NORTH CAROLINA Judicial COLLEGE

Incompetency and Adult Guardianship

April 30-May 1, 2015
School of Government, Chapel Hill, NC

Thursday, April 30, 2015

8:30 a.m.	**Check in**
9:00 a.m.	**Welcome and Introductions**
	Meredith Smith, Assistant Professor of Public Law and Government, School of Government
9:15 a.m.	**The Clerk's Role in Adult Guardianship Proceedings (120min)**
	Meredith Smith, Assistant Professor of Public Law and Government, School of Government
11:15 a.m.	**Break**
11:25 a.m.	**Medical Records as Evidence (60min)**
	Jill Moore, Associate Professor of Public Law and Government, School of Government
12:25 p.m.	**Lunch (Dining Hall)**
1:25 p.m.	**Medical Conditions that Impair Capacity (90min)**
	Dr. Samuel Gray, Psychologist, Carolina Psychology Group, PLLC
2:55 p.m.	**Break**
3:05 p.m.	**Evidentiary Issues in Guardianship Cases (80min)**
	Meredith Smith, Assistant Professor of Public Law and Government, School of Government
4:25 p.m.	**Break**
4:30 p.m.	**The Role of the Guardian Ad Litem (60min)**
	Natalie Miller, Attorney, Law of Natalie J. Miller, LLC
5:30 p.m.	**Adjourn**

Friday, May 1, 2015

8:30 a.m.	**Restoration of Competency (50min)**
	Meredith Smith, Assistant Professor of Public Law and Government, School of Government
9:20 a.m.	**Break**
9:30 a.m.	**Presiding Over Cases with Unrepresented Litigants (75min)**
	Judge Beth Keever, District Court Judge, ret.
10:45 a.m.	**Break**
10:55 a.m.	**Post-Appointment Issues and Management of Wards (65min)**
	Stacey Skradski, Empowering Lives Guardianship Services, LLC
12:00 p.m.	**Box Lunches + Presiding without Bias (75min)**
	Jim Drennan, Professor of Public Law and Government (part-time, retired), School of Government
1:15 p.m.	**Mock Hearing (105min)**
	Meredith Smith, Assistant Professor of Public Law and Government, School of Government
3:30 p.m.	**Adjourn**

13 Hours CEUs
Applied for 11 General Hours and 2 Ethics Hours of CLEs

Incompetency and Adult Guardianship for Clerks of Superior Court
UNC School of Government
Chapel Hill, NC
April 30-May 1, 2015

EVALUATION

SESSION EVALUATION

Thursday, April 30, 2015

The Clerk's Role in Adult Guardianship Proceedings
Meredith Smith, UNC School of Government

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Medical Records as Evidence
Jill Moore, UNC School of Government

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge?	Too difficult	About right	Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Medical Conditions that Impair Capacity
Dr. Samuel Gray, Carolina Psychology Group, PLLC

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge?	Too difficult	About right	Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Evidentiary Issues in Guardianship Cases
Meredith Smith, UNC School of Government

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

The Role of the Guardianship Ad Litem
Natalie Miller, Law of Natalie J. Miller, LLC

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Friday, May 1, 2015

Restoration of Competency
Meredith Smith, UNC School of Government

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Presiding Over Cases with Unrepresented Litigants
Judge Beth Keever, District Court Judge, ret.

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Post-Appointment Issues and Management of Wards
Stacey Skradski, Empowering Lives Guardianship Services, LLC

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Presiding without Bias
Jim Drennan, UNC School of Government

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

Mock Hearing
Meredith Smith, UNC School of Government

Please rate your instructor's teaching:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The instructor presented the material clearly.	SD	D	N	A	SA
The instructor was knowledgeable and well-prepared.	SD	D	N	A	SA
The instructor's pace was appropriate.	SD	D	N	A	SA
Overall, the session was skillfully done.	SD	D	N	A	SA

Please rate the session content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The session content is important for my professional development.	SD	D	N	A	SA

Was the content appropriate for your level of knowledge? Too difficult About right Too easy

Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:

COURSE EVALUATION

Course Content
Please rate the usefulness and length of each session:

	Usefulness		Session Length		
	Keep Session	Omit Session	Too Short	Just Right	Too Long
The Clerk's Role in Adult Guardianship Proceedings					
Medical Records as Evidence					
Medical Conditions that Impair Capacity					
Evidentiary Issues in Guardianship Cases					
The Role of the Guardian Ad Litem					
Restoration of Competency					
Presiding Over Cases with Unrepresented Litigants					
Post-Appointment Issues and Management of Wards					
Presiding without Bias					
Mock Hearing					

Are there any topics that we should add to the course?

Please rate the course content:	*Strongly Disagree*		*Neither*		*Strongly Agree*
The course (as a whole) will be useful to me.	SD	D	N	A	SA
The course materials will be useful to me.	SD	D	N	A	SA

Please share any additional comments about course content. If you indicated that you were dissatisfied with one or more aspects of course content, we are particularly interested in learning how we can do better in the future:

Please rate the logistics of the course:	*Strongly Disagree*		*Neither*		*Strongly Agree*
Registering for the course was simple and straightforward.	SD	D	N	A	SA
Before attending the course, I received appropriate and timely information about course logistics.	SD	D	N	A	SA
The room set-up was appropriate for this class.	SD	D	N	A	SA
On-site School of Government staff was informed and helpful.	SD	D	N	A	SA

Please share any additional comments about course logistics. If you indicated that you were dissatisfied with one or more logistical aspects of the course, we are particularly interested in learning how we can do better in the future:

How did you find out about the course? (please check all that apply)

___ Postcard Announcement
___ Email Announcement
___ School of Government Flyer
___ School of Government Website
___ School of Government Listserv
Please specify: _____
___ Referral from Colleagues
___ Web Search
___ Advertisement
___ School of Government Blog
Please specify: _____
___ Other, Please specify: _____

APPENDIX A:
Incompetency and Guardianship Procedures

	Form Numbers and Titles	Person Responsible	Procedures	Statutes
Special Proceeding – Incompetency	AOC-SP-550-Special Proceeding Action Cover Sheet	Person filing SP documents w/clerk	Cover page for SP filings	Rule 5(b) Rules of Practice
	AOC-SP-200-Petition for Adjudication of Incompetence and Application for Appointment of Guardian (Limited or Interim Guardian)	Petitioner and/or petitioner's attorney	Initiation of the SP file	G.S. 35A-1105, 1112-1114, 1210
	AOC-SP-201-Notice of Hearing & Order Appointing Guardian ad Litem	Clerk & sheriff's deputy	Pre-hearing	G.S. 35A-1107-1109, 1112, 1207
	AOC-SP-207, Certificate of Service	Person responsible for service	Notice of hearing and petition	G.S. 35A-1109
	AOC-SP-208, Guardianship Capacity Questionnaire	All interested persons	Pre-hearing	N/A
	AOC-SP-901M-Request and Order for Multidisciplinary Evaluation	Any requesting party and/or the clerk	Pre-hearing	G.S. 35A-1111(a)&(b)
	AOC-SP-900M-ORDER on Motion for Appointment of Interim Guardian	Assistant or elected clerk	Prior to interim hearing, if one is scheduled	G.S. 35A-1114
	AOC-SP-202, ORDER on Petition for Adjudication of Incompetence	Hearing clerk	As a result of adjudication hearing	G.S. 35A-1112, 1113, 1116, 1120, 1205
Guardianship Estate	AOC-E-406, ORDER on Application for Appointment of Guardian (if respondent is declared incompetent)	Hearing clerk who appoints guardian (usually the same clerk who adjudicated incompetence)	As a result of adjudication & appointment of guardian hearings	G.S. 35A-1213-1215, 1226

	Form Numbers and Titles	Person Responsible	Procedures	Statutes
Guardianship Estate	AOC-E-206-Application for Letters of Guardianship	Person(s) appointed guardian on AOC-E-406	After AOC-E-406 order & prior to issuance of letters	G.S. 35A-1210, 1212, 35A-1251
	AOC-E-401- Bond	Corporate surety and guardian under oath	Prior to issuance of letters	G.S. 35A-1231
	AOC-E-400-Oath	Guardian takes oath before clerk or notary	Prior to issuance of letters	N.C. Constitution, Art. VI., Sec. 7; G.S.11-7, 11-11; 28A-7-1
	AOC-E-402-Order of Issuance of Letters	Assistant or elected clerk	Prior to issuance of letters	G.S. 35A-1215, 1226
	Guardianship letters of authority are as follows: • AOC-E-413-Letters of Appointment of General Guardian • AOC-E-408-Letters of Appointment General Guardian of Estate • AOC-E- 407-Letters of Appt. General Guardian of Person • AOC-E-419-Letters Appt. Limited General Guardian • AOC-E-417-Letters of Appointment Limited Guardian of Estate • AOC-E-418-Letters of Appt. Limited Guardian of Person	Usually estates clerk, may be a deputy clerk, assistant clerk or the elected clerk	Official qualification of guardian-the issuance of letters	G.S. 35A-1203, 1206, 1251, 1212, 1215
	AOC-E-510-Inventory for Guardianship Estate	Guardian if assets	Due w/in 3 months from date of letters	G.S. 35A-1261
	AOC-E-506-Account Annual/Final Accounting	Guardian if assets	Due w/in 1 year from date of letters and due annually	G.S. 35A-1264, 1266

TAB 01

Clerk's Role in Adult Guardianship Proceedings

184 N.C.App. 526
Court of Appeals of North Carolina.

Cornelius CLAWSER and wife, Marlene Clawser, Plaintiffs,
v.
Coralee CAMPBELL d/b/a Mason's Ruby and Sapphire Mine, Christine L. Mason, an incompetent person, by and through her Guardian, Cora Lee Campbell, Defendants.

No. COA06–1192. | July 3, 2007.

Synopsis
Background: Invitee and wife filed suit against incompetent person and her daughter, alleging negligence, ultra-hazardous activity, and loss of consortium after invitee was injured while gem mining on real property owned by incompetent person. The Superior Court, Macon County, Zoro Guice, Jr., J., entered judgment on jury verdict in favor of plaintiffs totaling $187,500. Defendants appealed.

Holdings: The Court of Appeals, Martin, C.J., held that:

[1] incompetent person was neither properly sued nor served in the absence of a guardian ad litem or general guardian, and

[2] order striking defendants' defenses on the issue of liability, as a sanction for defendant's failure to attend her scheduled discovery deposition, was improper.

Judgment vacated; remanded.

West Headnotes (4)

[1] **Mental Health**
Necessity of Appointment
Mental Health
Persons to Be Served

Incompetent person, a defendant in negligence action brought by invitee who was injured while gem mining on real property owned by incompetent person, was neither properly sued nor served in the absence of a guardian ad litem or general guardian; incompetent person was sued and served through her guardian of the person, which was improper. West's N.C.G.S.A. §§ 35A–1241, 35A–1251.

2 Cases that cite this headnote

[2] **Pretrial Procedure**
Striking Pleadings

Trial court's order striking defendants' defenses on the issue of liability in negligence action, as a sanction for defendant's failure to attend her scheduled discovery deposition, was improper, where transcript revealed that trial court did not consider any lesser sanctions before striking the defendants' defenses.

2 Cases that cite this headnote

[3] **Pretrial Procedure**
Failure to Disclose; Sanctions

The striking of defenses or counterclaims is an appropriate sanction for a party's discovery violation, and such decision is within the province of the trial court.

2 Cases that cite this headnote

[4] **Pretrial Procedure**
Failure to Disclose; Sanctions

If a trial court chooses to exercise the option of striking a party's defenses or counterclaims as a sanction for a discovery violation, it must do so after considering lesser sanctions.

2 Cases that cite this headnote

****780** Appeal by defendants from judgment entered 22 March 2005 and order entered 19 October 2005 by Judge Zoro Guice, Jr. in Macon County Superior Court. Heard in the Court of Appeals 27 March 2007.

Attorneys and Law Firms

Melrose, Seago & Lay, P.A., by Randal Seago, Sylva, for plaintiffs-appellees.

Collins & Hensley, P.A., by Robert E. Hensley, Franklin, for defendants-appellants.

Opinion

MARTIN, Chief Judge.

***527** Defendants appeal from a judgment entered upon a jury verdict in favor of the plaintiffs totaling $187,500. For the reasons below, we vacate the trial court's judgment and remand for further proceedings after appointment of a proper guardian for defendant Mason.

The evidence before the trial tended to show that defendant Mason was, on the date this action was filed, approximately 90 years old and resided in a nursing facility for the elderly in Macon County. On 11 July 2002, the Clerk of Superior Court for Macon County determined that she lacked sufficient capacity to manage her own affairs or make important decisions concerning her person, family or property, and adjudicated her incompetent. Her daughter and co-defendant, Cora Lee Campbell, was appointed guardian of her person on 1 August 2002.

