

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**Introduced**

## **Senate Bill 603**

BY SENATORS DRENNAN, BLAIR, GAUNCH, MARONEY,

MAYNARD, PLYMALE, AND TRUMP

[Introduced February 19, 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 proceedings for involuntary custody for examination; and adding licensed professional  
 3 counselors to the list of professionals that may examine an individual by order of a circuit  
 4 court, mental hygiene commissioner, or magistrate.

*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 professional  
31 counselor practicing in compliance with §30-31-1 et seq. of this code, a licensed independent  
32 clinical social worker practicing in compliance with §30-30-1 et seq. of this code, an advanced  
33 nurse practitioner with psychiatric certification practicing in compliance with §30-7-1 et seq. of this  
34 code, a physician assistant practicing in compliance with §30-3-1 et seq. of this code, or a  
35 physician assistant practicing in compliance with §30-14A-1 et seq. of this code: *Provided*, That  
36 a licensed independent clinical social worker, a physician assistant or an advanced nurse  
37 practitioner with psychiatric certification may only perform the examination if he or she has  
38 previously been authorized by an order of the circuit court to do so, the order having found that  
39 the licensed independent clinical social worker, physician assistant or advanced nurse practitioner  
40 with psychiatric certification has particularized expertise in the areas of mental health and mental  
41 hygiene or addiction sufficient to make the determinations as are required by the provisions of  
42 this section. The examination is to be provided or arranged by a community mental health center  
43 designated by the Secretary of the Department of Health and Human Resources to serve the  
44 county in which the action takes place. The order is to specify that the hearing be held forthwith

45 and is to provide for the appointment of counsel for the individual: *Provided, however,* That the  
46 order may allow the hearing to be held up to 24 hours after the person to be examined is taken  
47 into custody rather than forthwith if the circuit court of the county in which the person is found has  
48 previously entered a standing order which establishes within that jurisdiction a program for  
49 placement of persons awaiting a hearing which assures the safety and humane treatment of  
50 persons: *Provided further,* That the time requirements set forth in this subsection only apply to  
51 persons who are not in need of medical care for a physical condition or disease for which the  
52 need for treatment precludes the ability to comply with the time requirements. During periods of  
53 holding and detention authorized by this subsection, upon consent of the individual or in the event  
54 of a medical or psychiatric emergency, the individual may receive treatment. The medical provider  
55 shall exercise due diligence in determining the individual's existing medical needs and provide  
56 treatment the individual requires, including previously prescribed medications. As used in this  
57 section, "psychiatric emergency" means an incident during which an individual loses control and  
58 behaves in a manner that poses substantial likelihood of physical harm to himself, herself or  
59 others. Where a physician, psychologist, licensed professional counselor, licensed independent  
60 clinical social worker, physician assistant, or advanced nurse practitioner with psychiatric  
61 certification has within the preceding 72 hours performed the examination required by the  
62 provisions of this subdivision, the community mental health center may waive the duty to perform  
63 or arrange another examination upon approving the previously performed examination.  
64 Notwithstanding the provisions of this subsection, §27-5-4(r) of this code applies regarding  
65 payment by the county commission for examinations at hearings. If the examination reveals that  
66 the individual is not mentally ill or addicted or is determined to be mentally ill or addicted but not  
67 likely to cause harm to himself, herself, or others, the individual shall be immediately released  
68 without the need for a probable cause hearing and ~~absent a finding of professional negligence~~  
69 the examiner is not civilly liable for the rendering of the opinion absent a finding of professional  
70 negligence. The examiner shall immediately provide the mental hygiene commissioner, circuit

71 court, or designated magistrate before whom the matter is pending the results of the examination  
72 on the form provided for this purpose by the Supreme Court of Appeals for entry of an order  
73 reflecting the lack of probable cause.

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

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

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

96 (h) If the magistrate, mental hygiene commissioner, or circuit court judge at a probable

97 cause hearing or at a final commitment hearing held pursuant to the provisions of §27-5-4 of this  
98 code finds that the individual, as a result of mental illness or addiction, is likely to cause serious  
99 harm to himself, herself, or others and because of mental illness or addiction requires treatment,  
100 the magistrate, mental hygiene commissioner, or circuit court judge may consider evidence on  
101 the question of whether the individual's circumstances make him or her amenable to outpatient  
102 treatment in a nonresidential or nonhospital setting pursuant to a voluntary treatment agreement.  
103 The agreement is to be in writing and approved by the individual, his or her counsel, and the  
104 magistrate, mental hygiene commissioner, or circuit court judge. If the magistrate, mental hygiene  
105 commissioner, or circuit court judge determines that appropriate outpatient treatment is available  
106 in a nonresidential or nonhospital setting, the individual may be released to outpatient treatment  
107 upon the terms and conditions of the voluntary treatment agreement. The failure of an individual  
108 released to outpatient treatment pursuant to a voluntary treatment agreement to comply with the  
109 terms of the voluntary treatment agreement constitutes evidence that outpatient treatment is  
110 insufficient and, after a hearing before a magistrate, mental hygiene commissioner, or circuit judge  
111 on the issue of whether or not the individual failed or refused to comply with the terms and  
112 conditions of the voluntary treatment agreement and whether the individual as a result of mental  
113 illness or addiction remains likely to cause serious harm to himself, herself, or others, the entry of  
114 an order requiring admission under involuntary hospitalization pursuant to the provisions of §27-  
115 5-3 of this code may be entered. In the event a person released pursuant to a voluntary treatment  
116 agreement is unable to pay for the outpatient treatment and has no applicable insurance  
117 coverage, including, but not limited to, private insurance or Medicaid, the Secretary of the  
118 Department of Health and Human Resources may transfer funds for the purpose of reimbursing  
119 community providers for services provided on an outpatient basis for individuals for whom  
120 payment for treatment is the responsibility of the department: *Provided*, That the department may  
121 not authorize payment of outpatient services for an individual subject to a voluntary treatment  
122 agreement in an amount in excess of the cost of involuntary hospitalization of the individual. The

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

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

149 commitment.

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

NOTE: The purpose of this bill is to add licensed professional counselors to the list of professionals that may examine an individual by order of a circuit court, mental hygiene commissioner, or magistrate for purposes of an involuntary custody proceeding.

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