

**SECOND ENGROSSMENT
with Senate Amendments**

Fifty-fifth
Legislative Assembly
of North Dakota

REENGROSSED HOUSE BILL NO. 1047

Introduced by

Legislative Council

(Criminal Justice Committee)

(Representatives Mahoney, Kretschmar, R. Kelsch, Brown, Bernstein)
(Senator Nalewaja)

- 1 A BILL for an Act to create and enact chapter 25-03.3 of the North Dakota Century Code,
2 relating to civil commitment of sexually dangerous individuals.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1.** Chapter 25-03.3 of the North Dakota Century Code is created and
5 enacted as follows:

6 **25-03.3-01. Definitions.** In this chapter, unless the context otherwise requires:

- 7 1. "Committed individual" means an individual committed for custody and treatment
8 pursuant to this chapter.
- 9 2. "Executive director" means the executive director of the department of human
10 services or the executive director's designee.
- 11 3. "Qualified expert" means an individual who has an expertise in sexual offender
12 evaluations and who is a psychiatrist or psychologist trained in a clinical program
13 and licensed pursuant to this state's law, or a psychologist approved for exemption
14 by the North Dakota board of psychology examiners.
- 15 4. "Respondent" means an individual subject to commitment pursuant to this chapter.
- 16 5. "Sexual act" means sexual contact between human beings, including contact
17 between the penis and the vulva, the penis and the anus, the mouth and the penis,
18 the mouth and the vulva, or the vulva and the vulva; or the use of an object that
19 comes in contact with the victim's anus, vulva, or penis. Sexual contact between
20 the penis and the vulva, or between the penis and the anus, or an object and the
21 anus, vulva, or penis of the victim, occurs upon penetration, however slight.
22 Emission is not required.
- 23 6. "Sexual contact" means any touching of the sexual or other intimate parts of an
24 individual for the purpose of arousing or satisfying sexual or aggressive desires.

- 1 7. "Sexually dangerous individual" means an individual who is shown to have
2 engaged in sexually predatory conduct and who has a congenital or acquired
3 condition that is manifested by a sexual disorder, a personality disorder, or other
4 mental disorder or dysfunction that makes that individual likely to engage in further
5 acts of sexually predatory conduct which constitute a danger to the physical or
6 mental health or safety of others. It is a rebuttable presumption that sexually
7 predatory conduct creates a danger to the physical or mental health or safety of
8 the victim of the conduct. The term does not include an individual with mental
9 retardation.
- 10 8. "Sexually predatory conduct" means:
- 11 a. Engaging or attempting to engage in a sexual act or sexual contact with
12 another individual, or causing or attempting to cause another individual to
13 engage in a sexual act or sexual contact, if:
- 14 (1) The victim is compelled to submit by force or by threat of imminent
15 death, serious bodily injury, or kidnapping directed toward the victim or
16 any human being, or the victim is compelled to submit by any threat
17 that would render an individual of reasonable firmness incapable of
18 resisting;
- 19 (2) The victim's power to appraise or control the victim's conduct has been
20 substantially impaired by the administration or employment, without the
21 victim's knowledge, of intoxicants or other means for purposes of
22 preventing resistance;
- 23 (3) The actor knows or should have known that the victim is unaware that a
24 sexual act is being committed upon the victim;
- 25 (4) The victim is less than fifteen years old;
- 26 (5) The actor knows or should have known that the victim suffers from a
27 mental disease or defect that renders the victim incapable of
28 understanding the nature of the sexual act or contact;
- 29 (6) The victim is in official custody or detained in a hospital, prison, or other
30 institution and is under the supervisory authority or disciplinary control
31 of the actor; or

