

**ARTICLE 8**  
**COMPETENCY IN DELINQUENCY CASES**

## 15-11-801. Purpose

The purpose of this article is to:

- (1) Set forth procedures for a determination of a child's mental competency to stand trial; and
- (2) Provide a mechanism for the development and implementation of competency restoration or remediation services, when appropriate, including treatment, habilitation, support, or supervision services.

### Comments

One of the basic tenets of criminal law is that an individual must be competent to stand trial in order for those due process rights to which he or she is entitled to have any meaning. Drope v. Missouri, 420 U.S.162, 171 (1975)(holding that the prohibition against trying or convicting a defendant while incompetent to stand trial is “fundamental to an adversary system of justice.”); See also Elizabeth S. Scott and Thomas Grisso, Developmental Incompetence, Due Process, and Juvenile Justice, 83 N.C. L. Rev. 793, 795 (2005); Richard J. Bonnie and Thomas Grisso, Adjudicative Competence and Youthful Offenders, Youth on Trial 75 (Thomas Grisso and Robert G Schwartz eds., 2000). This principle applies in delinquency cases as well. In the Interest of S.H., 469 S.E.2d 810 (Ga. App. 1996)(holding that a child's due process rights were violated when he was adjudicated delinquent while incompetent to stand trial). Evaluating competency in delinquency cases involves the additional consideration of incompetence based solely on developmental immaturity. Thomas Grisso, Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform, 12 Am. Bar Assoc. Criminal Justice Magazine 3 (1997). Notably, the recognition of this significant factor is already found in current law. See O.C.G.A. § 15-11-151(5).

The new provisions governing competency in delinquency proceedings are intended to provide clear procedures for evaluating whether a child is mentally competent to stand trial and to remove any ambiguity regarding the goals of the competency statute: to restore or remediate when possible and appropriate. The provisions are structured to provide a succinct procedure for this process and to provide guidance on the various possible disposition options available to children who are found incompetent to stand trial. To address the complexity of determining disposition options available for the child who is found incompetent to stand trial based solely on developmental immaturity or for the child found to be unrestorably incompetent to stand trial, this proposed statute provides the option of designating the child's case as a child in need of services proceeding. Accordingly, as explained in article 6, the original provisions governing the “plan manager” and the development of a “mental competency plan” have been removed from the competency statute as their structure better serves the provision of necessary mental health services through the new statutory framework of article 6. See Scott and Grisso, Developmental Incompetence, at 839-840 (suggesting that mental health and

social service dispositions may be appropriate for some children found incompetent to stand trial).

The purpose provision is drawn from O.C.G.A. § 15-11-150 and is revised to reflect the clarified role of the competency statute.

## **15-11-802. Definitions**

- (1) “Division,” as used in this article, means the Division of Mental Health, Developmental Disabilities and Addictive Diseases;
- (2) “Examiner” means a licensed psychologist or psychiatrist who has expertise in child development specific to severe or chronic disability of children attributable to intellectual impairment and has received training in forensic evaluation procedures through formal instruction, professional supervision, or both.
- (3) “Mental competency proceedings” means hearings conducted to determine whether a child is mentally competent to participate in adjudication, a disposition hearing, or a transfer proceeding.
- (4) “Mentally competent” means having sufficient present ability to understand the nature and object of the proceedings, to comprehend his or her own situation in relation to the proceedings, and to assist counsel in the preparation and presentation of his or her case in all adjudication, disposition, or transfer hearings. The child’s age or immaturity may be used as the basis for determining the child’s competency.
- (5) “Mentally ill” means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.
- (6) “Mental retardation” means a state of significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating in the developmental period.

### **Comments**

This provision compiles the definitions relevant to competency proceedings.