Plaintiff Cornelius Clawser was injured on 12 September 2002 while gem mining on real property owned by defendant Mason. On 5 June 2003, plaintiffs filed suit against defendant Campbell, alleging negligence, ultra-hazardous activity and loss of consortium. Defendant Campbell filed an Answer on 17 August 2003 through James R. Anderson, her attorney. Plaintiffs filed an amended complaint to add defendant Mason on 21 November 2003. The Amended Complaint was served by mail addressed to "John R. Anderson ... For Defendant Cora Lee Campbell." On 13 March 2004, Mr. Anderson filed an answer purportedly on behalf of both Ms. Mason and Ms. Campbell ****781** denying negligence but conceding personal jurisdiction over both defendants. Mr. Anderson was subsequently allowed to withdraw as counsel due to his relocation to Fayetteville. In the interim, plaintiffs had sought and obtained an entry of default on 21 January 2004.

Defendant Campbell subsequently sought to retain the services of another local attorney, Andrew Patterson. On the first day of trial, prior to jury selection, Mr. Patterson advised the court that he had not agreed to represent defendant Campbell, and did not represent her. At the same time, the trial court addressed the plaintiffs' motion for sanctions against defendants for defendant Campbell's failure to appear at a deposition. Defendant Campbell told the court that Mr. Patterson had advised her not to go to the deposition since he would not be able to appear. The trial court allowed plaintiffs' motion to strike defendants' answer with respect to liability, and to proceed to trial solely on damages. During the course of the trial, the trial court ***528** became aware that Mr. Patterson had not returned the defendants' case file to Ms. Campbell after deciding not to represent defendants. The trial court expressed its concern over the situation, but continued the trial with defendant Campbell representing herself and her mother *pro se.* After deliberation, the jury awarded Cornelius Clawser $185,000 for his injuries, and Marlene Clawser $2,500 for loss of consortium.

On 19 August 2005, defendants filed a Motion Pursuant to Rule 60 and a Motion for Temporary and Preliminary Injunction. On 22 August 2005, the Macon County Superior Court entered an order temporarily restraining and enjoining the Macon County Sheriff's Department from taking any action to execute on the judgment. The order was periodically extended. Defendants' Rule 60 motion came for a hearing before the Macon County Superior Court on 9 September 2005. On 19 October 2005, the court ruled that defendants had failed to plead or prove any grounds for relief under Rule 60. The motion was denied. This appeal follows.

[1] We first address the issue of whether defendant Mason was properly sued and served through her Guardian of the Person. Plaintiffs argue that she was properly served and defended, and that furthermore, any objection to service has been waived by the failure of defendants to raise it as a threshold defense. Defendants contend that since defendant Mason was never served appropriately and that her Guardian of the Person was not authorized to undertake a defense on her behalf, any service and consequent waiver was ineffective. Whether a Guardian of the Person may sue or be sued on behalf of a ward appears to be an issue of first impression in North Carolina. None of the authority cited by the parties in their briefs speaks directly to the issue, and our own

research has failed to unearth any. However, our Supreme Court has held that if a defendant is *non compos mentis*, he must defend by "general or testamentary guardian if he has one within the state, and, if he has none, by a guardian ad litem to be appointed by the court." *Hood v. Holding*, 205 N.C. 451, 453, 171 S.E. 633, 634 (1933). We note that defendant Mason had no general or testamentary guardian, and no guardian ad litem was ever appointed by the court.

We further note that the *Hood* holding is supported by the current statutory scheme. The statutes governing general guardians specifically grant general guardians the power to undertake and defend legal actions on behalf of their wards:

> ***529** In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers: ...
>
> (3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

****782** N.C. Gen. Stat § 35A–1251 (2005). By contrast, the statute dealing with Guardians of the Person confers no power to maintain action, only stating that such a Guardian may confer such consent as necessary to maintain a service:

> § 35A–1241. Powers and duties of guardian of the person
>
> (a) To the extent that it is not inconsistent with the terms of any order of the clerk or any other court of competent jurisdiction, a guardian of the person has the following powers and duties:....
>
> (3) The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. The guardian shall not, however, consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk in accordance with G.S. 35A–1245. The guardian of the person may give any other consent or approval on the ward's behalf that may be required or in the ward's best interest. The guardian may petition the clerk for the clerk's concurrence in the consent or approval.

Under the doctrine *inclusio unius est exclusio alterius* ("The inclusion of one is the exclusion of another." *Black's Law Dictionary* 763 (6th ed.1990)), the legislature's decision to confer the power to maintain an action on a general guardian, but not a guardian of the person, implies that the latter lacks such power. This is also an implied requirement of our Rules of Civil Procedure which impose the ***530** requirement of appointment of a guardian *ad litem* where no general or testamentary guardian has been appointed. *See* N.C. Gen.Stat. § 1A–1, Rule 17(b)(2)(2005)("In actions or special proceedings when any of the defendants are infants or incompetent persons, ... they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided.") Therefore, we must conclude that defendant Mason was neither properly sued nor served in the absence of a guardian *ad litem* or general guardian, and set aside the verdict against her on that basis.

Turning to defendant Campbell, defendants argue that the trial court erred in granting the plaintiffs' motion for sanctions against defendants by barring defendants from denying liability, and limiting the trial to damages. We agree.

Plaintiffs argue that the entry of default against the defendants was based on their failure to file a responsive pleading to the Amended Complaint. However, the transcript clearly reveals that the issue of liability was decided based on defendant Campbell's failure to attend her scheduled discovery deposition. At the time in question, plaintiffs' counsel told the trial court:

> Plaintiff Counsel: We would ask the court to enter a judgment against her [defendant] as to liability and proceed only on damages. That would be our request for-*an appropriate response for not participating in her deposition.* ...
>
> Trial Court: The Court will allow the motion of the plaintiff as to liability and will try this matter on the question of damages, and finds that the plaintiff [sic] received notice of the deposition and for whatever reason chose not to appear at the deposition and made no appearance at the deposition following due and proper notice of the deposition. So we'll try the matter only on the question of damages.... Ma'am, I don't know if you understand what's going on or not, but

> liability is no longer an issue, the Court having decided that that *is a proper determination for the Court to make as sanctions for your failure to appear for the deposition.*

(Emphasis added). The above exchange makes clear that defendants' denial of liability was stricken based solely for defendant Campbell's discovery violations, and not by reason of the earlier entry of default. Having asserted only that ground in their arguments to the trial court, ***531** plaintiffs are estopped from raising an alternative argument before this Court. "Our Supreme Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State* ****783** *v. Holliman*, 155 N.C.App. 120, 123, 573 S.E.2d 682, 685 (2002) (citation omitted).

[2] [3] [4] Therefore, we review the propriety of striking the defendants' defenses as a sanction for the discovery violation. This Court has recently reaffirmed "that trial courts are not without the power to sanction parties for failure to comply with discovery orders." *Harrison v. Harrison*, 180N.C.App. 452, ——, 637 S.E.2d 284, 288 (2006). Striking of defenses or counterclaims is an appropriate remedy, and is within the province of the trial court. *Jones v. GMRI, Inc.*, 144 N.C.App. 558, 565, 551 S.E.2d 867, 872 (2001). This Court will not disturb a dismissal absent a showing of abuse of discretion by the trial judge. *Benton v. Hillcrest Foods, Inc.*, 136 N.C.App. 42, 524 S.E.2d 53 (1999). However, if the trial court chooses to exercise the option of striking a party's defenses or counterclaims, it must do so after considering lesser sanctions. *See In re Pedestrian Walkway Failure*, 173 N.C.App. 237, 251, 618 S.E.2d 819 (2005); *Goss v. Battle*, 111 N.C.App. 173, 176, 432 S.E.2d 156, 159 (1993).

An examination of the transcript reveals that the trial court did not consider any lesser sanctions before striking the defendants' defenses on the issue of liability. The trial then proceeded on the sole issue of damages. Therefore, we are compelled to set aside the trial court's order striking defendants' defenses. The judgment is thus vacated, and the case remanded to the trial court for proceedings consistent with this opinion.

Judgment vacated; Remanded.

Judges WYNN and GEER concur.

Parallel Citations

646 S.E.2d 779

End of Document

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92 N.C.App. 257
Court of Appeals of North Carolina.

Mildred Irene CLINE
v.
Henry E. TEICH, Guardian for Hazel J. CLINE.

No. 8828DC514. | Dec. 20, 1988.

Incompetent's spouse brought action seeking award of support from incompetent's estate and permission to live rent-free in incompetent's home. The District Court, Buncombe County, Earl J. Fowler, Jr., J., dismissed complaint for failure to state claim, and spouse appealed. The Court of Appeals, Becton, J., held that: (1) duty to provide support to dependent spouse was continuing obligation that was fairly chargeable to estate of incompetent; (2) support relief spouse was entitled to was not exclusively confined to statutory special proceeding for sale of incompetent's property; (3) in limited instance in which incompetent's estate was ample to provide for his own care and maintenance, award of spousal support could properly be charged against estate; but (4) district court was not proper forum in which to seek spousal support from estate of incompetent, and district court accordingly had no jurisdiction over spouse's claim.

Vacated and remanded with instructions.

West Headnotes (7)

[1] **Mental Health**
Husband, Wife or Children, Allowance for Support

Duty to provide support to dependent spouse is continuing obligation fairly chargeable to estate of incompetent, and complaint of wife seeking award of support from incompetent husband's estate and permission to live rent-free in his home accordingly stated legally recognized claim.

1 Cases that cite this headnote

[2] **Mental Health**
Husband, Wife or Children, Allowance for Support

Support relief that incompetent's spouse was entitled to was not confined exclusively to statutory special proceeding for sale of incompetent's property; spouse might be entitled to relief even if statutory procedure available for sale of incompetent's property were not appropriate to spouse's circumstances. G.S. § 35A-1307.

Cases that cite this headnote

[3] **Clerks of Courts**
Judicial Functions and Proceedings

Clerk of superior court had residual equitable power under statutes, after he ensured estate was ample to meet expenses of caring for incompetent, to examine facts and circumstances of case to determine whether incompetent's spouse should be granted support from incompetent's estate and granted right to continue to live in incompetent's home. G.S. § 35A-1101 et seq.

1 Cases that cite this headnote

[4] **Mental Health**
Husband, Wife or Children, Allowance for Support

Factors that clerk of superior court might consider in determining whether incompetent's spouse should be granted support from incompetent's estate included size and condition of estate, current and future demands against it, and spouse's needs. G.S. § 35A-1101 et seq.

1 Cases that cite this headnote

[5] **Mental Health**
Husband, Wife or Children, Allowance for Support

Estate of incompetent may not be so depleted in favor of spouse as to compromise quality of care provided to incompetent or to force incompetent to become public charge.

Cases that cite this headnote

[6] **Mental Health**
Husband, Wife or Children, Allowance for Support

In limited instance in which incompetent's estate is ample to provide for his own care and maintenance, award of spousal support may properly be charged against the estate.

Cases that cite this headnote

[7] **Mental Health**
Jurisdiction

District court was not proper forum in which to seek spousal support from estate of incompetent, and district court accordingly had no jurisdiction over incompetent's spouse's claim for support; superior court is only proper division to hear matters regarding administration of incompetents' estates, and spouse should have made her demand for support before clerk of superior court either as motion pursuant to statute that permits consideration of any matter pertaining to guardianship or as special proceeding for sale of incompetent's property under another statute. G.S. §§ 7A-246, 35A-1207, 35A-1307.

4 Cases that cite this headnote

Attorneys and Law Firms

****463 *258** Winner & Heck by Dennis J. Winner, Asheville, for plaintiff-appellant.

Grimes & Teich by Henry E. Teich, Asheville, for defendant-appellees.

Opinion

BECTON, Judge.

Plaintiff, Mildred Cline, brought this action in district court seeking an award of support from her incompetent husband's estate and permission to live rent-free in his home. She appeals from an order dismissing her Complaint for failure to state a claim.

I

Mildred and Hazel Cline were married 2 May 1986. They lived together in Mr. Cline's home until 21 November 1987, when a medical condition left him permanently brain damaged. Mr. Cline was institutionalized as a result, and defendant Henry Teich was appointed his guardian. Teich refused to provide funds from the estate for Mrs. Cline's support, informing her of his belief that, as guardian, he was not authorized by law to do so.

Mildred Cline brought an action against Teich, alleging in the Complaint that she had been supported by her husband until his incompetency, that she now needs reasonable support from his estate, and that the estate is sufficient both to support her in the manner she enjoyed before her husband's incompetency and to permit her to live in her husband's house without paying rent to the guardian.