- 1 (7) The victim is a minor and the actor is an adult; or
- 2 b. Engaging in or attempting to engage in sexual contact with another individual
- 3 or causing or attempting to cause another individual to have sexual contact, if:
- 4 (1) The actor knows or should have known that the contact is offensive to
- 5 the victim; or
- 6 (2) The victim is a minor, fifteen years of age or older, and the actor is the
- 7 minor's parent, guardian, or is otherwise responsible for general
- 8 supervision of the victim's welfare.
- 9 9. "Should have known" means a reasonable individual without a congenital or
- 10 acquired condition that is manifested by a sexual disorder, a personality disorder,
- 11 or other mental disorder or dysfunction in the actor's circumstances would have
- 12 known.
- 13 10. "Superintendent" means the superintendent of the state hospital or the
- 14 superintendent's designee.
- 15 11. "Treatment facility" means any hospital, including the state hospital, or any
- 16 treatment facility that can provide directly, or by direct arrangement with other
- 17 public or private agencies, evaluation and treatment of sexually dangerous
- 18 individuals.

19 **25-03.3-02. Jurisdiction and venue.** The district court has original jurisdiction over

20 the proceedings governed by this chapter. A proceeding pursuant to this chapter must be tried

21 in the county in which the respondent resides or is located.

22 **25-03.3-03. Sexually dangerous individual - Petition.** If it appears that an individual

23 is a sexually dangerous individual, the state's attorney may file a petition in the district court

24 alleging that the individual is a sexually dangerous individual and stating sufficient facts to

25 support the allegation.

26 **25-03.3-04. Retention of records.** Notwithstanding any other provision of law, all

27 adult and juvenile case files and court records of an alleged offense defined by section

28 12.1-20-03, 12.1-20-04, 12.1-20-05, 12.1-20-06, or 12.1-20-07 must be retained for fifty years

29 and made available to any state's attorney for purposes of investigation or proceedings

30 pursuant to this chapter.

1 **25-03.3-05. Abrogation of confidentiality statutes and privileges.** Notwithstanding
2 any other provision of law requiring confidentiality of information about individuals receiving
3 care, custody, education, treatment, or any other services from the state or any political
4 subdivision, any confidential information about a respondent or committed individual must be
5 released to a state's attorney for proceedings pursuant to this chapter unless release results in
6 the loss of federal funds. The physician-patient privilege and psychotherapist-patient privilege
7 do not apply to communications relevant to an issue in proceedings to commit an individual as
8 a sexually dangerous person if the physician or psychotherapist in the course of diagnosis or
9 treatment determines the patient is in need of commitment and to communications with a
10 committed individual. The provision of any confidential or privileged information to the state's
11 attorney does not render the state, any political subdivision, or any state or political subdivision
12 official or employee, or other person liable pursuant to any criminal or civil law relating to
13 confidentiality or privilege.

14 **25-03.3-06. Use of confidential records.** Upon request, any confidential records
15 provided to the state's attorney pursuant to this chapter must be made available to the
16 respondent or committed individual, the attorney of the respondent or committed individual, a
17 qualified expert charged with examining the respondent or committed individual, the court, and
18 any treatment facility in which the respondent or committed individual is being evaluated or
19 treated pursuant to this chapter.

20 **25-03.3-07. Appointment of guardian ad litem.** At any stage of a proceeding under
21 this chapter, on application of a party or on its own motion, the court may appoint a guardian ad
22 litem for a minor who is a witness or otherwise involved in the proceeding, if the minor has no
23 parent, guardian, or custodian appearing on the minor's behalf or the interests of those persons
24 conflict with those of the minor. The department of human services shall pay the expense of
25 the guardian ad litem fee as established by the court.

26 **25-03.3-08. Sexually dangerous individual - Procedure on petition - Detention.**
27 Upon the filing of a petition pursuant to this chapter, the court shall determine whether to issue
28 an order for detention of the respondent named in the petition. The petition may be heard ex
29 parte. The court shall issue an order for detention if there is cause to believe that the
30 respondent is a sexually dangerous individual. If the court issues an order for detention, the
31 order must direct that the respondent be taken into custody and transferred to an appropriate

1 treatment facility to be held for evaluation and subsequent hearing pursuant to this chapter.
2 Under this section, the department of human services shall pay for any expense incurred in the
3 detention or evaluation of the respondent.

