



Transition Review Committee

68th Montana Legislature

SENATE MEMBERS

DENNIS LENZ
CHRISTOPHER POPE

HOUSE MEMBERS

MARY CAFERRO
JENNIFER CARLSON

PUBLIC MEMBERS

ANN GEIGER
REZA GHOMI
MIKE LAHR
SARA HANSON-BAIAMONTE
HEATHER O'HARA
MIKE RANDOL
MELANIE WILLIAMS

COMMITTEE STAFF

MILLY ALLEN, Research Analyst
JOLANDA SONGER, Secretary

January 17, 2024

To: Transition Review Committee
From: Maddie Krezowski, Staff Attorney
Re: Overview of Involuntary Civil Commitment Statutes and Process in Montana

Table of Contents:

- I. Introduction**
- II. Brief Legislative History of Involuntary Civil Commitment Process Under Title 53, Chapter 21, Part 1**
- III. Involuntary Civil Commitment Process**
 - A. Summary**
 - B. Pre-Petition Emergency Detention**
 - C. Filing of Petition Starts Court Process**
 - D. Initial Hearing**
 - E. Examination of Respondent Following Initial Hearing**
 - F. Continued Detention of Respondent Pending Hearing**
 - G. Trial or Hearing on Petition**
 - H. Disposition Hearing**
- IV. Existing Statutes Allowing for Diversion from Montana State Hospital**
 - A. Commitment to Community Treatment**
 - B. Commitment to Non-State Behavioral Health Inpatient Facility**
 - C. Commitment to Montana Mental Health Nursing Center**
 - D. Stay of Involuntary Commitment Process for Diversion to Voluntary Short-Term Inpatient Treatment**
 - E. Commitment to Category D Assisted Living Facility**
- V. Statutory Procedural Rights Under Title 53, Chapter 21, Part 1**
 - A. Guaranteed Statutory Procedural Rights**
 - B. Waiver of Procedural Rights**

I. Introduction

This memo provides an overview of the current statutes and process relating to the involuntary civil commitment of individuals with mental disorders to the Montana State Hospital or alternate facilities. The statutory process governing involuntary civil commitments aims to balance protecting the constitutional liberty interests and due process rights of an individual facing involuntary commitment with getting the individual treatment and ensuring the safety of the individual and the public.

In Part II, the memo provides a brief legislative history of Title 53, chapter 21, part 1. In Part III, it reviews the statutory process to civilly commit an individual in Montana. Part IV describes diversions from the Montana State Hospital provided in statute. Finally, Part V discusses the statutory rights guaranteed by Title 53, chapter 21, part 1, and how those rights can be waived. The text of the relevant statutes are attached to the end of the memo.

Involuntary Civil Commitment Process is Separate from the Criminal or Forensic Process

The involuntary civil commitment process is governed by Title 53, Chapter 21, Part 1. An individual may be committed to the Montana State Hospital or other community-based services under these statutes when the individual has a mental disorder and because of the mental disorder (1) is unable to care for the individual's basic needs; or (2) poses a danger to self or others. The purpose of the civil commitment process is to get the individual into treatment for the individual's own safety or the safety of the community.

The civil commitment process under Title 53, Chapter 21, Part 1, is a separate process from criminal or forensic mental health proceedings under Title 46, Chapter 14. Criminal or forensic mental health proceedings under Title 46, Chapter 14, address questions of the mental competency of a defendant to stand trial in a criminal case. The purpose of the forensic process under Title 46, Title 14, is to determine whether the defendant is mentally competent to stand trial for criminal conduct and if the defendant is not mentally competent to do so to restore the individual to competency so the individual can stand trial.

II. Brief Legislative History of Involuntary Civil Commitment Under Title 53, Chapter 21, Part 1

The current process to involuntary commit an individual with a mental disorder under Title 53, Chapter 21, Part 1, was enacted in 1975. *See* 1975 Mont. Laws Ch. 466; *see also* 1977 Mont. Laws Ch. 546 (generally revising and clarifying the statutes passed in 1975). The statutes provide the basic process for the proceedings in court and ensure the protection of the individual's constitutional and statutory rights. This process includes provisions for emergency

detention of an individual, petitioning the court for commitment, an initial hearing, an evaluation by a professional person, a trial before a jury or merits hearing before a judge on the petition, and a disposition hearing.