In his Answer, Teich admitted that Mr. Cline's estate includes certain income-producing property and that Mrs. Cline is in need of support. A premarital agreement entered into by the Clines was raised as a defense, however, and Teich moved to dismiss the Complaint under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The trial judge granted the motion to dismiss.

We decline to address on appeal whether the premarital agreement precludes Mrs. Cline from reaching her husband's ***259** estate for support since that question is not appropriate to our disposition of this case.

Two questions remain for our decision in this appeal. The first is whether Mrs. Cline's Complaint states a claim upon which relief can be granted. If the Complaint states a valid claim, the second question is whether that claim may properly be brought in district court. Although we conclude that the Complaint states a claim for relief, we nonetheless hold that the Complaint should have been dismissed for lack of subject matter jurisdiction because it prayed for relief not available in district court. Accordingly, we vacate the judgment of the district court.

II

A. *Rule 12(b)(6) Standard*

A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure tests the legal sufficiency of a complaint. *See, Stanback v. Stanback,* 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). A complaint must state the substantive elements of some "legally recognized claim" to withstand a motion to dismiss. *Id.* at 204, 254 S.E.2d at 626. In ruling on the motion, all factual allegations in the complaint are taken to be true. *See Jackson v. Bumgardner,* 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986).

> Dismissal of a complaint under Rule 12(b)(6) is proper [only] when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that *no law supports plaintiff's claim;* (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Jackson, 318 N.C. at 174-75, 347 S.E.2d at 745 (emphasis added) (citations omitted).

Teich maintains that Mrs. Cline stated no legally recognized claim for relief because, in his view, the law does not authorize ****464** disbursement of funds from an incompetent's estate for spousal support.

B. *Action for Spousal Support is a Legally Recognized Claim*

[1] Although no statutory provisions squarely apply to the present situation, there is ample support in North Carolina law for ***260** the conclusion that spousal support may be an appropriate charge against an incompetent's estate.

The common law duty to provide support to a dependent spouse has long been recognized in this State. *See Ritchie v. White,* 225 N.C. 450, 453, 35 S.E.2d 414, 416 (1945); *Bowling v. Bowling,* 252 N.C. 527, 533, 114 S.E.2d 228, 232 (1960); *cf. Williams v. Williams,* 299 N.C. 174, 187, 261 S.E.2d 849, 858 (1980) (even wealthy spouse may be "dependent spouse" entitled to support). This duty "has been enforced even where the husband was incompetent, ... [and] where the wife was financially capable of providing for her own needs." *North Carolina Baptist Hospitals, Inc. v. Harris,* 319 N.C. 347, 349, 354 S.E.2d 471, 472 (1987) (citing *Reynolds v. Reynolds,* 208 N.C. 254, 180 S.E. 70 (1935); *Bowling,* 252 N.C. 527, 114 S.E.2d 228).

The North Carolina cases on point, though old, remain valid precedent. In *Brooks v. Brooks,* 25 N.C. 389, 391 (3 Ired.1843), quoted with approval in *Ford v. Security National Bank,* 249 N.C. 141, 143-44, 105 S.E.2d 421, 423-24 (1958), our supreme court stated that "[i]t is true that the wife and children of a lunatic are entitled to maintenance out of the estate, according to their circumstances, after properly providing for the lunatic." Similarly, in *In re Hybart,* 119 N.C. 359, 364, 25 S.E. 963, 966 (1896), the court noted that the law "contemplates giving a wife who lives in the mansion house of her [incompetent] husband the right to remain there...." And in *Reynolds v. Reynolds,* the court held that the wife of an incompetent had the right to receive support from the income of her husband's estate when that income exceeded the cost of caring for him. 208 N.C. 254, 265, 180 S.E. 70, 77 (1935). None of these cases have been overruled by our courts or invalidated by our legislature.

Chapter 35A of the General Statutes, which was recently enacted, governs the administration of incompetents' estates. Chapter 35A contemplates a spousal support obligation. Under Section 35A-1307, an incompetent's spouse who is "in needy circumstances" may bring a special proceeding before the clerk of superior court to sell the incompetent's property and apply the proceeds to support. N.C.Gen.Stat.Sec. 35A-1307 (1987). Presumably, resort to sale of an incompetent's property is necessary only when estate income is insufficient to provide support.

***261** Other statutory provisions implicitly recognize that spousal support is a proper charge against an incompetent's estate, whether or not the spouse is

destitute. *See, e.g.,* N.C.Gen.Stat.Sec. 35A-1321 (1987) (implying that incompetent's spouse and children should be supported from the estate: "members of [incompetent's] *family* " must be provided with "all the necessaries and suitable comforts of life" before advancements of surplus income may be made to certain of incompetent's relatives, while advancements of surplus income from estate of childless, *unmarried* incompetent may be made to certain other relatives). *See also* N.C.Gen.Stat.Sec. 34-14.1 (1984) (guardian is authorized to pay veterans' benefits to spouse of incompetent veteran).

In light of the foregoing, we conclude that the duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent. Therefore, Mrs. Cline's Complaint for support stated a legally recognized claim.

C. *Authority to Disburse Estate Funds for Spousal Support*

[2] The guardian asserts that the relief Mrs. Cline is entitled to, if any, is confined exclusively to the statutory special proceeding for sale of the incompetent's property set out in N.C.Gen.Stat.Sec. 35A-1307. We disagree. In the event that the procedure available under Section 35A-1307 is not ****465** appropriate to Mrs. Cline's circumstances, as would be the case, for example, if estate income renders sale of Mr. Cline's property unnecessary or undesirable, or Mrs. Cline is not "needy" as contemplated by the statute, we conclude that she may nonetheless be entitled to relief. This relief may come directly from the guardian, or may be pursued independently in superior court.

In most cases, a guardian is empowered under chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; *prior* approval of expenditures is *necessary* only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. *See* N.C.Gen.Stat.Secs. 35A-1251(12), (19); 35A-1301; 35A-1306; 35A-1307; 35A-1310; 35A-1311 (1987). Of course, the guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest, *see* N.C.Gen.Stat.Sec. 35A-1251, and in all cases, the guardian's management of the estate will eventually be subject to judicial scrutiny. *See* N.C.Gen.Stat.Sec. ***262** 35A-1260 *et seq.* (1987) (requiring periodic submission of estate accounts for approval by clerk of superior court). If the guardian questions the propriety of a particular charge against the estate, he may seek prior court approval before making payment by filing a motion in the cause with the superior court clerk. *See* N.C.Gen.Stat.Sec. 35A-1207 (1987). Furthermore, "any interested person"-in the case before us, the spouse-may also seek payment of an obligation from an incompetent's estate by filing a motion in the cause under Section 35A-1207. *Id.*

[3] [4] In the final analysis, whether the issue of spousal support comes before the clerk of superior court upon the motion of Teich or of Mrs. Cline under Section 35A-1207, as a special proceeding under Section 35A-1307, or through an account statement submitted by Teich, we conclude that the clerk of superior court-after first ensuring that the estate is ample to meet the expenses of caring for Mr. Cline-has residual equitable power under chapter 35A to examine the facts and circumstances of the case to determine whether Mrs. Cline should be granted support from her husband's estate and the right to continue to live in his home. *See Coxe v. Charles Stores Co.,* 215 N.C. 380, 382-83, 1 S.E.2d 848, 849 (1939) (superior court's equitable power over wards' estates may extend beyond those powers specifically conferred by statute). Factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and Mrs. Cline's needs. *See generally,* 24 A.L.R.3d 863 (1969) (Supp.1988).

[5] [6] The rule we announce is narrow. We do not hold that the estate of an incompetent may be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge. Rather, we hold that in the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate. Accordingly, we hold that Mrs. Cline stated a claim upon which relief can be granted.

III

[7] The motion to dismiss in the present case was directed to a perceived absence of law to support Mrs. Cline's claim for relief. ***263** In arriving at our conclusion that her Complaint stated a legally recognized claim, we additionally decide that the Complaint should have been dismissed under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction.

As provided in Rule 12(h)(3) of the Rules of Civil Procedure, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the

subject matter, the court [must] dismiss the action." N.C.Gen.Stat. Sec. 1A-1, R.Civ.P. 12(h)(3) (1983). The question of subject matter jurisdiction may properly be raised for the first time on appeal, and this court may raise it on its own motion. *Bache Halsey Stuart, Inc. v. Hunsucker,* 38 N.C.App. 414, 421, 248 S.E.2d 567, 570 (1978), *cert. denied,* 296 N.C. 583, 254 S.E.2d 32 (1979); *see Jenkins v. Winecoff,* 267 N.C. 639, 641-42, 148 S.E.2d 577, 578-79 (1966). We hold that the district court was not the ****466** proper forum in which to seek spousal support from the estate of an incompetent, and therefore that it had no jurisdiction over the claim.

District court is the proper division for spousal support in the form of *alimony. See* N.C.Gen.Stat. Sec. 7A-244 (Supp.1987). Mrs. Cline does not seek dissolution of her marriage. Nor does she allege fault by her husband, a prerequisite to alimony even in an action for alimony without divorce. *See* N.C.Gen.Stat. Sec. 50-16.2 (1987). Instead, she seeks support from the estate of an incompetent, relief the district court is without jurisdiction to grant.

The superior court is the only proper division to hear matters regarding the administration of incompetents' estates. *See* N.C.Gen.Stat. Sec. 7A-246 (1986); N.C.Gen.Stat. ch. 35A (1987). Mrs. Cline should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to Section 35A-1207, which permits "consideration of any matter pertaining to a guardianship," or as a special proceeding for the sale of her husband's property under Section 35A-1307.

Although the practical consequence of dismissal of a complaint under either Rule 12(b)(6) or 12(b)(1) is the same-the case is dismissed-the legal effect is quite different. As this court stated in *Tart v. Walker,* 38 N.C.App. 500, 502, 248 S.E.2d 736, 737 (1978), "[a] motion to dismiss for lack of subject matter ***264** jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim...." The following comparison of the effect of dismissal under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, which are identical to our own rules, is instructive:

> There are two important distinctions between a dismissal pursuant to subdivision b(1) [for lack of subject matter jurisdiction] and one under b(6) for failure to ... state a claim. First, a *dismissal under b(1) is not on the merits and thus is not given res judicata effect.* Second, the court is not restricted to the face of the pleadings but may review any evidence ... to resolve factual disputes concerning the existence of jurisdiction to hear the action.

2A Moore's Federal Practice para. 12.07 [2.-1] (1987) (footnotes omitted) (emphasis added). *Accord* Second Restatement of Judgments Sec. 19, comment d (1982) (Supp.1986).

Rule 41(b) of the North Carolina Rules of Civil Procedure provides the basis for concluding that dismissal under Rule 12(b)(6) is an adjudication on the merits, and therefore that 12(b)(6) dismissal bars subsequent relitigation of the same claim. *See Johnson v. Bollinger,* 86 N.C.App. 1, 8, 356 S.E.2d 378, 383 (1987). Rule 41(b) provides in relevant part that

> [u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and *any dismissal* not provided for in this rule, *other than a dismissal for lack of jurisdiction,* for improper venue, or for failure to join a necessary party *operates as an adjudication upon the merits.*

N.C.Gen.Stat. Sec. 1A-1, R.Civ.P. 41(b) (1983) (emphasis added).

Because the district court lacked subject matter jurisdiction over the present case, it had no authority to consider whether the Complaint failed to state a claim. Accordingly, we vacate the order dismissing the Complaint for failure to state a claim upon which relief can be granted.

IV

We hold that Mrs. Cline's Complaint seeking support from her incompetent husband's estate stated a legally recognized claim for relief, but that the claim was asserted in the wrong ***265** forum. We vacate the judgment of the district court, and remand with instructions to enter an order dismissing the Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

VACATED AND REMANDED.

Parallel Citations

374 S.E.2d 462

EAGLES and GREENE, JJ., concur.

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140 N.C.App. 767
Court of Appeals of North Carolina.

In the Matter of Myrna CADDELL.
Patricia Currin, as Guardian, Petitioner,
v.
James M. Johnson, Guardian Ad Litem for Myrna Caddell, Respondent.
In the Matter of Velma Caddell.
Patricia Currin, as Guardian, Petitioner,
v.
Dwight W. Snow, Guardian Ad Litem for Velma Caddell, Respondent.

No. COA99–1153. | Dec. 5, 2000.

Guardian petitioned to disclaim the interests of her mentally disabled wards, a mother and daughter, in the estate of, respectively, their brother and uncle. The Superior Court, Harnett County, Henry V. Barnette, Jr., J., approved and affirmed an order of the county clerk of the superior court denying petition as to the mother, which rendered moot the petition as to the daughter who would only take if mother disclaimed. Guardian appealed. The Court of Appeals, Timmons-Goodson, J., held that finding that it was not in mother's best interest to disclaim her $200,000 inheritance was warranted.

