# Involuntary Civil Commitment and the Inescapable Wetness of Light

*By R. Shawn Majette, Esq.*

When our friend and *NAELA News* Editor-in-Chief Ruth Ratzlaff asked me to write a "little article" about civil commitment for *NAELA News*, "just a couple of pages," of course I was flattered.

I thought it would be easy because I have served as a mental health judge (in Virginia, a "special justice") for more than 23 years, during which I believe I have heard 7,000 or more cases.

I dutifully commenced with an outline, my Lexis subscription, and plenty of time before the deadline.

Writer's block comes to all of us, except those to whom it should, but this was worse. After more false starts than usual, each tumbling into its predecessor more offensively than the last, that failure's ugly face poked its tongue at me, and the cheery month of March slipped between my legs like a sneering, oiled eel.

And then the truncheon blunted me behind the occiput, and in those stars were the light: I was trying to tell my friends what wet is. Or, more precisely, trying to write my friends how it is to be wet.

Would a literate fish, gamboling mere yards away in the easy breakers of the April surf here in North Carolina's Outer Banks (lightly pounding in my old ears as I finally tap this into the laptop in the quiet hours of my little firm's Annual Elder Law Retreat) find himself similarly perplexed when set to the briny task of explaining the state of wetness to a cactus?

Would he start with the chemical analysis? Would he leap from the water to the sand? Or, like I, suddenly realizing that he is surrounded and living in a perpetual wetness, smile, and spray the vegetable student with a bit of the moist stuff at hand, sigh, and hope for the best?

It is with this admission of failure and a trembling finger that I press the left button on my mouse and submit this article to Ruth.

Involuntary civil commitment is the only legal proceeding known to my grey hairs by which the state deprives a person of liberty without proof of a criminal act or a civil contempt.[1]

Fortunately for all of us, and especially your writer, the law has been settled since at least 1975 that "a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[2]

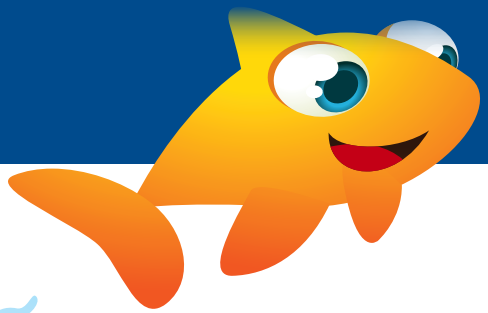
Because an involuntary civil commitment so intensely disrupts the normal life, a state may thus intrude upon proof of the predicate facts — mental illness and some character of dangerousness — by evidence which is clear and convincing, but not necessarily beyond a reasonable doubt.[3]

States are free within the confines of *Donaldson* and *Addington* to create statutory authority to effect civil com-

1 Demore v. Kim, 538 U.S. 510, 549 (2003) (pretrial immigration detention).

2 O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). Mr. Donaldson, held for 15 years under a civil commitment, was entitled to bring an under 42 USC 1983 for damages on the allegations that he was harmless to himself and others during much of the confinement period.

3 To meet due process demands, the standard has to inform the fact finder that the proof must be greater than the preponderance of the evidence standard applicable to other categories of civil cases. Addington v. Texas, 441 U.S. 418, 432-433 (1979).



mitments. Each state has done so,[4] and the lawyer must consult local law to understand state specific requirements.[5]

Clients, often the family members of the impaired individual, must be gently informed that the Constitution builds a protective hedge around mere eccentricity. Until a person's state of mind so affects himself or his peers that he is unable to control himself, and a consequent, articulable danger looms in the near future, one is free to glide, stagger, and crawl through life with his fancies, fears, and foibles intact.

However, when a mental illness is diagnosed,[6] *and* there is proof by clear and convincing evidence that there is "a substantial likelihood that, as a result of mental illness, the person will, in the near future:

1. Cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or
2. Suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, and
3. All available less restrictive treatment alternatives to involuntary inpatient treatment … have been investigated and determined to be inappropriate," the Court may enter an order for involuntary treatment in a mental health facility. The initial period cannot exceed 30 days, or 180 days for a subsequent commitment during the initial 30-day period.[7]

## Procedure

The procedure for these cases is closely defined by the applicable statutes.

