrate may enter
28 an order for the individual named in the application to be detained and taken into custody for the
29 purpose of holding a probable cause hearing as provided in subsection (g) of this section for the
30 purpose of an examination of the individual by a physician, psychologist, a licensed independent
31 clinical social worker practicing in compliance with §30-30-1 *et seq.* of this code, an advanced
32 nurse practitioner with psychiatric certification practicing in compliance with §30-7-1 *et seq.* of this
33 code a physician assistant practicing in compliance with §30-3-1 *et seq.* of this code or a physician
34 assistant practicing in compliance with §30-14A-1 *et seq.* of this code: *Provided*, That a licensed
35 independent clinical social worker, a physician assistant or an advanced nurse practitioner with
36 psychiatric certification may only perform the examination if he or she has previously been
37 authorized by an order of the circuit court to do so, the order having found that the licensed
38 independent clinical social worker, physician assistant or advanced nurse practitioner with
39 psychiatric certification has particularized expertise in the areas of mental health and mental
40 hygiene or addiction sufficient to make the determinations as are required by the provisions of
41 this section. The examination is to be provided or arranged by a community mental health center
42 designated by the Secretary of the Department of Health and Human Resources to serve the
43 county in which the action takes place. The order is to specify that the hearing be held forthwith
44 and is to provide for the appointment of counsel for the individual: *Provided, however*, That the
45 order may allow the hearing to be held up to 24 hours after the person to be examined is taken

46 into custody rather than forthwith if the circuit court of the county in which the person is found has
47 previously entered a standing order which establishes within that jurisdiction a program for
48 placement of persons awaiting a hearing which assures the safety and humane treatment of
49 persons: *Provided further*, That the time requirements set forth in this subsection only apply to
50 persons who are not in need of medical care for a physical condition or disease for which the
51 need for treatment precludes the ability to comply with the time requirements. During periods of
52 holding and detention authorized by this subsection, upon consent of the individual or in the event
53 of a medical or psychiatric emergency, the individual may receive treatment. The medical provider
54 shall exercise due diligence in determining the individual's existing medical needs and provide
55 treatment the individual requires, including previously prescribed medications. As used in this
56 section, "psychiatric emergency" means an incident during which an individual loses control and
57 behaves in a manner that poses substantial likelihood of physical harm to himself, herself or
58 others. Where a physician, psychologist, licensed independent clinical social worker, physician
59 assistant or advanced nurse practitioner with psychiatric certification has within the preceding 72
60 hours performed the examination required by the provisions of this subdivision, the community
61 mental health center may waive the duty to perform or arrange another examination upon
62 approving the previously performed examination. Notwithstanding the provisions of this
63 subsection, §27-5-4(r) of this code applies regarding payment by the county commission for
64 examinations at hearings. If the examination reveals that the individual is not mentally ill or
65 addicted or is determined to be mentally ill or addicted but not likely to cause harm to himself,
66 herself or others, the individual shall be immediately released without the need for a probable
67 cause hearing and ~~absent a finding of professional negligence~~ the examiner is not civilly liable for
68 the rendering of the opinion absent a finding of professional negligence. The examiner shall
69 immediately provide the Mental Hygiene Commissioner, circuit court or designated magistrate
70 before whom the matter is pending the results of the examination on the form provided for this
71 purpose by the Supreme Court of Appeals for entry of an order reflecting the lack of probable

72 cause.

73 (f) A probable cause hearing is to be held before a magistrate designated by the chief
74 judge of the judicial circuit, the Mental Hygiene Commissioner or circuit judge of the county of
75 which the individual is a resident or where he or she was found. If requested by the individual or
76 his or her counsel, the hearing may be postponed for a period not to exceed 48 hours.

77 The individual must be present at the hearing and has the right to present evidence,
78 confront all witnesses and other evidence against him or her and to examine testimony offered,
79 including testimony by representatives of the community mental health center serving the area.
80 Expert testimony at the hearing may be taken telephonically or via videoconferencing. The
81 individual has the right to remain silent and to be proceeded against in accordance with the Rules
82 of Evidence of the Supreme Court of Appeals, except as provided in §27-1-12 of this code. At the
83 conclusion of the hearing, the magistrate, Mental Hygiene Commissioner or circuit court judge
84 shall find and enter an order stating whether or not there is probable cause to believe that the
85 individual, as a result of mental illness or addiction, is likely to cause serious harm to himself or
86 herself or to others.

87 (g) Probable cause hearings may occur in the county where a person is hospitalized. The
88 judicial hearing officer may: Use videoconferencing and telephonic technology; permit persons
89 hospitalized for addiction to be involuntarily hospitalized only until detoxification is accomplished;
90 and specify other alternative or modified procedures that are consistent with the purposes and
91 provisions of this article. The alternative or modified procedures shall fully and effectively
92 guarantee to the person who is the subject of the involuntary commitment proceeding and other
93 interested parties due process of the law and access to the least restrictive available treatment
94 needed to prevent serious harm to self or others.