Over the years, the legislature has amended Title 53, Chapter 21, Part 1 to expand who may act as a professional person to conduct evaluations under the statute, *see* 1983 Mont. Laws Ch. 578 (allowing DPHHS to certify professional persons); 2001 Mont. Laws Ch. 310 (advanced practice nurse practitioners); 2007 Mont. Laws Ch. 71 (psychologists); 2017 Mont. Laws Ch. 133 (physician’s assistants); update terminology, *see* 1997 Mont. Laws Ch. 490; account for co-occurring mental health and substance use disorders, *see* 2005 Mont. Laws Ch. 81; add a requirement for notice to the Department of Public Health and Human Services (DPHHS) when a petition is filed, *see* 2003 Mont. Laws Ch. 165; allow for the use of two-way audio-visual communication at court hearings, *see* 2001 Mont. Laws Ch. 212; 2023 Mont. Laws Ch. 757; add a procedure for ordering involuntary medication, *see* 1995 Mont. Laws Ch. 434; provide for commitment to community treatment, non-state behavioral health inpatient facilities, or the Montana mental health nursing center, *see* 2001 Mont. Laws Ch. 342; 2003 Mont. Laws Ch. 513; 2003 Mont. Laws Ch. 554; 2007 Mont. Laws Ch. 116; and divert individuals to short-term inpatient treatment or category D assisted living facilities, *see* 2009 Mont. Laws Ch. 481; 2017 Mont. Laws Ch. 402.

III. Involuntary Civil Commitment Process

A. Summary

The basic process for an involuntary civil commitment includes:

- Filing a petition with the court;
- Initial hearing on the petition;
- Evaluation by a professional person;
- Merits hearing before judge or a jury trial;
- Disposition hearing.

The statutes also provide procedures and requirements for pre-petition emergency detention and continued detention during the commitment proceedings. Additional detail on this process is provided below. The text of the relevant statutes are included in an appendix at the end of this memo.

A Note on Terminology

The statute provides definitions in section 53-21-102, MCA. The following definitions are helpful while reviewing this memo:

A “respondent” is the “person alleged in a petition filed pursuant to this part to be suffering a mental disorder and requiring commitment”.

A “friend of respondent” is “any person willing and able to assist a person suffering from a mental disorder and requiring commitment or a person alleged to be suffering from a mental disorder and requiring commitment in dealing with legal proceedings, including consultation with legal counsel and others”.

A “professional person” includes “(a) a medical doctor; (b) an advanced practice registered nurse, as provided for in 37-8-202, with a clinical specialty in psychiatric mental health nursing; (c) a licensed psychologist; (d) a physician assistant licensed under Title 37, chapter 20, with a clinical specialty in psychiatric mental health; or (e) a person who has been certified, as provided in 53-21-106, by” DPHHS.

B. Pre-Petition Emergency Detention

Section 53-21-129, allows a peace officer to take into custody any person who appears to have a mental disorder and either appears (1) to present an imminent danger of death or bodily harm to the person or to others; or (2) to be substantially unable to provide for the person’s own basic needs of food, clothing, shelter, health, or safety. *See* 53-21-129(1), MCA.

Where Detained Person May Be Held

A person detained under this part may not be held in a jail or other correctional facility. *See* 53-21-120(3), MCA. The person must be detained in the least restrictive environment required to protect the life and physical safety of the person detained or members of the public. *See* 53-21-120(1), MCA. Such a facility may include a mental health facility in the community with an available bed or a hospital.

