

IVC Trial Advocacy



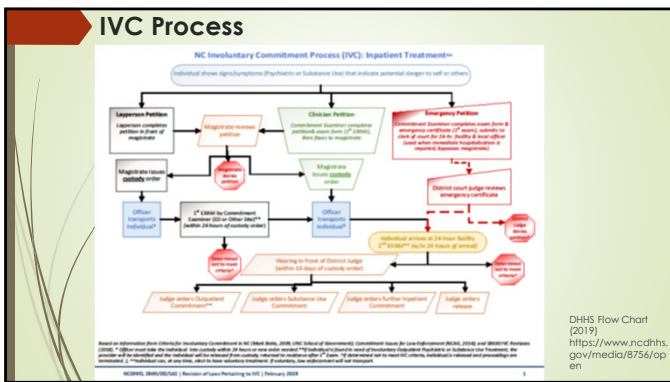
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What Necessitates Commitment

- Mental Illness – DSM V
- Dangerousness – 122C-3(11)
 - Danger to Self (this is generally very broad)
 - Danger to Others
 - Or Both
 - Plus "The future element"
 - "Although the trial court need not say the magic words 'reasonable probability of future harm,' it must draw a nexus between past conduct and future danger." In re J.P.S., 264 N.C. App. 58 (2019).

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Initial Process and Concerns

- With all IVC patients, it is their right to go to court and challenge for their release.
- An attorney may, however, choose not to go to court if the patient clearly does not understand and needs continued treatment.
- Patients control the decision making in all other circumstances

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Initial Process and Concerns Cont.

- Seeking voluntary care for mental health
- Seeking care voluntarily for seemingly unrelated issues
- Police, Family, Friends.
- An Emergency Certificate

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Danger to Self Defined

- 122C-3

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Danger to Others Defined

122C-3

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Break Down of Procedure

- Affidavit/Petition
- Custody Order
- Initial Qualified Physician's Exam (QPE)
- Transport to 24hr Facility
- Second QPE within 24hrs
- Commitment rights attach

Attorney is appointed (Office of Special Counsel)
Right to a court hearing within 10 days

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Affidavit/Petition- AOC-SP-300



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Affidavit and Petition

- 122C-261 – Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.
 - A (a) "Anyone who has knowledge of an individual who is mentally ill and either (i) **dangerous to self**, as defined in Gen. Stat. 122C-3(aa)a.,
 - or **dangerous to others** as defined in Gen. Stat. 122C-3(11)b.,
 - or . . . to prevent further disability or deterioration . . .
 - and execute an affidavit**, and petition the clerk or magistrate for
 - issuance of an order to take the respondent into custody for examination**
 - The affidavit shall include the facts

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Initial Attack – Affidavit for Custody

- N.C. Gen. Stat. 122C-261 – Affidavit and Petition Before Clerk or Magistrate When Immediate Hospitalization is not Necessary, Custody Order
 - This is a long statute but the focus is on the "facts" contained in the affidavit presented before the magistrate and not on "conclusions."

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In re Reed, 39 N.C. App. 227 (1978)

- "The affidavit shall include the facts on which the affiant's opinion is based." *Id.* at 228.
- Here, the affidavit provided only conclusions.

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In re Ingram, 74 N.C. App. 579 (1985)

- If the affidavit is insufficient, so too is the custody order that relied on the affidavit and you never reach the actual findings.

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Affidavit and Petition Cont.

- 122C-261 – Affidavit and petition before clerk or magistrate when immediate hospitalization is not necessary; custody order.
 - B (d) "If the affiant is a physician or eligible psychologist, . . .
 - (4) the clerk or magistrate shall issue an order for transportation to or custody at a 24-hour facility
 - provided that if a 24-hour facility is not immediately available or appropriate to the respondent's medical condition,
 - the respondent may be temporarily detained under appropriate supervision and, upon further examination,
 - [Respondent could be] released in accordance with Gen. Stat. 122C-263(d)(2).
 - Practice Note: Pay attention to the initial hospital and for how long the patient was there.