1. This term is included for clarity.
2. This term is current O.C.G.A. § 15-11-151(9). The revision strikes the descriptive term “qualified” from “qualified examiner” as superfluous. The expanded definition of an examiner is drawn from Louisiana Children’s Code Ann. art. 834(A)(1) and emphasizes that the evaluation of a child requires specialized knowledge. See Thomas Grisso, *Clinical Evaluations for Juveniles’ Competence to Stand Trial: A Guide for Legal Professionals*, 15 (2005)(stating that “evaluations should be performed by mental health professionals who are specialized not only in evaluations for forensic questions, but also are specialized

in the diagnosis of children's mental disorders and the assessment of youths' developmental capacities.”).

3. This term is current O.C.G.A. § 15-11-151(4) and remains substantively unchanged.
4. This term is current O.C.G.A. § 15-11-151(5) and remains substantively unchanged.
5. This term is current O.C.G.A. § 15-11-151(6) and remains substantively unchanged.
6. This term is current O.C.G.A. § 15-11-151(7) and remains substantively unchanged.

**15-11-803. Stay of proceedings regarding child who may not be mentally competent to stand trial**

- (a) When a delinquency petition is filed alleging a child under the age of 14 has committed a serious violent felony as defined in Code section 17-10-6.1, the court shall stay all delinquency proceedings relating to that petition and order a full mental health evaluation and report concerning the child's mental condition.
- (b) If at any time after the filing of a petition alleging delinquency the court has reason to believe that the child named in the petition may not be mentally competent to stand trial, the court on its own motion or on the motion of the attorney representing the child, any guardian ad litem for the child, the child's parent, guardian, or legal custodian, or the prosecuting attorney shall stay all delinquency proceedings relating to that petition and order a full mental health evaluation of and report on the child's mental condition.
- (c) Any motion, notice of hearing, order, or other pleading relating to the child's competency to stand trial shall be served upon the child, the child's attorney, the child's guardian ad litem, the child's parent, guardian, or legal custodian, the prosecuting attorney, and the victim.
- (d) Prior to the administration of any evaluation, the court shall appoint an attorney to represent the child if the child is not yet represented by counsel.
- (e) All time limits under article 7 of this chapter for adjudication and disposition of a delinquency proceeding are tolled during the evaluation, adjudication, and disposition phases of the mental competency proceeding.

**Comments**

This provision incorporates O.C.G.A. § 15-11-152(a) and is expanded and revised to provide further procedural guidance. Subsection (a) of this provision requires a mental health evaluation for any child under the age of 14 accused of committing a serious violent felony. The MacArthur study on juveniles' competence to stand trial found that children under 14 were twice as likely than young adults to be "seriously impaired" on the evaluation of abilities relevant for competency leading to the conclusion that children under 14 are probably not competent to stand trial. MacArthur Research Network on Adolescent Development and Juvenile Justice, MacArthur Juvenile Adjudicative Competence Study: Summary, (last visited Feb. 21, 2008) [http://www.adjj.org/downloads/58competence\\_study\\_summary.pdf](http://www.adjj.org/downloads/58competence_study_summary.pdf). Accordingly, by requiring an evaluation of competency for this younger population accused of the most serious crimes, subsection (a) ensures that the right to a fair trial is protected. See id.; See also Laurence Steinberg, MacArthur Foundation Study Calls Competency into Question, 18 Criminal Justice 20, 24 (Fall 2003)

Subsection (e) is drawn from language in current O.C.G.A. § 15-11-152(a) and is revised for clarity and consistency with the rest of the proposed model code.

