DA 17-0179

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 176

IN THE MATTER OF:

S.D.,

Respondent and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DI 17-003D
Honorable Dan Wilson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, James Reavis, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jonathan M. Krauss, Assistant Attorney General, Helena, Montana

Ed Corrigan, Flathead County Attorney, Stacy Bowman, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: May 9, 2018

Decided: July 17, 2018

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 The State filed a petition to involuntarily commit S.D. after she attempted to kill herself and expressed ongoing suicidal ideation and hopelessness. After the initial hearing, S.D.'s attorney filed a waiver of her rights, which included her signed consent to involuntary commitment. The District Court approved the waiver and ordered S.D.'s commitment. On appeal, S.D. argues that the District Court violated her statutory and due process rights when it committed her without holding a hearing. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 In January 2017, the State filed a petition against 71-year-old S.D., alleging that she suffered from a mental disorder and required involuntary commitment. The State submitted and incorporated by reference a report by a mental health professional, Jami M. Flickinger (Flickinger), who had examined S.D. Flickinger's report stated that S.D. had made efforts to kill herself while residing in two different assisted living facilities. It stated that at one of the facilities S.D. used a nurse's unattended keys to access most of her medications, and at another facility S.D. had tried—unsuccessfully—to break a mirror to cut herself. According to Flickinger's report, S.D. admitted "ongoing suicidal ideation and hopelessness due to her physical and mental health condition." Flickinger's opinion was that S.D.'s mood was depressed and her affect flat, that she had no insight into the nature of her condition, and that she had inadequate judgment and impulse control. Flickinger also described S.D. as possessing a clear stream of thought without bizarre or illogical elements or spontaneous expressions of hallucinatory, illusional, or

delusional thoughts or perceptions. Flickinger recommended that S.D. be committed to the Montana State Hospital for up to 90 days.

¶3 The State's petition for involuntary commitment listed the procedural rights available to S.D. under §§ 53-21-115 to -118, MCA. Flickinger's report, incorporated in the petition by reference, included a list of the same procedural rights, except for information about the right to voluntarily take necessary medications. Based on the State's petition, the District Court issued an order that scheduled both an initial appearance and an adjudicatory hearing and designated two people to act as alternates as S.D.'s appointed friend.

¶4 The State appeared at the initial hearing before the District Court, and S.D. and her attorney appeared via videoconference. The record does not reflect whether S.D.'s appointed friend was present. The District Court ensured that all parties could see and hear one another and then advised S.D. of her civil commitment procedural rights. After advising S.D. of her rights, the District Court asked her if she had any questions. S.D. replied, "No, I don't have any questions right now."

¶5 That same morning, S.D. and her attorney filed a "Waiver of Hearing on Petition" with the District Court. The waiver stated that S.D. acknowledged that she had received a copy of the State's petition; that she discussed the petition with her attorney; and that she was aware of the "fundamental rights" set forth in the petition, as well as other rights. The waiver included several paragraphs that described the procedural rights in §§ 53-21-115 to -118, MCA, and stated that S.D. was aware, understood, and/or had

knowledge of those; it also stated that S.D. had been informed by her attorney that she had the right to a jury trial and the right to appeal any final ruling. The waiver stated S.D.'s belief that she needed treatment for a "mental disease or disorder." It continued, "I wish to avoid any further hearings and I do hereby waive my right to attend any future hearings." S.D. then expressly waived all her listed rights except the right to receive treatment, and she consented to the court entering an order for her involuntary commitment to the Montana State Hospital for a period not to exceed 90 days.

¶6 S.D. and her attorney both signed the waiver. S.D. signed immediately beneath the following text:

> I further certify that 1) I have discussed this waiver with my attorney; 2) I understand the rights listed above; 3) it is my desire and intent to voluntarily waive these rights; and 4) I have discussed the nature of these proceedings with my attorney and I understand the purpose of these proceedings.

S.D.'s attorney signed below text that stated:

> I certify that 1) I have discussed this waiver with the [R]espondent; 2) I am satisfied that the Respondent understands the rights listed above; 3) I believe it is the Respondent's desire and intent to voluntarily waive these rights; and 4) I have discussed the nature of these proceedings with the Respondent and I am satisfied that the Respondent understands the purpose of these proceedings.

The record does not reflect whether S.D.'s appointed friend participated in S.D.'s decision to sign the waiver or whether Flickinger concurred.