Affirmed.

West Headnotes (7)

[1] **Mental Health**
Property and Management of Mentally Disordered Person's Estate

The clerk of superior court has original jurisdiction over matters involving the management by a guardian of her ward's estate.

4 Cases that cite this headnote

[2] **Clerks of Courts**
Judicial functions and proceedings

An appeal to the superior court from an order of the clerk of court presents for review only errors of law committed by the clerk.

Cases that cite this headnote

[3] **Clerks of Courts**
Judicial functions and proceedings

On appeal to the superior court from an order of the clerk, the reviewing judge conducts a hearing on the record, rather than de novo, with the objective of correcting any error of law.

Cases that cite this headnote

[4] **Appeal and Error**
Scope of Inquiry in General

When the superior court sits as an appellate court, the standard of review in the Court of Appeals is the same as in the superior court.

Cases that cite this headnote

[5] **Mental Health**
Property and Management of Mentally Disordered Person's Estate

There was no obvious benefit to elderly, mentally disabled ward in renouncing her share of her brother's estate, and thus, finding that it was not in her best interest to disclaim $200,000 inheritance was warranted, even though she would forfeit her $430 monthly public assistance benefits and be required to reimburse state $10,320 for two years' of such benefits, where interest and investment income earned on remaining $189,680 would more than offset the loss of state benefits and the $100 provided each month by her siblings without depleting public

resources, and there was no evidence that she would, if mentally competent, disclaim her inheritance in favor of other legatees. G.S. § 35A–1251.

Cases that cite this headnote

[6] **Mental Health**
Authority, duties, and liability of guardians in general

The guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest.

2 Cases that cite this headnote

[7] **Mental Health**
Duties and liabilities of guardian or committee in general

Although the guardian is not required to exercise infallible judgment in the preservation and management of her ward's estate, she is expected to exhibit ordinary diligence and the highest degree of good faith in the performance of her fiduciary responsibilities.

2 Cases that cite this headnote

****627 *767** Appeal by petitioner from order entered 5 May 1999 by Judge Henry V. Barnette, Jr. in Superior Court, Harnett County. Heard in the Court of Appeals 17 August 2000.

Attorneys and Law Firms

Sharon A. Keyes, Fayetteville, for petitioner-appellant Patricia Currin, as Guardian for Velma and Myrna Caddell.

Dwight W. Snow, Guardian Ad Litem for respondent-appellee Velma Caddell, and James M. Johnson, Dunn, Guardian Ad Litem for respondent-appellee Myrna Caddell.

Opinion

TIMMONS–GOODSON, Judge.

Patricia Currin ("petitioner") appeals the denial of her petition for leave to disclaim the interests of her wards, Velma and Myrna Caddell, in the estate of Carson R. Coats. The relevant facts follow.

At the time of the 8 October 1998 hearing before the Clerk of Superior Court, Velma was eighty-two years old and was in reasonably good health. Her daughter, Myrna, was fifty-eight years old and, like her mother, had no significant physical ailments. Velma and Myrna both were born with mental disabilities and, throughout their ***768** respective lives, have depended heavily on Velma's siblings, the Coats family, to care for them and to support them financially. After Velma's marriage to Jesse Caddell and the birth of their daughter, Myrna, the Coats family made it possible for the Caddells to live somewhat independently in a house situated on Coats property. However, when Jesse died in April of 1996, the Coats family moved Velma and Myrna to the Brookfield Retirement Center in Lillington, North Carolina, where they currently reside.

As residents of Brookfield, Velma and Myrna each incur monthly living expenses in the amount of $950.00. Both women receive public assistance totaling $944.00 per month, i.e., a Social Security payment of $499.00, a SSI disbursement of $15.00, and a State Special Assistance benefit of $430.00. In addition, the Coats family supplies Velma and Myrna with food, clothing and personal health care items, the cost of which approximates $100.00 per month for each.

In October 1996, Velma's brother, Carson R. Coats, died testate in the State of Virginia. Under his will, he bequeathed his entire estate in four equal shares to his surviving siblings, Velma, Wayne Coats, Valeria Adams, and Coma Lee Currin. Velma's inheritance is approximately $200,000.00, and since she has no other assets, the bequest comprises her entire estate. Because of her mental disability, Velma lacks the capacity to make and execute a will. Thus, upon her death, her estate will pass by intestate succession to her daughter, Myrna (provided she survives Velma). Similarly, Myrna's estate, upon her death, will be distributed to her intestate heirs.

In 1997, Velma's sisters, Valeria and Coma Lee,

disclaimed their inheritances under Carson's estate so that the monies would pass directly to their children without incurring additional estate taxes. Seeking a similar result with respect to Velma's inheritance, petitioner, as Guardian for Velma and Myrna, petitioned the Harnett County Clerk of Superior Court for leave to disclaim Velma's share of the estate and the interest that would pass to her daughter, and sole heir, Myrna. Following two evidentiary hearings, the Clerk denied the petition, concluding that it was not in Velma's best interest to disclaim her inheritance. The Clerk's ruling rendered moot the issue of whether petitioner should then be permitted to disclaim Myrna's interest in the estate. On appeal, the Superior Court approved and affirmed the Clerk's order. Petitioner filed notice of appeal to this Court.

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[1] [2] [3] [4] ***769** The Clerk of Superior Court has original jurisdiction over matters involving ****628** the management by a guardian of her ward's estate. *See In re Lancaster,* 290 N.C. 410, 423, 226 S.E.2d 371, 379 (1976) (recognizing that duty to protect infants and incompetents "has been entrusted by statute to the clerk of superior court in the first instance.") An appeal to the Superior Court from an order of the Clerk " 'present[s] for review only errors of law committed by the clerk.' " *In re Flowers,* 140N.C.App. 225, ——, 536 S.E.2d 324, 325 (2000) (quoting *In re Simmons,* 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (internal citations omitted)). The reviewing judge conducts a hearing on the record, rather than *de novo,* with the objective of correcting any error of law. *Id.* "Likewise, when the superior court sits as an appellate court, '[t]he standard of review in this Court is the same as in the Superior Court.' " *Id.* (quoting *In re Estate of Pate,* 119 N.C.App. 400, 403, 459 S.E.2d 1, 2–3 (1995) (citation omitted)).

[5] Petitioner first contends that the Clerk erred by concluding that it was not in Velma's best interest to disclaim her inheritance under Carson's estate. Petitioner argues that a renunciation would best serve the interests of her wards, because it would "preserve [their] inheritance for their ultimate intended beneficiaries" and would "maintain the wards' government benefits." We are not persuaded.

[6] [7] The relevant statute, section 35A–1251 of our General Statutes, provides as follows:

> In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:
>
> ....
>
> (5a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

N.C.Gen.Stat. § 35A–1251(5a) (1999). "[T]he guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest[.]" *Cline v. Teich,* 92 N.C.App. 257, 261, 374 S.E.2d 462, 465 (1988). Although the guardian is not ***770** required to exercise infallible judgment in the preservation and management of her ward's estate, she is expected to exhibit "ordinary diligence and the highest degree of good faith" in the performance of her fiduciary responsibilities. *Kuykendall v. Proctor,* 270 N.C. 510, 516, 155 S.E.2d 293, 299 (1967).

As reflected in the Clerk's findings of fact, the evidence of record shows that Velma's monthly expenses at the retirement home total $950.00. Each month, she receives $944.00 in government benefits and approximately $100.00 from the Coats family in food, clothing, and personal items. The record further discloses that Velma's share of Carson's estate is approximately $200,000.00. If she takes the inheritance, she will forfeit her State Special Assistance benefit of $430.00 per month, and she will have to reimburse the State for the amount of such assistance she received over a period of two years, i.e., approximately $10,320.00. However, accepting the bequest will not result in the loss of her monthly SSI disbursement of $15.00 or her Social Security payment of $499.00.

In light of these facts, we can see no obvious benefit to Velma in renouncing her share of Carson's estate. We agree with the finding by the Clerk that the interest and investment income earned on the sum of $200,000.00 (or $189,680.00, after Velma reimburses the State) "will more than offset her loss of $430.00 a month in state benefits" and the $100.00 provided each month by her siblings. Thus, we see no reason to disclaim Velma's inheritance and thereby artificially create a need for public assistance, when private funds are available to pay the cost of her nursing home care. To do so would unnecessarily deplete public resources intended to benefit

those exhibiting a genuine financial need. Therefore, we hold that the Clerk did not err in concluding that it was in Velma's best interest to share in Carson's estate.

****629** As to petitioner's contention that a renunciation would preserve the inheritance for the "ultimate intended recipients" of Velma's estate and Myrna's estate, we reiterate that in determining whether renunciation is appropriate, the primary concern is the best interest of the ward. N.C.G.S. § 35A–1251. Furthermore, there is absolutely no evidence in the record that either Velma or Myrna would, if mentally competent, disclaim her inheritance under Carson's will in favor of the other legatees. Nonetheless, petitioner vehemently argues that the bequest should be relinquished to those persons who would take it by default, i.e., Wayne Coats, the children of Valeria Adams, and the children of Coma Lee Currin. As the spouse of Coma Lee Currin's son, petitioner has a personal, albeit indirect, stake in the outcome of this ***771** proceeding. Given petitioner's arguably adverse interest to those of her wards and the absence of any evidence that either ward would renounce her inheritance, we hold that the Clerk did not err by denying petitioner's request for leave to disclaim Velma's and Myrna's interests in the estate of Carson R. Coats.

We have examined petitioner's remaining argument and, in light of the preceding discussion, find it lacking in merit. The order of the Superior Court is affirmed.

Affirmed.

Judges WYNN and McGEE concur.

Parallel Citations

538 S.E.2d 626

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140 N.C.App. 225
Court of Appeals of North Carolina.

In the Matter of William C. FLOWERS.

No. COA99-1187. | Oct. 3, 2000.

Daughter petitioned to have father declared incompetent and to have a public guardian appointed, and siblings intervened. The Clerk of the Superior Court, Carteret County, entered order finding father to be incompetent and appointing son as guardian. Siblings appealed and the Superior Court, Carteret County, Charles H. Henry, J., affirmed the clerk's order. Siblings appealed. The Court of Appeals, Smith, J., held that evidence supported appointing son as guardian.

Affirmed.

West Headnotes (4)

[1] **Mental Health**
Nature and form of remedy and jurisdiction
Mental Health
Scope of review in general and trial de novo

In the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative, and appeals present for review only errors of law committed by the clerk of court; in exercising the power of review, the judge is confined to the correction of errors of law, and the hearing is on the record rather than de novo.

3 Cases that cite this headnote

[2] **Courts**
Review and vacation of proceedings

When the superior court sits as an appellate court, the standard of review in the Court of Appeals is the same as in the Superior Court.

1 Cases that cite this headnote

[3] **Mental Health**
Evidence

Evidence supported appointing son as guardian for incompetent father, although siblings claimed that son had already fraudulently obtained power of attorney and was holding father's money for his own use and benefit; son took care of father, father's attorney opined that father was competent when power of attorney and will bequeathing residual estate to son was signed, and guardian ad litem recommended that son be appointed guardian.

Cases that cite this headnote

[4] **Mental Health**
Evidence

In determining the proper appointment of a guardian of incompetent person, the person's will, power of attorney, and health care power of attorney evidenced person's trust in and reliance on son and his desire to provide for a child who had provided care and support for him, and thus, clerk could note that will was likely to be probated, as the potential invalidity of the documents was a fact to be considered in weighing the credibility of the evidence.

Cases that cite this headnote

****324 *226** Appeal by petitioners from order entered 17 August 1999 by Judge Charles H. Henry in Carteret County Superior Court. Heard in the Court of Appeals 22 August 2000.

Attorneys and Law Firms

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, Jr., Beaufort, for petitioner-appellants Patricia

Flowers Piner, Joseph M. Flowers, and William C. Flowers, Jr.

Mason & Mason, P.A., by L. Patten Mason, Morehead, for appellee Richard C. Flowers.

Opinion

SMITH, Judge.

On 9 June 1999, petitioner Patricia Flowers Piner (Patricia) filed in Carteret County Superior Court a "Petition for Adjudication of ***227** Incompetence and Application for Appointment of Guardian." She sought to have her father, William C. Flowers (Mr. Flowers), declared incompetent and a "Public Guardian" appointed to handle Mr. Flowers' affairs. On 24 June 1999, the Clerk of Superior Court of Carteret County conducted a hearing on the matter. During the hearing, L. Patten Mason, attorney for Richard Cass Flowers (Cass), who is a son of Mr. Flowers, moved that Cass be appointed guardian. His motion was "predicated upon the alleged powers of attorney appointing him as such and also to the effect that he was the only one who really understood the properties owned by [Mr. Flowers], and that he would be capable of managing the so called estate."

