



# New Rules for Adult Guardianship Proceedings: Applying the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (G.S. Chapter 35B) in North Carolina

Meredith Smith

## I. Introduction

Dottie is an elderly widow who has lived her entire life in Iowa. She has two adult children, Eddie, who lives nearby, and Linda, who lives in North Carolina. Linda decides to take Dottie to North Carolina and place her in a nursing home. Linda then files a petition with a court in North Carolina to have her mother adjudicated incompetent and to be appointed her mother's *general guardian*.<sup>1</sup> Eddie files a similar petition with a court in Iowa. Which state's court has jurisdiction to enter an order regarding Dottie's competency and to appoint a guardian—North Carolina's or Iowa's?

Bob lives in North Carolina. A few years ago, a North Carolina court adjudicated Bob incompetent and appointed a county department of social services (DSS) to serve as Bob's *guardian of the person*<sup>2</sup> and a private attorney as his *guardian of the estate*.<sup>3</sup> Bob recently moved to New York to live with his daughter and her family. While Bob's daughter was unable to serve as his guardian at the time of his adjudication, DSS now feels that Bob's best interests will be served by living in New York with his daughter as his general guardian. How does DSS go about seeking transfer of the case from North Carolina to New York?

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[Meredith Smith](#) is a School of Government faculty member specializing in public law and government.

1. North Carolina law defines "general guardian" as "a guardian of both the estate and the person." Chapter 35A, Section 1202(7) of the North Carolina General Statutes (hereinafter G.S.).

2. A "guardian of the person" means "a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward." G.S. 35A-1202(10). "Ward" means "a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction." *Id.* § 1202(15).

3. A "guardian of the estate" means "a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward." G.S. 35A-1202(9).

Cindy is the guardian of the person for her 22-year-old daughter, Mary, who is currently undergoing treatment for substance abuse and bipolar disorder. Cindy and Mary live in Virginia, where Mary's guardianship case is being administered. Cindy wants Mary to get in-patient treatment at UNC-Chapel Hill. However, the UNC facility will not accept Mary as a patient without proof of Cindy's authorization to act on Mary's behalf in North Carolina. What could Cindy do to obtain such authorization?

On June 30, 2016, North Carolina Governor Pat McCrory signed Session Law (hereinafter S.L.) 2016-72, also known as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (or UAGPPJA, pronounced, familiarly, as "you-ah-gap-jah"), to provide answers to questions like these.<sup>4</sup> UAGPPJA is not intended to change the established system for adjudicating an adult incompetent and appointing a guardian under Chapter 35A of the North Carolina General Statutes (hereinafter G.S.).<sup>5</sup> S.L. 2016-72 created a new G.S. Chapter 35B that is intended to resolve jurisdictional issues in incompetency and guardianship proceedings that involve or potentially involve North Carolina and another state<sup>6</sup> or foreign country.<sup>7</sup> It is modeled after, and has similarities to, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).<sup>8</sup>

## A. The Purposes of UAGPPJA

Below are the four main purposes of UAGPPJA.

1. **Initial Filing.** Prevent jurisdictional disputes between the courts of different states over the initial filing of an incompetency and guardianship proceeding.
2. **Transfer.** Establish a procedure for transferring adult guardianship cases from one state to another.

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4. S.L. 2016-72.

5. G.S. 35B-1(c). Under North Carolina law, adjudication of incompetency and appointment of a guardian are two separate proceedings resulting in two separate orders. The incompetency proceeding is initiated by a petition filed by a petitioner against a respondent, who is the alleged incompetent person. *Id.* § 35A-1105. The proceeding is treated as a special proceeding. *In re Winstead*, 189 N.C. App. 145, 146 (2008). At the hearing on the petition, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that the respondent is incompetent. *Id.* § 35A-1112. In contrast, the guardianship proceeding is initiated by an application and is in the nature of an estate matter. *Winstead*, 189 N.C. App. at 151. During the guardianship proceeding, the court's role shifts to a more protective/oversight posture that considers the respondent's best interests. The court has the duty to inquire and to receive evidence necessary to determine the needs and best interests of the respondent. *Id.* § 35A-1212(a).

6. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States. G.S. 35B-2(18).

7. G.S. 35B-1(b); *id.* § 35B-4 (providing that a North Carolina court may treat a foreign country as if it were a state for purposes of applying certain sections of UAGPPJA, including those that cover the initial filing and transfer of guardianship cases but not including the law's registration provisions).

8. A version of the UCCJEA was adopted in North Carolina in 1999 as G.S. Chapter 50A.

3. **Registration.** Provide a uniform national system for registration and enforcement of out-of-state adult guardianship orders.
4. **Cooperation among courts in different states.**<sup>9</sup> Facilitate cooperation and communication between courts in different states.<sup>10</sup>

UAGPPJA is a product of the Uniform Law Commission and has been adopted by all but a handful of states.<sup>11</sup> It is effective, as adopted in North Carolina, on December 1, 2016.<sup>12</sup> The provisions related to determining jurisdiction for an initial filing apply to all new incompetency and adult guardianship proceedings **filed on or after that date.**<sup>13</sup> However, the provisions of UAGPPJA applicable to transfer and registration of orders apply to all cases in North Carolina as of December 1, 2016, **regardless of when they were filed.**<sup>14</sup>

UAGPPJA does not apply to minor guardianships because those are already covered, in part, under North Carolina's version of the UCCJEA.<sup>15</sup> Similarly, UAGPPJA does not apply to adult protective services proceedings pertaining to disabled or older adults brought under G.S. Chapter 108A or to domestic violence and civil no-contact proceedings under G.S. Chapters 50B and 50C.<sup>16</sup>

The N.C. Administrative Office of the Courts (AOC), through the Estates and Special Proceedings Forms Subcommittee, revised two incompetency forms in response to this new law. Table 1, below, lists the revised forms, available as of December 1, 2016.

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9. This bulletin covers the three main areas of UAGPPJA: initial filings, transfer, and registration. It does not address in any great detail provisions related to communication and cooperation between courts. Those provisions are found in G.S. 35B-5, -6, and -7.

10. G.S. 35B-1(d).

11. The Uniform Law Commission maintains a website with an up-to-date list of states that have enacted UAGPPJA. See Uniform Law Commission, *Adult Guardianship and Protective Proceedings Jurisdiction Act*, [www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act](http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act) (last visited Oct. 31, 2016). As of the date of this bulletin, Florida, Kansas, Michigan, Texas, Wisconsin, and the U.S. Virgin Islands have not adopted UAGPPJA. The bulletin specifically focuses on those situations where the states involved in the initial filing, transfer, and registration analysis have each adopted UAGPPJA. UAGPPJA as adopted in G.S. Chapter 35B does not limit its application to those instances when both states have adopted the uniform law. When dealing with a non-UAGPPJA state, a North Carolina court applies the relevant provisions as they relate to this state's actions. However, because the non-UAGPPJA state may have a different process, it requires a case-by-case analysis of how the two sets of laws fit together to determine which court has jurisdiction to act, whether the case may be transferred, and whether registration is possible.

12. S.L. 2016-72, § 4.

13. *Id.*

14. *Id.*

15. G.S. 35B-3(1). See also G.S. Chapter 50A. The UCCJEA applies to "child custody proceedings," which include proceedings where legal custody, physical custody, or visitation of the child is an issue. G.S. 50A-102(4). This likely includes minor guardianship proceedings under Article 5 of G.S. Chapter 35A and, specifically, guardianship of the person or general guardianship proceedings.

16. G.S. 35B-3(2) and (3).

**Table 1. Incompetency and Guardianship Forms Revised as a Result of UAGPPJA**

Form Number	Form Name
SP-200	Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian
SP-202	Order on Petition for Adjudication of Incompetence

## II. New Terminology

One key difference between UAGPPJA as adopted in North Carolina under G.S. Chapter 35B and existing G.S. Chapter 35A is the terminology used in the two chapters. To create a common language among states that enact UAGPPJA, G.S. Chapter 35B retains the terminology adopted by the Uniform Law Commissioners and refers to two types of proceedings:

1. guardianship proceedings and
2. protective proceedings.

The terms “guardianship proceeding”, “guardianship order”, and “incapacitated person” as used in G.S. Chapter 35B relate to proceedings for a guardian of the person and a general guardian.<sup>17</sup> In contrast, the terms “protective proceedings”, “protective orders”, and “protected persons” as used in G.S. Chapter 35B pertain to proceedings for a guardian of the estate, a general guardian, and to other orders related to management of an adult’s property entered pursuant to G.S. Chapter 35A.<sup>18</sup> Table 2 discusses these terms.

**Table 2. The Relationship between Terminology in G.S. Chapters 35A and 35B**

Term in G.S. Chapter 35B	Relation to Terminology in G.S. Chapter 35A
Guardianship Proceeding	Judicial proceeding seeking an order for the appointment of a guardian of the person or a general guardian
Guardianship Order	Order appointing a guardian of the person or a general guardian
Incapacitated Person	Adult for whom a guardian of the person or a general guardian has been appointed (the ward)
Protective Proceeding	Judicial proceeding seeking an order for the appointment of a guardian of the estate or a general guardian
Protective Order	Order appointing a guardian of the estate or a general guardian, or another order related to a person’s property under G.S. Chapter 35A
Protected Person	Adult for whom a guardian of the estate or a general guardian has been appointed (the ward)

17. G.S. 35B-2(7), (6), and (8).

18. G.S. 35B-2(15), (14), and (13).

### III. Initial Filing of the Incompetency Petition: Deciding Which State May Act

One purpose of UAGPPJA is to limit jurisdiction to adjudicate incompetency and appoint a guardian for an adult to the most appropriate state. UAGPPJA, as adopted in G.S. Chapter 35B, now provides the exclusive jurisdictional basis for the clerk of superior court<sup>19</sup> in North Carolina to adjudicate the incompetency of an adult and to appoint a guardian for that person.<sup>20</sup> Effectively, G.S. Chapter 35B is now a gatekeeper to G.S. Chapter 35A proceedings pertaining to adults.