4 **25-03.3-09. Right to counsel - Waiver.**

- 5 1. Every respondent is entitled to legal counsel. Unless an appearance has been
6 entered on behalf of the respondent, the court, within twenty-four hours from the
7 time the petition was filed, exclusive of weekends or holidays, shall appoint
8 counsel to represent the respondent. If a respondent retains counsel, the retained
9 counsel immediately shall notify the court of that fact.
- 10 2. After consultation with counsel, the respondent may waive the right to counsel or
11 the right to any hearing provided pursuant to this chapter by notifying the court in
12 writing. The notification must clearly state the respondent's reasons for the waiver
13 and be signed by counsel for the respondent.
- 14 3. If the court determines that the respondent is indigent, the court shall appoint
15 counsel and order that appointed counsel be compensated by the county that is
16 the respondent's place of residence in a reasonable amount based upon time and
17 expenses.
- 18 4. The state's attorney of a county that has expended sums pursuant to subsection 3
19 may seek civil recovery of those sums from property of the respondent.
20 Commencement of the action must occur within six years after the date the sums
21 were paid. After notice and hearing, the court may order an individual to reimburse
22 the county for expenditures made on that individual's behalf pursuant to this
23 chapter.

24 **25-03.3-10. Notice.** If a respondent is detained pursuant to section 25-03.3-08, the
25 state's attorney shall provide the respondent, or the respondent's guardian, if appropriate, with
26 a copy of the petition filed with the court. The state's attorney shall provide the respondent with
27 written notice of the respondent's right to a preliminary hearing and a commitment hearing, if
28 probable cause is found to exist; the right to counsel and that counsel will be appointed for the
29 respondent, if the respondent is indigent; and the right to have an expert of the respondent's
30 choosing conduct an evaluation and testify on the respondent's behalf or, if the respondent is

1 indigent, that the court will appoint a qualified expert for the respondent. The notice must state
2 the date, time, and place for the preliminary hearing.

3 **25-03.3-11. Preliminary hearing - Probable cause.** The respondent is entitled to a
4 preliminary hearing within seventy-two hours of being taken into custody pursuant to an order
5 of the court, excluding weekends and holidays, unless the respondent chooses to waive the
6 preliminary hearing pursuant to section 25-03.3-09. The respondent has a right to be present,
7 to testify, and to present and cross-examine witnesses at any preliminary hearing. Every
8 individual not necessary must be excluded, except that the court may admit any individual
9 having a legitimate interest in the proceeding. If the court determines after a preliminary
10 hearing that there is probable cause to believe the respondent is a sexually dangerous
11 individual, the court shall order that the respondent be transferred to an appropriate treatment
12 facility for an evaluation as to whether the respondent has a congenital or acquired condition
13 that is manifested by a sexual disorder, a personality disorder, or other mental disorder or
14 dysfunction that makes the respondent likely to engage in further acts of sexually predatory
15 conduct. If the court determines that probable cause does not exist to believe that the
16 respondent is a sexually dangerous individual, the court shall dismiss the petition. If the
17 respondent waives the preliminary hearing, then the respondent must be immediately
18 transferred to an appropriate treatment facility for an evaluation as to whether the respondent
19 has a congenital or acquired condition that is manifested by a sexual disorder, a personality
20 disorder, or other mental disorder or dysfunction that makes the respondent likely to engage in
21 further acts of sexually predatory conduct.