By order filed 25 June 1999, the court allowed petitioners Joseph M. Flowers (Joseph) and William C. Flowers, Jr. (William), sons of Mr. Flowers, to be made parties to ****325** the action. On 29 June 1999, the clerk entered an order finding "clear, cogent, and convincing evidence that [Mr. Flowers] is incompetent" and appointing Cass guardian for Mr. Flowers. Petitioners appealed to the superior court, which, in an order entered 17 August 1999, concluded:

> 1. The clerk's findings of fact in her June 29, 1999 order are supported by the evidence and testimony received during the June 24, 1999 hearing.
>
> 2. The clerk's conclusions of law are supported by her findings of fact contained in the above order.
>
> 3. The clerk has not abused her discretion in the appointment of Richard Cass Flowers as general guardian.

From this order, petitioners now appeal.

I.

[1] [2] We first point out the superior court's standard of review in a proceeding to appoint a guardian for an incompetent:

> In the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk. In exercising the power of review, the judge is confined to the correction of errors of law. The hearing is on the record rather than *de novo.*

In re Simmons, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (internal citations omitted); *see also In re Bidstrup,* 55 N.C.App. 394, 396, 285 S.E.2d 304, 305 (1982) ("The clerk's appointment of a guardian for ***228** an incompetent's estate therefore involves a determination too routine to justify saddling a superior court judge with a review any more extensive than a review of the record."). Likewise, when the superior court sits as an appellate court, "[t]he standard of review in this Court is the same as in the Superior Court." *In re Estate of Pate,* 119 N.C.App. 400, 403, 459 S.E.2d 1, 2-3 (1995) (citation omitted).

II.

[3] Petitioners first contend the clerk of court erred in appointing Cass as guardian for Mr. Flowers. They argue that the evidence before the clerk substantiated their claim that Cass "had already obtained over three and one-half million dollars from [Mr. Flowers] by the use of a power of attorney that was fraudulently obtained and was holding said sum for his own use and benefit." Accordingly, petitioners contend, the clerk's appointment of Cass was contrary to law and reversible error. We disagree.

Looking to the record as it was submitted to us,[1] the evidence of Mr. Flowers' incompetence was uncontested and not challenged on appeal. Mr. Flowers' decline began in the early 1990's; his communication skills had greatly declined by the end of 1995 and had ceased by 1998.

Other evidence before the clerk was that Mr. and Mrs. Flowers resided in the motel they owned and ran in Atlantic Beach. William, a resident of Kannapolis, testified that he visited several times a year. He testified that when the motel burned down in early 1996, Cass took

Mr. and Mrs. Flowers in and helped rebuild the motel. The Flowers' returned to the motel upon completion of the renovation. When Mrs. Flowers died, Cass assumed the care-taking of Mr. Flowers.

The middle son, Joseph, also testified. Joseph lives in Florida and testified that he had visited several times since Mr. Flowers got sick and that recently Mr. Flowers was unable to acknowledge Joseph was his son. He testified that Cass seemed to be responsible for the ongoing care of Mr. Flowers; Mr. Flowers' physical care was good.

Patricia testified she has had a good relationship with her father. However, when she inquired in July 1995 about his hygiene, Mr. Flowers asked her to leave. Her next visit to her parents was after the ***229** motel burned. From January to mid-October 1998, Patricia ran the motel for her father. She testified she did not visit her parents when they were with Cass. Patricia further testified that Cass ****326** has provided for Mr. and Mrs. Flowers, but contended that he received expense checks from the motel.

Also testifying was Robert Cummings (Cummings), the attorney who drafted Mr. Flowers' will and power of attorney in 1995. After counseling Mr. and Mrs. Flowers, he formed the opinion that Mr. Flowers was competent. Accordingly, he prepared the documents and sent them to Mr. and Mrs. Flowers for their review. The couple made a few changes and came to Cummings' office to sign the will. Cummings went over the details of the will with Mr. Flowers. They conversed about family and politics. Cummings testified that Mr. Flowers gave good answers but seemed a bit hard of hearing. Mr. Flowers signed the documents in the presence of witnesses. Cummings spoke again with Mr. and Mrs. Flowers on two or three occasions after the motel burned. On 8 August 1997, he prepared an affidavit regarding Mr. Flowers' competence.

Cecil Harvell (Harvell), an attorney hired by Cass in 1998, prepared an irrevocable trust, which was signed by Mr. Flowers and was for the benefit of Mr. Flowers during his lifetime and, upon the death of Mr. Flowers, for the benefit of Cass's children. Harvell testified that the purpose of the trust was to give relief from federal estate and inheritance taxes.

Several documents were entered in evidence: (1) Mr. Flowers' 1995 will left all of his tangible property to his wife if surviving, otherwise to Cass. It gave $100.00 to each of the four children; it provided that, of Mr. Flowers' shares of stock in Flowers Development Corporation, Inc., one-half each would be distributed to Mrs. Flowers and Cass. Mr. Flowers' residuary estate was bequeathed to his wife, if surviving, otherwise to Cass. Cass and Mrs. Flowers were appointed co-executors of his estate. (2) Mr. Flowers' 1995 general power of attorney appointed Mrs. Flowers and Cass as attorneys-in-fact. (3) Mr. Flowers' 1995 health care power of attorney appointed Mrs. Flowers and Cass as health care attorneys-in-fact. (4) Cummings' affidavit detailed the correspondence involved in drafting the 1995 documents and attested to the competence of Mr. Flowers at the time of execution. (5) An Amendment and Restatement of Power of Attorney, signed by Mr. Flowers in December 1998, again appointed Cass as attorney-in-fact and Sylvia M. Flowers as successor attorney-in-fact.

***230** Based on the foregoing evidence, the clerk made the following findings of fact:

> 1. On the 11th day of May, 1995, William C. Flowers signed a general power of attorney as well as a health care power of attorney, both of which documents provided that in the event it became necessary for a court to appoint a guardian of W.C. Flowers' property, he nominated his agents (Richard Cass Flowers and Grace L. Flowers) to be guardian of his property and to serve without bond or security. Grace L. Flowers is now deceased.
>
> 2. The general power of attorney and health care power of attorney above referenced both provided that if one of the agents or attorneys in fact was unable to serve, then William C. Flowers appointed the remaining agent to act as his successor agent and to be vested with the same powers and duties.
>
> 3. At the time William C. Flowers signed the general power of attorney and the health care power of attorney, he was competent and had the legal capacity to sign said documents.
>
> 4. The guardian ad litem recommended to the Clerk that Richard Cass Flowers be appointed general guardian for his father, William C. Flowers.
>
> 5. Richard Cass Flowers has cared for his father and been responsible for his father's estate exclusively since the time of his mother's death in August of 1998.
>
> 6. Richard Cass Flowers' performance of his duties in caring for the personal and estate interests of William C. Flowers has been pursuant to the 1995 power of attorney and health care power of attorney.
>
> 7. Richard Cass Flowers has kept accurate records of the receipts and expenditures that he has handled [o]n

behalf of his father.

8. The petitioner has requested the Clerk to appoint the public guardian to serve as general guardian for William C. Flowers.

****327** 9. The estate of William C. Flowers consists of a motel, rental property and other assets which require extensive time and ***231** knowledge to manage. The public guardian does not have the time, personnel or resources to be guardian of the estate of William C. Flowers.

Based on these findings, the clerk concluded:

2. At the time William C. Flowers signed the general power of attorney and the health care power of attorney, he was competent and had the legal capacity to sign said documents.

3. Richard Cass Flowers is not disqualified from being general guardian of his father's estate and person.

4. No good cause has been shown as to why Richard Cass Flowers should not serve as general guardian for his father.

5. The appointment of Richard Cass Flowers as guardian for his father, William C. Flowers, is in the best interest of William C. Flowers[.]

Our review of the record shows plenary evidence to support the clerk's findings, and we discern no error of law in appointing Cass as guardian. The clerk aptly reviewed the evidence and applied the law to the evidence presented. This assignment of error is overruled.

III.

[4] Petitioners next contend "there was insufficient evidence offered at the hearing to justify the clerk to find that a will of William C. Flowers would be probated that would devise the bulk of the estate of William C. Flowers to Richard Cass Flowers." This argument is without merit.

First, the phraseology of petitioners' argument would lead one to believe that the clerk made a "finding of fact" that Mr. Flowers' will would devise the bulk of his estate to Cass. However, no such finding exists. The only language resembling that offered by petitioners is found in a document entitled "Statment [sic] by Clerk on Appeal," which was submitted to the superior court on petitioners' appeal. The statement reads in pertinent part:

> The Court notes that if it appears that [Cass] has been presumptuous with indicating how property in the Trust should be directed upon the death of his father, it does follow the direction of the Last Will and Testament. Taking all matters in consideration, ***232** it is reasonable to believe that the copy of the Last Will and Testament could be probated, at the proper time.

The clerk never made a "finding" in this regard; indeed, such a finding would have been beyond the scope of the clerk's authority.

Second, in making this argument, petitioners' brief refers this Court to its Assignment of Error # 2, which reads: "The appointment of the guardian was made on the basis of a false representation or a mistake by the Clerk in considering alleged copies of a will, health care power of attorney, and general power of attorney, the originals of which were destroyed." The argument made in their brief, while referencing Assignment of Error # 2, is at best minimally related to the assigned error. The case law cited and argued on appeal relates solely to issues surrounding the validity or invalidity of a will. The issue presented to the clerk, and now on appeal to this Court, is the proper or improper appointment of a guardian. Mr. Flowers' will, power of attorney, and health care power of attorney merely evidenced Mr. Flowers' trust in and reliance on Cass and his desire to provide for a child who had provided care and support for him. The potential invalidity of the documents was a fact to be considered by the clerk in weighing the credibility of the evidence. Accordingly, this assignment of error is overruled.

As a final matter, we note that petitioners' assignments of error set forth in the record on appeal fail to make "clear and specific" references to the record or transcript. N.C.R.App.P. 10(c)(1). While this alone subjects an appeal to dismissal, we have thoroughly considered the arguments raised on this appeal and found them meritless. The order of the superior court is affirmed.

Affirmed.

Judges GREENE and EDMUNDS concur.

Parallel Citations

536 S.E.2d 324

Footnotes

1 We note that no transcript of the hearing before the clerk was included in the record on appeal. Accordingly, our review is limited to the clerk's notes and statement and exhibits, all of which were included in the record.

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183 N.C.App. 480
Court of Appeals of North Carolina.

In the Matter of the Guardianship of Clara Stevens THOMAS, Incompetent.
Mary Paul Thomas, Petitioner/Appellant,
v.
Teresa T. Birchard, Moving Party/Appellee.

No. COA06–623. | June 5, 2007.

Synopsis
Background: Ward's child appealed clerk of court's decision that modified guardianship by removing guardian of the person and appointing other child as successor guardian of the person. The Superior Court, Wake County, Robert H. Hobgood, J., affirmed clerk's order. Child appealed.

Holdings: The Court of Appeals, Elmore, J., held that:

[1] clerk of court had jurisdiction to hear other child's motion, and

[2] as a matter of first impression, under statute governing removal of guardian by clerk of court, guardian may be removed not only for cause, but also for better care and maintenance of wards and their dependents.

Affirmed.

West Headnotes (2)

[1] **Guardian and Ward**
Jurisdiction of Courts

Clerk of court had jurisdiction to hear motion that was filed by ward's child and that sought removal of guardian of the person and appointment of child as successor guardian of the person; statute governing removal of guardian by clerk clearly stated that clerk had power on information or complaint made to remove guardian and appoint successor guardian. West's N.C.G.S.A. § 35A–1290(a).

Cases that cite this headnote

[2] **Guardian and Ward**
Removal

Under statute governing removal of guardian by clerk of court, guardian may be removed not only for cause, but also for better care and maintenance of wards and their dependents; portion of statute permitting removal for better care and maintenance is entirely separate from portions requiring removal of guardians for specific reasons. West's N.C.G.S.A. § 35A–1290(a, b, c).

Cases that cite this headnote

****608** Appeal by petitioner from judgment entered 7 March 2006 by Judge Robert H. Hobgood in Wake County Superior Court. Heard in the Court of Appeals 7 February 2007.

Attorneys and Law Firms

****609** Vann & Sheridan, LLP, by Gilbert W. File, Raleigh, for the petitioner-appellant.

James B. Craven, III, Durham, for the appellee.

Leslie G. Fritscher, Greenville, for the Guardian ad Litem-appellee.

Mary Jude Darrow, for amicus curiae, Conference of Clerks of Superior Court of North Carolina.