For all new incompetency proceedings filed in North Carolina on or after December 1, 2016, the petitioner should allege that, and the clerk must determine whether, North Carolina has jurisdiction to adjudicate incompetence and to appoint a guardian of the estate, guardian of the person, or general guardian.<sup>21</sup> The clerk must ensure that jurisdiction is proper at the beginning of any hearing before getting into the substantive issues of incompetency and guardianship. If the clerk fails to ensure that jurisdiction is proper, it is possible that the clerk's orders related to incompetency and/or guardianship could be held void if it is later found that the clerk lacked jurisdiction.<sup>22</sup> The parties may not consent to subject matter jurisdiction if it is otherwise improper, nor may they waive any jurisdictional deficiency.<sup>23</sup> The court may only exercise jurisdiction in an incompetency and adult guardianship proceeding if it exists under G.S. Chapter 35B. The better practice is for the clerk to make findings of fact to support a conclusion of law in the clerk's final incompetency and guardianship orders that the court has subject matter jurisdiction.

#### A. When Does North Carolina Have Jurisdiction to Adjudicate Incompetency and Appoint a Guardian?

G.S. Chapter 35B establishes a waterfall provision giving jurisdictional priority first to the respondent's home state, then to a *significant-connection state*,<sup>24</sup> and finally to an "other" state when no home state or significant-connection state is appropriate or exists.<sup>25</sup> See Figure 1, below.

A flowchart summarizing the process for determining whether North Carolina may and should exercise jurisdiction in a particular case may be found in [Appendix A](#), "Does North Carolina Have Jurisdiction to Enter an Incompetency and Adult Guardianship Order?"

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19. For purposes of G.S. Chapter 35B, the word "court" means the clerk of superior court to the same extent the clerk has original jurisdiction over incompetency and adult guardianship proceedings under G.S. Chapter 35A. G.S. 35B-2(2). *See also id.* §§ 35A-1103(a); -1203(a). Furthermore, an assistant clerk is authorized to perform all the duties and functions of the elected clerk of superior court, and any act of an assistant clerk "is entitled to the same faith and credit" as that of the elected clerk. *Id.* § 7A-102(b).

20. G.S. 35B-16.

21. *See* revised AOC forms SP-200 and SP-202.

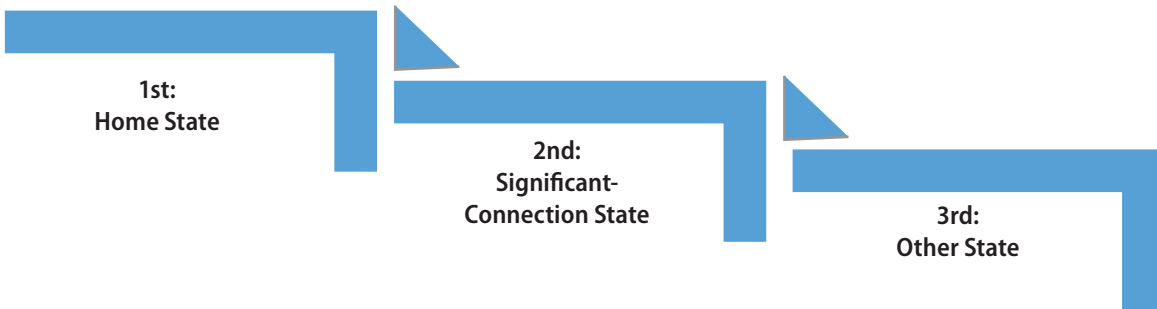
22. *See State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535 (1952) (citations omitted) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment . . . and a void judgment may be attacked whenever and wherever it is asserted . . .").

23. *In re T.R.P.*, 360 N.C. 588 (2006).

24. *See infra* section III.A.2.b for a definition of this term.

25. G.S. 35B-17

**Figure 1. Jurisdictional Priority under G.S. Chapter 35B**



### 1. Home State Preferred

As noted above, the highest jurisdictional priority in the statute goes to the respondent's home state. A key factor in the jurisdictional analysis is the fact that a respondent can only have one home state. It is possible that a respondent will not have a home state if the respondent moved frequently prior to the filing of the petition, but there can never be more than one.

North Carolina has jurisdiction to adjudicate incompetency and enter a guardianship order if North Carolina is the respondent's home state. However, if another state is the respondent's home state, it impacts the authority of a North Carolina court to hear the case if a petition is filed here. Therefore, it is important to determine whether the respondent has a home state at all, even if that state is not North Carolina.

#### a. When Is a State the Home State?

There are two steps to determining whether a respondent has a home state. Both are based on the respondent's physical presence in a state but they have different "lookback" periods:<sup>26</sup> the first step has a six-month lookback, while the second step has a twelve-month lookback. Each step is described in more detail below. Note that neither step requires an analysis of the respondent's domicile or residence. The only thing that matters for purposes of determining the respondent's home state is the length of physical presence in a state.

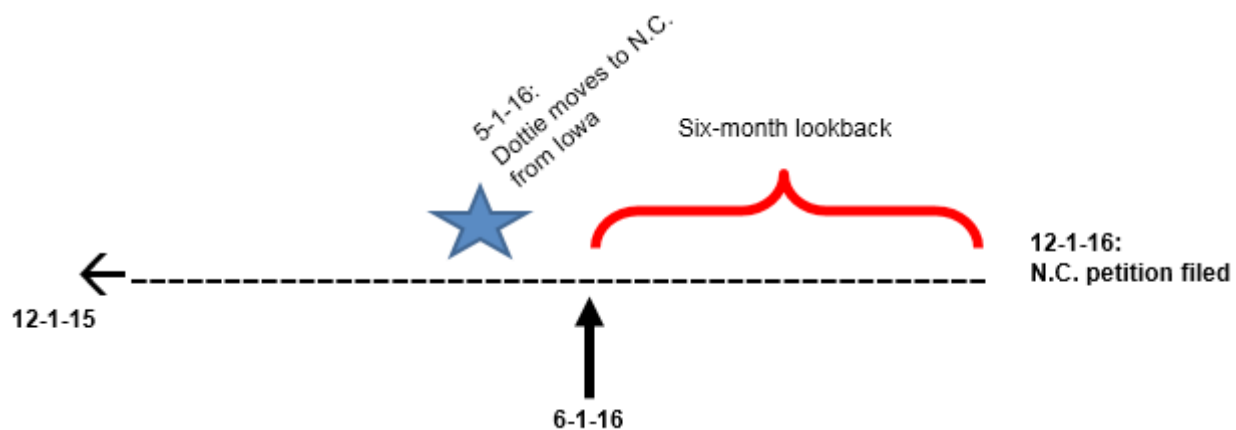
#### i. Physical Presence Initial Lookback Period: Six Months Immediately Before the Petition for Adjudication of Incompetency Is Filed

To determine the respondent's home state, if in fact there is one, the clerk must initially determine whether the respondent was **physically present** in any state for the six months immediately preceding the date the petition for adjudication of incompetence was filed.<sup>27</sup> When evaluating the six-month period, the court should not take into account any periods of "temporary absence".<sup>28</sup> Although not defined in the statute, a *temporary absence* includes short trips away from the state for vacations, visits with family and friends, business trips, and short-term health care treatment. If the respondent was physically present in one state for six months immediately preceding the petition, that state is the respondent's home state.

26. A "lookback period" is the period of time prior to and including the date the petition for adjudication of incompetency is filed; the court examines this period to determine whether jurisdiction is proper based on the physical presence of the respondent.

27. G.S. 35B-15(a)(2). Petitioners typically use the AOC form petition for adjudication, SP-200, available at [www.nccourts.org/Forms/Documents/707.pdf](http://www.nccourts.org/Forms/Documents/707.pdf).

28. G.S. 35B-15(a)(2).

**Figure 2. Timeline of Dottie's Case (1)*****Dottie***

In Dottie's case, as described at the beginning of this bulletin, the clerk needs to know the date that Dottie, the respondent, moved to North Carolina from Iowa and then must compare that date with the date that Linda, the petitioner/daughter, filed the incompetency/general guardianship petition. If Dottie moved to North Carolina in May 1, 2016, and was physically present in North Carolina until Linda filed the petition on December 1, 2016, then North Carolina would be Dottie's home state (see Figure 2, above). As the home state, North Carolina has jurisdiction to proceed with the case over all other states.<sup>29</sup> North Carolina may, however, choose to decline jurisdiction as discussed in section III.A.4, below.

North Carolina's position as home state ensures that it will have jurisdiction to hear Dottie's case even if another petition is filed in a different state before a petition is filed in North Carolina. For example, if Dottie's son, Eddie, filed a competing petition in Iowa, a state that has also enacted UAGPPJA, an Iowa court would not have jurisdiction to later hear Dottie's case and would have to dismiss or stay the case given the pending proceeding in North Carolina, Dottie's home state.

