

3.3 Involuntary Substance Abuse Commitment

A. Affidavit and Petition Before Clerk or Magistrate

Involuntary substance abuse commitment begins with an individual appearing before either the clerk of superior court or a magistrate to petition by affidavit for a person believed to be a substance abuser and dangerous to self or others to be taken into custody for an examination. The affidavit must include the facts on which the affiant's opinion is based. G.S. 122C-281(a).

This statute tracks the provisions for mental health commitment in G.S. 122C-261(a), except that there is no requirement that the affiant state whether the respondent is believed to be mentally retarded. G.S. 122C-281(a); *see infra* Appendix A, Form AOC-SP-300. Counsel should review the treatment provider's justification for maintaining a client with mental retardation on any type of involuntary commitment. When the justification does not meet the legal standard for a waiver or other exception allowing involuntary commitment, counsel should seek to have the client removed from involuntary status. For a discussion of commitment of individuals with mental retardation, *see supra* § 2.3N.

Case law: An unsworn petition and a petition without facts supporting conclusory statements are grounds for dismissal.

In re Ingram, 74 N.C. App. 579 (1985). The *Ingram* case contains two important holdings concerning the sufficiency of the affidavit and petition:

- failure of the petition to be sworn to under oath is ground for dismissal of the petition; and
- failure of the petition to state sufficient facts supporting the allegations that the respondent is mentally ill and dangerous to self or others is ground for dismissal of the petition.

For a more complete discussion of the case, *see supra* § 2.3A.

B. Custody Order for Examination

The clerk or magistrate must review the petition to determine if there are "reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably a substance abuser and dangerous to himself or others." G.S. 122C-281(b). If so, the clerk or magistrate must issue an order to a law enforcement officer or other authorized person to take the respondent into custody for examination by a physician or eligible psychologist. *Id*; *see infra* Appendix A, Form AOC-SP-302. The clerk has no duty to contact the area authority regarding a respondent who might be mentally retarded. *But cf. infra* Appendix A, Form AOC-SP-302 (indicating that the area authority must be contacted if a respondent who is mentally ill is also mentally retarded).

C. Transportation Procedures

The general provisions for transportation of respondents in involuntary substance abuse proceedings are the same as the transportation provisions applicable to mental health commitment proceedings discussed *supra* in § 2.3C. *See* G.S. 122C-251.

D. Custody and Transport to First Examination

Procedures for a law enforcement officer or other authorized individual to assume custody of and transport a substance abuse respondent for examination are contained in G.S. 122C-281(e) and 122C-283(a) and generally mirror the procedures governing mental health commitments found in G.S. 122C-261(e) and 122C-263(a). *See supra* § 2.3D. Unlike the mental health statute, the substance abuse statute does not provide for temporary detention in a state facility for the mentally ill pending the first examination. *Compare* G.S. 122C-283(a) (substance abuse statute) *with* G.S. 122C-263(a) (mental health statute).

E. First Examination Requirements

Factors to be evaluated. The physician or eligible psychologist must perform the examination as soon as possible, and no later than twenty-four hours after the respondent's arrival.

The examiner must assess the following:

- “(1) Current and previous substance abuse including, if available, previous treatment history; and
- (2) Dangerousness to himself or others”

G.S. 122C-283(c).

Although substance abuse commitment usually involves outpatient treatment, the substance abuse statute does not require the determination that “the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness,” which is necessary for a mental health outpatient commitment. *See* G.S. 122C-263(d)(1)c. (mental health statute); *see also supra* § 2.3E. In addition, for a substance abuse commitment, there is no provision for first examination via telemedicine. *See supra* § 2.3F.

Recommendation. If the examiner finds that the respondent is a substance abuser and is dangerous to self or others, commitment must be recommended. Unlike mental health commitment procedures, there is then an additional determination. The examiner must recommend whether the respondent should be released or held at a 24-hour facility pending hearing. G.S. 122C-283(d); *see infra* Appendix A, Form DMH 5-72-01, Section III. If the examiner recommends that the respondent be held, the law enforcement officer or other designated individual must transport the respondent to a 24-hour facility. G.S.