¶7 The District Court issued an order that day committing S.D. to the Montana State Hospital for up to 90 days. The Court stated in the order that it had considered the

reasons for the waiver pursuant to § 53-21-119, MCA, and was satisfied that the "Respondent is aware of the waiver of hearing after having consulted with her attorney, and is capable of making a knowing decision therein."

STANDARD OF REVIEW

¶8 Due process claims in involuntary civil commitment cases are subject to plenary review. *In re N.A.,* 2014 MT 257, ¶ 10, 376 Mont. 379, 334 P.3d 915. We review an involuntary civil commitment order to determine whether the district court's findings of fact are clearly erroneous and its conclusions of law are correct. *In re R.W.K.,* 2013 MT 54, ¶ 14, 369 Mont. 193, 297 P.3d 318. We require strict adherence to the involuntary commitment statutory scheme, considering the "utmost importance of the rights at stake." *In re Mental Health of L.K.-S.,* 2011 MT 21, ¶ 15, 359 Mont. 191, 247 P.3d 1100.

DISCUSSION

¶9 S.D. argues that the District Court erred as a matter of law when it committed her to the Montana State Hospital upon her signed waiver without a hearing or trial. She contends that the court could not accept her waiver without "a hearing about the waiver, in a courtroom, in front of a judge." The State responds that the record establishes that S.D. was capable of making a knowing and intentional waiver, and the court did not need to hold a hearing.

¶10 Title 53, chapter 21, MCA, authorizes and prescribes the process for involuntary commitment of individuals for mental health treatment. This system is part of a "rather

recent development" in the law to establish "strong procedural safeguards to protect the interests of those facing involuntary civil commitment" that are "focused on improving the fairness and accuracy of the process." *In re S.M.*, 2017 MT 244, ¶ 24, 389 Mont. 28, 403 P.3d 324. Those procedural safeguards are spelled out in §§ 53-21-115 to -118, MCA. Section 53-21-119, MCA, governs waiver of those rights. It provides in part:

> (1) A person may waive the person's rights, or if the person is not capable of making an intentional and knowing decision, these rights may be waived by the person's counsel and friend of respondent, if a friend of respondent is appointed, acting together if a record is made of the reasons for the waiver. The right to counsel may not be waived. The right to treatment provided for in this part may not be waived.
> (2) The right of the respondent to be physically present at a hearing may also be waived by the respondent's attorney and the friend of respondent with the concurrence of the professional person and the judge upon a finding supported by facts that:
> (a)(i) the presence of the respondent at the hearing would be likely to seriously adversely affect the respondent's mental condition; and
> (ii) an alternative location for the hearing in surroundings familiar to the respondent would not prevent the adverse effects on the respondent's mental condition; or
> (b) the respondent has voluntarily expressed a desire to waive the respondent's presence at the hearing.

¶11 Breaking it down, this statute prescribes that: (1) all statutory rights afforded a respondent in a civil commitment proceeding may be waived, except for the right to counsel and the right to treatment, *see In re S.M.*, ¶ 30 (rejecting constitutional challenge to statute prohibiting waiver of right to counsel); (2) if capable of doing so, a respondent may waive her own rights, *see In re R.W.K.*, ¶ 10 (upholding trial court's conclusion that respondent was capable of waiving his rights and stipulating to commitment); (3) if the

respondent is not capable, her rights may be waived only when her counsel and appointed friend agree on the waiver and make a record of it, *see In re L.K.-S.*, ¶¶ 22-26 (reversing commitment where record did not show appointed friend's concurrence in waiver); *In re P.A.C.*, 2013 MT 84, ¶ 13, 369 Mont. 407, 298 P.3d 1166 (reversing involuntary commitment where the record did not establish that respondent was capable of making an intentional and knowing decision to waive her rights); and (4) if the court holds a hearing and the respondent is not there, the hearing may go forward in her absence only if the respondent's attorney and friend waive her presence, with the concurrence of the designated professional, and the presiding judge makes the factual findings required by subsection (2), *see In re Matter of Mental Health of L.K.*, 2009 MT 366, ¶ 19, 353 Mont. 246, 219 P.3d 1263 (concluding that district court could not conduct commitment hearing in respondent's absence without a record that appointed friend or professional person concurred, and with "no record of findings supported by facts as required by § 53-21-119(2)(a) and (b), MCA.").

