

Incompetency Hearings: Procedure and Evidence

May 25, 2007

Lou Newman

NC Judicial College

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Guardianship Proceedings Procedural and Evidentiary Issues



Guardian ad Litem Attorney



Legal Authorities for Incompetency Proceedings:

- N.C.G.S. Chapter 35A
“Incompetency and Guardianship”
- N. C. Rules of Civil Procedure
- N. C. Rules of Evidence

**Chapter 1A.
Rules of Civil Procedure.**

§ 1A-1. Rules of Civil Procedure.

The Rules of Civil Procedure are as follows:

Article 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. They shall also govern the procedure in tort actions brought before the Industrial Commission except when a differing procedure is prescribed by statute. (1967, c. 954, s. 1; 1971, c. 818.)

**Chapter 8C.
Evidence Code.**

§ 8C-1. Rules of Evidence.

The North Carolina Rules of Evidence are as follows:

Article 1.

General Provisions.

Rule 101. Scope.

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101. (1983, ch. 701, s. 1.)

Rule 102. Purpose and construction.

(a) In general. — These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Miscellaneous Rules.

Rule 1101. Applicability of rules.

- (a) Proceedings generally. – Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.
 - (b) Rules inapplicable. – The rules other than those with respect to privileges do not apply in the following situations:
 - (1) Preliminary Questions of Fact. – The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).
 - (2) Grand Jury. – Proceedings before grand juries.
 - (3) Miscellaneous Proceedings. – Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.
 - (4) Contempt Proceedings. – Contempt proceedings in which the court is authorized by law to act summarily. (1983, c. 701, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 14; 1985, c. 509, s. 2.)
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Who may attend the hearing?



Gladys Kravitz

“I’m just curious.”

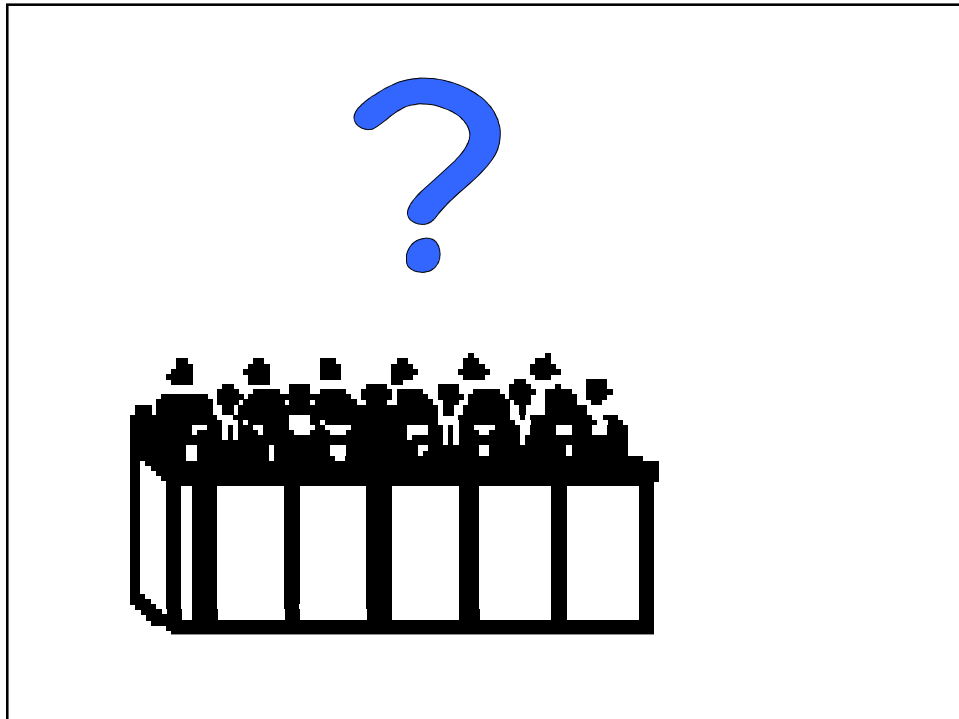


Reporter

“The public has a right to know!”

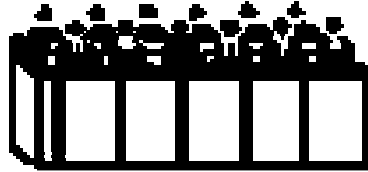
§ 35A-1112. Hearing on petition; adjudication order.

- (a) The hearing on the petition shall be at the date, time, and place set forth in the final notice of hearing and shall be open to the public unless the respondent or his counsel or guardian ad litem requests otherwise, in which event the clerk shall exclude all persons other than those directly involved in or testifying at the hearing.



§ 35A-1110. Right to jury.

The respondent has a right, upon request by him, his counsel, or his guardian ad litem, to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. The jury shall be composed of 12 persons chosen from the county's jury list in accordance with the provisions of Chapter 9 of the General Statutes. (1987, c. 550, s. 1.)



EVIDENCE

Petitioner?

Respondent?

Other relative?

Friend?

§ 35A-1112. Hearing on petition; adjudication order.

(b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses.

Dr. Nick Riviera
Suite 101
Springfield Medical Building
Springfield, MM
(888)555-1011

To Whom It May Concern:

I have examined Mrs. Inez Smith and have concluded that she is incompetent.

*Dr. Nick Riviera
4/17/07*

_____ **Rx**

Hope Valley Nursing Home
1234 Hope Valley Rd.
Durham, North Carolina 27777
919-682-6820

To Whom It May Concern:
Re: Inez Smith

I am writing this note at the request Mrs. Smith's son, Paul. Mrs. Smith has been a resident of Hope Valley Nursing Home since February 25, 2007, following her discharge from Durham Regional Hospital for treatment of a stroke. The stroke has significantly limited her ability to communicate and make decisions for herself. She also shows signs of progressive dementia. In my opinion, Mrs. Smith is not competent to manage her own affairs.

