

Rule 601. Competency.

Comment - 2007

Pa. R.E. 601[(a)] differs from F.R.E. 601 and is intended to preserve existing Pennsylvania law. F.R.E. 601 abolishes all existing grounds of incompetency except for those specifically provided in later rules dealing with witnesses and in civil actions governed by state law. [Pa. R.E. 601(b) has no counterpart in the Federal Rules.] Pa. R.E. 601(a) is consistent with Pennsylvania statutory law. 42 Pa. C.S.A. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. See, e.g., 42 Pa. C.S.A. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa. C.S.A. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa. C.S.A. §§ 5925, 5926, and 5927); 42 Pa. C.S.A. §§ 5930-5933 and 20 Pa. C.S.A. § 2209 ("Dead Man's statutes").

[Pa. R.E. 601(a) does not recognize any decisional grounds for incompetency.] At one time Pennsylvania law provided that neither a husband nor a wife was competent to testify to non-access or absence of sexual relations if the effect of that testimony would illegitimize a child born during the marriage. See *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969). [This] That rule was abandoned in *Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975).

Pa. R.E. 601(b) has no counterpart in the Federal Rules and is consistent with Pennsylvania law concerning the factors for determining competency of a person to testify, including persons with a mental defect and children of tender years. See *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976) (standards for determining competency generally); *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity). In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court reiterated concern for the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or "taint" the child's memory and ability to testify truthfully about that memory. See also *Commonwealth v. Judd*, 897 A.2d 1224 (2006).

The application of the standards in Pa. R.E. 601(b) is a factual question to be resolved by the Court[.] as a preliminary question under Rule 104. The party challenging competency bears the burden of proving grounds of incompetency by clear and convincing evidence. *Commonwealth v. Delbridge*, 578 Pa. at 664, 855 A.2d at 40. In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court announced a per se rule requiring trial courts to

conduct competency hearings outside the presence of the jury. Expert testimony has been used when competency under these standards has been an issue. E.g., *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaertner*, 355 Pa. Super. 203, 484 A.2d 92 (1984). [Pa. R.E. 601(b) is intended to preserve existing law and not to expand it.]

Pa. R.E. 601(b) does not address the admissibility of hypnotically refreshed recollection. In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection. Applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for scientific testimony, the Court was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Commonwealth v. Nazarovitch*, supra; see also *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) (same). Pa. R.E. 601(b) is not intended to change these results. For the constitutional implications when a defendant in a criminal case, whose memory has been hypnotically refreshed, seeks to testify, see *Rock v. Arkansas*, 483 U.S. 44 (1987).