¶12 Applying these statutory requirements, we have held that a district court may not accept a respondent's stipulation to involuntary civil commitment "without first making an affirmative determination on the record—based upon the evidence presented, including the representations of the respondent and/or his attorney and friend—that the person to be committed understands his procedural rights, and that he waives those rights intentionally and knowingly." *In re A.M.,* 2014 MT 221, ¶ 15, 376 Mont. 226, 332 P.3d 263. The nature and extent of the record regarding the respondent's waiver

depends upon the facts and circumstances of the case. *In re P.A.C.,* ¶ 14. More "diligent" inquiry would be appropriate if the respondent's capacity to waive her rights is in doubt, such as "perhaps involving input from the professional person who evaluated the respondent." *In re P.A.C.,* ¶ 14. But the record does not necessarily have to reflect more than that the attorney had "discussed the matter with her client; that the client desired to waive his rights; and that the attorney was satisfied that her client understood his rights and the nature of the proceeding." *In re P.A.C.,* ¶ 14.

¶13 In *In re R.W.K.,* the respondent appeared at his involuntary commitment hearing with his attorney and his appointed friend. R.W.K.'s attorney represented to the District Court that he had met with R.W.K. and his appointed friend, that R.W.K. understood his involuntary commitment procedural rights and the nature of the proceedings, and that he stipulated to the allegations of the petition and agreed to a commitment at the Montana State Hospital. The District Court determined that R.W.K. was capable of making an intentional and knowing decision, accepted R.W.K.'s waiver and stipulation based on his attorney's representations, and issued an order with a finding that R.W.K. "understands all procedural rights and that he waives those rights knowingly." *In re R.W.K.,* ¶ 10. On appeal, R.W.K. argued that the District Court violated his rights under § 53-21-119(1), MCA, by failing to question him personally about the waiver. We affirmed the validity of the waiver, holding that the District Court could rely correctly on the attorney's representations of R.W.K.'s waiver and need not have made further inquiry. *In re R.W.K,* ¶ 24.

¶14 In *In re P.A.C.*, the respondent's attorney appeared without respondent P.A.C. at the commitment hearing. The attorney informed the District Court she had met with P.A.C. and informed her of "all her rights, including the right to be present, and she declined." *In re P.A.C.,* ¶ 4. The District Court then proceeded with the hearing and committed P.A.C., and she appealed. We held that the record did not show that P.A.C. was capable of making an intentional and knowing waiver under § 53-21-119(1), MCA, and that the District Court should have made further inquiry to "satisfy itself that the waiver is intentional and knowing, and [to ensure] that the record reflect[ed] the district court's acceptance of the sufficiency of counsel's representations as to the waiver, or of any other evidence presented on the issue." *In re P.A.C.,* ¶ 16. We clarified that a respondent does not need to attend a hearing before her attorney can convey her waiver of her right to attend, noting that "[s]uch a requirement would elevate form over substance and would be a disservice to the respondent who does not wish to attend." *In re P.A.C.,* ¶ 15.

¶15 Here, S.D. expressly acknowledged in the written waiver her understanding of her rights and of the purpose of the proceedings. After discussion with S.D., her attorney made an affirmative representation attesting to his satisfaction with her understanding and expressed no concern that she was not capable of waiving her own rights. The representations from S.D. and her attorney demonstrate that S.D. waived her rights and consented to commitment intentionally and knowingly. Those representations were "made by the respondent [her]self" and placed on the record in S.D.'s attested written

waiver. *In re A.M.*, ¶ 16. The record also included Flickinger's report, which indicated that S.D. had a clear stream of thought and no sign that she lacked an ability to make her own knowing decision about the proceedings.

¶16 The question S.D. presents is whether the District Court was required to assess in open court her capacity to make an intentional and knowing waiver. Unlike our decisions in *In re L.K.*, *In re P.A.C.*, and *In re L.K.-S.*, this case does not involve a commitment hearing held in the respondent's absence. Nor is the issue governed by our decision in *In re A.M.*, where the court accepted a stipulation to commitment when "neither [the respondent] nor his attorney made any representations" regarding the respondent's understanding of his procedural rights or whether "he had the capacity to knowingly and intentionally waive" them, and the district court made no inquiry or record in that regard. *In re A.M.*, ¶ 14. Here, the District Court's order committing S.D. reflected consideration of S.D.'s waiver under § 53-21-119(1), MCA. The order expressed the court's satisfaction that S.D. was aware of the waiver of her rights after having consulted with her attorney and that S.D. was capable of making a knowing decision.