**ii. Physical Presence Secondary Lookback Period: Twelve Months Before the Petition for Adjudication of Incompetency Is Filed**

If the respondent was not physically present in any one state for six consecutive months immediately prior to the filing of the petition for adjudication of incompetence, the clerk must look back twelve months to determine whether the respondent was physically present in any one state for at least six consecutive months during the twelve-month period immediately prior to the filing of the incompetency petition.<sup>30</sup> If the respondent was physically present in any one state for six consecutive months during that time period, that state is the respondent's home state. This provision is intended to allow a home state to exercise jurisdiction to adjudicate incompetence and appoint a guardian for up to six months *after* a person physically moves to

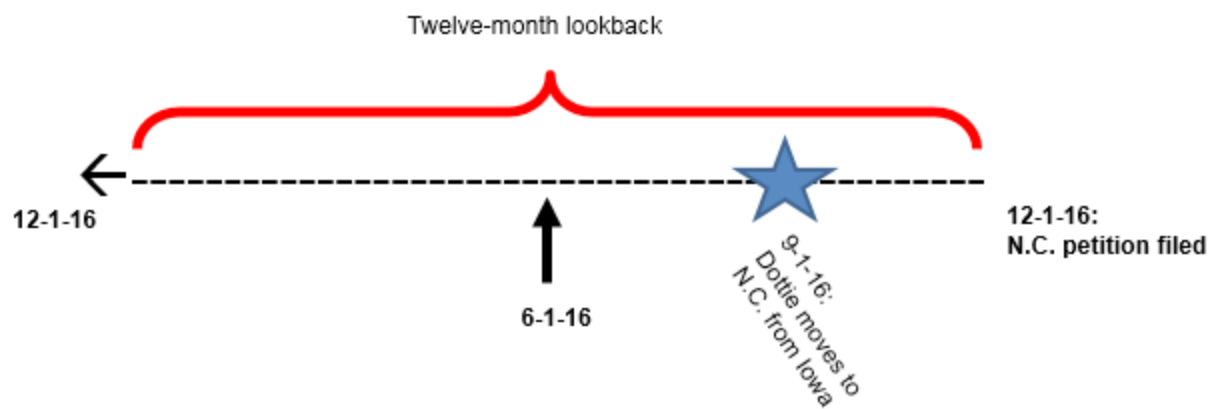
29. G.S. 35B-17(1).

30. G.S. 35B-15(a)(2).

another state.<sup>31</sup> When evaluating this time period, the court should not take into account any periods of temporary absence.<sup>32</sup>

Thus, in our example, if Dottie moved to North Carolina from Iowa on September 1, 2016, and Linda filed the petition on December 1, 2016, Dottie's home state would be Iowa (see Figure 3, below). This is because Dottie was not physically present in one state for six consecutive months during the initial six-month lookback period before the filing of the petition in North Carolina (6-1-16 to 12-1-16). Once the court moves to the second step of the analysis, it would determine that Dottie was physically present in another state, Iowa, for at least six consecutive months (12-1-15 to 9-1-16) during the twelve-month lookback period.

**Figure 3. Timeline of Dottie's Case (2)**



However, if a petition is filed here and North Carolina is not the respondent's home state, as is the case shown above, or if the respondent does not have a home state, North Carolina may still have jurisdiction to act. Alternative bases for jurisdiction exist when North Carolina is a significant-connection or other state, or when special jurisdiction exists, as discussed in sections III.A.2, 3, and 5, respectively, below.

## 2. Significant-Connection State

If North Carolina is not the respondent's home state, a North Carolina court may still have jurisdiction to hear an incompetency and guardianship case if North Carolina is a significant-connection state.<sup>33</sup> This is true even if the respondent has a home state. While a respondent may only have one home state, if any, it is possible for him or her to have multiple significant-connection states. There are three steps to determine whether North Carolina has jurisdiction to act as a significant-connection state.

31. NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), Prefatory Note at 3 (2015) (hereinafter *UAGPPJA*), [www.uniformlaws.org/shared/docs/adult\\_guardianship/UAGPPJA\\_2011\\_Final%20Act\\_2015feb4.pdf](http://www.uniformlaws.org/shared/docs/adult_guardianship/UAGPPJA_2011_Final%20Act_2015feb4.pdf).

32. G.S. 35B-15(a)(2). See *supra* section III.A.1.a.i for a discussion of what may constitute a temporary absence.

33. G.S. 35B-17.



**a. Is a Petition Pending in Another State?**

If, at the time the petition is filed in North Carolina, a petition for an order adjudicating incompetence or for the appointment of a guardian is pending in the respondent's home state or in a significant-connection state, a North Carolina court has jurisdiction to hear the case only if special jurisdiction exists or the other court declines jurisdiction in favor of North Carolina.<sup>34</sup> North Carolina lacks jurisdiction if there is a prior pending petition in the respondent's home state or in another significant-connection state even if North Carolina is also a significant-connection state. If the petitioner knows of a proceeding pending in another state, it would be important to include information about that proceeding in the petition filed in North Carolina. The clerk may also inquire about such pending proceedings at the hearing. If the North Carolina petitioner fails to notify the court that a proceeding is pending in another state, it is likely that another person notified of the North Carolina proceeding will inform the North Carolina court of the prior pending petition in another state.<sup>35</sup>

If a petition is pending in the respondent's home state or in another significant-connection state, the clerk must stay the proceeding and communicate with the court in the other state to determine whether that court intends to decline jurisdiction in favor of North Carolina as a more appropriate forum.<sup>36</sup> The clerk may allow the parties to participate in the communication<sup>37</sup> and must make a record of any such communication.<sup>38</sup> If the other state has jurisdiction as the home state or as a significant-connection state and does not decline to act, then the clerk must dismiss the North Carolina petition.<sup>39</sup>

**b. Is North Carolina a Significant-Connection State?**

If no petition is pending in another state at the time the North Carolina petition is filed, the petitioner may allege that, and then the clerk must analyze whether, North Carolina is a **significant-connection state**.<sup>40</sup> A significant-connection state is a state

- that is not the respondent's home state,
- that the respondent has a significant connection to beyond mere physical presence, and
- in which substantial evidence concerning the respondent is available.<sup>41</sup>

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34. Note: If an order adjudicating incompetence and appointing a guardian exists in another state, a person may be seeking to transfer the order to North Carolina. In those instances, a North Carolina court does have jurisdiction and should follow the procedure set forth *infra* section IV.

35. If a petition for adjudication of incompetence or an application for appointment of a general guardian or a guardian of the person or for issuance of a protective order is brought in North Carolina and North Carolina is not the home state on the date the petition was filed, then notice of the petition must also be given to persons entitled to notice had the proceeding been brought in the respondent's home state, and such notice must be given in the manner it would be given in North Carolina. G.S. 35B-22.

36. G.S. 35B-23(2); -5(a) (providing that a North Carolina court may communicate with a court in another state concerning a proceeding under G.S. Chapter 35B). The statute does not specify "a particular means of communication." *UAGPPJA*, Section 104, Comment. Communication may occur through electronic means, including email. *Id.* See *infra* section III.A.4.a for what constitutes a more appropriate forum.

37. G.S. 35B-5(a).

38. *Id.* The statute is silent as to what type of record the court must make. The comment to *UAGPPJA* suggests that the record may include an electronic recording of a telephone call, a memorandum summarizing a conversation, and email communications. *UAGPPJA*, Section 104, Comment.

39. G.S. 35B-23(2).

40. G.S. 35B-17(2).

41. G.S. 35B-15(a)(3).

A respondent may have multiple significant-connection states. In determining whether North Carolina is a significant-connection state, the petitioner should present evidence on the following subjects for the clerk to consider:

- the location of the respondent's family and other persons required to be notified of the proceedings;
- the length of time the respondent was physically present in North Carolina and the duration of any absences;
- the location of the respondent's property; and
- the extent to which the respondent has ties to a particular state, including voting registration, tax return filings, vehicle registration, driver's license, social relationships, and receipt of services.<sup>42</sup>

***c. May North Carolina Exercise Jurisdiction as a Significant-Connection State?***

If the clerk determines that North Carolina is a significant-connection state, then the clerk must find, based on the evidence presented, that one of the following is also true to exercise jurisdiction:

- the respondent does not have a home state; or
- the respondent's home state declined to exercise jurisdiction because North Carolina is a more appropriate forum; or
- before the clerk enters a final order adjudicating incompetency and appointing a guardian, all of the following are true:
  - a petition is not filed in the respondent's home state,<sup>43</sup>
  - an objection to the North Carolina court's jurisdiction is not filed by a person entitled to notice; and
  - the clerk determines that North Carolina is an appropriate forum based on the factors described in section III.A.4.a, below.<sup>44</sup>

If one of the above are true, North Carolina is a significant-connection state, and no prior petition is filed in the respondent's home state or in another significant-connection state, then North Carolina has jurisdiction to proceed with the case and to enter an incompetency and guardianship order as a significant-connection state. Under such circumstances, if the respondent has a home state, notice of the North Carolina petition must be given to any person entitled to notice of the proceeding in the respondent's home state.<sup>45</sup> Notice is required to be given in the same manner as notice is required to be given in North Carolina.<sup>46</sup> Before proceeding with the substantive incompetency and guardianship hearing as a significant-connection state, the clerk should confirm that the petitioner provided such notice if the respondent has a home state.

42. G.S. 35B-15(b).

43. If a petition is filed in the respondent's home state before the clerk enters the final order adjudicating incompetency and appointing a guardian, the clerk must stay the proceeding and communicate with the court in the other state to determine whether that court intends to decline jurisdiction in favor of North Carolina as a more appropriate forum. G.S. 35B-23(2). If the home state does not decline to act, then the clerk must dismiss the North Carolina petition. *Id.* If a petition is filed after the clerk enters final orders adjudicating incompetence and appointing a guardian, the home state has no jurisdiction to act and must dismiss the proceeding. *Id.* § 35B-19.

44. G.S. 35B-17(2).

45. G.S. 35B-22.

46. *Id.*

Applying the above rules to Dottie's case, assume that she moved to North Carolina immediately before Linda filed the petition here and that, therefore, Iowa remained her home state. Linda stated in her petition that no other petition was pending when she filed her petition in North Carolina. North Carolina may be a significant-connection state, notwithstanding Dottie's short presence in this state, if there is evidence that Dottie has family in North Carolina, including Linda; that Dottie moved all her tangible property here; that Dottie registered her car and obtained a driver's license here; that Dottie has many friends in North Carolina because she vacationed here all her life; and there is other information supporting her ties to the state.