122C-283(d). This detention at the facility pending hearing is distinguished from the substance abuse commitment itself; substance abuse commitment is not commitment to a facility, but rather to the care of the area authority or a physician.

If the examiner does not recommend that the respondent be held at a 24-hour facility pending hearing, the respondent must be released pending the hearing. G.S. 122C-283(d)(1).

If the examiner finds that the respondent is not a substance abuser and dangerous to self or others, the respondent must be released and the proceedings terminated. G.S. 122C-283(d)(2).

Temporary waiver of requirement of physician or eligible psychologist to perform first examination. A bill enacted on July 1, 2003, S.L. 2003-178, and extended periodically allows the Secretary of Health and Human Services, on the request of a LME, to waive temporarily the statutory requirement that either a physician or eligible psychologist perform the initial examination. Session Law 2010-119 continues this program until October 1, 2012. The waiver applies only on a “pilot program basis” on request and if certain criteria are met. A maximum of twenty programs may receive a waiver, which would allow the first examination to be performed by a licensed clinical social worker, a masters level psychiatric nurse, or a masters level certified clinical addictions specialist.

Note: If recommending commitment, the examiner is not required to recommend either inpatient or outpatient commitment. A substance abuse commitment is to the physician or area authority that will be supervising and managing treatment and determining what portion of the treatment, if any, will be in a 24-hour facility. The examiner recommends only whether the respondent will be held in a 24-hour facility pending hearing.

F. Alternative Procedure: Affidavit by Physician or Eligible Psychologist

As in the mental health commitment procedures, a physician or eligible psychologist who has examined the respondent may petition for substance abuse commitment without appearing before the clerk or a magistrate. *See supra* § 2.3H. The physician or eligible psychologist must conduct the examination in compliance with the requirements of the first examination described *supra* in § 3.3E and then execute the affidavit before any official authorized to administer oaths. G.S. 122C-281(d).

The legislature has not amended this statute to allow filing of the affidavit with the clerk or magistrate by facsimile transmission as of this writing. The parallel section in the mental health commitment section, G.S. 122C-261(d), was amended in 2005 to allow filing by facsimile transmission.

G. Second Examination

A second examination is required only when substance abuse commitment is recommended by the first examiner *and* the respondent is held in a 24-hour facility

pending hearing. This examination must occur within twenty-four hours of the respondent's arrival at the facility. G.S. 122C-285(a). If the first examination occurred at the "same facility in which the respondent is held, the second examination must occur not later than the following regular working day." G.S. 122C-285(b).

The second examination must be performed by a physician if the first examination was conducted by an eligible psychologist. If a physician performed the first examination, however, the second examination may be conducted by a "qualified professional," which includes a wide range of professionals. G.S. 122C-285(a); *see supra* § 3.2.

The examiner must use the same assessment criteria used for the initial examination. If the examiner finds that the respondent is a substance abuser and is dangerous to self or others, the examiner must hold the respondent for treatment pending a hearing. The examiner has the option of either holding the respondent at the 24-hour facility or designating other treatment pending the hearing. G.S. 122C-285(a).

If the second examiner does not find that the criteria for substance abuse commitment exist, the respondent must be released and the proceeding terminated. The individual who transported the respondent to the facility must return the respondent to the originating county. The examiner is required to report the reasons for the release in writing to the clerk of court of the county in which the custody order originated. G.S. 122C-285(a).

H. Duties of the Clerk of Superior Court

On receipt of a recommendation of substance abuse commitment from a physician or eligible psychologist, the clerk, on direction of a district court judge, must assign counsel, calendar the case for hearing, and give notice to the respondent, the respondent's counsel, and the petitioner of the time and place of the hearing. As in mental health commitment proceedings, the petitioner may file a written waiver of the right to notice of the hearing. G.S. 122C-284(a).

If the respondent was released pending hearing, the clerk of the county where the petition originated is responsible for these duties. If the respondent is held in a 24-hour facility pending hearing, the clerk of the county where the facility is located is responsible. *Id.*