¶17 Comparing the processes in criminal cases is not particularly helpful in resolving the question on appeal. Criminal procedure statutes provide different procedural requirements, stating for example that a plea of guilty must be entered "in open court." Section 46-16-105(1)(a), MCA. We have recognized that "the Sixth Amendment [to the United States Constitution] and Article II, Section 24, of Montana's Constitution [(setting forth the rights of the accused)] do not apply to civil commitment proceedings."

In re J.S., 2017 MT 214, ¶ 19, 388 Mont. 397, 401 P.3d 197. Civil commitment proceedings instead are protected by the constitutions' Due Process Clauses. *In re J.S.*, ¶ 15; *In re S.M.*, ¶ 15. In that regard, "the process afforded to respondents in civil commitment proceedings is the subject of a 'considered legislative response,' and we should be cautious to extend constitutional protections that 'place the matter outside the arena of public debate and legislative action.'" *In re S.M.*, ¶ 25 (quoting *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 73, 129 S. Ct. 2308, 2322 (2009)).

¶18 Under § 53-21-119(1), MCA, the only rights a respondent may not waive are the right to counsel and the right to treatment. The statute does not require the court to hold a hearing in order to allow a commitment hearing to be waived and does not require a waiver to be made in open court. This Court's imposition of such requirements would add language impermissibly. *See* § 1-2-101, MCA. Rather, the record before the committing court—whether presented orally or in writing—must support the substantive determination of a valid waiver. *See In re A.M.*, ¶ 15.

¶19 On the record presented in this case, we conclude that both S.D.'s waiver and the District Court's order committing her are sufficient to find an intentional and knowing waiver pursuant to § 53-21-119(1), MCA. It was not necessary for the court to set a hearing to inquire further into her waiver of rights. The District Court complied with the requirements of § 53-21-119(1), MCA, in accepting S.D.'s waiver without a hearing and did not violate her right to due process.

CONCLUSION

¶20 The District Court's order of commitment is affirmed.

/S/ BETH BAKER

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ JIM RICE

Justice Laurie McKinnon, dissenting.

¶21 There must be a hearing to determine if a respondent knowingly and intentionally waived her rights pursuant to § 53-21-119(1), MCA. If the respondent is not present at that hearing, then the court must strictly follow waiver of physical presence as described in § 53-21-119(2), MCA. As neither occurred here, I would reverse S.D.'s commitment. I dissent from the Court's decision that a mentally ill person may be involuntarily committed by signing paperwork, which is approved by the court in a two-page order without holding a hearing. Such a practice is inconsistent with our statutory scheme; our jurisprudence establishing strict protections for the rights of mentally ill persons; and our requirement that a judge perform a diligent inquiry at a hearing to determine if the respondent is capable of making a knowing and intentional decision.

a. A hearing and waiver of the right to be physically present is statutorily required.

¶22 I begin my analysis with the statutory scheme, which is to be "administered with full respect for the person's dignity and personal integrity" and ensures that "due process

of law is accorded any person coming under the provisions of this part." Section 53-21-101(1), (4), MCA. In addition to "any other rights that may be guaranteed by the constitution of the United States and of this state," § 53-21-115(1)-(4), (7) MCA, enumerates some of a respondent's rights and establishes that a respondent has "the right to notice reasonably in advance of any *hearing* . . ."; "the right in any *hearing* to be present, to offer evidence, and to present witnesses . . ."; "the right to know, before a *hearing*, the names and addresses of any witnesses who will testify in support of a petition"; "the right in any *hearing* to cross-examine witnesses"; and "the right in any *hearing* to be proceeded against according to the rules of evidence applicable to civil matters generally." (Emphasis added.) It is thus clear that § 53-21-115, MCA, contemplates a hearing in an involuntary commitment proceeding.

¶23 Additionally, § 53-21-115, MCA, provides that a person involuntarily detained has "other rights that may be guaranteed by the constitution of the United States and of this state . . . ." These other rights would include, at a minimum, those afforded to a person accused of committing a crime, such as the right to "appear and defend in person and by counsel" at his trial. Mont. Const. art. II, § 24. A person involuntarily detained or against whom a petition has been filed faces a significant deprivation of liberty, just as an accused criminal defendant faces, and is therefore entitled to at least the same fundamental constitutional and statutory rights afforded to an accused. This Court has long recognized that constitutional due process protections for an accused provide that "[i]f a defendant chooses to waive his right to be present at a critical stage of the trial, the

court must obtain an on-the-record personal waiver by the defendant acknowledging the defendant voluntarily, intelligently, and knowingly waives that right." *State v. McCarthy*, 2004 MT 312, ¶ 32, 324 Mont. 1, 101 P.3d 288. The Court's conclusion that a respondent who signed paperwork prepared by her counsel may be committed without *any* hearing provides less constitutional due process protection than is afforded to those accused of committing crimes. The Court's reasoning is fundamentally unsound.