Under those circumstances, North Carolina would have jurisdiction to act if the clerk determined that there is no other prior pending proceeding and that this state is a significant-connection state and an appropriate forum. This is true even though Dottie has a home state. However, if Eddie (1) files a petition in Iowa, Dottie's home state, at any time before the clerk in North Carolina enters a final order adjudicating incompetence and appointing a guardian and (2) notifies the clerk in North Carolina of the Iowa petition, the clerk here must stay the proceeding and communicate with the court in Iowa to discuss which court will proceed with the case. This is because jurisdiction is lost if a petition is later brought in the respondent's home state before the entry of a final order in a significant-connection state.<sup>47</sup> As a result of Eddie's Iowa petition, Iowa would have jurisdiction to act as Dottie's home state unless it declined in favor of North Carolina as a more appropriate forum. If Iowa does not decline jurisdiction, the clerk must dismiss the North Carolina proceeding despite the fact that the clerk determined North Carolina is a significant-connection state and an appropriate forum.

If, instead of filing a petition in Iowa and before the clerk enters a final order adjudicating Dottie's competency and appointing a guardian, Eddie raises an objection before the clerk to North Carolina's jurisdiction, the clerk should examine whether there is a more appropriate forum to hear the case, such as Iowa. If the clerk determines that Iowa is a more appropriate forum in response to Eddie's objection, the clerk may enter an order declining jurisdiction as set forth in section III.A.4, below.

### 3. Other State

Even if North Carolina is not a home state or a significant-connection state, a North Carolina court may exercise jurisdiction in another limited instance—when it is what is known as an “other” state. In such cases, North Carolina has jurisdiction to act in response to a petition filed here where

1. the respondent's home state and all other significant connection states decline jurisdiction because North Carolina is the more appropriate forum and
2. jurisdiction in North Carolina is consistent with the United States and the North Carolina Constitutions.<sup>48</sup>

If a petitioner alleges that North Carolina has jurisdiction on this basis, the petitioner should also present evidence that any home state and all significant-connection states have declined jurisdiction. If a court declines jurisdiction, there is no requirement under G.S. Chapter 35B

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47. *UAGPPJA*, Section 209, Comment.

48. G.S. 35B-17(3).

that the court enter an order to that effect. However, it may be a best practice for a court to do so to create a record of the court's decision to decline jurisdiction. The North Carolina court could also communicate with the state that declined jurisdiction to confirm that the state did in fact do so.<sup>49</sup> The clerk shall make a record of any such communication.<sup>50</sup>

If the respondent has a home state and North Carolina is an "other" state, notice of the North Carolina petition must be given to any person entitled to notice of the proceeding had a proceeding been brought in the respondent's home state.<sup>51</sup> Notice is required to be given in the same manner as notice is required to be given in North Carolina.<sup>52</sup> Before proceeding with the substantive incompetency and guardianship hearing as an "other" state, the clerk should confirm that the petitioner provided such notice if the respondent has a home state.

In Dottie's case, North Carolina may fall under this "other" category if Linda moved Dottie to North Carolina only a few days before Linda filed the petition. North Carolina would not be Dottie's home state and may not yet be a significant-connection state. However, as discussed further in section III.A.4.a, below, Iowa may decline jurisdiction in favor of North Carolina if, for example, Dottie expressed a preference for living in North Carolina with Linda; Dottie will live permanently at home with Linda; Dottie has no other property in Iowa; and no abuse, neglect, or exploitation of Dottie has occurred or is likely to occur.<sup>53</sup> Once Iowa declines jurisdiction, provided there are no significant-connection states that also must decline jurisdiction, a North Carolina court may have jurisdiction to act if Dottie is physically present and served in North Carolina. If necessary, the North Carolina court could use the cooperation and testimony provisions in G.S. 35B-6 and -7 to obtain information relevant to the North Carolina proceeding from witnesses, documents, and other evidence located out of state.<sup>54</sup> These provisions include, but are not limited to, the ability of a North Carolina court to request a court in another state to hold an evidentiary hearing; order a person to produce evidence or give testimony; order an evaluation of the respondent; and issue an order for the release of information, including protected health information.<sup>55</sup>

#### 4. North Carolina's Authority to Decline Jurisdiction

If North Carolina has jurisdiction to act either as the home state, as a significant-connection state, or as an "other" state, North Carolina may decline jurisdiction and not hear the case if the North Carolina court determines that (1) another state is a more appropriate forum or (2) North Carolina acquired jurisdiction through unjustifiable conduct.<sup>56</sup>

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49. G.S. 35B-5.

50. G.S. 35B-5(a).

51. G.S. 35B-22.

52. *Id.*

53. These are the factors a court would apply to determine that North Carolina is a more appropriate forum under G.S. 35B-20.

54. Note: The provisions related to cooperation between courts and testimony from other states apply to any incompetency and guardianship proceeding in North Carolina, not just when North Carolina exercises "other" jurisdiction.

55. G.S. 35B-6.

56. G.S. 35B-20; -21.

**a. More Appropriate Forum**

Even though North Carolina has jurisdiction to act, a court may decline to exercise jurisdiction if the court decides that another state is a more appropriate forum.<sup>57</sup> The clerk must consider all relevant factors in deciding whether there is a more appropriate forum, including

- any expressed preference of the respondent;
- whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- the length of time the respondent was physically present in or was a legal resident of this or another state;
- the distance of the respondent from the court in each state;
- the financial circumstances of the respondent's estate;
- the nature and location of relevant evidence;
- the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- the familiarity of the court of each state with the facts and issues in the proceeding; and
- if an appointment was made, the court's ability to monitor the conduct of the guardian.<sup>58</sup>

If a proceeding is properly before the court in North Carolina but the clerk determines that another state is a more appropriate forum, the clerk may either dismiss or stay the proceeding.<sup>59</sup> The clerk may also enter any order the clerk determines is just and proper, including the condition that a petition for the appointment of a general guardian or a guardian of the person or for the issuance of a protective order be filed promptly in another state.<sup>60</sup>

In Dottie's case, if she moved to North Carolina in May 2016 and was physically present in this state until Linda filed the incompetency/guardianship petition on December 1, 2016, then North Carolina is Dottie's home state under the first step of the home state definition. This is because she was physically present in North Carolina for the six consecutive months immediately preceding the petition. North Carolina would have jurisdiction to hear the case. However, a North Carolina court may decide to decline to exercise jurisdiction in favor of Iowa as the more appropriate forum if, for example, Dottie expresses a desire to move back to Iowa and she still has many friends, family, and medical providers in Iowa. In that instance, the North Carolina court is allowed, but not required, to enter an order staying the proceeding and directing Linda to promptly file a petition in Iowa. A similar analysis would apply if Dottie was from a foreign country. A North Carolina court may decline jurisdiction because a foreign country is a more appropriate forum.<sup>61</sup>

**b. Unjustifiable Conduct**

A North Carolina court with jurisdiction to hear a case may also decline to exercise jurisdiction at any time, including after appointing a guardian of the person or a general guardian or after issuing a protective order, if the court determines that jurisdiction was obtained by unjustifiable

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57. G.S. 35B-20.

58. G.S. 35B-20(c).

59. G.S. 35B-20(b).

60. *Id.*

61. G.S. 35B-4; *UAGPPJA*, Section 103, Comment.

conduct.<sup>62</sup> “Unjustifiable conduct” is not defined in G.S. Chapter 35B. According to the comments accompanying UAGPPJA, this ambiguity and flexibility was intentional.<sup>63</sup> The provision is intended to address the problem of “granny snatching,” which is when someone uproots an adult who may lack capacity from his or her home, moves the adult to another state, and seeks to be appointed as his or her guardian. Typically, this happens when the petitioner wants to gain control of the adult’s financial resources. The adult is in an unfamiliar place away from family and from other evidence material to the guardianship proceeding. In this situation, the adult may be more likely to suffer abuse, neglect, or exploitation. In these and other instances, the court could decline to exercise jurisdiction if it appears that the court obtained jurisdiction because of unjustifiable conduct. The unjustifiable conduct does not have to be by a party or, specifically, by the petitioner who filed the case.<sup>64</sup>

The “unjustifiable conduct” concept affords the court the authority to “fashion an appropriate remedy” when it has inappropriately acquired jurisdiction.<sup>65</sup> In addition to or in lieu of declining jurisdiction, the court may exercise jurisdiction for the limited purpose of ensuring the health, safety, and welfare, or protecting property, of the respondent.<sup>66</sup> This includes staying the proceeding until a guardianship petition is filed in another state with jurisdiction and then declining jurisdiction.<sup>67</sup> In spite of finding unjustifiable conduct, a North Carolina court may decide to proceed with the case after considering certain factors identified in G.S. 35B-21(a)(3).

If a party committed the unjustifiable conduct that resulted in a North Carolina court having jurisdiction over the case, the court may assess reasonable expenses, including attorneys’ fees and court costs, against that party.<sup>68</sup>

## 5. Special Jurisdiction in the Case of an Emergency or Property Located in North Carolina

If a North Carolina court lacks jurisdiction because it is not a home state, a significant-connection state, or an “other” state, the court still has jurisdiction to act in case of an emergency related to the ward’s person or when the person’s real or tangible personal property is located in North Carolina.<sup>69</sup> This is known as *special jurisdiction*.