Opinion

ELMORE, Judge.

***481** On 7 March 2006, the Wake County Superior Court affirmed a 21 December 2005 order by the Wake County Clerk of Court changing the guardianship of Clara

Stevens Thomas. It is from this decision that petitioner appeals.

Mrs. Thomas was declared incompetent on 12 August 2003. She was a resident of Wake County at the time, and Daniel B. Finch of Raleigh was appointed as the guardian of the estate. Aging Family Services, Inc. was appointed guardian of the person and served in that role until 13 September 2005. Petitioner and Dr. Teresa T. Birchard are the adult children of Mrs. Thomas. In 2003, Dr. Birchard was living and practicing medicine in Hawaii when her mother was declared incompetent and guardians were appointed. In 2004, Dr. Birchard moved to Sanford, in Lee County, where she maintains an OB–GYN practice.

***482** On 9 February 2005, Mrs. Thomas was discharged from a hospital after suffering a stroke, and moved to Dr. Birchard's home in Sanford. On 17 June 2005, Dr. Birchard filed a motion to modify guardianship, asking that her mother's guardianship be modified as follows:

> When this special proceeding was brought in 2003, the movant was living in Hawaii. Clara Stevens Thomas is now living with the movant, her daughter Teresa T. Birchard, a physician in Sanford. There is no longer any connection to Wake County, and the guardianship should be transferred to Lee County. As Dr. Birchard is the de facto [sic] guardian of the person, such status may as well be made de jure [sic]. It will also be less expensive for the ward's estate if Dr. Birchard is made guardian of the estate as well.

Dr. Birchard's request to be made guardian of the estate was subsequently abandoned. The clerk heard this motion on 13 September 2005, and followed the recommendation of the Guardian ad Litem by appointing Dr. Birchard as guardian of the person of Mrs. Thomas. This appointment was formalized in a 13 October 2005 order. Petitioner gave notice of appeal to superior court on 14 October 2005.

After hearing the appeal on 5 December 2005, the superior court remanded to case to the clerk for additional findings of fact and conclusions of law. The clerk then entered the order of 21 December 2005, from which petitioner renewed her appeal on 2 January 2006. The superior court affirmed the clerk's order, holding:

> The only issue before the Court is whether or not the Clerk was authorized by G.S. 35A–1290(a) to make a change in the guardianship of Mrs. Thomas. This Court agrees with the Clerk that if G.S. 35A–1290(a) does *not* allow such a change as was made here, that statute is indeed meaningless, a most improbable result. The Clerk clearly applied the correct standard, in the language of G.S. 35A–1290(a), "the better care and maintenance of wards."

On appeal to this Court, petitioner argues that the superior court erred because the clerk applied the incorrect standard for removing a guardian of the person. Rather than using a "better care and maintenance of the ward" standard, petitioner argues that the clerk should have used a "for cause" standard. We disagree.

The parties are in disagreement about the interpretation of N.C. Gen.Stat. § 35A–1290, which states, in relevant part:

> ***483** (a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.

****610** N.C. Gen.Stat. § 35A–1290(a) (2005). Two sections follow, sections (b) and (c), which list situations in which "[i]t is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests." *Id.* at § 35A–1290(b) and (c). N.C. Gen.Stat. § 35A–1290 replaced § 33–9 in 1987, and neither this Court nor the Supreme Court has had occasion to determine the appropriate standard for replacing a guardian under § 35A–1290. Therefore, this is a case of first impression for this Court.

[1] Although petitioner first contends that the clerk lacked jurisdiction to hear Dr. Birchard's motion, this argument is without merit. The language of 35A–1290(a) clearly states that the clerk has the "power and authority on information or complaint made to remove any guardian" and "to appoint successor guardians." N.C. Gen.Stat. § 35A–90(a) (2005). Here, Dr. Birchard filed a motion to remove Mrs. Thomas's guardian and appoint a new one, which fits squarely within the authority granted the clerk by section 35A–1290(a).

[2] Petitioner next argues that "[c]ase law interpreting the former statutes governing the removal of guardians establishes that a guardian may only be removed for cause and, furthermore, establishes the legislature's intent that the current removal statute be consistent with this historical interpretation." The most recent case cited by petitioner is *In re Williamson*, 77 N.C.App. 53, 334 S.E.2d 428 (1985), which was based on the now-repealed N.C. Gen.Stat. § 33–9. In *Williamson*, this Court held that "[a] legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances. Unfitness or neglect of duty must be shown. G.S. 33–9." *Id.* at 60, 334 S.E.2d at 432. *Williamson* is easily distinguished from the case at hand for at least three reasons: (1) the statute upon which this Court relied in *Williamson* has been repealed and replaced; (2) the guardianship at issue in *Williamson* was that of a child, not an incompetent adult; and (3) a judge changed the guardianship in *Williamson*, not a superior court clerk. Furthermore, the *Williamson* rule has not been applied to any other guardianship cases, much less any cases decided under N.C. Gen.Stat. § 35A–1290.

***484** "Where the statutory language is clear and unambiguous, 'the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language.' " *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) (quoting *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993)). Here, the statutory language is clear: the clerk may "enter orders for ... the better care and maintenance of wards and their dependents." N.C. Gen.Stat. § 35A–1290(a) (2005). This portion of the statute is permissive, and entirely separate from the other subsections of the statute, which *require* the removal of the guardian for specific reasons (*i.e.*, "for cause"). *See* N.C. Gen.Stat. § 35A–1290(b) and (c) (2005). Petitioner's interpretation of the statute makes the delineation between permissive removal of guardians and mandatory removal of guardians superfluous. "Such statutory construction is not permitted, because a statute must be construed, if possible, to give meaning and effect to all of its provisions." *HCA Crossroads Residential Ctrs. v. North Carolina Dep't of Human Resources*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990).

Accordingly, we hold that both the clerk and the superior court applied the correct standard to the petition for removal of a guardian, and the appointment of a substitute guardian: the better care and maintenance of the ward.[1] The clerk properly determined that, for "the better care and maintenance" of Mrs. Thomas, the corporate guardian, located in Wake County, should be replaced by Mrs. Thomas's daughter, in whose Lee County home Mrs. Thomas resides. We also note that the previous ****611** guardian, Aging Family Services, Inc., has raised no objection to being replaced by Dr. Birchard.

Affirmed.

Judges TYSON and GEER concur.

Parallel Citations

644 S.E.2d 608

Footnotes

1 In its *amicus curiae* brief, the Conference of Clerks of Superior Court of North Carolina notes that, "the Clerks in all 100 counties read G.S. 35A–1290(a) the same way, taking as their lodestar that the goal must *always* be 'the better care and maintenance of wards.' " This being the case, we are confident that our decision will have no disruptive effect on the administration of guardianships by the clerks of this state.

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160 N.C.App. 704
Court of Appeals of North Carolina.

In re the Matter of William Brooks HIGGINS.

No. COA02-1265. | Oct. 21, 2003.

Petitioner sought to have her brother declared incompetent. The Superior Court, Yancey County, James U. Downs, J., concluded that the brother was not incompetent. Petitioner appealed, and the brother died. The Court of Appeals, Eagles, C.J., held that the action abated upon the death.

Appeal dismissed.

West Headnotes (1)

[1] Abatement and Revival
Actions and Proceedings Which Abate

Cause of action to declare person incompetent did not survive his death, and, thus, the appeal from decision that the person was not incompetent abated upon the death; the result that the petition sought to accomplish was no longer necessary since a guardian was no longer needed, and granting the relief sought would be nugatory after the death. West's N.C.G.S.A. §§ 28A-18-1(b)(3), 35A-1120; Rules App.Proc., Rule 38(a).

2 Cases that cite this headnote

****77 *704** Appeal by petitioner from order dismissing petition for adjudication of incompetence entered 13 November 2000 by Judge James U. Downs in Yancey County Superior Court. Heard in the Court of Appeals 15 September 2003.

Attorneys and Law Firms

***705** Wade Hall, Asheville, for petitioner-appellant.

Donny J. Laws, Burnsville, for respondent-appellee.

Opinion

EAGLES, Chief Judge.

This is an appeal from an order dismissing a N.C. Gen.Stat. § 35A-1105 petition for adjudication of incompetence. Petitioner sought to have her brother, the respondent, declared incompetent.

At the time of the hearing, the respondent, William Brooks Higgins, was a seventy-six year old man who resided by himself in Yancey County. Petitioner is the respondent's sister, Linda Waldrep. Petitioner visited respondent at his home in late January or early February 2000 and decided that her brother did not need to be living by himself. Petitioner opined that respondent appeared dirty, undernourished and in poor health and that the house was "a wreck." Petitioner took respondent to her home and attempted to care for him there, but because she worked full time, was unable to provide adequate attention to respondent's care. Petitioner had respondent, a veteran, admitted to the Asheville VA Medical Center on 10 February 2000. The staff of the medical center did not address competency on the day they admitted respondent, but did note that his mental status exam revealed orientation "only to person" and severe deficits in short term memory.

At some point in February 2000, while respondent was in the hospital, petitioner and Estel Higgins, the respondent's brother, each obtained a power of attorney for respondent. This led to a dispute over who ****78** was authorized to manage respondent's care and financial affairs. On 3 March 2000, petitioner filed a petition to have respondent declared incompetent, in Buncombe County. On 17 March 2000, Estel Higgins sought to intervene and moved to have the venue changed to Yancey County. On 29 March 2000, the matter was transferred to Yancey County for a hearing before the Yancey County Clerk of Superior Court.

In July 2000, the clerk conducted the hearing and dismissed the petition because he did not find by clear, cogent and convincing evidence that respondent was incompetent. Petitioner then appealed to have the matter reheard in Superior Court. Respondent filed a motion to dismiss and petitioner filed a motion for summary judgment before the Superior Court, both were denied. The matter was then heard by the Superior Court in a bench trial. On 13 November 2000, the Superior Court

concluded that "Respondent is not incompetent and ***706** declines to find that the Respondent is incompetent" and dismissed the petition. Petitioner appeals this decision. During the pendency of this appeal, respondent died on 26 December 2002.

Petitioner argues on appeal that: (1) the trial court erred in allowing evidence to be presented by individuals other than the petitioner and respondent, (2) the trial court erred in denying her motion for summary judgment, and (3) the trial court erred in dismissing the petition for adjudication of incompetence. However, the dispositive issue is whether, when the trial court dismisses a petition for adjudication of incompetence, the action abates upon the death of the respondent during the pendency of the petitioner's appeal. We conclude that it does.

We note that the respondent died during the pendency of this appeal. "No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives." N.C.R.App. P. 38(a). Consequently, we must determine whether the cause of action survived respondent's death. The survival of causes of action is governed by N.C. Gen.Stat. § 28A-18-1:

> (a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.
>
> (b) The following rights of action in favor of a decedent do not survive:
>
> > (1) Causes of action for libel and for slander, except slander of title;
> >
> > (2) Causes of action for false imprisonment;
> >
> > (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

N.C. Gen.Stat. § 28A-18-1 (2001). Here, the first two exceptions clearly do not apply. However, the third exception does apply.

The third exception provides that a cause of action does not survive a party's death where the relief sought could not be enjoyed or granting it would be nugatory after death. (Nugatory meaning "[o]f no force or effect; useless; invalid." Black's Law Dictionary 1093 (7th ed.1999)). In deciding whether the relief could not be enjoyed or granting ***707** it would be nugatory, this court has looked at the purpose or the desired end result of a proceeding. In *Elmore v. Elmore*, 67 N.C.App. 661, 313 S.E.2d 904 (1984), this Court found that a divorce action did not survive the death of a party because the main purpose of a divorce, the dissolving of the marital state, was accomplished by the death of a party. Therefore, we examine the main purpose of incompetency proceedings for adults to determine whether the death of the respondent obviates that purpose.

Chapter 35A of the North Carolina General Statutes governs incompetency proceedings. An incompetent adult is "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen.Stat. § 35A-1101(7) (2001). When an adult is adjudicated incompetent, a guardian ****79** is appointed. N.C. Gen.Stat. § 35A-1120 (2001). The guardian is to help the incompetent individual exercise their rights, including the management of their property and personal affairs, and to replace the individual's authority to make decisions when the individual does not have adequate capacity to make those decisions. N.C. Gen.Stat. § 35A-1201(a) (2001). As the guardian helps the individual exercise their rights and makes decisions that the individual would otherwise make, a guardian is essential only while the individual is still alive. After the individual dies, there is no longer a need for a guardian to help the individual. Thus, the result that the petition seeks to accomplish is no longer necessary after a respondent dies.