### **15-11-804. Evaluation of a child's mental condition**

- (a) The court ordered evaluation and report shall be conducted by an examiner who shall consider whether the child is mentally competent to stand trial. The court shall provide the examiner with any law enforcement or court records necessary for understanding the petition alleging delinquency. The attorney for the child and the prosecuting attorney shall provide the examiner with any records from any other available sources that are deemed necessary for the mental competency evaluation.
- (b) The mental health evaluation shall be performed on an outpatient basis unless the court specifically finds that hospitalization of the child for evaluation of competency is necessary or the child is currently hospitalized in a psychiatric hospital. If hospitalization is warranted, the court may order the child sent to a hospital designated by the Director of the Division of Mental Health, Developmental Disabilities and Addictive Diseases, as appropriate for the evaluation of a child.
- (c) If the child is hospitalized, the child shall be hospitalized only for such time as the director of the hospital deems necessary to perform an adequate evaluation of the child's competency, but not to exceed 5 days from the date of admission to the hospital.
- (d) An examiner who conducts the evaluation shall submit a written report to the court within 30 days from receipt of the court order requiring the evaluation. The court may, in its discretion, grant the examiner an extension in filing the report. The report shall contain the following:
  - (1) The specific reason for the evaluation, as provided by the court or the party requesting the evaluation;
  - (2) The evaluation procedures used, including any psychometric instruments administered, any records reviewed, and the identity of any persons interviewed;
  - (3) Any available pertinent background information;
  - (4) The results of a mental status exam, including the diagnosis and description of any psychiatric symptoms, cognitive deficiency, or both;
  - (5) A description of the child's abilities and deficits in the following mental competency functions:
    - (A) The ability to understand and appreciate the nature and object of the proceedings;

- (B) The ability to comprehend his or her situation in relation to the proceedings; and
  - (C) The ability to assist counsel in the preparation and presentation of his or her case;
- (6) An opinion regarding the potential significance of the child's mental competency, strengths, and deficits;
- (7) An opinion regarding whether or not the child should be considered mentally competent to stand trial; and
- (8) A specific statement explaining the reasoning supporting the examiner's final determination.
- (e) If, in the opinion of the examiner, the child should not be considered mentally competent to stand trial, the report shall also include the following:
- (1) An opinion as to whether there is a substantial probability that the child will attain the mental competency necessary to participate in adjudication, a disposition hearing, or a transfer hearing in the foreseeable future;
  - (2) If the examiner believes that the child will attain mental competency, recommendations for the general level and type of remediation necessary for significant deficits;
  - (3) A recommendation as to the appropriate treatment setting and whether residential or nonresidential treatment is required or appropriate;
  - (4) When appropriate, recommendations for modifications of court procedure which may help compensate for mental competency weaknesses and
  - (5) If the child is currently receiving medication, how medication might affect the child in the proceedings.
- (f) If the examiner determines that the child is currently competent because of ongoing treatment with psychotropic medication, the report shall address the necessity of continuing that treatment and shall include a description of any limitation that the medication may have on competency.
- (g) Copies of the written evaluation report shall be provided by the court to the attorney representing the child, the prosecuting attorney or a member of his or her staff, and any guardian ad litem for the child no later than five days after receipt of the report by the court.
- (h) Upon a showing of good cause by any party or upon the court's own motion, the court may order additional examinations by other examiners. In no event shall

more than one examination be conducted by an examiner employed by the Department of Human Resources.

### **Comments**

This provision is drawn from O.C.G.A. § 15-11-152(b) - (g). Subsections (b) and (c) specifying the possible locations for an evaluation are modeled after Virginia Code Ann. § 16.1-356(B). The 5-day limitation for hospitalization in subsection (c) is drawn from O.C.G.A. § 37-3-64 regarding evaluations for mental illness. Subsections (d) and (e) are drawn from O.C.G.A. § 15-11-152(c) and (d) but are revised to include recommendations on information that should be included in an examiner's reports and opinions. See Thomas Grisso, Clinical Evaluations for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals, 29-30 (2005).

Subsection (d)(8) requiring an explanation of the reasoning behind the examiner's opinion is particularly important because when the explanations are missing, the examiner takes on the role of a factfinder. Id. at 30. In addition, an explanation can clarify what were the most important data or observations leading to the final opinion and what are likely causes of any deficits. Id. Subsections (e)(3) and (e)(5) are modeled after Arizona Rev. Stat. § 8-291.07(C) and (D).