### a. Appointment of Guardian of the Person in an Emergency

A North Carolina court otherwise lacking jurisdiction has special jurisdiction to appoint a guardian of the person in the event of an emergency for a respondent who is physically present in North Carolina.<sup>70</sup> “Emergency” is defined as a circumstance that will likely result in substantial harm to a respondent’s health, safety, or welfare, and for which an appointment of a guardian of the person is necessary because there is no other person who has the authority and is willing to act on the respondent’s behalf.<sup>71</sup> If a petition is filed and the clerk finds that the respondent is physically present in North Carolina and that an emergency exists, then the clerk

62. G.S. 35B-21(a).

63. UAGPPJA, Section 207, Comment.

64. *Id.*

65. *Id.*

66. G.S. 35B-21(a)(2).

67. *Id.*

68. G.S. 35B-21(b).

69. G.S. 35B-18.

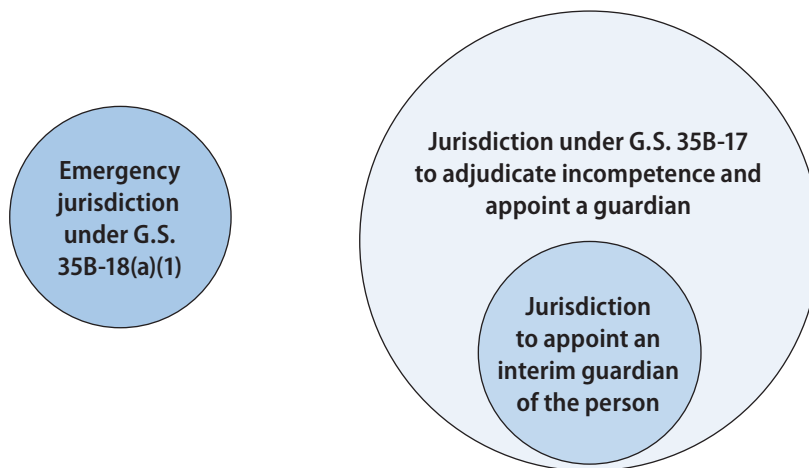
70. G.S. 35B-18(a)(1).

71. G.S. 35B-15(a)(1).

may enter an order appointing a guardian of the person for a term not exceeding ninety days based on this special jurisdiction.<sup>72</sup> The emergency appointment should not be converted into a “de facto permanent appointment.”<sup>73</sup> It is an appointment for a limited time in a temporary location.<sup>74</sup> The emergency proceeding must be dismissed if a petition is later filed in the respondent’s home state and the home state requests that North Carolina dismiss the emergency proceeding, regardless of whether the request is before or after the appointment.<sup>75</sup>

For example, if a person is in a car accident while driving through North Carolina that results in her incapacity, a North Carolina court could appoint a guardian of the person to make medical decisions on behalf of the injured person in North Carolina. In the order appointing the emergency guardian of the person, the court should make findings as to whether the respondent has an agent under health care power of attorney authorized to act in North Carolina or another person authorized to make medical decisions on the person’s behalf. An emergency only exists if the respondent lacks an authorized and willing surrogate decision maker. In the absence of an emergency, the court lacks the special jurisdiction to appoint a guardian of the person.

*Interim guardian of the person cases distinguished.* Note that special jurisdiction in an emergency is different from the court’s authority to appoint an interim guardian of the person under G.S. 35A-1114. An interim guardian of the person appointment occurs as part of and pursuant to a motion filed in the underlying G.S. Chapter 35A incompetency proceeding.<sup>76</sup> To appoint an interim guardian of the person, the North Carolina court must first have jurisdiction as a home state, as a significant-connection state, or as an “other” state. By contrast, the special jurisdiction in an emergency provision discussed above applies when such jurisdiction does not exist.



72. *Id.*

73. *UAGPPJA*, Section 204, Comment.

74. *Id.*

75. G.S. 35B-18(b).

76. G.S. 35A-1114(a) (emphasis added) (stating that “[a]t the time of or subsequent to the filing of a petition [for adjudication of incompetence,] the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian”).

Note that AOC forms SP-200, Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian; SP-202, Order on Petition for Adjudication of Incompetence; and E-406, Order on Application for Appointment of Guardian, are not appropriate to use in the event the court is exercising special jurisdiction in an emergency. As of the date of this bulletin, there is no AOC published form petition or order for a person seeking such an appointment.

***b. Issuance of a Protective Order for Real and Tangible Property in North Carolina***

A North Carolina court that lacks jurisdiction as a home state, as a significant-connection state, or as an other state also has special jurisdiction to issue a “protective order” related to real or tangible personal property located in North Carolina.<sup>77</sup> As discussed earlier, the term “protective order” has a specific meaning in this context. The term refers to an order appointing a guardian of the estate or a general guardian, or to another order related to the management of an adult’s property entered pursuant to G.S. Chapter 35A.<sup>78</sup> This jurisdiction may serve as a basis for the appointment of an ancillary guardian under G.S. 35A-1280 to manage a non-resident ward’s real and tangible property located in North Carolina, for a special proceeding to remove a nonresident’s tangible personalty from the state under G.S. 35A-1281, or for the appointment of an interim guardian of the estate under G.S. 35A-1114.

## IV. Transfer of Cases to and from North Carolina

The second major purpose of UAGPPJA is to provide a process for transferring an existing case in or out of the state. It is intended to address scenarios like Bob’s, described at the start of this bulletin, where a person under guardianship permanently moves or has a significant connection to another state. In Bob’s case, his guardian of the person, the county department of social services, determined that it was in his best interests to move from North Carolina to live in New York with his daughter and for his daughter to serve as his guardian there. The transfer provisions do not apply when a guardian seeks to take some limited action in a state on behalf of a nonresident ward. In those cases, registration, which is discussed in section V, below, and not transfer, of the case would be appropriate.

The process for transferring Bob’s case out of North Carolina is set forth in G.S. 35B-30. A flowchart providing a step-by-step guide to the “transfer out” process is found in [Appendix B](#). The process for transferring a case from another state to North Carolina is set forth in G.S. 35B-31. A flowchart providing a step-by-step guide to the “transfer in” process is found [Appendix C](#). S.L. 2016-72 repealed the existing process for transferring cases into North Carolina under G.S. 35A-1113.

<sup>77</sup> G.S. 35B-18(a)(2). This does not include intangible property such as bank accounts. *See UAGPPJA*, Section 204, Comment.

<sup>78</sup> G.S. 35B-2(14).



## A. Transferring a Case Out of North Carolina

A case may be transferred out of North Carolina only upon the petition of the guardian of the person, the guardian of the estate, or the general guardian.<sup>79</sup> A petition for transfer is a request to transfer both the incompetency (special proceeding (SP)) and the guardianship (estate proceeding (E)) cases.<sup>80</sup> The guardian must serve a copy of the petition by first-class mail<sup>81</sup> on any person who is entitled to notice of the original incompetency and guardianship proceedings.<sup>82</sup> This includes the ward; any next of kin; the ward's attorney or guardian ad litem, if appointed by the clerk;<sup>83</sup> other parties of record, including any guardian other than the petitioner; and anyone else designated by the clerk.<sup>84</sup>

On the clerk's motion or on the motion of the petitioner or any person entitled to notice of the proceeding, the clerk must hold a hearing on the petition for transfer.<sup>85</sup> If no one moves for a hearing but there is an indication that the petition for transfer is contested, it is best practice for the clerk, on the clerk's own motion, to hold a hearing. However, the clerk may decide the matter summarily, meaning without a hearing.<sup>86</sup> In the absence of a motion for a hearing, it is not clear from the statute when the clerk may decide the matter summarily after service of the petition on the requisite persons. It is also not clear by what date a person entitled to notice would need to move for a hearing after service of the petition for transfer. Finally, the petition is not required to be verified, and, therefore, is not under oath. If the clerk proceeds summarily, the clerk should wait a reasonable time before entering a provisional order granting the transfer petition to allow notified persons time to file an objection to transfer.

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79. G.S. 35B-30(a).

80. *Id.*

81. The statute does not specify how the petition must be served. *See generally* G.S. 35B-30. Because the petition is filed in an existing proceeding, it is likely that service by first-class mail or other service in compliance with Rule 5 of the N.C. Rules of Civil Procedure is sufficient.

82. G.S. 35B-30(b).

83. Given that service is required on the ward's attorney or guardian ad litem (GAL), it raises the question as to whether a GAL must be appointed when a petition to transfer is filed. G.S. 35A-1217 provides that the clerk shall appoint a GAL to represent a ward in a guardianship proceeding if the ward has been adjudicated incompetent and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the GAL are pursuant to rules adopted by the N.C. Office of Indigent Defense Services (IDS). G.S. 35A-1217. Therefore, unless prohibited by IDS rules, it would be logical for the clerk to appoint a GAL in response to a petition to transfer if the clerk determines that the ward's interests are not adequately represented. Automatic appointment of a GAL in every case may create unnecessary expense where the petition for transfer is uncontested or where the ward's interests are otherwise adequately represented.

84. G.S. 35A-1109; -1211.

85. G.S. 35B-30(c).

86. *Id.* *See also* UAGPPJA, Article 3, General Comment.

Furthermore, before entering a provisional order authorizing transfer of the incompetency and guardianship case, the clerk must find, based on the evidence presented, that

- the other state will likely accept the transfer;<sup>87</sup>
- the ward is physically present in or is reasonably expected to move permanently to the other state, or, if the guardian is a guardian of the estate, the ward has a *significant connection*<sup>88</sup> to the other state;
- no objection to transfer has been made, or, if an objection has been made, the objecting party failed to establish that transfer would be contrary to the interests<sup>89</sup> of the ward; and
- plans for the ward's care and services in the other state are reasonable and sufficient, if the ward has a guardian of the person, or adequate arrangements will be made for the management of the ward's property, if the ward has a guardian of the estate.<sup>90</sup> If the ward has a general guardian, the clerk must find both reasonable and sufficient plans for care and services and adequate arrangements for property.<sup>91</sup>

If the clerk makes these findings, then the clerk must enter a provisional order granting the petition to transfer and directing the guardian to petition for transfer in the other state.<sup>92</sup> The clerk may enter a final order confirming transfer once the clerk receives and approves a final accounting from the guardian of the estate or the general guardian and receives a copy of the provisional order accepting transfer from the other state.<sup>93</sup>

Returning to Bob's case, either the county department of social services (DSS), as Bob's guardian of the person, or the private attorney, as Bob's guardian of the estate, could petition to transfer the case to New York. If either of them petition, the clerk considers transfer of the incompetency proceeding along with the entire guardianship, both the guardianship of the person and of the estate. The statute does not state expressly that a guardianship may not be split. However, if transfer is granted, it seems reasonable to transfer both the guardianship of the person and of the estate along with the incompetency proceeding in order to avoid conflicting courts with dueling authority, an essential purpose of UAGPPJA.<sup>94</sup>

If DSS believes that transferring the case to New York so that Bob's daughter may serve as guardian there is in Bob's best interests, DSS should first file a motion to remove itself as the guardian of the person and to appoint Bob's daughter as his guardian of the person on the basis that doing so is in the best interests of Bob. This is because one of the criteria the receiving

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87. If the county department of social services (DSS) is serving as guardian of the person, guardian of the estate, or general guardian in North Carolina and initiates the transfer of a case from North Carolina, one of the findings the accepting state must make is that the guardian is eligible for appointment in the accepting state. G.S. 35B-31(d)(2). A North Carolina DSS is not eligible for appointment in another state. One solution to this dilemma is discussed further in the example set forth at the end of this subsection.