Evaluation By Professional Person Required to Hold Person Until Next Business Day

The person may be taken into custody by a peace officer only for sufficient time to contact a professional person for emergency evaluation. *See* 53-21-129(1), MCA. If the professional person agrees with the officer, the person may be detained and treated in a mental health facility or hospital located in the community—or, if a bed is not available in the community, at the Montana State Hospital—until the next regular business day. *See* 53-21-129(2), MCA. At that time, the professional person must either release the detained person or file findings with the county attorney to support a petition for involuntary commitment. *See* 53-21-129(2), MCA. If the county attorney determines probable cause exists for involuntary commitment based on the

professional person's report, the county attorney must file a petition to civilly commit the person. See 53-21-129(2), MCA.

C. Filing of Petition Starts Court Process

Only County Attorney May File Petition with Court

The court process starts when a county attorney files a petition with a district court pursuant to section 53-21-121, MCA. A county attorney may file a petition upon written request of any person having direct knowledge of the facts. Section 53-21-121(1), MCA. Under the statutes, only a county attorney may file an initial petition for involuntary commitment.

Contents of Petition

The petition must contain:

- the name and address of the person requesting the petition and the person's interest in the case, section 53-21-121(2)(a), MCA;
- the name of the respondent and, if known, the address, age, sex, marital status, and occupation of the respondent, section 53-21-121(2)(b), MCA;
- the purported facts supporting the allegation of mental disorder, including a report by a mental health professional if any, a statement of the disposition sought, and the need for commitment, section 53-21-121(2)(c), MCA;
- the name and address of every person known or believed to be legally responsible for the care, support, and maintenance of the respondent, section 53-21-121(2)(d), MCA;
- the name and address of the respondent's next of kin to the extent known to the county attorney and the person requesting the petition, section 53-21-121(2)(e), MCA;
- the name and address of any person whom the county attorney believes might be willing and able to be appointed as friend of respondent, section 53-21-121(2)(f), MCA;
- the name, address, and telephone number of the attorney, if any, who has most recently represented the respondent; if there is no attorney, there must be a statement as to whether to the best knowledge of the person requesting the petition the respondent is indigent and unable to afford the services of an attorney, section 53-21-121(2)(g), MCA;
- a statement of the rights of the respondent, which must be in conspicuous print and identified by a suitable heading, section 53-21-121(2)(h), MCA;
- the name and address of the mental health facility to which it is proposed that the respondent may be committed, if known, section 53-21-121(2)(i), MCA.

Notice

Notice of the petition must be provided to the respondent; the respondent's counsel; the person or persons legally responsible for care, support, and maintenance of the respondent; the next of kin identified in the petition; any person named in the petition as a possible friend; the director of DPHHS or the director's designee; and the mental health facility to which the respondent may be committed, if known. Section 53-21-121(3), MCA.

Court Makes Initial Probable Cause Determination Based on Petition

Upon filing of the petition, the district court must determine, based on the information contained in the petition whether there is probable cause for the commitment of the respondent. If the judge finds there is no probable cause, the judge shall dismiss the petition. Section 53-21-122(2)(a), MCA. If the judge finds there is probable cause to commit the respondent based on review of the petition, the court must hold an initial hearing on the petition. Section 53-21-122(2)(a), MCA.

D. Initial Hearing

Counsel for Respondent Appointed for Initial Hearing

After finding there is probable cause to commit the respondent based on review of the petition, the court may appoint counsel for the respondent if the respondent is not already represented by private counsel before the initial hearing. Section 53-21-122(2)(a), MCA.

Purpose of Initial Hearing

A number of important procedural things happen at the initial hearing:

- The respondent may object to the court's finding of probable cause. Section 53-21-122(2)(a), MCA.
- The court must advise the respondent of the respondent's constitutional and statutory rights and the substantive effect of the petition. Section 53-21-122(2)(a), MCA.
- The court appoints a professional person to evaluate the respondent. Section 53-21-122(2)(a), MCA.
- The court sets a date for a hearing on the merits of the petition, which must be held within 5 days of the initial hearing but cannot be held the same day as the initial hearing. Section 53-21-122(2)(a), MCA.
- The court may also appoint a friend, if there is an appropriate person willing and able to perform the functions of a friend under the statutes and the respondent consents to the appointment. Section 53-21-122(2)(b), MCA. The friend assists the respondent in dealing with legal proceedings, including consultation with legal counsel and others. The friend

may attend meetings with legal counsel or the professional person and must consent to waiver of the respondent's presence at hearings on the petition.