¶24 The Court's conclusion is inconsistent with the statutory scheme for another important reason: § 53-21-119(1)-(2), MCA, particularizes the procedure by which many rights may be waived. Indeed, while a respondent may waive the right to be *physically present* at a hearing if "the person's counsel and friend of respondent, if a friend of respondent is appointed" act together and "a record is made of the reasons for the waiver," the Court concludes today that signing a form prepared by her attorney may dispense of a respondent's right to the trial itself. *See* § 53-21-119(1), MCA. In doing so, the Court throws the baby out with the bathwater and renders the waiver procedure pertaining to a respondent's presence during trial superfluous. The statutory requirements for waiving specific rights that occur during the hearing or trial itself no longer have meaning or purpose if the trial can be dispensed of by signing a form.

¶25 Also problematic are the Court's repeated references to S.D.'s court filing entitled "Waiver of Hearing on Petition" as evidence that became part of the "record." Opinion, ¶ 15. The Court describes them as "representations [which] were 'made by the respondent [her]self' and *placed on the record* in S.D.'s written waiver." Opinion, ¶ 15

(quoting *In re A.M.*, ¶ 16) (emphasis added).[1] However, no matter how the Court chooses to characterize S.D.'s filing, it does not by virtue of such characterization become evidence in "the record before the committing court." Opinion, ¶ 18. In *In re L.K.-S.*, ¶ 27, this Court reversed a commitment after concluding the record did not support the trial court's express finding that the appointed professional person concurred in the waiver of L.K.-S.'s right to a jury trial. L.K.-S. was yelling during the proceeding, which prevented the court reporter from recording the professional person's waiver testimony. *In re L.K.-S.*, ¶ 23. This Court held that the requirements for accepting a waiver pursuant to § 53-21-119(2), MCA, did not exist in the record. *In re L.K.-S.*, ¶ 25. Here, as in *In re L.K.-S.*, there is no evidence or record upon which the District Court could find that S.D. intentionally and knowingly waived her right to trial. This is true no matter how many times this Court describes S.D.'s court filing by using the words "attesting," "representation," and "expressly acknowledged."

¶26 In my view, and as a final consideration of our statutory scheme, the Court also errs when it fails to address the waiver provisions of § 53-21-119, MCA, in their entirety. Section 53-21-119(1), MCA, addresses waiver of rights, with the exception of the right to be physically present, in two situations: (1) when a person is capable of making an intentional and knowing decision, the person may waive her rights; and (2) when she is

[1] The Court also refers to Flickinger's report as included in the "record" and classifies it as a document upon which the District Court could conclude S.D. was able to waive her right to trial. Opinion, ¶ 15. However, this report was only contained in the court file and was not admitted as evidence during a hearing, attached to an affidavit, and cannot otherwise be considered evidence.

not capable, her rights may be waived by her counsel and appointed friend "acting together if a record is made of the reasons for the waiver." Section 53-21-119(2), MCA, addresses the more specific right of the respondent to be "physically present" during the hearing, one obviously implicated if, as here, there is no hearing at all. The court would have certainly held a hearing had S.D. been present. A respondent may not waive her right to be physically present at her hearing, *regardless of whether she is making an intentional and knowing decision*, unless the judge agrees with her counsel and appointed friend's waiver on her behalf and makes findings, "supported by facts," that either (1) the respondent's presence at the hearing would "seriously adversely affect the respondent's mental condition"; *and* that an "alternative location for the hearing in surroundings familiar to the respondent would not prevent adverse effects" on her mental condition; or (2) the respondent "expressed a desire to waive" her presence. Section 53-21-119(2), MCA. Accordingly, the Legislature established a specific procedure for protecting a respondent's due process rights when a hearing would adversely affect her mental condition. Otherwise, as any other party must do, a respondent is required to appear at a hearing. While a respondent may waive her rights to contest the State's evidence, the State has presented, in the first instance, a sufficient basis for the hearing to occur. Importantly, we are not here considering the sufficiency of affidavits that establish a concurrence of S.D.'s attorney and appointed friend and a judicial determination supported by specific factual findings that presence at a hearing would adversely affect her mental condition and no alternative situation is available. Here, S.D. appeared at her

initial appearance without incident. The State did not dismiss its petition and there is nothing, other than convenience of counsel and the court, establishing a basis to waive S.D.'s physical presence at a hearing where the court should have made an appropriate inquiry into her waiver.

