

817.05 INCOMPETENCY—RESTORATION.

NOTE WELL: N.C.G.S. § 35A-1130 provides for a six person jury trial upon request by the ward, the ward's counsel, or the ward's guardian ad litem. "Failure to request a trial by jury shall constitute a waiver of the right." However, the clerk may "require trial by jury in accordance with N.C.G.S. § 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on [the clerk's] own motion." The Clerk's order on a restoration of competency may be appealed to the Superior Court.

The *(state number)* issue reads:

"Is *(name of ward)* a competent adult¹?"

In an earlier case, *(name of ward)* was declared to be an incompetent adult and a guardian *ad litem* was appointed to manage *(the ward)*'s property and personal affairs.

(Name moving party) now seeks to have [[his] [her] competency] [the competency of *(name of ward)*] restored. On this issue, the burden of proof is on the *(name moving party)*.² This means that the *(name moving party)* must prove, by the preponderance of the evidence,³ that *(name of ward)* is a competent adult.

A "competent adult" is an adult who has sufficient capacity to manage [his] [her] own affairs and to make and communicate important decisions concerning [his] [her] person, family or property.

A person has sufficient capacity to manage [his] [her] own affairs if [he] [she] is able to transact the ordinary business involved in taking care of [his] [her] property, and is able to exercise rational judgment and weigh the consequences of [his] [her] actions upon [himself] [herself], [his] [her] [family] [property].⁴ A person does not lack competence because another might manage that person's property more wisely or efficiently, or because lack of judgment is shown in an isolated incident and does not apply to the

person's management of [his] [her] entire property and business. If the person understands what is required for the management of [his] [her] ordinary business affairs and is able to perform those acts with reasonable continuity, and if the person comprehends the effect of what [he] [she] does and can exercise [his] [her] own will, [he] [she] has the capacity to manage [his] [her] own affairs.

A person has sufficient capacity to make and communicate important decisions about [his] [her] person, family, or property if the person is able to make and communicate decisions about how to furnish the necessities of life, such as food, shelter, clothing, and medical care for [himself] [herself] [and [his] [her] [family] [property].

(Use the following bracketed paragraph if there is evidence of a least restrictive alternative.)

[A person does not lack competence if, by means of a less restrictive alternative, a person is able to sufficiently manage [his] [her] affairs and communicate important decisions concerning [his] [her] person, family, and property.⁵ A less restrictive alternative is an arrangement enabling the respondent to manage [his] [her] affairs or make or communicate important decisions concerning [his] [her] person, property, or family that restricts fewer rights of the respondent than would the adjudication of incompetency and appointment of a guardian.⁶]

(Use the following bracketed language if there is evidence that the person adjudicated incompetent suffers from a disease or medical condition.)

[The fact that (*name of ward*) has certain medical conditions does not by itself prove lack of sufficient capacity. In this case, evidence has been presented that (*name of ward*) suffers from (*name of disease, injury, or medical condition*). The law defines (*name of disease, injury, or medical*

condition) as (*provide appropriate definition from N.C.G.S. § 35A-1101*⁷). This evidence is to be considered in the same manner as any other evidence presented in this hearing. Even if you find that (*name of ward*) suffers from (*name of disease, injury, or medical condition*), that alone does not mean that (*name of ward*) lacks sufficient capacity and is incompetent. The only issue for you to decide is whether (*name of ward*) has sufficient capacity to make and communicate important decisions about [his] [her] [person] [family] [property] and to manage [his] [her] [own affairs.]

Finally, as to this issue on which (*name moving party*) has the burden of proof, if you find, by the preponderance of the evidence, that (*name of ward*) is a competent adult, then it would be your duty to answer this issue “Yes” in favor of (*name moving party*).

If, on the other hand, you fail to so find, then it would be your duty to answer this issue “No.”

1. In a restoration proceeding, it is unlikely that the ward is an emancipated minor.

2. N.C.G.S. § 35A-1130.

3. N.C.G.S. § 35A-1130 provides that the standard of proof required is by a “preponderance of the evidence.” In other pattern instructions, the phrase “by the greater weight of the evidence” is used. Both phrases, taken together, are substantially similar.

4. *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 80 N.C. App. 122, 125, 341 S.E.2d 608, 610 (1986) (key issue in a competency inquiry is subject's ability to manage his affairs).

5. This language was added to N.C.G.S. § 35A-1101 by Session Law 2023-124.

6. The term “less restrictive alternative” includes supported decision making, appropriate and available technological assistance, appointment of a representative payee, and appointment of an agent by the respondent, including appointment under a power of attorney for health care or power of attorney for finances. N.C.G.S. § 35A-1101(11a).

7. Each condition is specifically defined in the statute.