E. Examination of Respondent Following Initial Hearing

Requirements for Examination

After the initial hearing, the respondent must be examined by the appointed professional person "without unreasonable delay." Section 53-21-123(1), MCA. The examination is limited to 4 hours. Section 53-21-123(1), MCA.

Report and Recommendation to Court

The report from the professional person must include a recommendation whether (1) the petition should be dismissed, (2) the respondent should be diverted to short-term inpatient treatment or a category D assisted living facility, or (3) the commitment proceedings should continue. Section 53-21-123(3), MCA.

Effect of Professional Person's Recommendation on the Proceedings

If the professional person recommends that the petition be dismissed, the court must dismiss the petition, unless the county attorney, upon good cause shown, requests the court to order an additional evaluation by a different professional person. Section 53-21-123(3)(a), MCA. The court must suspend the commitment proceedings if the professional person recommends diversion to short-term inpatient treatment or a category D assisted living facility unless the county attorney or counsel for the respondent objects. Section 53-21-123(3)(b), MCA. If the professional person recommends the proceedings continue, the court proceeds with a merits hearing on the petition. Section 53-21-123(3)(c), MCA.

F. Continued Detention of Respondent Pending Hearing

A respondent may not be detained during the proceedings unless it is requested by the county attorney and supported by probable cause. Section 53-21-124(1), MCA. The respondent must be detained in the least restrictive setting necessary to ensure the presence of the respondent and safety of the respondent and others. Section 53-21-124(2), MCA. If the respondent is detained, the respondent has a right to be examined by an additional professional person of the respondent's choice. Section 53-21-124(3), MCA. The respondent may not be detained in a jail or other correctional facility during the proceedings. Section 53-21-124(4), MCA.

G. Trial or Hearing on Petition

Option for Jury Trial

A respondent may request a jury trial any time before the date set for the merits hearing. Section 53-21-125, MCA. At least two-thirds of the jury must concur that the respondent is suffering from a mental disorder and requires commitment. Section 53-21-126(3), MCA.

Merits Hearing Before Judge

If a jury trial is not requested the matter is heard by a judge in a merits hearing. The hearing is limited to the determination of whether (1) the respondent is suffering from a mental disorder and (2) requires commitment. Section 53-21-126(1), MCA. The Montana Rules of Evidence apply to the proceeding. Section 53-21-115(7), MCA. The hearing may be closed to the public for the protection of the respondent. Section 53-21-126(3), MCA.

Criteria for Commitment

In determining whether the respondent requires commitment, the court must consider whether the respondent meets any of the following criteria:

- the respondent, because of a mental disorder, is substantially unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety, section 53-21-126(1)(a), MCA;
- the respondent has recently, because of a mental disorder and through an act or omission, caused self-injury or injury to others, section 53-21-126(1)(b), MCA;
- because of a mental disorder, there is an imminent threat of injury to the respondent or to others because of the respondent's acts or omissions, section 53-21-126(1)(c), MCA. Imminent threat of self-inflicted injury or injury to others must be proved by overt acts or omissions, sufficiently recent in time as to be material and relevant as to the respondent's present condition, section 53-21-126(2), MCA;
- the respondent's mental disorder, as demonstrated by the respondent's recent acts or omissions, will, if untreated, predictably result in deterioration of the respondent's mental condition to the point at which the respondent will become a danger to self or to others or will be unable to provide for the respondent's own basic needs of food, clothing, shelter, health, or safety, section 53-21-126(1)(d), MCA.