This is a cause of action where granting the relief sought would be nugatory after the death of the respondent. We do not address the issue of whether there is an appeal of right from the denial of a petition to declare a person incompetent. *See* N.C. Gen.Stat. § 35A-1115. We conclude that a petition to declare a respondent incompetent does not survive the death of the respondent under N.C. Gen.Stat. § 28A-18-1. Thus, the appeal abated upon the 26 December 2002 death of the respondent. The appeal has become moot and is accordingly dismissed.

Appeal dismissed.

Judges McCULLOUGH and STEELMAN concur.

Parallel Citations

587 S.E.2d 77

587 S.E.2d 77

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160 N.C.App. 85
Court of Appeals of North Carolina.

In the Matter of The Estate of Robert L. MOORE, Jr., Incompetent.

No. COA02–1248. | Aug. 19, 2003.

Executor of estate appealed the denial by the Clerk of the Superior Court of his motions to vacate commissions awarded to decedent's guardian, and to reopen guardianship for purpose of determining whether commissions were valid. The Superior Court, Wake County, Howard E. Manning, Jr., J., affirmed. Executor appealed. The Court of Appeals, Hudson, J., held that guardian was entitled to commissions only on portion of proceeds of real estate sales that was used to pay debts and administrative costs of guardianship.

Reversed and remanded.

West Headnotes (5)

[1] **Guardian and Ward**
Jurisdiction of courts

The Clerk of Superior Court has original jurisdiction over matters involving the management by a guardian of her ward's estate.

Cases that cite this headnote

[2] **Guardian and Ward**
Review

An appeal to the superior court from an order of the clerk relating to management by a guardian of her ward presents for review only errors of law committed by the clerk; the reviewing judge conducts a hearing on the record rather than de novo, with the objective of correcting any error of law.

Cases that cite this headnote

[3] **Guardian and Ward**
Review

In guardianship matters, Court of Appeals' standard of review is the same as the Superior Court's.

Cases that cite this headnote

[4] **Guardian and Ward**
Commissions

Guardian was entitled to commission only on portion of proceeds of real estate sales that was used to pay ward's debts and administrative costs of guardianship, rather than entire amount of sale, where guardian's petitions to sell real estate were premised on need to pay debts and administrative costs, and orders by clerk of superior court permitting the sales were granted for purpose of paying debts and administrative costs. West's N.C.G.S.A. §§ 28A–23–3(b), 35A–1269.

Cases that cite this headnote

[5] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

If a statute is clear and unambiguous, and no constitutional challenge is made, Court of Appeals is bound to apply the plain language of the statute.

Cases that cite this headnote

****808 *85** Appeal by Executor of the Estate of Robert L.

Moore, Jr. from judgment entered 7 June 2002 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 June 2003.

Attorneys and Law Firms

Law Office of Michael W. Patrick, by Michael W. Patrick, Chapel Hill, for executor-appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Jennifer D. Maldonado, Raleigh, for respondent-appellee.

Opinion

***86** HUDSON, Judge.

Benjamin S. Moore ("executor"), executor of the estate of Robert L. Moore, Jr., deceased ("decedent"), appeals an award of commissions to Decedent's guardian. Executor argues (1) that the order violates the statute governing commissions for guardians; and (2) even if the order did not violate the governing statutes, the court should not have allowed the entire commission in the year of sale. We agree that the order is contrary to the statute and reverse.

BACKGROUND

Mr. Robert L. Moore, Jr. accumulated substantial real estate holdings during his lifetime. In his later years, he suffered from Alzheimer's disease and required extensive, long-term medical care. During Decedent's illness, his wife sold or otherwise transferred all of his real estate holdings, by power of attorney, for her own benefit or for the benefit of Decedent's oldest son, Robert L. Moore III. Mrs. Moore died in 1996, having appointed her son as executor of her estate.

In early 1997, Decedent's daughter asked the clerk of superior court to appoint an interim guardian for Decedent. Robert Monroe ("guardian") was appointed interim, and then permanent, guardian of Decedent's estate. Soon after his appointment, the guardian filed a lawsuit against Mrs. Moore's estate and against Decedent's son. Under the terms of the settlement of the lawsuit, Mrs. Moore's estate and trust transferred several parcels of real estate back to Decedent. Also as part of the settlement, the guardian received a fund of $272,000 to be used only to pay for Decedent's medical care and that was projected to cover the cost of the care for two years. In addition, the guardian received an unrestricted fund containing another $262,800 that could be used for any purpose, including the payment of attorney's fees.

On 17 August 1998, the guardian petitioned the clerk of superior court to sell three tracts of real estate to pay the legal fees associated with the litigation and to cover the increasing costs of Decedent's care. The clerk approved the petitions on the grounds that they were "necessary to create assets to pay the costs of administration and debts necessarily incurred in maintaining the said ward." The guardian sold the real estate, thereby garnering more than three million dollars for Decedent's estate.

***87** After the real estate sales, the clerk approved commissions of five percent of the full amount of the proceeds received by the sales. Specifically, "[t]he commissions were not limited to the amount of the proceeds used to pay debts of the ward or the costs of administration of the Estate."

Mr. Moore died on 1 October 2000. The following month, Benjamin S. Moore was appointed to be Decedent's executor and personal representative. Executor filed a Motion to Vacate Orders Fixing Commissions & To Set a Reasonable Commission and a Motion to Reopen the Guardianship for the purpose of determining whether the approved commissions were valid as a matter of law. The clerk denied both motions, and Executor appealed to the superior court. The superior court entered a judgment affirming the clerk's order, and Executor appeals.

ANALYSIS

[1] [2] [3] "The Clerk of Superior Court has original jurisdiction over matters involving the management by a guardian of her ward's estate." *Caddell v. Johnson*, 140 N.C.App. 767, 769, 538 S.E.2d 626, 627–28 (2000). An appeal to the superior court from an order of the clerk " 'present[s] for review only errors of law committed by the clerk.' " *In re Flowers*, 140 N.C.App. 225, 227, 536 S.E.2d 324, 325 (2000) (quoting ****809** *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966)). The reviewing judge conducts a hearing "on the record rather than *de novo*," with the objective of correcting any error of law. *Id.* In guardianship matters, this Court's standard of review is the same as the superior court's. *Caddell*, 140 N.C.App. at 769, 538 S.E.2d at 628.

[4] Executor contends that the clerk erred by awarding the guardian a commission of five percent of the full amount of the proceeds received from the sales of the three tracts of land. Executor argues that the commission should have

been limited to the amount used to pay administrative costs and Decedent's debts. We agree and conclude that the clerk and the court erred as a matter of law.

We find no common law in our jurisdiction that directly addresses this issue. However, we conclude that the statute governing the payment of commissions to guardians does. G.S. § 35A–1269 provides that "[t]he clerk shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to ***88** executors, administrators and collectors under the provisions of G.S. 28A–23–3 and G.S. 28A–23–4." Section 28A–23–3, in turn, governs commissions allowed to personal representatives and provides that "[w]here real property is sold to pay debts or legacies, the commission shall be computed *only on the proceeds actually applied* in the payment of debts or legacies." N.C. Gen.Stat. § 28A–23–3(b) (emphasis added).

Here, the guardian's petitions to sell Decedent's real estate were premised on the guardian's need to pay the debts and administrative costs of Decedent's estate. Similarly, the clerk's orders that allowed the sale of the real estate were granted for the purpose of paying the debts and administrative costs of the estate. Because the real estate was sold to pay the debts of Decedent, we conclude that the statutory limitation of § 28A–23–3(b) applied. Therefore, the clerk erred by computing the guardian's commission on the full proceeds of the real estate sale rather than limiting his computation to those proceeds actually applied to Decedent's debts.

[5] Respondent Robert E. Monroe argues that, as a policy matter, the commissions allowed to guardians should be treated differently than those allowed to other personal representatives such as executors. If a statute is clear and unambiguous, and no constitutional challenge is made, we are bound to apply the plain language of the statute. *Orange County ex rel. Byrd v. Byrd*, 129 N.C.App. 818, 822, 501 S.E.2d 109, 112 (1998). We find no ambiguity in the statutes governing commissions for guardians and personal representatives and thus apply the statute as written. Respondent's policy argument is more appropriately addressed to the General Assembly.

CONCLUSION

For the reasons discussed above, we reverse the superior court and remand for computation of the guardian's commissions consistent with this opinion.

Reversed and Remanded.

Judges TIMMONS–GOODSON and STEELMAN concur.

Parallel Citations

584 S.E.2d 807

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266 N.C. 702
Supreme Court of North Carolina.

In the Matter of R. A. SIMMONS, Guardian of Ernie Algernon Simmons, Incompetent.

No. 203. | March 23, 1966.

Incompetent, by next friend, filed a petition before the Clerk of the Superior Court of Sampson County for removal of the incompetent's guardian. The Clerk entered a judgment removing the guardian, and the guardian appealed to the Superior Court. The Superior Court, Sampson County, Albert W. Cowper, J., entered a judgment affirming the judgment of the Clerk, and the guardian appealed. The Supreme Court, Higgins, J., held that evidence sustained findings of the Clerk that guardian of incompetent had failed and neglected to maintain incompetent in suitable manner and that conflict of interests existed between the guardian and the incompetent and that therefore the guardian should be removed.

Affirmed.

West Headnotes (3)

[1] **Mental Health**
Proceedings in General

Evidence sustained findings of Clerk of Superior Court that guardian of incompetent had failed and neglected to maintain incompetent in suitable manner and that conflict of interests existed between the guardian and the incompetent and that therefore the guardian should be removed. G.S. § 33-9.

2 Cases that cite this headnote

[2] **Clerks of Courts**
Judicial Functions and Proceedings
Mental Health
Review

Statute providing that whenever civil action or special proceeding begun before Clerk of Superior Court is for any ground whatever sent to Superior Court, judge has jurisdiction and duty to proceed to hear and determine all matters in controversy unless action is sent back to Clerk applies only to civil actions and special proceedings and not to appeal to Superior Court from judgment of Clerk of Superior Court removing guardian of incompetent. G.S. §§ 1-276, 33-9.

9 Cases that cite this headnote

[3] **Mental Health**
Review

In appointment and removal of guardians of incompetents, appellate jurisdiction of Superior Court is derivative, and appeals from judgment of Clerk of Superior Court appointing or removing guardians present for review only errors of law committed by Clerk, and, in exercising power of review, judge of Superior Court is confined to correction of errors of law, and hearing is on record rather than de novo. G.S. §§ 33-7, 33-9.

10 Cases that cite this headnote

***703 **231** The incompetent, Ernie Algernon Simmons, aged 42 years, by his duly appointed Next Friend, filed a verified petition before the Clerk of the Superior Court of Sampson County, asking that the incompetent's guardian, R. A. Simmons, be removed. The petition alleged: (1) R. A. Simmons was appointed guardian on September 22, 1960, and 'acquired the assets of the incompetent's estate * * * valued at $26,000.00 in real estate and $25,500 in personal property.' ****232** (2) The net income for the years 1961 through 1964, inclusive, as reported by the guardian was: 1961, $24,654.12; 1962 $9,556.62; 1963, $5,855.19; and 1964, $3,398.50. Here quoted verbatim are other allegations of the petition:
'VI. That during the same period the accounts filed by

said guardian reflect expenditures for the welfare and maintenance of his ward in the total sum of $5,246.22. * * *

'That included in the totals set forth above are expenditures in the amount of $1,799.33 for a truck, $340.00 for a refrigerator, and $103.00 for a television set. That the majority of the remaining amount was delivered to Millie Kate Simmons as allowance for providing the ward with room and board for a part of the period covered.

***704** 'IX. That by virtue of the allegations set forth herein, it is specifically alleged that the fiduciary has neglected to maintain his ward in a manner suitable to his degree.

'X. That by reason of these and other causes, in addition to the matters set out above, the said Ernie Algernon Simmons, incompetent, will suffer irreparable damage by reason of the neglect of the guardian if the Court fails to remove said guardian in accordance with North Carolina General Statutes, Section 33-9.'

Pursuant to notice to the guardian, the Clerk of the Superior Court conducted a hearing on July 29, 1965. The respondent appeared in person and by counsel, who entered a demurrer Ore tenus to the petition. The clerk overruled the motion; whereupon the respondent filed answer. The clerk made notes summarizing the evidence at the hearing. In the summary of the respondent's testimony the following appears: 'Did not go to see Al while he was in the hospital. Never called any of the family inquiring about how Al. is. * * * Has done nothing to help Al since 1964. * * * and intending to keep anyone else from handling this estate.' At the conclusion of the hearing the clerk made findings of fact, among them the following:

'VI. That since the initiation of the guardianship the reports and direct evidence from witnesses, including the guardian, clearly establish the fact that the guardian has expended very little for the support and maintenance of his ward. It appears that the primary expenditure was the sum of $75.00 monthly for some period of time made payable to the ward's mother to compensate the mother for the room and board of the ward. That this arrangement required the ward to remain in his mother's home under conditions that were far from favorable to his best interests and welfare. It was further established that during the two-year period prior to said hearing the ward has had little or no benefit from his estate, regardless of the fact that he has needed assistance at many times.