¶27 I do not contend that a respondent may not waive her right to a contested hearing in accordance with the provisions of § 53-21-119(1), MCA. I do contend, however, that the provisions of § 53-21-119(2), MCA, remain applicable and may not be dispensed of by a respondent's signature on a form. The right to be physically present at a hearing is based upon principles of fairness and the notion that a respondent has the right to hear and see the evidence presented, defend against the allegations, meet witnesses face-to-face, assist and ensure counsel represents her interests, and to assist the judge in understanding why she does or does not need treatment and her preferences for treatment. The Court's interpretation of § 53-21-119(1), MCA, and conclusion that no hearing is required, without considering subsection (2), renders subsection (2) meaningless and the Court's waiver analysis incomplete. Accordingly, I would conclude that the statutory scheme provides there must be a hearing to determine if a respondent knowingly and intentionally waived her rights pursuant to § 53-21-119(1), MCA. If the respondent is not present at that hearing, then the waiver of physical presence as described in § 53-21-119(2), MCA, must be strictly followed.

b. This Court's jurisprudence requires a hearing to determine the validity of a waiver.

¶28 While we have not previously addressed a commitment where there was no hearing during the trial phase, our jurisprudence requires courts to strictly adhere to the statutory scheme and diligently inquire as to the waiver of trial rights. We specifically addressed § 53-21-119(2), MCA, in *In re L.K.*, ¶ 19. L.K. appeared from Warm Springs through Vision Net, but voluntarily left the room during the hearing and indicated she no longer wanted to be present. *In re L.K.*, ¶¶ 5-6. The district court continued with the hearing after advising L.K. that she had the right to return and participate at any time. *In re L.K.*, ¶ 7. This Court reversed L.K.'s commitment, concluding the court insufficiently complied with the "express requirements" of § 53-21-119(2), MCA, which require a record be made that counsel and the appointed friend or professional person concurred in the waiver of L.K.'s right to be present. *In re L.K.*, ¶ 19. Although L.K. refused to remain at her trial and voluntarily left the hearing room at Warm Springs, this Court applied well-established precedent requiring strict statutory adherence and concluded that the provisions of § 53-21-119(2), MCA, had not been met.[2]

¶29 In *In re R.W.K.*, ¶ 9, the respondent was present for his trial and remained silent as his counsel represented to the court, in front of R.W.K.'s appointed friend, that R.W.K. waived his rights. We explained that "[t]hese statements concerning waiver were made

[2] Had the friend or professional person not concurred in the waiver, I am not sure where that would have left the trial court given that L.K. emphatically refused to attend the proceeding. *In re L.K.*, ¶¶ 6-7. It would seem unreasonable to forcefully detain a respondent during trial in order to ensure her physical presence and compliance with § 53-21-119(2), MCA. A continuance, perhaps useful to de-escalate the hearing, normally would not be an option given that the trial on the petition must generally occur within five days. Section 53-21-122(2)(a), MCA.

in open court and in the presence of R.W.K. and the appointed friend." *In re R.W.K.*, ¶ 24. Under these circumstances, we concluded that the district court's determination "that R.W.K. was capable of making an intentional and knowing decision regarding his procedural rights, and [that R.W.K.] validly waived those rights" was supported by sufficient facts. *In re R.W.K.*, ¶ 21. In *In re R.W.K.*, neither the absence of a trial nor the presence of the respondent was at issue. Indeed, it was precisely because the respondent was present and remained silent during counsel's representations to the court and appointed friend that this Court was able to determine that the record adequately supported a waiver pursuant to § 53-21-119(1), MCA.