Effective July 1, 2025, an individual with a primary diagnosis of Alzheimer's disease, other forms of dementia, or traumatic brain injury may be committed only if the person meets the criteria in subsections 53-21-126(1)(b) (recently caused injury to self or others), (1)(c) (imminent

threat of injury to self or others), or (1)(d)(i)(A) (if left untreated will predictably deteriorate to the point of being a danger to self or others).

Professional Person Must Testify at Hearing

The professional person appointed by the court must be present for the hearing and subject to cross-examination. Section 53-21-126(3), MCA. The professional person may testify as to whether the respondent is suffering from a mental disorder and requires commitment. Section 53-21-126(4), MCA. There must be evidence demonstrating at least one of the commitment criteria found in 53-21-126(1), MCA (discussed above). Section 53-21-126(4), MCA.

Standard of Proof at Merits Hearing

Section 53-21-126(2), MCA, provides a high standard of proof for the merits hearing:

The standard of proof in a hearing held pursuant to this section is proof beyond a reasonable doubt with respect to any physical facts or evidence and clear and convincing evidence as to all other matters. However, the respondent's mental disorder must be proved to a reasonable medical certainty.

This standard of proof during the merits hearing is derived from the analysis in a United States Supreme Court case, *Addington v. Texas*, 441 U.S. 418 (1978). There the United States Supreme Court held that the Fourteenth Amendment to the United States Constitution required at least clear and convincing evidence to involuntarily civilly commit a person given the important liberty interest at stake. The Supreme Court declined to apply the proof beyond a reasonable doubt standard used in criminal cases, because proving dangerousness and mental disability is inherently less certain than whether a person committed a criminal act, which relies on physical facts and evidence. The Court opined that medical professionals work in "reasonable medical certainty" for diagnoses, which does not translate into "proof beyond a reasonable doubt." The Montana statute addresses the concerns raised in *Addington* by requiring proof beyond a reasonable doubt for physical facts or evidence, proof to reasonable medical certainty for whether the respondent has a mental disorder, and clear and convincing evidence as to all other matters. Although this three-part standard of proof is derived from the analysis in *Addington*, that decision does not require this multiprong standard. The *Addington* decision requires states to apply at least a clear and convincing standard of proof in civil commitment cases. Montana requires a higher standard of proof for some factors with this hybrid standard.

Results of Merits Hearing

If the court or jury determine that the respondent is not suffering from a mental disorder or does not require commitment, the respondent must be discharged and the petition dismissed. Section

53-21-127(1), MCA. Effective July 1, 2025, the court must also dismiss the petition and the respondent must be discharged if the respondent's primary diagnosis is Alzheimer's disease, or other forms of dementia, or traumatic brain injury and the respondent is unable to provide for the respondent's own needs or if left untreated will predictably deteriorate to the point of being unable to provide for the respondent's own basic needs without an additional finding of danger to self or others. Section 53-21-127(1)(c), MCA. When a petition is dismissed the court case is over and the court no longer oversees the provision of treatment and care for the individual.

If it is determined the respondent does suffer from a mental disorder and requires commitment, the court must hold a posttrial disposition hearing. Section 53-21-127(2), MCA.

H. Disposition Hearing

The disposition hearing must be held within 5 days of the merits hearing. Section 53-21-127(2), MCA. The court may order further evaluation and treatment of the respondent before the disposition hearing. Section 53-21-127(2), MCA. In practice, the disposition hearing is often held on the same day and in conjunction with the merits hearing.

Options for Commitment at Disposition Hearing

At the disposition hearing, the court may commit the respondent to:

- the state hospital or to a non-state behavioral health inpatient facility for a period of not more than 3 months, section 53-21-127(3)(a), MCA;
- a community facility, which may include a category D assisted living facility, or a community program, or to an appropriate course of treatment for not more than 3 months (or 6 months if the respondent has been previously committed), section 53-21-127(3)(b), MCA; or
- the Montana mental health nursing care center for a period of not more than 3 months, section 53-21-127(3)(c), MCA. The court may only commit someone to the Montana mental health nursing care center if the respondent meets the admission criteria and the superintendent of the center has issued a written authorization specifying a date and time for admission, section 53-21-127(3)(c)(i) through (ii), MCA.