88. This, term for purposes of transfer, is defined in G.S. 35B-15(b) and described *supra* section III.A.2.b.

89. See UAGPPJA, Article 3, General Comment (stating that the term "interests" was chosen over "best interests" to reflect the strong autonomy values in modern guardianship law).

90. G.S. 35B-30(d) and (e).

91. G.S. 35B-30(f).

92. G.S. 35B-30(d), (e), and (f).

93. The provisional order accepting transfer from the other state must be issued in accordance with provisions similar to G.S. 35B-31 in the other state, which governs accepting a transfer of a case from another state.

94. G.S. 35B-1(d)(1).

court must find before entering an order authorizing transfer is that the guardian is eligible for appointment under that state's laws.<sup>95</sup> A North Carolina DSS would not be eligible for appointment in New York. Therefore, before seeking to transfer the case, DSS or Bob's daughter could file a motion to remove DSS and appoint Bob's daughter as the guardian of the person, and then the daughter could file a petition to transfer the case to New York. See [Appendix B](#), "Transfer of an Existing Incompetency and Adult Guardianship Case from North Carolina to Another State."

## B. Transferring a Case to North Carolina

To transfer a guardianship from another state to North Carolina, the general guardian, guardian of the person, or guardian of the estate files a petition for transfer in North Carolina, along with a certified copy of the other state's provisional order of transfer.<sup>96</sup>

A copy of the petition and the order is served on those persons entitled to notice of the original incompetency and guardianship proceeding in North Carolina *and* in the transferring state.<sup>97</sup> Notice must be given in the same manner as notice is required in those original proceedings in North Carolina.<sup>98</sup> This likely means that the following parties must be served in the following manner based on North Carolina service requirements:

- the ward/respondent by personal service;
- the next-of-kin by first-class mail;
- the ward's counsel or guardian ad litem, if appointed,<sup>99</sup> pursuant to Rule 4 of the N.C. Rules of Civil Procedure;<sup>100</sup>
- the other parties of record, including any guardian that is not the petitioner, and any other persons required to be noticed in the transferring state by first-class mail; and
- anyone else designated by the clerk by first-class mail.<sup>101</sup>

The petitioner should identify in the petition to accept transfer whether the transferring state's laws require notice to any other person in addition to those listed who are noticed under North Carolina law.<sup>102</sup> The clerk should confirm that service has been made on such other persons if there are any additional persons whom the other state requires to be noticed that North Carolina law does not.

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95. G.S. 35B-31(d)(2).

96. G.S. 35B-31(a).

97. G.S. 35B-31(b).

98. *Id.*

99. It may be unnecessary to appoint a guardian ad litem (GAL) for purposes of making a decision on whether to accept transfer, given that the court is charged with accepting the transfer *unless* the guardian is ineligible for appointment or a person entitled to notice files an objection and establishes that the transfer will be contrary to the interests of the ward. Otherwise, the court's decision to accept transfer is not discretionary. Therefore, it may be good practice, when a petition to accept transfer is filed, to wait and see whether or not there is an objection to the transfer before appointing a GAL in response to a petition accepting transfer.

100. G.S. 1A-1, Rule 4.

101. G.S. 35A-1109; -1211.

102. G.S. 35B-31(b).

On the clerk's motion or on the motion of the petitioner or any person entitled to notice of the proceeding, the clerk must hold a hearing on the petition to accept transfer.<sup>103</sup> However, the clerk may decide the matter summarily.<sup>104</sup> As discussed in the previous section on transfer of a proceeding out of North Carolina, the clerk should wait a reasonable time after the petition is filed before entering a provisional order accepting transfer without a hearing to ensure that there are no objections.

The court must enter a provisional order accepting transfer unless (1) an objection is made to the transfer and the objector establishes that the transfer would be contrary to the interests<sup>105</sup> of the ward or (2) the general guardian, guardian of the estate, or guardian of the person is ineligible for appointment in North Carolina.<sup>106</sup> Once the North Carolina court enters a provisional order accepting transfer, the court has the authority to appoint a general guardian, a guardian of the estate, or a guardian of the person in North Carolina.<sup>107</sup> The court then enters a final order accepting transfer once it receives a copy of the final order from the other state granting transfer.<sup>108</sup> By entering a final order accepting transfer from another state, the North Carolina court recognizes that state's adjudication of incompetency and appointment of the guardian.<sup>109</sup>

Within ninety days from the date the clerk enters the final order accepting transfer of the guardianship to North Carolina, the clerk must determine whether the guardianship needs to be modified to comply with North Carolina law.<sup>110</sup> This may include, for example, requiring a bond or modifying a bond amount. It is advisable for the clerk to schedule a status hearing and to notice the guardian of the hearing so that he or she may appear before the court to go over North Carolina requirements to file accountings and status reports, if required, and to take the oath and receive North Carolina letters of appointment.<sup>111</sup> Once the case is transferred to North Carolina, the clerk may also consider any other motions pertaining to the adult's capacity or guardianship, including whether limited guardianship or restoration are appropriate. See [Appendix C](#), "Transfer of an Existing Incompetency and Adult Guardianship Case to North Carolina from Another State."

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103. G.S. 35B-31(c).

104. *Id.* See also *UAGPPJA*, Article 3, General Comment. The statute does not state how long the court must wait after service before summarily entering a provisional order accepting transfer.

105. See *UAGPPJA*, Article 3, General Comment (stating that the term "interests" was chosen over "best interests" to reflect the strong autonomy values in modern guardianship law).

106. G.S. 35B-31(d). This may include, for example, whether or not the guardian is eligible to be bonded if the guardian is a guardian of the estate or a general guardian. The transferring state may not have required a bond.

107. G.S. 35B-18(a)(3).

108. The final order granting transfer from the other state must be issued in accordance with provisions similar to those found in G.S. 35B-30, which govern transferring a case from another state.

109. G.S. 35B-31(g). The purpose of this provision is to eliminate "the need to prove the case in the second state from scratch, including proving the respondent's incapacity and choice of guardian. . . ." See *UAGPPJA*, Article 3, General Comment. It does not prohibit the accepting court from modifying the guardianship to a limited guardianship or restoring the person's competency if a motion for either is later brought before the court.

110. G.S. 35B-31(f).

111. The court may find it necessary to appoint a guardian ad litem (GAL) in connection with this hearing to allow the GAL to make recommendations to the court about whether the guardianship needs to be modified to conform to the laws of North Carolina.

## V. Registration

The purpose of registration is to facilitate the enforcement of guardianship orders from other states.<sup>112</sup> The types of scenarios that typically invoke registration issues are when a nonresident of North Carolina owns real or personal property here or when he or she seeks some sort of medical or other personal care service in North Carolina. The nonresident is incapacitated and a guardian has been appointed on his or her behalf in another state. The guardian and the ward have no intention of moving to North Carolina, thus transfer of the case is inapplicable. However, the guardian does want to exercise some decision-making authority in North Carolina, either with respect to the person or to the property of the ward.

### A. Process to Register an Out-of-State Order in North Carolina

On and after December 1, 2016, a guardian of the person, a guardian of the estate, or a general guardian<sup>113</sup> appointed in another state may register an out-of-state order in North Carolina.<sup>114</sup> Registration is available whether the guardianship is full or limited.<sup>115</sup> G.S. 35B-36 prescribes the process for registering a guardianship of the person order. G.S. 35B-37 sets forth the process for registering a general guardianship order or a “protective order.”

The guardian commences the registration process by giving notice to the court that appointed the guardian of his or her intent to register the order. The guardian obtains certified copies of the order appointing the guardian and letters of office<sup>116</sup> from the court, as well as the copy of any bond.<sup>117</sup> Authenticated copies are not required.<sup>118</sup>

Next, the guardian files certified copies of the other state’s letters and the order and a copy of the bond, if any, in North Carolina, and the North Carolina court files the copies as a foreign judgment.<sup>119</sup> If the order is an order for a guardian of the person, it may be filed by the guardian of the person in any appropriate county.<sup>120</sup> For example, a county where a ward seeks treatment or other health care. If the order is an order for a guardian of the estate or for a general guardian, then the documents may be filed in any county where the ward has property.<sup>121</sup>

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112. *UAGPPJA*, Article 4, General Comment.

113. Keep in mind that different terminology may be used. A guardian of the person in another state may simply be a “guardian”, while a guardian of the estate may be a “conservator”.

114. G.S. 35B, Article 4.

115. *Id.*

116. Under North Carolina law, whenever a guardian is duly appointed and qualified, the clerk must issue the guardian “letters of appointment” signed and sealed by the clerk. G.S. 35A-1206. Generally, letters specify the type of guardian appointed and the nature and extent of the guardian’s authority. *Id.* In other states, letters of appointment may be called “letters of office” or referred to by some other term.