### **15-11-805. Transfer of proceedings**

- (a) If at any time following a finding that a child is not mentally competent to stand trial, the court determines that the child is a resident of a county of this state other than the county in which the court sits, the court may transfer the proceeding to the county of the child's residence unless the alleged delinquent act would be a felony if committed by an adult.
- (b) When any case is transferred, certified copies of all legal, social history, health, or mental health records pertaining to the case on file with the clerk of the court shall accompany the transfer. Compliance with this code section shall terminate jurisdiction in the sending court and initiate jurisdiction in the receiving court.
- (c) If the child's mental competency is restored, jurisdiction of the case may be returned to the sending court for the adjudication hearing and any subsequent proceedings.

#### **Comments**

This provision is current O.C.G.A. § 15-11-153.2. It is revised for clarity and consistency with the rest of the proposed model code.

### **15-11-806. Mental competency hearings; findings**

- (a) A hearing to determine a child's mental competency to stand trial shall be conducted within 60 days after the initial court order for evaluation. The hearing may be continued by the court for good cause shown.
- (b) Written notice shall be given to all parties and the victim at least ten days prior to the hearing.
- (c) Except as provided in subsection (d), the burden of proving that the child is not mentally competent shall be on the child. The standard of proof necessary for proving mental incompetency shall be a preponderance of the evidence.
- (d) For a child who is under the age of 14 at the time of the alleged delinquent act and who is alleged to have committed a serious violent felony as defined in Code section 17-10-6.1, there shall be a presumption that the child is not mentally competent to stand trial. The prosecuting attorney shall overcome this presumption by a preponderance of the evidence.
- (e) At the hearing to determine mental competency to stand trial, the child's attorney and the prosecuting attorney shall have the right to:
  - (1) Present evidence;
  - (2) Call and examine witnesses;
  - (3) Cross-examine witnesses; and
  - (4) Present arguments.
- (f) The examiner appointed by the court shall be considered the court's witness and shall be subject to cross-examination by both the child's attorney and the prosecuting attorney.
- (g) The court's findings of fact shall be based on any evaluations of the child's mental condition conducted by examiners appointed by the court, any evaluations of the child's mental condition conducted by independent evaluators hired by the parties, and any additional evidence presented.
- (h) If the court finds that the child is mentally competent, the proceedings which have been suspended shall be resumed. The time limits under article 7 of this chapter for adjudication and disposition of the petition shall begin to run from the date of the order finding the child mentally competent.

- (i) Copies of the court's findings shall be given to the same individuals to whom notice of the mental competency hearing was provided and within ten days following the issuance of those findings.

### **Comments**

This provision is drawn from current O.C.G.A. § 15-11-153. It has been revised for clarity and consistency in keeping with the rest of the proposed model code and includes only language relevant to the procedural aspects of the hearing itself. Subsection (d) reflects the inclusion of a mandatory evaluation for children under the age of 14 accused of committing a serious violent felony.

### **15-11-807. Disposition of incompetent child**

- (a) If the court initially finds that the child is incompetent to stand trial because of mental illness or mental retardation, but may be restored to competency, the court shall order that the child undergo an attempt at restoration to competency.
- (b) If the court initially finds that the child is incompetent to stand trial because of age or immaturity, or any other reason other than mental illness or mental retardation, but the child's incompetence may be remediated, the court shall order remediation services for the child.
- (c) If the court initially finds that a child is unrestorably incompetent to stand trial, the court shall:
  - (1) Order that a Child in Need of Services petition be filed;
  - (2) Appoint a plan manager; and
  - (3) Order that procedures for a mental health plan be initiated.
- (d) If the child is determined to be incompetent to stand trial, the court shall retain jurisdiction of the child for up to 2 years after the date of the order of incompetency, with review hearings at least every 6 months to redetermine competency.
- (e) All court orders determining incompetency must include specific written findings by the court as to the nature of the incompetency and whether the child requires secure or nonsecure treatment. A child may be placed in a secure treatment facility or program if the court makes a finding by clear and convincing evidence that:
  - (4) The child is mentally ill or mentally retarded and meets the requirements for civil commitment pursuant to Chapters 3 and 4 of Title 37; and
  - (5) All available less restrictive alternatives, including treatment in community residential facilities or community settings which would offer an opportunity for improvement of the child's condition, are inappropriate.
- (f) A child who is mentally incompetent to stand trial shall not be subject to transfer to superior court, adjudication, disposition, or modification of disposition so long as the mental incompetency exists.
- (g) If the court determines that a child is mentally incompetent to stand trial, and is alleged to have committed a delinquent act which would be a misdemeanor if committed by an adult, the court may dismiss the petition without prejudice.