In determining where to commit the respondent, the court shall choose the least restrictive alternative necessary to protect the respondent and the public and to permit effective treatment. Section 53-21-127(5), MCA. In practice, the availability of beds at any facility other than the Montana State Hospital plays a role in this determination.

The order may authorize the facility to administer appropriate medication involuntarily under certain conditions. Section 53-21-127(6), MCA.

If the court commits a person based on the criterion in section 53-21-126(1)(d), MCA, (if left untreated will predictably deteriorate) the court may commit the person only to a community facility, which may include a category D assisted living facility, or a program or an appropriate course of treatment. In these cases, the court may not commit a person to the state hospital, a nonstate behavioral health inpatient facility, or the Montana mental health nursing care center. Section 53-21-127(7), MCA. However, beginning July 1, 2025, if the person's primary diagnosis is Alzheimer's disease, or other forms of dementia, or traumatic brain injury, the petition is dismissed and the person must be discharged. Section 53-21-127(1)(c), MCA.

Commitment Order Requirements

The commitment order must contain the following findings of fact:

- a detailed statement of the facts upon which the court found the respondent to be suffering from a mental disorder and requiring commitment, section 53-21-127(8)(a), MCA;
- the alternatives for treatment that were considered, section 53-21-127(8)(b), MCA;
- the alternatives available for treatment of the respondent, section 53-21-127(8)(c), MCA;
- the reason that any treatment alternatives were determined to be unsuitable for the respondent, section 53-21-127(8)(d), MCA;
- the name of the facility, program, or individual to be responsible for the management and supervision of the respondent's treatment, section 53-21-127(8)(e), MCA;
- if the order includes a requirement for inpatient treatment, the reason inpatient treatment was chosen from among other alternatives, section 53-21-127(8)(f), MCA;
- if the order commits the respondent to the Montana mental health nursing care center, a finding that the respondent meets the admission criteria of the center and that the superintendent of the center has issued a written authorization specifying a date and time for admission, section 53-21-127(8)(g), MCA;
- if the order provides for an evaluation to determine eligibility for entering a category D assisted living facility, a finding that indicates whether the respondent meets the admission criteria; there is availability in a category D assisted living facility; and a category D assisted living facility is the least restrictive environment because the respondent is unlikely to benefit from involuntary commitment to facilities with more intensive treatment, section 53-21-127(8)(h), MCA; and
- if the order includes involuntary medication, the reason involuntary medication was chosen from among other alternatives, section 53-21-127(8)(i), MCA.

IV. Existing Statutes Allowing for Diversion from the Montana State Hospital

Over the years, the Legislature has enacted statutes to provide alternatives to commitment to the Montana State Hospital within Title 53, Chapter 21, Part 1.

A. Commitment to Community Treatment

In 2001, the Legislature created a path to commitment to community treatment, rather than inpatient care at the Montana State Hospital. *See* 2001 Mont. Laws Ch. 342; sections 53-21-149 through -152, MCA. These statutes allow the court to commit someone to a community facility, program, or course of treatment with the option of a court-ordered treatment plan. Section 53-21-127(3)(b), MCA. Under this alternative, the court designates a community facility or program or individual responsible for the management and supervision of the respondent's treatment. Section 53-21-149(1), MCA.

B. Commitment to Non-State Behavioral Health Inpatient Facility

In 2003, the Legislature provided for commitment to non-state behavioral health inpatient facilities and required DPHHS to provide rulemaking to regulate such facilities. *See* 2003 Mont. Laws Ch. 513; sections 53-21-193 through -194, MCA. The regulations can be found at ARM 37.106.1701 through .1704. Before a respondent can be committed to the custody of a non-state behavioral health inpatient facility, the facility must state that a bed is available and agree to accept transfer of the patient based on admission criteria. Section 53-21-193(2), MCA. A court is prohibited from ordering commitment to a non-state behavioral health inpatient facility if a bed is not available at the facility. Section 53-21-195(4), MCA.