22 **25-03.3-12. Sexually dangerous individual - Evaluation.** The evaluation must be
23 conducted by one or more experts chosen by the executive director. Whenever a respondent
24 is subject to an evaluation pursuant to this chapter, the respondent may retain an expert to
25 perform an evaluation or testify on the respondent's behalf. In the case of a respondent who is
26 indigent, the court shall appoint a qualified expert to perform an examination or participate in
27 the commitment proceeding on the respondent's behalf. The department of human services
28 shall compensate any qualified expert appointed by the court on behalf of an indigent
29 respondent in a reasonable amount based on time and expenses. An expert retained on behalf
30 of the respondent must have reasonable access to the respondent for the purpose of the
31 examination and to all relevant medical, psychological, and court records and reports.

1 **25-03.3-13. Sexually dangerous individual - Commitment proceeding - Report of**
2 **findings.** Within thirty days after the finding of probable cause, the court shall conduct a
3 commitment proceeding to determine whether the respondent is a sexually dangerous
4 individual. The court may extend the time for good cause. At the commitment proceeding, any
5 testimony and reports of an expert who conducted an examination are admissible, including
6 risk assessment evaluations. Any proceeding pursuant to this chapter must be tried to the
7 court and not a jury. At the commitment proceeding, the state's attorney shall present evidence
8 in support of the petition and the burden is on the state to show by clear and convincing
9 evidence that the respondent is a sexually dangerous individual. An individual may not be
10 committed unless evidence is admitted establishing that at least two experts have concluded
11 the individual has a congenital or acquired condition that is manifested by a sexual disorder, a
12 personality disorder, or other mental disorder or dysfunction that makes that individual likely to
13 engage in further acts of sexually predatory conduct. The respondent has a right to be present,
14 to testify, and to present and cross-examine witnesses. Every person not necessary must be
15 excluded, except that the court may admit any person having a legitimate interest in the
16 proceeding. If the respondent is found to be a sexually dangerous individual, the court shall
17 commit the respondent to the care, custody, and control of the executive director. The
18 executive director shall place the respondent in an appropriate facility or program at which
19 treatment is available. The appropriate treatment facility or program must be the least
20 restrictive available treatment facility or program necessary to achieve the purposes of this
21 chapter. The executive director may not be required to create a less restrictive treatment
22 facility or treatment program specifically for the respondent or committed individual. Unless the
23 respondent has been committed to the legal and physical custody of the department of
24 corrections and rehabilitation, the respondent may not be placed at and the treatment program
25 for the respondent may not be provided at the state penitentiary or an affiliated penal facility. If
26 the respondent is found not to be a sexually dangerous individual, the court shall discharge the
27 respondent.

28 **25-03.3-14. Interagency placement.** If a committed individual also has been
29 committed to the legal and physical custody of the department of corrections and rehabilitation,
30 the director of the department of corrections and rehabilitation and the executive director may

1 consult one another and determine the appropriate placement of the individual and may
2 transfer the individual between placements.

3 **25-03.3-15. Evidence of prior acts.** Notwithstanding any other provision of law, in any
4 proceeding pursuant to this chapter, evidence of prior sexually predatory conduct or criminal
5 conduct, including a record of the juvenile court, is admissible.

6 **25-03.3-16. Limitation on findings as evidence in criminal proceedings.** Any
7 determination made pursuant to this chapter regarding whether a respondent is a sexually
8 dangerous individual or has a congenital or acquired condition that is manifested by a sexual
9 disorder, a personality disorder, or other mental disorder or dysfunction is inadmissible in any
10 criminal proceeding against the respondent, including any criminal proceeding to determine
11 whether the respondent is fit to stand trial, incapable of forming requisite intent, or not guilty by
12 reason of lack of responsibility because of mental disease or defect.