- (h) If a child is detained in a secure detention facility and the court determines that the child is mentally incompetent to stand trial, the child shall be released from detention and the Division shall place the child in an appropriate treatment setting, as recommended by the examiner, within 5 days.

### **Comments**

This provision is new and governs disposition options for a child found incompetent to stand trial. It is modeled in part after Florida and Virginia. Fla. Rev. Stat. § 985.19( and Va. Code Ann. § 16.1-357. Subsections (f) and (g) are drawn from current O.C.G.A. § 15-11-153.1(a),(b). Subsection (e)(2) is included to emphasize the importance of ensuring the least restrictive treatment settings are considered. See Thomas Grisso, Clinical Evaluations for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals 41 (2005).

The term “remediation” instead of “restoration” is used in subsection (b) to signal the distinction between finding a child incompetent to stand trial based solely on developmental immaturity and a child found incompetent to stand trial based on mental illness or mental retardation as in subsection (a). The term remediation is fitting in these instances because it is not possible to restore something that was never there. See Jodi L. Viljoen and Thomas Grisso, Prospects for Remediating Juveniles' Adjudicative Incompetence, 13 Psychol. Pub. Pol’y. & L. 87, 88 (2007)(noting that “some adolescents may be incompetent because of their developmental stage, meaning they have never yet achieved competence. The term remediation may be preferable to restoration in describing the goal of interventions for such youths because this term does not assume prior competence.”).

### **15-11-808. Restoration to competency orders and reports**

- (a) All restoration to competency orders issued by the court shall contain:
  - (1) The name of the competency restoration program provider and the location of the program;
  - (2) A statement of the arrangements for the child's transportation to the program site;
  - (3) The length of the competency restoration program;
  - (4) A statement of the arrangements for the child's transportation after the program ends; and
  - (5) A direction concerning the frequency of reports required by the court.
- (b) The competency restoration program provider shall file a written report with the court:
  - (1) Not later than 6 months after the date the court orders that restoration to competency be attempted but prior to the first review hearing;
  - (2) At the end of any period of extended treatment;
  - (3) At any time the Division of Mental Health, Developmental Disabilities and Addictive Diseases, through its restoration program provider, determines the child has attained competency; or
  - (4) At shorter intervals designated by the court in its restoration to competency order.

#### **Comments**

This provision is new and details the information to be included in restoration orders and reports. It is modeled after Arizona Rev. Stat. Ann. § 8-291.08(E).