Sincerely,
Nick Riviera, M.D.
Attending Physician
Hope Valley Nursing Home

Article 8.
Hearsay.

Rule 801. Definitions and exception for admissions of a party-opponent.

The following definitions apply under this Article:

- (a) Statement. – A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.
- (b) Declarant. – A "declarant" is a person who makes a statement.

(c) Hearsay. – "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

- (d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy. (1983, c. 701, s. 1.)

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by statute or by these rules. (1983, c. 701, s. 1.)

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (4) Statements for Purposes of Medical Diagnosis or Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(6) Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(24) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

Subpoena of Documents served upon Dr. Nick Riviera:

Request for all medical records of Inez Smith, including but not limited to the results of all testing, examination reports, all progress notes, and reports of any and all diagnoses.

To be produced on April 25, 2007
County Courthouse, Room 1207

*Affidavit of Sue Smith
To Whom It May Concern:*

I am the daughter of Inez Smith. My mother lived with me in Florida until two months ago when she moved to North Carolina. Over the past two years my mother started forgetting things and didn't act like herself. I took her to the doctor here and she said she has Alzheimer's. Mama took the car out right before she moved and got lost the police had to bring her back home. She cussed out me and the police and she has never cussed in her life. I have arthritis bad and couldn't take care of Mama anymore and I can't travel because it is too painful. I just want help for my mother and for her to be safe. I hope you will name my brother Paul as guardian so he can look out for her.

*Sincerely,
Sue Smith
April 17, 2007*

Subscribed and witness before me this
the ____ day of April, 2007.
Jane X. Doe (SEAL)
Jane X. Doe, Notary Public

Rule 804. Hearsay exceptions; declarant unavailable.

- (a) Definition of unavailability. – "Unavailability as a witness" includes situations in which the declarant:
- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
 - (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
 - (3) Testifies to a lack of memory of the subject matter of his statement; or
 - (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
 - (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

1. Former Testimony. . . .
2. Statement Under Belief of Impending Death. . . .
3. Statement Against Interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.
4. Statement of Personal or Family History. – (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

- (5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

Sue Smith



**Chapter 8C.
Evidence Code.**

Article 7.
Opinions and Expert Testimony.

Rule 701. Opinion testimony by lay witness.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. (1983, c. 701, s. 1.)

MULTIDISCIPLINARY



EVALUATIONS



Purpose:

“To assist in determining the nature and extent of a respondent’s disability, or to assist in developing an appropriate guardianship plan or program...”

G.S. 35A-1111(a).

§ 35A-1111. Multidisciplinary evaluation.

(a) To assist in determining the nature and extent of a respondent's disability, or to assist in developing an appropriate guardianship plan and program, the clerk, on his own motion or the motion of any party, may order that a multidisciplinary evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be made in writing and filed with the clerk within 10 days after service of the petition on the respondent.

§ 35A-1111. Multidisciplinary evaluation.

(b) If a multidisciplinary evaluation is ordered, the clerk shall name a designated agency and order it to prepare, cause to be prepared, or assemble a current multidisciplinary evaluation of the respondent. The agency shall file the evaluation with the clerk not later than 30 days after the agency receives the clerk's order. The multidisciplinary evaluation shall be filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of a guardian under Subchapter II of this Chapter, or both. Unless otherwise ordered by the clerk, the agency shall send copies of the evaluation to the petitioner and the counsel or guardian ad litem for the respondent not later than 30 days after the agency receives the clerk's order. The evaluation shall be kept under such conditions as directed by the clerk and its contents revealed only as directed by the clerk. The evaluation shall not be a public record and shall not be released except by order of the clerk.

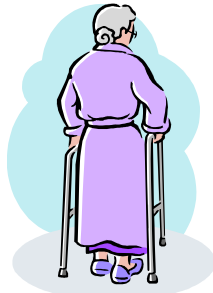
Mental Health Center



Dr. Ima Bizet

§ 35A-1111. Multidisciplinary evaluation.

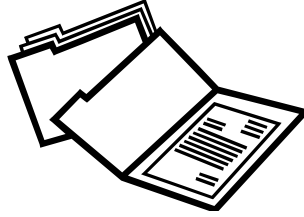
(c) If a multidisciplinary evaluation does not contain medical, psychological, or social work evaluations ordered by the clerk, the designated agency nevertheless shall file the evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter, the agency shall explain why the evaluation does not contain such medical, psychological, or social work evaluations.



**“I’m not going. That is not my doctor!
You’ll just have to haul me off to jail.”**

**§ 35A-1111. Multidisciplinary
evaluation.**

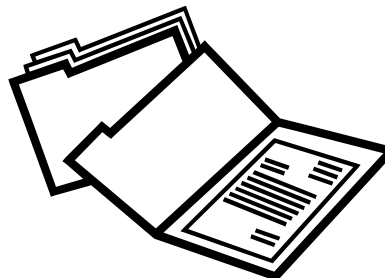
(d) The clerk may order that the respondent attend a multidisciplinary evaluation for the purpose of being evaluated.



Report from Mental Health Center

§ 35A-1111. Multidisciplinary evaluation.

(e) The multidisciplinary evaluation may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian under Subchapter II of this Chapter, or both. (1987, c. 550, s. 1.)





Dr. Bizet under cross-examination.