13 **25-03.3-17. Postcommitment proceeding, discharge, and further disposition.**

- 14 1. A committed individual must remain in the care, custody, and control of the
15 executive director until, in the opinion of the executive director, the individual is
16 safe to be at large and has received the maximum benefit of treatment.
- 17 2. Each committed individual must have an examination of that individual's mental
18 condition at least once a year. A report regarding the examination must be
19 provided to the court that committed the individual. At the time of the annual
20 examination, the committed individual has the right to have an expert examine the
21 individual, and, upon the request of an indigent committed individual, the court
22 shall appoint a qualified expert to examine the committed individual and report to
23 the court. The department of human services shall compensate a qualified expert
24 appointed by the court in a reasonable amount based on time and expenses. That
25 expert must have reasonable access to the committed individual and to all records
26 relating to the committed individual, including confidential records.
- 27 3. If a committed individual has been committed to an out-of-state facility by the
28 executive director for purposes of treatment, an expert from that state may be
29 appointed by the court as a qualified expert for an indigent committed individual for
30 any postcommitment proceeding.

1 4. After any report pursuant to this section is provided to the court, the court may
2 order further examination and investigation of the committed individual as the court
3 considers necessary. The court may set the matter for a hearing. At the hearing,
4 the committed individual is entitled to be present and to the benefit of the
5 protections afforded at the commitment proceeding. The state's attorney shall
6 represent the state at the hearing. After the hearing, the court shall determine
7 whether the committed individual is to be discharged or to be retained as a
8 sexually dangerous individual in the care, custody, and control of the executive
9 director.

10 5. The executive director may only discharge a sexually dangerous individual from
11 commitment pursuant to a court order. The executive director may petition the
12 committing court at any time for the discharge of the committed individual. The
13 executive director shall give the state's attorney notice of any petition for discharge
14 the executive director files with the court. Before the petition is granted, the state's
15 attorney has the right to be heard by the court on the petition. The state's attorney
16 may waive this right.

17 **25-03.3-18. Petition for discharge - Notice.**

18 1. Annually, the executive director shall provide the committed individual with written
19 notice that the individual has a right to petition the court for discharge. The notice
20 must explain to the committed person when the committed person has a right to a
21 hearing on the petition. The notice must inform the committed person of the rights
22 this chapter affords the committed person at a discharge hearing. The executive
23 director shall forward a copy of the notice to the committing court.

24 2. If the committed individual files a petition for discharge and has not had a hearing
25 pursuant to section 25-03.3-17 or this section during the preceding twelve months,
26 the committed individual has a right to a hearing on the petition.

27 3. At the hearing on the petition for discharge, the committed individual is entitled to
28 be present and to the benefit of the protections afforded at the commitment
29 proceeding. The state's attorney shall represent the state and may have the
30 committed individual evaluated by experts chosen by the state. The committed
31 individual is entitled to have an expert of the committed individual's choice conduct

an evaluation. The court shall appoint a qualified expert, if the committed individual is indigent and requests an appointment. The department of human services shall compensate a qualified expert appointed by the court in a reasonable amount based on time and expenses. That expert must have reasonable access to the committed individual and to all records relating to the committed individual, including confidential records.

4. At any hearing held pursuant to a petition for discharge, the burden of proof is on the state to show by clear and convincing evidence that the committed individual remains a sexually dangerous individual.

25-03.3-19. Appeal. The respondent has the right to an appeal from an order of commitment or an order denying a petition for discharge. Upon entry of an appealable order, the court shall notify the respondent of the right to appeal and the right to counsel. The notice of appeal must be filed within thirty days after entry of the order. The appeal must be limited to a review of the procedures, findings, and conclusions of the committing court. Pending a decision on appeal, the order appealed from remains in effect.

25-03.3-20. Limitation of liability. A person acting in good faith upon either actual knowledge or reliable information, who provides information to the state's attorney or the court pursuant to this chapter, is not subject to civil or criminal liability.

25-03.3-21. Recovery of expense. The department of human services, to the extent it has expended sums or provided services pursuant to this title, may seek civil recovery from the property of the respondent or committed individual. The department of human services must commence the action within six years after the department paid the sums or provided the services to the respondent or committed individual. After notice and hearing, the court may order an individual to reimburse the department of human services for all or part of the expenditures made for that individual pursuant to this chapter. In establishing the amount of reimbursement ordered under this section, the court shall consider the ability of the respondent or committed individual to pay.