### **15-11-809. Disposition of unrestorably incompetent child**

- (a) If at any time after the child is ordered to undergo restoration to competency services, the Division of Mental Health, Developmental Disabilities and Addictive Diseases, through its restoration program provider, determines that the child is likely to remain incompetent to stand trial for the foreseeable future, the Division shall submit a report to the court so stating. When appropriate, the report shall also include the following recommendations:
  - (1) Whether civil commitment proceedings pursuant to Chapters 3 and 4 of Title 37 should be initiated;
  - (2) If the child has reached the age of 18 years at the time of the competency determination, whether a referral should be made for appropriate adult services; or
  - (3) Whether the child should be provided other services by the court.
- (b) Upon receipt of the report, the court shall make a competency determination and shall order:
  - (1) When appropriate, that civil commitment proceedings pursuant to Chapters 3 and 4 of Title 37 be initiated. Such proceedings must be instituted not less than 60 days prior to the dismissal of the delinquency petition;
  - (2) If the child has reached the age of 18 years at the time of the competency determination, that referral be made for appropriate adult services; or
  - (3) That a Child in Need of Services petition be filed, that a plan manager be appointed, and that the procedures for a mental health plan be initiated.
- (c) If at any time after a child is found to be incompetent to stand trial due to age, immaturity, or for any reason other than mental illness or mental retardation and is ordered to undergo competence remediation services, and the Division determines that the child is likely to remain incompetent to stand trial for the foreseeable future, the Division shall submit a report and its conclusions to the court. Upon receipt of the report, the court shall make a competency determination and shall order:
  - (1) That the delinquency petition be dismissed; and
  - (2) That a Child in Need of Services petition be filed, that a plan manager be appointed, and that the procedures for a mental health plan be initiated.

- (d) If the court determines at any time that a child will never become competent to proceed, the court may:
- (1) Dismiss the delinquency petition;
  - (2) Order that a Child in Need of Services petition be filed, that a plan manager be appointed, and that procedures for a mental health plan be initiated;
  - (3) When appropriate, order that civil commitment proceedings pursuant to Chapters 3 and 4 of Title 37 be initiated. Such proceedings must be instituted not less than 60 days prior to the dismissal of the delinquency petition; or
  - (4) If the child has reached the age of 18 years at the time of the competency determination, make a referral for appropriate adult services.
- (e) If, at the end of the 2-year period following the date of the order of incompetency, a child has not attained competency to stand trial and there is no evidence that the child will attain competency within a year, the court shall dismiss the delinquency petition.

### **Comments**

This provision is new and governs disposition options for a child found unrestorably incompetent to stand trial. It maintains the current options found in O.C.G.A. 15-11-149 to order civil commitment when appropriate or to refer the child for adult services upon reaching the age of 18. The additional option allows the court to order that a child in need of services proceeding under article 6 be initiated and thereby triggers the development of a mental health plan and appropriate services for the child. This provision is drawn in part from Virginia Code Ann. § 16.1-358. Subsection (e) is drawn from O.C.G.A. § 15-11-155(d).

### **15-11-810. Review hearings**

- (a) The court shall hold a hearing to review a child's progress toward competency:
  - (1) At least every 6 months;
  - (2) At any time, on its own motion or on the motion of the prosecuting attorney, the child's attorney, or the child's guardian ad litem;
  - (3) On receipt of a report submitted by the Division; or
  - (4) Not less than 3 months before the child's eighteenth birthday.
- (b) If at a review hearing the court finds that the child has regained competency, the suspended proceedings shall be resumed and the time limits under article 7 of this chapter for adjudication and disposition of the petition shall begin to run from the date of the order finding the child mentally competent.
- (c) If at a review hearing held following the court's receipt of a report, the court finds that the child has not been restored to competency but that the child has made substantial progress toward restoration to competency, the court may extend the competency restoration program period for an additional 60 days if the court determines by clear and convincing evidence that further participation is likely to lead to restoration to competency.
- (d) If at a review hearing the court finds that the child is not restored to competency and is not restorable within the time left before the child's eighteenth birthday, the court shall dismiss the delinquency petition with prejudice if the child is alleged to have committed a delinquent act which would be a misdemeanor if committed by an adult.
- (e) At each review hearing, the court shall also consider whether the petition alleging delinquency should be withdrawn, maintained, or dismissed, without prejudice, upon grounds other than the child's not being mentally competent. If the court dismisses the petition, the prosecuting attorney may seek to refile a petition alleging a delinquent act which would be a felony if committed by an adult if the child is later determined to be mentally competent. The prosecuting attorney may also seek transfer to superior court if the child is later determined to be mentally competent and otherwise meets all the requirements for transfer under article 7.

### **Comments**

This provision is new and is modeled in part after Arizona Rev. Stat. § 8-291.10.