817.00 INCOMPETENCY.

> *NOTE WELL: N.C. Gen. Stat. § 35A-1110 provides for a jury trial "upon request by the respondent, respondent's counsel, or* his *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. Gen. Stat. § 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on* his *own motion." N.C. Gen. Stat. § 35A-1115 provides that appeal of "an order adjudicating incompetence shall be to the Superior Court for hearing* de novo*." Although not specified by statute or appellate decision, it would seem that the foregoing statutes permitting a jury trial request would be applicable to the* de novo *hearing in Superior Court. In an action for "Restoration of Competence," N.C. Gen. Stat. § 35A-1130 similarly provides for the right to trial by jury and appeal to the Superior Court.*[1]

The (*state number*) issue reads:

"Is the respondent an incompetent adult?"

An "incompetent adult" is an adult or emancipated minor who lacks sufficient capacity to manage *his* own affairs, or to make or communicate important decisions concerning *his* person, family or property. This lack of mental capacity may be due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury or some similar cause or condition.[2]

On this issue, the burden of proof is on the petitioner(s). This means that the petitioner(s) must prove, by clear, strong[3] and convincing evidence, two things:

First, that the respondent is an [adult] [emancipated minor].[4]

[In this case I instruct you that the respondent is an [adult]

[emancipated minor].]

Second, that the respondent either lacks sufficient capacity to manage *his* own affairs, or that the respondent lacks sufficient capacity to make or communicate important decisions concerning *his* person, family or property.

A person lacks sufficient capacity to manage *his* own affairs if the person is unable to transact the ordinary business involved in taking care of property, and is unable to exercise rational judgment and weigh the consequences of *his* acts upon *himself*, *his* family, or *his* property.[5] It is not enough to show that another might manage that person's property more wisely or efficiently, or to show lack of judgment in an isolated incident which does not apply to the person's management of *his* entire property or business.[6] If the person understands what is required for the management of ordinary business affairs and is able to perform those acts on a reasonably consistent basis,[7] and if the person comprehends the effect of what *he* is doing and can exercise *his* own will, the person does not lack capacity to manage *his* affairs.

A person lacks sufficient capacity to make or communicate important decisions about *his* person, family or property if the person is unable to make or communicate decisions about how to furnish the necessities of life, such as food, shelter, clothing and medical care for *himself* and *his* family, if any.[8]

The law does not require proof that such lack of capacity is caused by any particular cause or condition. Although the definition of incompetent adult refers to certain specific medical conditions, lack of capacity may be shown without evidence that the respondent suffers from any of those medical conditions. Likewise, evidence that the respondent suffers from any of those specific conditions does not, by itself, prove

lack of sufficient capacity.[9]

(In this case, evidence has been presented that the respondent suffers from (*state name of disease, injury or medical condition*). The law defines (*state name of disease, injury or medical condition*) as (*state appropriate definition from N.C. Gen. Stat. § 35A-1101*).[10] This evidence is to be considered in the same manner as any other clear, strong and convincing evidence presented in this hearing and should not be given any greater weight or credibility than the rest of the evidence. Even if you find that the respondent suffers from (*state name of disease, injury or medical condition*), that alone does not mean that the respondent lacks sufficient capacity and is incompetent, as I have defined those terms for you.)

Finally, as to this issue on which the petitioner(s) [has] [have] the burden of proof, if you find, by clear, strong and convincing evidence, that the respondent at this time is an adult or emancipated minor, and lacks sufficient capacity to manage *his* own affairs, or to make or communicate important decisions concerning *his* person, family or property, then it would be your duty to answer this issue "Yes" in favor of the petitioner(s).

If, on the other hand, you fail to so find, then it would be your duty to answer the issue "No" in favor of the respondent.

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1. However, in contrast to the twelve person jury required by N.C. Gen. Stat. § 35A-1110, N.C. Gen. Stat. § 35A-1130 mandates a jury of six persons.

2. N.C. Gen. Stat. § 35A-1101(7).

3. N.C. Gen. Stat. § 35A-1112(d) provides that the burden of proof is "clear, cogent and convincing evidence." To be consistent with other pattern charges, the phrase "clear, strong and convincing" is used. For an instruction, *see* N.C.P.I. 101.11. In an action for "Restoration of Competency," the burden of proof is on the respondent to prove

competency "by a preponderance of the evidence." N.C. Gen. Stat. § 35A-1130.

4. *See* N.C. Gen. Stat. § 90-85.3(h) ("Emancipated minor means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.").

5. *Cf. Soderlund v. Kuch*, 143 N.C. App. 361, 373, 546 S.E.2d 632, 638 (2001) ("Incompetent adult" not shown where the adult was able to arrange for places to live, signed leases, cooked, went shopping, held several jobs, attended college, obtained driver's licenses, drove vehicles, owned farmland, traveled and lived in foreign countries, produced a ballet, and created music.); *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 105, 165 S.E.2d 490, 499 (1969) (There is "no completely satisfactory definition of the phrase "incompetent from want of understanding to manage his own affairs. . . ." The facts in every case will be different and competency and incompetency will depend upon the individual's "general frame and habit of mind.").

6. *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). The term "affairs" encompasses more than "just one transaction or one piece of property to which he may have a unique attachment." *Hagins*, 275 N.C. at 106, 165 S.E.2d at 499.

7. *Hagins*, 275 N.C. at 104-106, 165 S.E.2d at 501.

8. *See supra*, note 5.

9. *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 557, 589 S.E.2d 391, 401 (2003), *cert. denied*, 358 N.C. 241, 594 S.E.2d 194 (2004), *cert. dismissed*, 358 N.C. 241, 594 S.E.2d 193 (2004) (appropriate test for establishing an adult incompetent is not based necessarily on physical infirmity, but is rather "'one of mental competence to manage one's own affairs'") (quoting *Cox*, 80 N.C. App. at 125, 341 S.E.2d at 610).

10. Each disease is specifically defined in the statute.