¶30 In *In re P.A.C.*, ¶ 4, P.A.C. was not present for the commitment hearing. The court nonetheless held a hearing wherein P.A.C.'s attorney advised the court that P.A.C. had been informed of "all her rights, including the right to be present, and she declined." *In re P.A.C.*, ¶ 4. Without addressing P.A.C.'s right to be physically present pursuant to § 53-21-119(2), MCA, this Court reversed the commitment, concluding that the court should have made further inquiry to determine whether P.A.C. was capable of making an intentional and knowing decision pursuant to § 53-21-119(1), MCA.[3] *In re P.A.C.*,

[3] The Court inappropriately seizes upon language in *In re P.A.C.* Opinion, ¶ 14 ("We clarified that a respondent does not need to attend a hearing before her attorney can convey her waiver of her right to attend . . . ."). However, in *In re P.A.C.* the Court expressly stated that the respondent's right to attend and the provisions of § 53-21-119(2), MCA, were not at issue. *In re P.A.C.*, ¶ 10. It is true, as we stated in *In re P.A.C.*, that it is not necessary for the respondent to be required to attend the proceeding against her will and that to do so "would be a disservice to the respondent who does not wish to attend." *In re P.A.C.*, ¶ 15. However, in such a circumstance, the provisions of § 53-21-119(2), MCA, apply and the court may proceed with the hearing in the respondent's absence provided the proper concurrences for the waiver are

¶¶ 13-16. In contrast to *In re P.A.C.*, where a hearing occurred and this Court determined that the inquiry made by the court *on the record* was insufficient; here, the District Court made no record at all, did not establish a valid waiver of S.D.'s right to be physically present, and did not make an on-the-record inquiry.

¶31 In *In re A.M.*, ¶¶ 4-6, the respondent did appear in court for trial and counsel represented that A.M. wished to go to Warm Springs and did not want to have a hearing. We reversed, concluding the district court violated A.M.'s statutory and due process rights by failing to make any inquiry or record of whether A.M. understood the rights he was waiving. *In re A.M.*, ¶¶ 14, 18. Justice Patricia Cotter, writing for the Court, cautioned:

> As the Court is encountering an increasing number of stipulations in involuntary commitment cases, we deem it necessary to reaffirm the principles of § 53-21-119(1), MCA, and our pronouncements in *P.A.C.* and *R.W.K.* We therefore hold that the District Court may not accept a stipulation to an involuntary commitment without first making an affirmative determination on the record—based upon the evidence presented, including representations of the respondent and/or his attorney and friend—that the person to be committed understands his procedural rights, and that he waives those rights intentionally and knowingly. In the alternative, if the respondent is not capable of making an intentional and knowing decision, the respondent's counsel and friend must make a record in compliance with § 53-21-119(1), MCA. Because no evidence was presented and no record was made in this case establishing a knowing and intentional waiver of A.M.'s procedural rights, we must reverse A.M.'s commitment.
>
> We emphasize that any waiver of rights should preferably be made by the respondent himself when he is capable of making that decision, rather than

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obtained. In *In re P.A.C.* we expressly limited our inquiry to § 53-21-119(1), MCA, and did not address § 53-21-119(2), MCA.

> doing so through the representations of counsel. Though we recognize that each involuntary commitment proceeding presents unique circumstances, we encourage the court, where possible to obtain on the record a personal waiver by the respondent of those rights he chooses to waive.

In re A.M., ¶¶ 15-16. Although A.M. dealt only with the provisions of waiver pursuant to § 53-21-119(1), MCA, this Court recognized in *In re A.M.*, consistent with our precedent, that "'As these and other statutes make clear, a hearing on a petition for involuntary commitment is not merely a *pro forma* requirement, but an opportunity for the parties—both the petitioner and the respondent—to present evidence upon which the trial court can make required findings and enter appropriate orders.'" *In re A.M.*, ¶ 10 (quoting *In re E.P.B.*, 2007 MT 224, ¶ 12, 339 Mont. 107, 168 P.3d 662). Here, the Court dispenses with the entire trial itself, ostensibly on the basis of paperwork containing S.D.'s "representations" filed by her attorney. Our decision does not comport with the statutory scheme or this Court's jurisprudence.

¶32 S.D. maintains "there must be a hearing before a respondent's rights can be waived under Mont. Code Ann. § 53-21-119(1). If the respondent is not present at that hearing, then the waiver of physical presence as described in Mont. Code Ann. § 53-21-119(2) must also be strictly followed." For the aforesaid reasons, I agree with S.D. and I dissent from the Court's decision concluding otherwise.

/S/ LAURIE McKINNON

Justice Dirk Sandefur joins in the dissenting Opinion of Justice McKinnon.

/S/ DIRK M. SANDEFUR