§ 322.2. Proceedings to determine capacity. 1. Upon the receipt of examination reports ordered under section 322.1 of this act, the court shall conduct a hearing to determine whether the respondent is an incapacitated person. The respondent, the counsel for the respondent, the presentment agency and the commissioner of mental health or the commissioner of developmental disabilities, as appropriate, shall be notified of such hearing at least five days prior to the date thereof and afforded an opportunity to be heard.

2. If the court finds that the respondent is not an incapacitated person, it shall continue the delinquency proceedings.

3. If the court finds that the respondent is an incapacitated person, the court shall schedule a hearing to determine whether there is probable cause to believe that the respondent committed a crime. The order of proceeding at such hearing shall conform to section 325.2.

4. If the court finds that there is probable cause to believe that the respondent committed a misdemeanor, the respondent shall be committed to the custody of the appropriate commissioner for a reasonable period not to exceed ninety days. Unless the court specifies that such commitment shall be in a residential facility, such commissioner having custody may arrange for treatment in an appropriate facility or program, including an outpatient program, in accordance with subdivision (e) of section 7.09 or subdivision (c-1) of section 13.09 respectively, of the mental hygiene law. The court shall dismiss the petition on the issuance of the order of commitment and such dismissal shall constitute a bar to further prosecution of the charge or charges contained in the petition.

5. (a) If the court finds that there is probable cause to believe that the respondent committed a felony, it shall order the respondent committed to the custody of the commissioner of mental health or the commissioner of the office for people with developmental disabilities for an initial period not to exceed one year from the date of such order. Unless the court specifies that such commitment shall be in a residential facility, such commissioner having custody may arrange for treatment in an appropriate facility or program, including an outpatient

program, in accordance with subdivision (e) of section 7.09 or subdivision (c-1) of section 13.09 respectively, of the mental hygiene law. Such period may be extended annually upon further application to the court by the commissioner having custody or his or her designee. Such application must be made not more than sixty days prior to the expiration of such period on forms that have been prescribed by the chief administrator of the courts. At that time, the commissioner must give written notice of the application to the respondent, the counsel representing the respondent and the mental hygiene legal service if the respondent is at a residential facility. Upon receipt of such application, the court must conduct a hearing to determine the issue of capacity. If, at the conclusion of a hearing conducted pursuant to this subdivision, the court finds that the respondent is no longer incapacitated, he or she shall be returned to the family court for further proceedings pursuant to this article. If the court is satisfied that the respondent continues to be incapacitated, the court shall authorize continued custody of the respondent by the commissioner in a facility or program for a period not to exceed one year. Such extensions shall not continue beyond a reasonable period of time necessary to determine whether the respondent will attain the capacity to proceed to a fact finding hearing in the foreseeable future but in no event shall continue beyond the respondent's eighteenth birthday or, if the respondent was at least sixteen years of age when the act was committed, beyond the respondent's twenty-first birthday.

(b) If a respondent is in the custody of the commissioner upon the respondent's eighteenth birthday, or if the respondent was at least sixteen years of age when the act resulting in the respondent's placement was committed, beyond the respondent's twenty-first birthday, the commissioner shall notify the clerk of the court that the respondent was in his custody on such date and the court shall dismiss the petition.

(c) If the court finds that there is probable cause to believe that the respondent has committed a designated felony act, the court shall require that treatment be provided in a residential facility within the appropriate office of the department of mental hygiene or in an outpatient facility if the commissioner having custody of the child petitions the court pursuant to subdivision seven of this section and

such court approves.

(d) The commissioner shall review the condition of the respondent within forty-five days after the respondent is committed to the custody of the commissioner. He or she shall make a second review within ninety days after the respondent is committed to his or her custody. Thereafter, he or she shall review the condition of the respondent every ninety days. The respondent and the counsel for the respondent, shall be notified of any such review and afforded an opportunity to be heard. The commissioner having custody shall apply to the court for an order dismissing the petition whenever he or she determines that there is a substantial probability that the respondent will continue to be incapacitated for the foreseeable future. At the time of such application the commissioner must give written notice of the application to the respondent, the presentment agency and the mental hygiene legal service if the respondent is at a residential facility. Upon receipt of such application, the court may on its own motion conduct a hearing to determine whether there is substantial probability that the respondent will continue to be incapacitated for the foreseeable future, and it must conduct such hearing if a demand therefor is made by the respondent or the mental hygiene legal service within ten days from the date that notice of the application was given to them. The respondent may apply to the court for an order of dismissal on the same ground.

6. Any order pursuant to this section dismissing a petition shall not preclude an application for voluntary or involuntary care and treatment in a facility or program of the appropriate office of the department of mental hygiene pursuant to the provisions of the mental hygiene law. Unless the respondent is admitted pursuant to such an application he or she shall be released.

7. If the commissioner having custody of a child committed to a residential facility pursuant to subdivision four or paragraph (a) of subdivision five of this section determines at any time that such child may be more appropriately treated in a non-residential facility or on an outpatient basis, he or she may arrange for such treatment. If the commissioner having custody of a child committed to a residential facility pursuant to paragraph (c) of subdivision five of this section

determines at any time that such child may be more appropriately treated in a non-residential facility or on an outpatient basis, he or she may petition the family court for a hearing. If the court finds after a hearing that treatment in a non-residential facility or on an outpatient basis would be more appropriate for such child, the court shall modify its order of commitment to direct the commissioner to transfer the child to a non-residential facility or arrange outpatient treatment. Application for a hearing to determine whether any child committed to a residential facility under subdivisions four or five of this section may be more appropriately treated in a non-residential facility or on an outpatient basis may be made by the respondent.

8. If the commissioner having custody of the child determines at any time that such child is not an incapacitated person, he shall petition the court for a hearing. The respondent and the presentment agency shall be notified of such hearing within twenty-four hours of the scheduling of such hearing and afforded an opportunity to be heard. Application for such a hearing may be made by the respondent. If the court finds after the hearing that the child is no longer incapacitated, he shall be returned to the family court for further proceedings pursuant to this article.

9. Time spent by the respondent in the custody of a commissioner of an office within the department of mental hygiene or in a local hospital or detention facility pending transfer to the custody of the commissioner after a finding of incapacity, shall be credited and applied towards the period of placement specified in a dispositional order on the original petition.