95 (h) If the magistrate, Mental Hygiene Commissioner or circuit court judge at a probable
96 cause hearing or at a final commitment hearing held pursuant to the provisions of §27-5-4 of this
97 code finds that the individual, as a result of mental illness or addiction, is likely to cause serious

98 harm to himself, herself or others and because of mental illness or addiction requires treatment,
99 the magistrate, Mental Hygiene Commissioner or circuit court judge may consider evidence on
100 the question of whether the individual's circumstances make him or her amenable to outpatient
101 treatment in a nonresidential or nonhospital setting pursuant to a voluntary treatment agreement.
102 The agreement is to be in writing and approved by the individual, his or her counsel and the
103 magistrate, mental hygiene commissioner or circuit court judge. If the magistrate, Mental Hygiene
104 Commissioner or circuit court judge determines that appropriate outpatient treatment is available
105 in a nonresidential or nonhospital setting, the individual may be released to outpatient treatment
106 upon the terms and conditions of the voluntary treatment agreement. The failure of an individual
107 released to outpatient treatment pursuant to a voluntary treatment agreement to comply with the
108 terms of the voluntary treatment agreement constitutes evidence that outpatient treatment is
109 insufficient and, after a hearing before a magistrate, Mental Hygiene Commissioner or circuit
110 judge on the issue of whether or not the individual failed or refused to comply with the terms and
111 conditions of the voluntary treatment agreement and whether the individual as a result of mental
112 illness or addiction remains likely to cause serious harm to himself, herself or others, the entry of
113 an order requiring admission under involuntary hospitalization pursuant to the provisions of §27-
114 5-3 of this code may be entered. In the event a person released pursuant to a voluntary treatment
115 agreement is unable to pay for the outpatient treatment and has no applicable insurance
116 coverage, including, but not limited to, private insurance or Medicaid, the Secretary of the
117 Department of Health and Human Resources may transfer funds for the purpose of reimbursing
118 community providers for services provided on an outpatient basis for individuals for whom
119 payment for treatment is the responsibility of the department: *Provided*, That the department may
120 not authorize payment of outpatient services for an individual subject to a voluntary treatment
121 agreement in an amount in excess of the cost of involuntary hospitalization of the individual. The
122 secretary shall establish and maintain fee schedules for outpatient treatment provided in lieu of
123 involuntary hospitalization. Nothing in the provisions of this article regarding release pursuant to

124 a voluntary treatment agreement or convalescent status may be construed as creating a right to
125 receive outpatient mental health services or treatment or as obligating any person or agency to
126 provide outpatient services or treatment. Time limitations set forth in this article relating to periods
127 of involuntary commitment to a mental health facility for hospitalization do not apply to release
128 pursuant to the terms of a voluntary treatment agreement: *Provided, however,* That release
129 pursuant to a voluntary treatment agreement may not be for a period of more than six months if
130 the individual has not been found to be involuntarily committed during the previous two years and
131 for a period of no more than two years if the individual has been involuntarily committed during
132 the preceding two years. If in any proceeding held pursuant to this article the individual objects to
133 the issuance or conditions and terms of an order adopting a voluntary treatment agreement, then
134 the circuit judge, magistrate or Mental Hygiene Commissioner may not enter an order directing
135 treatment pursuant to a voluntary treatment agreement. If involuntary commitment with release
136 pursuant to a voluntary treatment agreement is ordered, the individual subject to the order may,
137 upon request during the period the order is in effect, have a hearing before a Mental Hygiene
138 Commissioner or circuit judge where the individual may seek to have the order canceled or
139 modified. Nothing in this section affects the appellate and habeas corpus rights of any individual
140 subject to any commitment order.

141 (i) If the certifying physician or psychologist determines that a person requires involuntary
142 hospitalization for an addiction to a substance which, due to the degree of addiction, creates a
143 reasonable likelihood that withdrawal or detoxification from the substance of addiction will cause
144 significant medical complications, the person certifying the individual shall recommend that the
145 individual be closely monitored for possible medical complications. If the magistrate, Mental
146 Hygiene Commissioner or circuit court judge presiding orders involuntary hospitalization, he or
147 she shall include a recommendation that the individual be closely monitored in the order of
148 commitment.

149 (j) The Supreme Court of Appeals and the Secretary of the Department of Health and

150 Human Resources shall specifically develop and propose a statewide system for evaluation and
151 adjudication of mental hygiene petitions which shall include payment schedules and
152 recommendations regarding funding sources. Additionally, the Secretary of the Department of
153 Health and Human Resources shall also immediately seek reciprocal agreements with officials in
154 contiguous states to develop interstate/intergovernmental agreements to provide efficient and
155 efficacious services to out-of-state residents found in West Virginia and who are in need of mental
156 hygiene services.

NOTE: The purpose of this bill is to make a technical correction by removing a requirement of a finding of professional negligence as it concerns involuntary hospitalizations.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.