

## 7.11 Hearing on Capacity to Proceed

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## 7.11 Hearing on Capacity to Proceed

### A. Request for Hearing

A hearing on capacity is typically calendared on receipt of the examiner's report, but if one has not been calendared, counsel should specifically request a hearing on capacity to proceed. *See also supra* § 7.10B, After Examination Finding Defendant Capable to Proceed.

### B. Nature of Hearing

In practice, a hearing on the juvenile's capacity may be somewhat informal. Nevertheless, a capacity hearing must, at a minimum, afford the juvenile the opportunity to present any evidence relevant to the question of the juvenile's capacity to proceed. *State v. Gates*, 65 N.C. App. 277, 283 (1983).

Although no appellate court has yet addressed the question of whether the North Carolina Rules of Evidence apply at capacity hearings, the operation of Rules of Evidence 101 and 1101 indicate that they apply. *See, e.g., State v. Foster*, 222 N.C. App. 199, 202–03 (2012) (holding that the Rules of Evidence apply to post-conviction DNA testing proceedings because such proceedings are not listed as excluded under N.C. R. Evid. 1101(b) and no statute bars their application to the proceedings). At the least, the courts have stated that the "safer practice" is for the courts to follow the rules of evidence because they may not base findings on inadmissible evidence. *State v. Willard*, 292 N.C. 567, 592 (1977).

G.S. 15A-1002(b1) mandates that the trial court make findings of fact, based on evidence presented at the hearing, to support its determination of the juvenile's capacity to proceed. G.S. 15A-1002(b1). Previously, findings were recommended but not required. *See State v. O'Neal*, 116 N.C. App. 390, 395–96 (1994) (the "better practice" is for judge to make findings).

### C. Evidentiary Issues

**Examination results.** Either party may call the examiner from a court-ordered examination, and the examiner's report is admissible. G.S. 15A-1002(b)(1a), (b)(2).

**Opinion testimony.** Both lay and expert witnesses may give opinions about whether the juvenile is able to perform the functions listed in G.S. 15A-1001(a). *State v. Silvers*, 323 N.C. 646, 654 (1989). However, neither lay nor expert witnesses may testify that the juvenile is or is not capable to proceed because such testimony involves a legal conclusion. *Id.* If the trial court prevents counsel from presenting proper opinion testimony on the question of the juvenile’s capacity to proceed, counsel must make an offer of proof to preserve the testimony in the event of an appeal. *State v. Simpson*, 314 N.C. 359, 370 (1985); *In re H.D.*, 184 N.C. App. 188 (2007) (unpublished).

Testimony by lay witnesses may support or even override expert testimony. In addition to testifying about the functions in G.S. 15A-1001(a), lay witnesses may be in a good position to relate their observations of and dealings with the juvenile. *See State v. Silvers*, 323 N.C. 646 (1989) (vacating conviction and remanding case for failure to allow defendant to present testimony of lay witnesses); *State v. Willard*, 292 N.C. 567 (1977) (upholding finding of capacity based in part on testimony of lay witnesses).

**Counsel’s observations and opinion.** Defense attorneys may offer their own observations and opinions about the juvenile’s capacity, but such statements without more may be unpersuasive and may not even be permitted. *See State v. Gates*, 65 N.C. App. 277 (1983) (upholding capacity finding where counsel offered own observations of defendant’s behavior but presented no medical evidence); *In re H.D.*, 184 N.C. App. 188 (2007) (unpublished) (counsel’s statement that he felt juvenile lacked capacity was not competent evidence and did not provide basis for reversing finding of capacity; court also found no error in trial court’s ruling that counsel could not testify about his juvenile client’s capacity unless he withdrew from representation). *But see State v. McRae*, 163 N.C. App. 359 (2004) (“Because defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel’s representation that his client is competent”); N.C. Rules of Professional Conduct, Rule 3.7(a)(3) (lawyer may act as advocate at trial in which lawyer is likely to be necessary witness if disqualification of lawyer would work substantial hardship on client), Rule 1.14(c) (lawyer is impliedly authorized to reveal confidential information about client with diminished capacity to extent reasonably necessary to protect client’s interest).

#### **D. Objection to Finding of Capacity**

If the trial court enters an order finding the juvenile capable to proceed, counsel should object at the conclusion of the capacity hearing and again at the beginning of the adjudicatory hearing to ensure the issue is preserved for appeal. The failure to object waives the issue. *State v. Robertson*, 161 N.C. App. 288, 290 (2003) (requiring that the defendant make a capacity objection at the beginning of trial); *In re Pope*, 151 N.C. App. 117, 119 (2002) (noting lack of objection to capacity at the capacity or adjudication hearing). Counsel should also assert that the finding would violate the juvenile’s right to due process. The failure to specify due process as a ground for objection waives the argument on appeal. *State v. Wiley*, 355 N.C. 592, 624 (2002). *But see* 1 NORTH

CAROLINA DEFENDER MANUAL § 2.7E, Objection to Finding of Capacity (2d ed. 2013) (suggesting that failure to object may not waive issue).

### **E. Effect of Finding of Incapacity by Court**

When the court finds a juvenile incapable of proceeding, it is authorized by G.S. 15A-1003 to initiate commitment proceedings under Part 7 of Article 5 of Chapter 122C of the General Statutes. *See* G.S. 7B-2401 (stating that G.S. 15A-1003 applies). For a discussion of commitment procedures, see NORTH CAROLINA CIVIL COMMITMENT MANUAL Ch. 2, Involuntary Commitment of Adults and Minors for Mental Health Treatment (2d ed. 2011).

G.S. 15A-1006 and 15A-1007 permit a court to hold supplemental hearings to determine if the defendant in a criminal case has gained capacity to proceed and calendar the criminal case for trial. However, the General Assembly did not make these statutes applicable to juvenile delinquency cases. G.S. 7B-2401. The procedure for bringing a juvenile back to court if he or she later becomes capable is therefore uncertain. Rather than leave the case pending while the juvenile is incapable, some prosecutors may choose to dismiss the case and refile the petition later if the juvenile appears to have gained capacity. Language recently added to G.S. 7B-2404 authorizes a prosecutor to take a voluntary dismissal of a juvenile petition. *See* 2015 N.C. Sess. Laws Ch. 58 (H 879). The statute is unclear about the circumstances in which the prosecutor may refile.