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Improper Paperwork and Evaluations



Paperwork must indicate the time and reason for requesting the order.



The hospital must still transfer the patient to a 24 hour facility.

The ER does not constitute a 24 hour facility. The 24hr facility must perform the second evaluation within 24 hours. Exception is if it is the same facility

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7 Day Limit After First Evaluation

- N.C. Gen. Stat. 122C-263(d)(2)
 - "If the respondent is temporarily detained and a 24-hour facility is not available or medically appropriate
 - seven days after the issuance of the custody order,
 - The proceedings shall be terminated.
 - New IVC paperwork may still be initiated

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Breaking down the 7-day Rule

It is specific to that petition and order and those proceedings are terminated.

The ER physician may initiate new proceedings prior to expiration of the first 7-day period as long as Respondent continues to meet criteria.

Prior Affidavits cannot be used as a basis for future commitment

Physicians must rely on new information and not prior information when petitioning under new paperwork

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Evaluation Procedure (1st Eval)

- 122C-263 – Duties of law-enforcement officer, first examination by physician or eligible psychologist.
 - A. (c) "The physician or eligible psychologist . . . shall examine . . . the respondent within 24 hours after the respondent is presented for examination."
 - Initial assessment:
 - (1) Current and previous mental illness, IDD, and/or previous treatment history
 - (2) Dangerousness to self, others or both
 - (3) Ability to survive safely without availability of supervision from family, friends or others; and
 - (4) Capacity to make informed treatment/medication decisions

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DHHS Form – QPE Example

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Evaluation Procedure (1st Eval) Cont.

- ▶ **122C-263 – Duties of law-enforcement officer, first examination by physician or eligible psychologist.**
- ▶ This subsection opens the door for some challenges to be made in that the doctor must note the nature and reason for the involuntary commitment.

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In re Woodie

- ▶ Failure to check a box by itself is not sufficient so long as there is additional supporting evidence/testimony from the doctor.

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Findings and Custody Order

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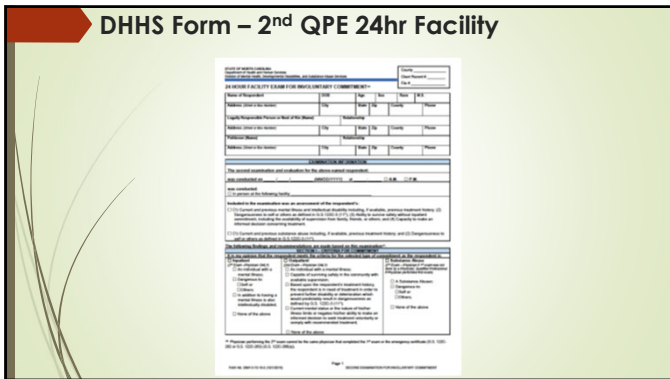
Findings and Custody Order Clinician

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Evaluation Procedure (2nd Eval)

- ▶ **122C-266 – Inpatient commitment; second examination and treatment pending hearing.**
 - ▶ within 24 hours of arrival at a 24-hour facility
 - ▶ the respondent shall be examined by a physician.
 - ▶ This physician **shall not be the same physician** who completed the certificate or examination (1st QPE)

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Evaluation Procedure (2nd Eval) Exception

- (e) "If the 24-hour facility described in Gen. Stat. 122C-252 or Gen. Stat. 122C-262 is the facility in which the first examination by a physician or eligible psychologist occurred and is the same facility in which the respondent is held, the second examination shall occur not later than the following regular working day."

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122C-268(j)

- **§ 122C-268. Inpatient commitment; district court hearing.**
- (j) To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is
 - mentally ill and
 - dangerous to self, or
 - dangerous to others
- The court shall record the facts that support its findings.

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Court Hearings

- The Petitioner has the burden of proof and thus presents first. Generally, the hospital will send a doctor that is familiar with Respondent.
- Respondent may choose to testify on his/her own behalf or to call any witnesses.
- Challenges should be made to Petitioner's expert for preservation of the record.
- A motion to dismiss should also be made at the end of Petitioner's evidence and at the end of all evidence for purposes of appeal.