A case for involuntary civil commitment is commenced with a petition, and usually involves the civil arrest of the respondent under an emergency custody order issued by a magistrate to require an initial evaluation.[8]

The initial evaluation is for a brief period not to exceed four hours. The evaluation must be conducted by a mental health professional designated by the local public mental health department or authority. The evaluator's findings are reduced to writing in a "screening report," which becomes evidence of the facts therein stated at the time of the evaluation.[9]

If the evaluation report and other evidence presented to the magistrate are persuasive that the respondent is mentally ill and requires hospitalization to avoid serious harm in the near future, a warrant is issued requiring the respondent to be taken into custody at a local hospital until a hearing can be scheduled.[10]

## The Hearing

The hearing is held as soon as notice can be given to the petitioner, who is permitted to appear in person, and to be represented by private counsel; counsel is *not* appointed for the petitioner.[11]

4 The Treatment Advocacy Center, which advocates on behalf of families in favor of involuntary commitment, publishes a useful analysis of statutory elements for the states at http://www.treatmentadvocacycenter.org/StateActivity/index.php?option=com_content&task=blogsection&id=7&Itemid=94.

5 References in this note relate to Virginia's statutory plan, Virginia Code § 37.2-800 *et seq.,* http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC37020000008000000000000.

6 Psychiatrists, social workers, and related clinicians often speak a frightful language punctuated by digital references. They can give a sensitive lawyer pause, but do not fear. They are speaking in the idiom of the *Diagnostic and Statistical Manual of Mental Disorders*. When this happens, http://allpsych.com/disorders/disorders_alpha.html is a helpful decoder ring, and will tell you (as it just has me) that in the fear of writing (and for the intrepid reader, your task of reading more of) this little note, a diagnosis of *Trichotillomania* may properly lie, DSM 312.39. Mercifully, states tend to define mental illness for these purposes more generally, and functionally. In Virginia, mental illness for purposes of involuntary civil commitment means "a disorder of thought, mood, emotion, perception, or orientation that significantly impairs judgment, behavior, capacity to recognize reality, or ability to address basic life necessities and requires care and treatment for the health, safety, or recovery of the individual or for the safety of others." Virginia Code § 37.2-100. In these proceedings, it includes the term "substance abuse," Virginia Code § 37.2-800, permitting process to help those in the grip of alcohol and other addictions.

7 Virginia Code § 37.2-817.

8 Virginia Code § 37.2-808.

9 Virginia Code § 37.2-816. The report is not subject to hearsay objections and must be considered by the Court, which may assign as much or as little weight to the same as the circumstances of the case dictate. For the form of report, see http://www.dbhds.virginia.gov/documents/forms/0224eMH.pdf.

10 Virginia Code § 37.2-809. The hearing must be held within 48 hours, unless there is an intervening weekend or holiday.

11 Virginia Code § 37.2-814.

Before the hearing, a statement of rights prescribed by the statute must be given to the respondent, and its content explained by his attorney.[12]

Before the hearing commences, an independent examiner is appointed by the court to examine the respondent. The examiner must be a designated health care licensee, and has particularized duties as a part of the evaluation process. The results of which must be reduced to written form for the court.[13]

In the hearing, the individual is represented by counsel of his own selection, or if none, then as appointed by the court.[14] Counsel has specific duties defined by the statute, which specifies that to the extent possible, the attorney's duty is to represent the wishes of the respondent.[15]

To avoid treatment for longer than is necessary, the director of the hospital having custody of the involuntary committee during the term of any involuntary civil com-

12 *Id.* The statement must at least inform the respondent of his rights to (i) retain private counsel or be represented by a court-appointed attorney, (ii) present any defenses including independent evaluation and expert testimony or the testimony of other witnesses, (iii) be present during the hearing and testify, (iv) appeal any order for involuntary admission to the circuit court, and (v) have a jury trial on appeal.

13 Virginia Code § 37.2-815. In Richmond, a psychiatrist generally serves in this capacity. The form of his report is found at http://www.dbhds.virginia.gov/documents/forms/1002IEpeMH.pdf.

14 Virginia Code § 37.2-814.

15 The attorney must also interview the respondent, the petitioner, the independent examiner described in § 37.2-815, the community services board staff, and any other material witnesses. He also shall examine all relevant diagnostic and other reports, present evidence and witnesses, if any, on his client's behalf, and otherwise actively represent his client in the proceedings. A health care provider shall disclose or make available all such reports, treatment information, and records concerning his client to the attorney, upon request. The role of the attorney shall be to represent the wishes of his client, to the extent possible.

mitment may release the involuntary committee at any time.[16] Generally this occurs upon order of the treating psychiatrist.

