

PROBATE CORNER

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ARTICLE: Deposing An Incapacitated Person

As a prerequisite to deposing an incapacitated person (or an alleged incapacitated person), it may be necessary to: (a) have a hearing to determine whether the witness is disqualified from testifying, and/or (b) submit written deposition questions to the witness.

A witness is presumed competent to testify until the contrary is established. *See* §90.601, Fla. Stat. (every person is competent to be a witness, except as otherwise provided by statute); Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000); Hawk v. State, 718 So. 2d 159 (Fla. 1998). Even a person who has been declared insane can be found competent to testify. *See* Belcher v. Johnson, 834 So. 2d 422 (2nd DCA 2003), *citing* Fla. Power & Light Co. v. Robinson, 68 So. 2d 406 (Fla. 1953). The witness's unreliability goes to his credibility, which is for the trier-of-fact to consider. *See* Terry v. State, 668 So. 2d 954, footnote 9 (Fla. 1996), *citing* Weygant v. Fort Meyers Lincoln Mercury, Inc., 640 So. 2d 1092 (Fla. 1994).

A witness is incompetent to testify if the Court determines the witness is (1) unable to communicate to the Court; (2) unable to understand the duty to tell the truth; or (3) unable to perceive and remember the events. *See* Rutherford, *Supra*; *citing* §§ 90.603, .604, Fla. Stat. Competency to testify is established when a witness has sufficient understanding to comprehend the obligations of the oath and is capable of giving a correct account of the matters which the witness has seen or heard relative to the question at issue. *See* Kaelin v. State, 410 So. 2d 1355 (Fla. 4th DCA 1982).

In Belcher v. Johnson, 834 So. 2d 422 (Fla. 2nd DCA 2003), the Belchers sought to take the deposition of Ms. Roberts, who is an elderly woman suffering from dementia. Her guardian filed a motion for protective order seeking to prevent the deposition because Ms. Roberts was, to some degree, legally incapacitated. The trial court granted the protective order without an evidentiary hearing and without making a factual determination that Ms. Roberts should be disqualified to testify as a witness under §90.603, F.S. Apparently, the trial court assumed that Ms. Roberts' incapacity for purposes of a guardianship proceeding rendered her disqualified to testify as a matter of law. The court quashed the protective order and remanded to the trial court to conduct a hearing to determine whether Ms. Roberts should be disqualified from testifying pursuant to section 90.603. The court reasoned that even a person who has been declared insane can be found competent to testify.

In Urbanek v. Hopkins, 993 So. 2d 1110 (Fla. 4th DCA 2008), a beneficiary of certain irrevocable living trusts sued the trustee for breach of fiduciary duty for failing to make distributions. In turn, the trustee counter-sued asserting that the beneficiary had induced the grantor to exert undue influence on the trustee to make improper distributions. The grantor was the father of the beneficiary and was not a party to the case. No claims were

made by or against the grantor. The trustee sought to take the grantor's oral deposition. The grantor's attorney objected to the deposition because the grantor was 88 years old and suffering from Parkinson's disease. The attorney furnished the trial court with a detailed affidavit from a physician who had specific knowledge about the grantor's condition and filed a motion to limit the deposition to written questions. In response, the trial court ordered the grantor and his physician to appear in court for a hearing on the grantor's medical condition. In spite of the affidavit establishing danger to the grantor's health from being forced to appear for a deposition, the judge nevertheless insisted that he come to court to testify and rejected the alternative of first permitting only a written deposition. The grantor did not personally come to court and appeared at the hearing through counsel. The trial judge ordered the grantor to submit to a compulsory medical examination (CME) by a physician chosen by the trustee within the next 30 days.

The appellate court quashed the order requiring a CME. The court found that the trustee failed to establish good cause for a CME and that initially, any deposition had to be limited to written deposition questions. The court reasoned:

As to the compulsory medical examination (CME) of the grantor-father, the trial judge overlooked the burden placed by Florida Rule of Civil Procedure 1.360 on the proponent of a CME. Under the rule, the party seeking a CME must show that the person to be examined is a party in the litigation who has himself placed his physical condition at issue. The party seeking the CME must establish good cause for such an exam. Here the trial judge should have first required written deposition questions of the grantor-father. Before the trustee could thereafter show good cause for a CME, he would thereupon have to show why the results of the written deposition failed to furnish the relevant information sought from the grantor-father.

In *Gordon v. Davis*, 267 So. 2d 874 (Fla. 3rd DCA 1972), plaintiff filed a slander action against defendant, which alleged that defendant called plaintiff psychotic. Defendant alleged the truth of the statement and want of malice as an affirmative defense. The trial court entered an order that plaintiff submit to a mental examination. Plaintiff contended entry of the order for examination was error because Fla. R. Civ. P. 1.360 was limited in scope to negligence cases, that the mental condition of plaintiff was not a matter in controversy in this case, and that good cause for the order was not shown. On appeal, the court found that Fla. R. Civ. P. 1.360 was not limited to personal injury actions. Plaintiff's mental condition was placed in controversy because the alleged slander was based on statements regarding plaintiff's mental condition. The court reasoned in part:

Under Rule 1.360 FRCP, in an action in which the mental or physical condition of a party is in controversy, examination of the party with respect thereto may be ordered, when good cause is shown therefor, without regard to the form or type of the civil action in which it is involved. In permitting such compulsory examination the rule does not

affect "substantive rights" of the litigants, since it relates exclusively to the obtaining of evidence, and is therefore procedural.