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Expert Witnesses

- All doctors must meet the requirements under the *Daubert* Standard and Rule 702. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- NC Rule 702
 - (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
 - (1) The testimony is based upon sufficient facts or data.
 - (2) The testimony is the product of reliable principles and methods.
 - (3) The witness has applied the principles and methods reliably to the facts of the case.

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NC Incorporates the *Daubert* Test

- *State v. McGrady*, 368 N.C. 880 (2016), establishes that qualification of experts in NC aligns with the federal rules and incorporates the standard from *Daubert*.
- Expert testimony is required for IVC.
- What steps should you take once the State has moved to tender a doctor as an expert?
 - Move for voir dire

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Court Hearings and Hearsay

- The Petitioner is allowed to present [c]ertified copies of reports and findings of physicians and psychologists and previous and current medical records. See Gen. Stat. 122C-268(f).
- However, Petitioner may not offer any evidence regarding a voluntary admission for purposes of an involuntary commitment. See Gen. Stat. 122C-208

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Court Hearings and Hearsay

- A physician may be allowed to testify to hearsay contained in the medical records as part of the basis of a psychiatric diagnosis.
 - "State v. Huffstetler, 312 N.C. 92, 107 (1984).
- However, it is advisable to challenge all hearsay or potential hearsay statements in order to preserve the record on appeal.
- See also *In re O.L.* (2020)

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Confrontation Clause and Court Hearings

- The Confrontation clause exists in a limited capacity. N.C. Gen. Stat. 122C-268(f)
 - "Certified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, **but the respondent's right to confront and cross-examine witnesses may not be denied.**"
- **Other Considerations:**
 - A physician may complete an evaluation but a different physician may testify about Respondent without such testimony being in violation of the Confrontation Clause.
 - However, Petitioner may not introduce a physician's report without that physician being present to testify to the report. See *In re Mackie*, 36 N.C. App. 638 (1978).

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Ineffective Assistance of Counsel

- **Caution:** *In re: J.C.D., No. COA18-957, 2019*
- "Respondent argues that 'she was denied effective counsel when her attorney conceded that [she] should be involuntarily committed, an argument which was in stark contrast to her wishes.'"

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Duration of Commitment - Disposition

- 122C-271 – Disposition
 - A (b) "If the respondent has been held in a 24-hour facility pending the district court hearing pursuant to Gen. Stat. 122C-268, the court may make one of the following dispositions:
 - (1) "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill; that the respondent is capable of surviving safely in the community with available supervision . . . it may order **outpatient commitment** for a period **not in excess of 90 days.**"
 - (2) "If the court finds by clear, cogent, and convincing evidence that the respondent is mentally ill and is dangerous to self, as defined in Gen. Stat. 122C-3(11)a., or others, as defined in Gen. Stat. 122C-3(11)b., it may order **inpatient commitment** at a 24-hour facility described in Gen. Stat. 122C-252 for a period **not in excess of 90 days.**"

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Continued Hospitalization and Rehearings

- A rehearing is the same as the initial hearing but should only focus on the facts and reason(s) for why Respondent continues to be a danger to self or others or both and not on the initial reason for treatment.
- If the judge is satisfied that Respondent needs further treatment, the judge may order the Respondent to remain for up to 180 days for a second rehearing and 365 for a third or subsequent rehearing.

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Rehearings – Timeframes

- 122C-276 – Inpatient commitment; rehearings for respondents other than insanity acquittees.
 - (a) "**Fifteen days before** the end of the initial inpatient commitment period if the attending physician determines that commitment of a respondent beyond the initial period will be necessary, he shall so notify the clerk of superior court of the county in which the facility is located. The clerk, **at least 10 days before** the end of the initial period, on order of a district court judge . . . shall calendar the rehearing.
 - (d) "Notice and proceedings of rehearings are governed by the same procedures as initial hearings and the respondent has the same rights he had at the initial hearing including the right to appeal."

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Questions

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