C. Commitment to Montana Mental Health Nursing Center

In 2003, the Legislature provided for direct commitment to the Montana mental health nursing center. *See* 2003 Mont. Laws Ch. 554. The court may directly commit a respondent to the Montana mental health nursing center only if the respondent meets the admission criteria of the center and the superintendent of the center has issued a written authorization specifying a date and time for admission. Section 53-21-127(3)(c), MCA.

D. Stay of Involuntary Commitment Process for Diversion to Voluntary Short-Term Inpatient Treatment

In 2009, the Legislature created a process to divert respondents from involuntary commitment to voluntary short-term inpatient treatment. *See* 2009 Mont. Laws Ch. 481; sections 53-21-1205 through -1206, MCA. The professional person conducting the evaluation of the respondent after the initial hearing may recommend diversion to short-term inpatient treatment. Section 53-21-123(2)(a)(i), MCA. If the professional person makes that recommendation, the court suspends the commitment process unless the county attorney or the respondent's attorney objects. Section 53-21-123(3)(b), MCA. The professional person must make a recommendation to the court for an appropriate placement in a mental health facility with available short-term treatment beds.

Section 53-21-1205(1), MCA. The short-term inpatient treatment may not exceed 14 days under this section. Section 53-21-1205(2), MCA. The commitment proceedings are restarted if the professional person determines that the respondent should not be released after 14 days, the respondent refuses treatment, the respondent's attorney requests release before the 14-day treatment period is completed, or the county attorney objects to respondent's release from the short-term inpatient treatment. Section 53-21-1205(5), MCA.

E. Commitment to Category D Assisted Living Facility

In 2017, the Legislature created a new license for category D assisted living facilities and allowed for diversion from the involuntary commitment process to a category D facility. *See* 2017 Mont. Laws Ch. 402; section 53-21-199, MCA. DPHHS adopted rules for category D facilities in September 2022. *See* ARM 37.106.2899 through 37.106.2899H. According to the Montana Health Care Association, there are currently no facilities licensed for category D.

The respondent, the court, or the professional person conducting the evaluation of the respondent after the initial hearing may initiate diversion from the commitment process to a category D assisted living facility before the merits hearing on the petition. Sections 53-21-123(3)(b), 53-21-199(1), and (2), MCA. To suspend commitment proceedings before the merits hearing and commit a person to a category D assisted living facility the court must find the respondent is:

- not suffering acute psychosis, section 53-21-199(3)(a), MCA;
- experiencing behavioral patterns that make the person a danger to self or others, section 53-21-199(3)(b), MCA;
- dependent on assistance for two or more activities of daily living, section 53-21-199(3)(c), MCA; and
- more likely to benefit from being in a category D assisted living facility than in the Montana mental health nursing care center or the Montana state hospital, section 53-21-199(3)(d), MCA.

Alternatively, a court may commit a respondent to a category D assisted living facility after the merits hearing. To commit a respondent to a category D assisted living facility at the disposition hearing, the court must find the respondent (1) meets the admission criteria; (2) there is availability in a category D assisted living facility; and (3) a category D assisted living facility is the least restrictive environment because the respondent is unlikely to benefit from involuntary commitment facilities with more intensive treatment. Section 53-21-127(8)(h), MCA.

V. Statutory Procedural Rights Under Title 53, Chapter 21, Part 1

Title 53, Chapter 21, Part 1, MCA, provides specific procedural rights for a person facing involuntary commitment to ensure the person's constitutional liberty and due process interests

are protected during the civil commitment process. These rights are codified in sections 53-21-114 through 118, MCA.