117. G.S. 35B-36; -37.

118. *UAGPPJA*, Article 4, General Comment.

119. G.S. 35B-36; -37. A guardian of the person may not register an order in North Carolina if a petition for the adjudication of incompetence and an application for the appointment of a guardian of the person is pending in North Carolina. G.S. 35B-36. Similarly, a guardian of the estate or a general guardian may not register an order in North Carolina if a petition for the adjudication of incompetence and an application for the appointment of a guardian of the estate is pending in North Carolina. *Id.* § 35B-37.

120. G.S. 35B-36.

121. G.S. 35B-37.

## B. Effect of Registration in North Carolina

Registration of an out-of-state guardianship order in North Carolina gives the guardian the authority to exercise all powers in North Carolina authorized in the order appointing the guardian from the other state, unless an action is prohibited by the laws of North Carolina.<sup>122</sup>

The most significant impact of the new registration provisions will be on the enforcement of out-of-state guardianship orders pertaining to a person. These provisions address situations like the one described at the start of this bulletin involving Cindy and her daughter, Mary, who live in Virginia. A Virginia court adjudicated Mary incompetent and appointed Cindy as her guardian. That court retains jurisdiction over the case. Cindy wants Mary to receive mental health treatment at a facility in North Carolina. Mother and daughter do not intend to move to North Carolina and do not want to permanently transfer the case here. However, the North Carolina care provider refuses to recognize an out-of-state guardianship order. By registering the order in North Carolina, Cindy, as the guardian, would have the authority to exercise all powers authorized by the out-of-state order and not prohibited under North Carolina law, including making certain health care decisions. If a third-party refuses to recognize any validly registered order in North Carolina, the court may grant any relief available under North Carolina law to enforce the registered order.<sup>123</sup>

The impact of the new registration provisions is less significant with respect to guardianships involving property. The legislation expressly preserved the existing provisions in G.S. Chapter 35A applicable to ancillary guardianship under G.S. 35A-1280 and removal of personalty from the state under G.S. 35A-1281.<sup>124</sup> As a result, registering a protective order or an order related to the nonresident ward's property in North Carolina does not eliminate the obligation

- to seek the appointment of an *ancillary guardian*<sup>125</sup> in North Carolina when a nonresident ward has real or personal property in North Carolina that will remain in the state<sup>126</sup> or
- to initiate a special proceeding by petition to remove personal property of a nonresident ward from North Carolina.<sup>127</sup>

Because these requirements were retained in North Carolina law, registration of an out-of-state order appointing a guardian to manage a nonresident ward's property will often be redundant. This is in part because registration of the order in North Carolina does not appear necessary for the North Carolina court to obtain jurisdiction over those proceedings. A North

122. G.S. 35B-38(a).

123. G.S. 35B-38(b).

124. S.L. 2016-72, § 3.

125. An ancillary guardian is person appointed guardian by a North Carolina court, through the authority of a guardian in another state, for a nonresident ward having real or personal property in North Carolina. G.S. 35A-1280; ANN M. ANDERSON & JOAN G. BRANNON, NORTH CAROLINA CLERK OF SUPERIOR COURT PROCEDURES MANUAL vol. II, pt. VI, ch. 86, p. 58 (UNC School of Government, 2012). Once appointed in North Carolina, an ancillary guardian has all the powers, duties, and responsibilities over the ward's estate, including the obligation to post a bond, as a guardian appointed in North Carolina. G.S. 35A-1280(b).

126. S.L. 2016-72, § 3; G.S. 35A-1280. The requirements for ancillary guardianship are described in ANDERSON & BRANNON, *supra* note 125, at vol. II, pt. VI, ch. 86, pp. 58–59, § XIV.

127. S.L. 2016-72, § 3; G.S. 35A-1281. The requirements of this process are more fully described in ANDERSON & BRANNON, *supra* note 125, at vol. II, pt. VII, ch. 122, pp. 1, 4.

Carolina court always has special jurisdiction to issue an order with respect to real or tangible personal property located in North Carolina.<sup>128</sup>

One area that is not redundant: registration of an order that is the other state's equivalent of a general guardianship order appears to now provide the general guardian appointed by another state with the authority to maintain actions and proceedings in North Carolina on behalf of the incapacitated person.<sup>129</sup> If the general guardian initiating or defending an action is not a resident of North Carolina, the guardian is subject to conditions imposed upon nonresident parties by North Carolina law.<sup>130</sup>

## Conclusion

UAGPPJA is now a part of North Carolina law in the form of a new G.S. Chapter 35B. In addition to creating a framework for court communication and cooperation, it serves as a gatekeeper to the courts' authority under G.S. Chapter 35A to adjudicate incompetence and appoint guardians in North Carolina in the first instance. It also provides a means to transfer certain cases to and from North Carolina. Finally, UAGPPJA sets forth a mechanism to register out-of-state orders in North Carolina when a nonresident guardian seeks to take some action with respect to the ward's person or property located in North Carolina. This bulletin provides an overview for each of these new processes. There will likely be additional information as new forms and rules of recordkeeping are created and other administrative aspects of implementing this new law play out.

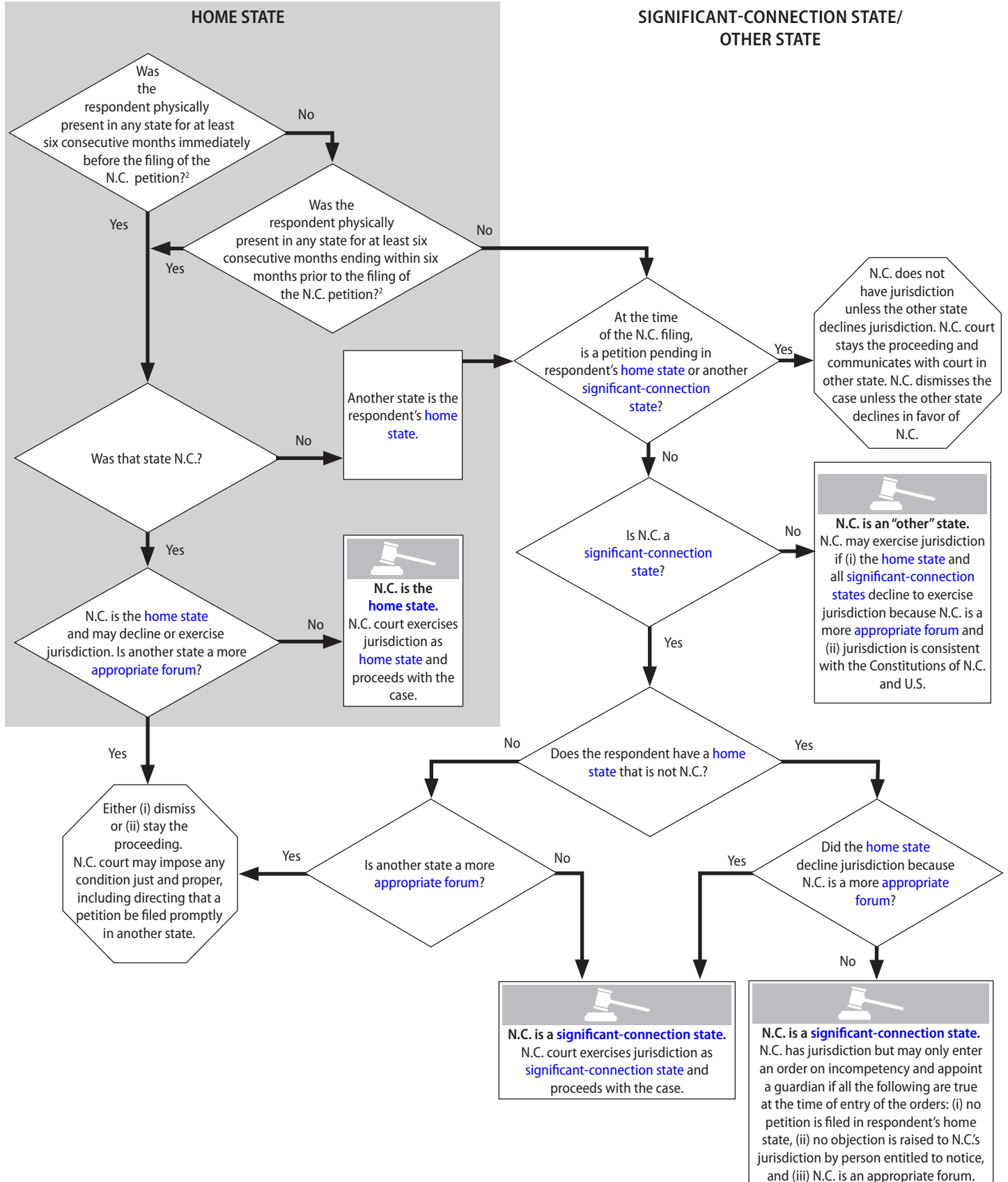
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128. G.S. 35B-18(a)(2).

129. *See* G.S. 35B-38(a); 1A-1, Rule 17(b)(1) and (2) (providing that a general or testamentary guardian "within this State" has the authority to sue or defend on behalf of an incompetent person).

130. G.S. 35B-38(a).

# Appendix A. Does North Carolina Have Jurisdiction to Enter an Incompetency and Adult Guardianship Order?<sup>1</sup> (G.S. Chapter 35B, Article 2)



Notes:  
 1. This flowchart does not cover an N.C. court's authority to exercise special jurisdiction.  
 2. The court does not take into account periods of temporary absence.



## Definitions/Explanation of Terms Used in Appendix A

**Home State** (G.S. 35B-15(a)(2)). The state where the respondent was physically present, including periods of temporary absence, for at least six consecutive months immediately prior to the filing of the petition; or, if none, the state in which the respondent was physically present, including periods of temporary absence, for at least six consecutive months ending within the six months prior to filing of the petition.