An aggrieved involuntary committee may appeal at any time during the first 30 days of any commitment in a *de novo* hearing, and is entitled to court appointed counsel and trial by jury as a matter of right on appeal.[17]

There are aspects of the involuntary civil commitment process which make it an important arrow to carry in the Elder Law attorney's quiver. Sometimes, it's the only arrow.

### Speed and Action

Compared with guardianship, the involuntary civil commitment process is *fast*.

Docket times for a guardianship may be upwards of two months; even an "emergency" guardianship proceeding may require several days to schedule, especially when there are time conflicts with other counsel.[18]

The hallmark of the proceeding is the focus upon *fresh* facts demonstrating an *immediate* need for hospitalization.

It is not unusual that a frantic call to "911" will result in nothing but a wearied police officer informing your client that nothing can be done until the gun is in her hand, or she commits some other crime. However, a knowledge of your local law and a Rolodex with the local mental health agency crisis unit numbers can be a huge help to your clients when seconds can save lives and a planned, targeted response is worth the world to your client.[19]

16 Virginia Code § 37.2- 838.
17 Virginia Code § 37.2- 821.

18 Absent good cause for waiver, Virginia imposes a seven-day delay from service of notice before a hearing on the petition may be held. Virginia Code § 37.2-1004.
19 The writer's little site for this material is http://mysite.verizon.net/shawn.majette/commitment.htm. Suggested forms for petitions for emergency consent (applicable in some cases only to physicians in Virginia, but perhaps more amplified in other jurisdictions) are

Likewise, knowing the language of your counterparts in the mental health profession can also assist your clients in making effective petitioners for intervention, and good witnesses in the hearings which result.

Like everything else, prepared clients are good witnesses. Nowhere has it been truer that a picture of newspapers stacked to the ceiling or the soiled bed clothes is worth several hundred words describing either. It is not unheard of to have The Paper Bag, containing samples of the soiled clothing with a provable chain of custody, accompany a determined petitioner to a hearing.

### Targeted Treatment Portal

Guardianship has its limits. More precisely, some cases that fall between the cracks of guardianship.

The definition of incapacity varies by state, but there will always be cases in which a person may be incapacitated but not necessarily mentally ill. There will also be cases in which a mentally ill person in need of treatment will not be incapacitated within the state's guardianship definition. Thus, there are cases in which a guardianship won't lie, or those in which it will, but it may as well stay in bed.

found at http://mysite.verizon.net/shawn.majette/2judconsforms.htm.



There are even cases when the incapacity is a mental illness (for example, dementia, the most common in the writer's private practice), but licensure and other statutory imbroglios bar the guardian from securing needed psychiatric treatment for an incapacitated ward.[20]

When the family member's objective is treatment for the mentally ill person, involuntary civil commitment process and its ancillary proceedings (often addressed simultaneously with the initial hearing) may therefore get results when nothing else will, and may be looked upon as a good analog to the guardianship/conservatorship proceedings.

Treatment for mental illness appears to focus largely on pharmaceuticals for conditions that can be well-managed by medicines.[21] These include depression, schizophrenia, bi-polar disorder, and certain obsessive compulsive disorders.

When the involuntary committee lacks capacity to consent to this treatment, or refuses it by reason of mental illness, a court order (if necessary under local law, as in Virginia) is available. These medicines can be seen as a portal for more lasting treatment.[22]

In these cases, an involuntary civil commitment both protects the involuntary committee and presents a platform in which the treating physician can evaluate his needs and offer medicines or other therapies (notably electroconvulsive treatments) to help. ■

20 In a case instituted before the present extension of Virginia's involuntary civil commitment laws, a circuit court held that a guardian could not commit the ward involuntarily, thus requiring involuntary commitment process pursuant to established civil commitment. The briefs for both positions (including one by a NAELA luminary) are posted, http://mysite.verizon.net/shawn.majette/2civcomoutlines.htm. The upshot was that the petitioner needed both the guardianship and help threading the involuntary civil commitment maze. Virginia remedied this unhappy situation in 2009 by permitting the trial court to authorize a specially authorized guardian to involuntarily admit an incapacitated ward for up to 10 days without the necessity of a separate involuntary civil commitment proceeding, Virginia Code § 37.2-805.1.

21 For a listing of some of these medicines which can be helpful in advising family members and informing physicians at the hospital regarding an involuntary committee's present medications, *see* http://mysite.verizon.net/shawn.majette/documents/Exhibit.pdf.

22 Virginia Code § 37.2-1102 provides that such therapies can be provided over the objection of an individual *only* when an involuntary civil commitment has been ordered.