A. Guaranteed Statutory Procedural Rights

A person detained pending a petition under this part must be informed of the person's constitutional and statutory rights and the county attorney must provide written notice of these rights within 3 days of the person's detention. Section 53-21-114, MCA. The statutory rights include:

- the right to notice reasonably in advance of any hearing or other court proceeding concerning the person, section 53-21-115(1), MCA;
- the right in any hearing to be present, to offer evidence, and to present witnesses in any proceeding concerning the person, section 53-21-115(2), MCA;
- the right to know, before a hearing, the names and addresses of any witnesses who will testify in support of a petition, section 53-21-115(3), MCA;
- the right in any hearing to cross-examine witnesses; section 53-21-115(4), MCA;
- the right to be represented by counsel, section 53-21-115(5), MCA;
- the right to remain silent, section 53-21-115(6), MCA;
- the right in any hearing to be proceeded against according to the rules of evidence applicable to civil matters generally, section 53-21-115(7), MCA;
- the right to view and copy all petitions on file with the court concerning the person, section 53-21-115(8), MCA;
- the right to be examined by a professional person of the person's choice when the professional person is willing and reasonably available, section 53-21-115(9), MCA;
- the right to be dressed in the person's own clothes at any hearing held pursuant to this part, section 53-21-115(9), MCA;
- the right to refuse any but lifesaving medication for up to 24 hours prior to any hearing held pursuant to this part, section 53-21-115(10), MCA;
- the right to voluntarily take necessary medications prior to any hearing pursuant to this part, section 53-21-115(11), MCA;
- the right to counsel and to be present at any hearing or trial, section 53-21-116, MCA;
- the right to assignment of counsel at the state's expense if the person is indigent or if the court determines assignment of counsel is in the best interest of justice, section 53-21-116, MCA;
- the right to secure an attorney of the person's own choice at the person's own expense, section 53-21-117, MCA;
- the right to secure a professional person of the person's own choosing to examine the person and testify at the hearing or trial, section 53-21-118(1), MCA;
- the right to be examined by a professional person other than the professional person requesting the commitment, to be given a reasonable choice of professional person when

possible, and when unable to pay for an examination by a professional person to have the county pay for the examination, section 53-21-118(2), MCA;

- the right to be advised that the professional person appointed to conduct the examination will include in the professional person's report a recommendation about whether the respondent should be diverted from involuntary commitment to short-term inpatient treatment or to a category D assisted living facility, section 53-21-122(3), MCA.

B. Waiver of Procedural Rights

In general, a person may waive most constitutional and statutory rights. However, a respondent in an involuntary civil commitment proceeding may not waive the right to treatment or the right to be represented by counsel. *See* section 53-21-119(1), MCA. There are three ways for a person to waive other rights under this part:

- if the person is capable of making an intentional and knowing decision, the person may waive the person's own rights, section 53-21-119(1), MCA;
- if the person is not capable of making an intentional and knowing decision, the person's counsel and court-appointed friend, if one is appointed, acting together may waive the person's rights if a record is made of the reasons for the waiver, section 53-21-119(1), MCA; or
- the respondent's attorney and court-appointed friend may waive the right of the person to be physically present with the concurrence of the professional person and the judge if:
 - the presence of the respondent at the hearing would be likely to seriously adversely affect the respondent's mental condition and an alternative location for the hearing in a surrounding familiar to the respondent would not prevent the adverse effects on the respondent's mental condition, section 53-21-119(2)(a); or
 - the respondent has voluntarily expressed a desire to waive the respondent's presence at the hearing, section 53-21-119(2)(b).

Note, the third avenue for waiving a person's presence requires the court to have appointed a friend for the respondent. Prior to 2009, the court was required to appoint a friend for the respondent. Amendments made in 2009 made the appointment of a friend conditional and discretionary but did not amend the requirement under section 53-21-119(2), MCA, for the respondent's counsel and friend to both waive the right of the respondent to be physically present. *See* 2009 Mont. Laws Ch. 80. If the court has not appointed a friend, the presence of the respondent cannot be waived under section 53-21-119(2), MCA. A number of commitment orders have been reversed on appeal to the Montana Supreme Court because of failure to meet the requirements to waive the respondent's presence under this section when the respondent is violent or uncooperative with attending hearings before the court and no friend has been appointed. *See, e.g., In re J.D.L.*, 2023 MT 64, P10.