**Temporary Absence.** Temporary absence is not defined in G.S. Chapter 35B but includes short-term out-of-state travel for most purposes (e.g., vacation, business, or visits with family or friends).

**Significant-Connection State** (G.S. 35B-15(a)(3) and (b)). A state, other than the home state, with which the respondent has a significant connection other than mere physical presence and in which substantial evidence concerning respondent is available. To determine significant connection, the court shall consider

- the location of the respondent's family and of other persons required to be notified of the proceedings;
- the length of time the respondent was physically present in North Carolina and the duration of any absence;
- the location of the respondent's property; and
- the extent to which the respondent has ties to a particular state, including voting registration, tax return filings, vehicle registration, driver's license, social relationships, and receipt of services.

**Appropriate Forum** (G.S. 35B-20). To determine whether a state is an appropriate forum, the court shall consider all relevant factors, including but not limited to the following:

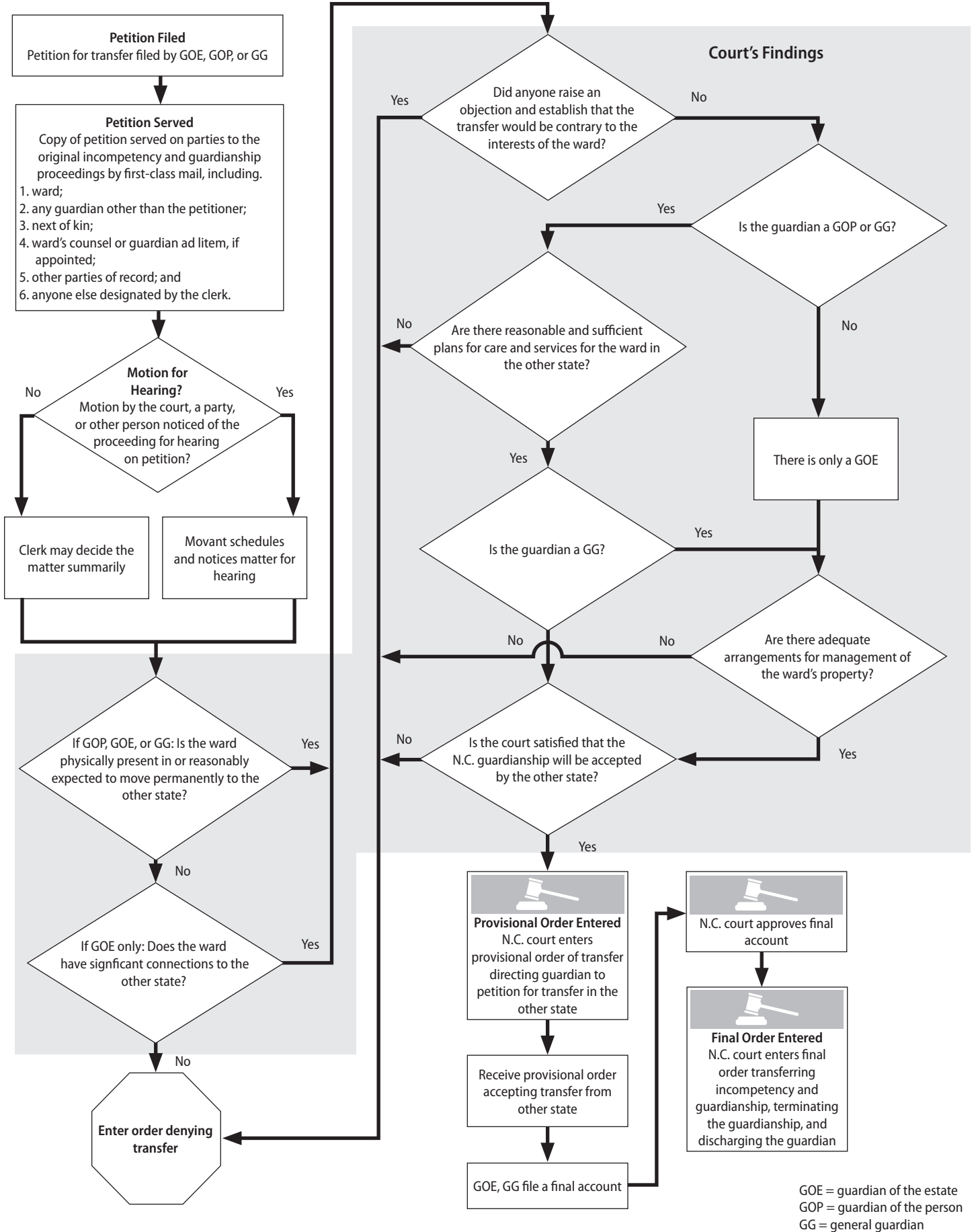
- any expressed preference of the respondent;
- whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- the length of time the respondent was physically present in or was a legal resident of this or another state;
- the distance of the respondent from the court in each state;
- the financial circumstances of the respondent's estate;
- the nature and location of relevant evidence;
- the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- the familiarity of the court of each state with the facts and issues in the proceeding; and
- if an appointment was made, the court's ability to monitor the conduct of the guardian.

**Special Jurisdiction** (G.S. 35B-18). A court that lacks jurisdiction as a home state, significant-connection state, or "other" state has special jurisdiction to

1. appoint a guardian of the person for up to ninety days if an *emergency* exists and the respondent is present and served in North Carolina (G.S. 35B-18(a)(1)) and
2. issue a protective order with respect to real or tangible personal property located in N.C. (G.S. 35B-18(a)(2))

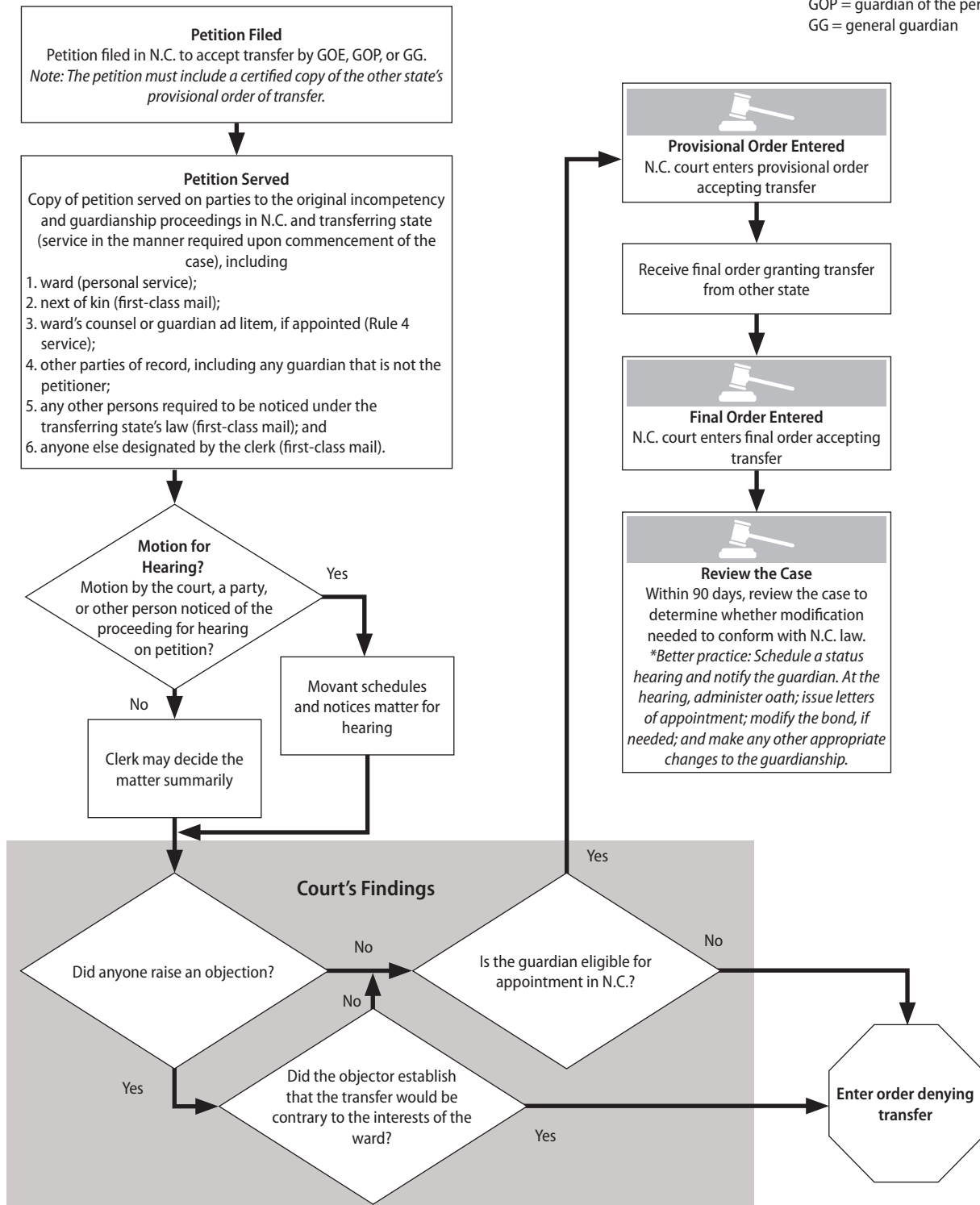
An emergency in this context is a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian of the person is necessary because no other person has authority and is willing to act on the respondent's behalf. G.S. 35B-15(a)(1).

# Appendix B. Transfer of an Existing Incompetency and Adult Guardianship Case from North Carolina to Another State (G.S. 35B-30)



# Appendix C. Transfer of an Existing Incompetency and Adult Guardianship Case to North Carolina from Another State (G.S. 35B-31)

GOE = guardian of the estate  
 GOP = guardian of the person  
 GG = general guardian



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