'VIII. That the evidence clearly established, even from the testimony of the guardian, that strong animosity exists between the guardian and his ward. That this animosity and personal feeling also exists between the ward and his mother, and this situation is highly detrimental to the ward's estate. That the guardian testified that he had expended no funds whatsoever for the benefit of his ward since January of 1965, and has made no effort to inquire as to the health and well-being of said ward since that date. That the evidence established ***705** that the guardian has never discussed with his ward any financial needs and has not communicated with him for a long period of time. That in view of these circumstances the ward has found it necessary to live with various members of his family for several months.'

'That the said fiduciary has failed and neglected to maintain his ward in a manner suitable to his degree * * * that a conflict of interests between R. A. Simmons, ****233** as guardian, and R. A. Simmons, individually, exists.

'X. The Court further found as a fact that the guardian and his mother are the nearest kin of said ward and could therefore benefit from the ward's estate after his death.'

In addition to the notice of the appeal, the clerk sent to the judge the pleadings, the guardian's returns, the notes summarizing the evidence of the witnesses at the hearing, and the order of removal entered thereon. The record does not indicate that any transcript of the evidence, other than the clerk's summary, was taken at the hearing, or that either party made any request for such transcript.

Before Judge Cowper the respondent renewed his demurrer, which the court overruled, and the respondent thereupon made these motions: (1) That the court hear the cause De novo. (2) That the court hear additional evidence material to the controversy. (3) That the cause be remanded to the clerk to hear additional evidence and to find additional facts.

'Each of the motions made by the guardian and set out above was denied by the Court; and the Court ruled that its jurisdiction over the matter was derivative only, and that the appeal of the matter would be heard by the Court in its appellate capacity by review of the record as produced by the Clerk of the Superior Court.

'After review of the record from the Clerk of Superior Court and argument of counsel, the Court found that the facts recited in the judgment entered by the Clerk supported said judgment and its conclusions under the terms of N.C.G.S. 33-9';

The court concluded:

> '(3) That the findings of fact related in the judgment entered by the Clerk support the judgment and its conclusions and that the same is hereby affirmed, and said cause is remanded to the Clerk of Superior Court for compliance with the judgment dated August 30, 1965.'

The respondent excepted and appealed.

Attorneys and Law Firms

***706** J. Russell Kirby, Wilson, Warren & Fowler, by Miles B. Fowler, Clinton, for guardian-appellant.

Joseph B. Chambliss, Clinton, for incompetent ward, appellee.

Opinion

HIGGINS, Justice.

Before the Clerk of Superior Court appoints a guardian, he must 'inform himself of the circumstances of the case * * *,' and 'commit the guardianship * * * as he may think best for the interest * * *' of the incompetent. G.S. s 33-7. The clerk has power 'on information or complaint' to remove the guardian and revoke his letters for a number of causes: '(3) Where the fiduciary neglects to * * * maintain the ward * * * in a manner suitable to (his) degree, * * * (4) Where the fiduciary would be legally disqualified to be appointed administrator * * *.' G.S. s 33-9. In the absence of other matters of which the court has jurisdiction, the Superior Court has no power to appoint a general guardian. Moses v. Moses, 204 N.C. 657, 169 S.E. 273; In re Estate of Styers, 202 N.C. 715, 164 S.E. 123.

The clerk found from the guardian's reports that the net income from the ward's estate dwindled from $24,654.12 in 1961 to $3,398.50 in 1964; and that the total expenditures for the period were $5,236.22, of which $1,799.33 was for a truck, $340.00 for a refrigerator for the respondent's mother, and $103.00 for a television set. The remainder was paid for board and room for the ward. The hearing was conducted on August 30, 1965. The appellant, according to the clerk's notes of his testimony, admitted he did not go to the hospital to see Al and did not make any inquiries and had done nothing to help Al since 1964; that he intended to keep anyone else from handling the estate.

****234** Likewise, according to the notes made by the clerk at the hearing, Mr. Honeycutt, a cousin of the guardian and the ward, who were brothers, testified Al went to the hospital, was disabled for four or five weeks, and for more than four months thereafter lived with the witness who received no pay during the disability and after that only $10.00 per week. Mrs. Honeycutt testified that the mother visited Al once during that time and R.A., not at all.

The clerk found that the guardian and the mother are the ward's next of kin and would benefit from the ward's estate at his death; that the guardian is not interested in the ward's welfare, avoids him when called on to assist, has neglected to maintain the ward in a manner suitable to his degree.

[1] [2] [3] The records and summary of the evidence warrant the clerk's findings which are sufficient to support the order of removal. The defendant contends that G.S. s 1-276 applies and that the appeal required ***707** the judge to hear the controversy De novo, hear evidence, or remand to the clerk for further findings. These contentions are not sustained. Appeals under G.S. s 1-276 are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. The distinction is this: In civil actions and special proceedings the clerk acts as a part of the Superior Court, subject to general review by the judge. In appointment and removal of a guardian the clerk performs 'duties formerly pertaining to judges of probate.' In the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk. In re Will of Hine, 228 N.C. 405, 45 S.E.2d 526; Moses v. Moses, supra; Edwards v. Cobb, 95 N.C. 4, 5. In exercising the power of review, the judge is confined to the correction of errors of law. The hearing is on the record rather than De novo. In re Sams' Estate, 236 N.C. 228, 72 S.E.2d 421, citing many cases. In Sams the judge heard the appeal, apparently De novo, and affirmed the clerk. This Court affirmed upon the ground 'there was no objection or exception to the De novo hearing in the Superior Court, and upon the record as presented no prejudicial error has been made to appear.' In the cases in which this Court has held the judge may review the appeals from the clerk De novo, these cases involved other matters which are not exclusively of a probate nature. The other matters convert the controversy into a civil action or a special proceeding reviewable under G.S. s 1-276. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365;

Windsor v. McVay, 206 N.C. 730, 175 S.E. 83; Wright v. Ball, 200 N.C. 620, 158 S.E. 192.

In this case, as in Sams, error of law does not appear. The judgment entered in the Superior Court is

Affirmed.

MOORE, J., not sitting.

Parallel Citations

147 S.E.2d 231

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189 N.C.App. 145
Court of Appeals of North Carolina.

In the Matter of Ruth Bunn WINSTEAD.

No. COA07–342. | March 4, 2008.

Synopsis
Background: County department of social services filed petition to adjudicate individual incompetent and an application to appoint guardian for individual. The Superior Court, Nash County, Quentin T. Sumner, J., found individual incompetent and appointed guardian. Individual's husband filed notice of appeal of both orders which were dismissed based on lack of standing. Husband appealed.

[Holding:] The Court of Appeals, McGee, J., held that husband had standing to appeal both orders.

Reversed and remanded.

West Headnotes (4)

[1] **Statutes**
General and specific statutes
Statutes
Earlier and later statutes

When two statutes apparently overlap, the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.

Cases that cite this headnote

[2] **Mental Health**
Right of review; parties

Husband of individual adjudicated incompetent had standing to appeal adjudication order, where husband was entitled to notice of the incompetency proceeding and was an interested party to that proceeding. West's N.C.G.S.A. § 35A–1115.

Cases that cite this headnote

[3] **Mental Health**
Right of review; parties

Husband of individual for whom guardian had been appointed was aggrieved by such appointment and, thus, had standing to appeal order appointing guardian. West's N.C.G.S.A. § 1–301.3(c).

Cases that cite this headnote

[4] **Appeal and Error**
Who are "aggrieved" in general

"Party aggrieved" who has right to appeal is one whose legal rights have been denied or directly and injuriously affected by action of trial court. West's N.C.G.S.A. § 1–301.3(c).

Cases that cite this headnote

****411** Appeal by Ronald Winstead from order dated 26 January 2007 by Judge Quentin T. Sumner in Superior Court, Nash County. Heard in the Court of Appeals 17 October 2007.

Attorneys and Law Firms

Kirk, Kirk, Howell, Cutler & Thomas, L.L.P., by C. Terrell Thomas, Jr., Wendell, for Appellant Ronald Winstead.

Jayne B. Norwood, Nashville, for Petitioner–Appellee.

Opinion

****412** McGEE, Judge.

***146** Nash County Department of Social Services (Petitioner) filed a petition for adjudication of incompetence and an application for appointment of guardian in this matter on 12 July 2006. Petitioner alleged that Ruth Bunn Winstead (Mrs. Winstead) was incompetent in that she "lack[ed] sufficient capacity to manage ... her own affairs, [or] to make or communicate important decisions concerning ... her person, family or property[.]" Petitioner also sought the appointment of an interim guardian for Mrs. Winstead because: (1) Mrs. Winstead "is in a condition that constitutes or reasonably appears to constitute an imminent or forseeable risk of harm to ... her physical well being and requires immediate intervention[;]" and (2) "there is or reasonably appears to be an imminent or forseeable risk of harm to ... her estate that requires immediate intervention in order to protect [her] interest." The petition listed Mrs. Winstead's husband, Ronald Winstead (Mr. Winstead), and daughter, Donna King, as Mrs. Winstead's next of kin.

The Clerk of Superior Court entered an order on Petitioner's motion for appointment of interim guardian on 13 July 2006. The Clerk named Laura S. O'Neal, in her capacity as Director of Nash County Department of Social Services, as Mrs. Winstead's interim guardian.

Mr. Winstead filed an application for letters of general guardianship on 28 August 2006, stating that he was Mrs. Winstead's spouse and that they had been married and had lived together for sixty years. A notice of hearing on incompetence was filed on 12 September 2006 and was served upon Mr. Winstead, *inter alios.*

Donna King filed an application for letters of guardianship of the person and for general guardianship on 9 October 2006. Following a hearing, the Clerk of Superior Court filed an order on petition for adjudication of incompetence on 18 October 2006, finding that Mrs. Winstead was incompetent. Donna King filed a second application for letters of general guardianship on 24 October 2006. An Assistant Clerk of Superior Court filed an order on application for appointment of guardian on 24 October 2006, appointing Donna King as Mrs. Winstead's general guardian.

Mr. Winstead filed a notice of appeal in the Superior Court from the order on petition for adjudication of incompetence and from the ***147** order on application for appointment of guardian. Petitioner filed a motion to dismiss Mr. Winstead's appeals on the ground that Mr. Winstead lacked standing to appeal. The trial court filed an amended order dismissing Mr. Winstead's appeals on 26 January 2007, concluding that Mr. Winstead lacked standing to appeal. Mr. Winstead appeals the amended order.

Mr. Winstead argues the trial court erred by dismissing his appeals from the order on petition for adjudication of incompetence and from the order on application for appointment of guardian. Mr. Winstead argues that pursuant to N.C. Gen.Stat. § 35A–1115, he had standing to appeal both orders. In response, Petitioner argues that "[N.C. Gen.Stat. §] 1–271 and [N.C. Gen.Stat. §] 1–301.2 ... apply and control with regard to whether [Mr.] Winstead [had] standing to appeal the adjudicatory portion of the hearing and [N.C. Gen.Stat. §] 1–301.3 applies with regard to the appointment of a guardian."

In addressing Mr. Winstead's standing to appeal the order on petition for adjudication of incompetence, we must determine which of the above-cited statutes applies. N.C. Gen.Stat. § 35A–1115 (2007) provides: "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." N.C. Gen.Stat. § 1–271 (2007) provides: "Any party aggrieved may appeal in the cases prescribed in this Chapter." N.C. Gen.Stat. § 1–301.2(a) (2007) speaks more specifically to special proceedings: "This section applies to special proceedings heard by the clerk of superior court in the exercise of the judicial powers of that office." Like N.C.G.S. § 1–271, N.C. Gen.Stat. § 1–301.2(e) (2007) provides for an appeal only by an aggrieved party: "A party aggrieved by an order or judgment of a clerk that finally ****413** disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo." However, N.C. Gen.Stat. § 1–301.2(g)(1) (2007) states: "Appeals from orders entered in [proceedings for adjudication of incompetency] are governed by Chapter 35A to the extent that the provisions of that Chapter conflict with this section."

[1] "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Seders v. Powell, Comr. of Motor Vehicles,* 298

N.C. 453, 459, 259 S.E.2d 544, 549 (1979). In this case, N.C.G.S. § 35A–1115 is the ***148** most specific statute dealing with appeals from an order adjudicating incompetency and is therefore the controlling statute.

[2] While N.C.G.S. § 35A–1115 does not give specific guidance as to who may appeal from an order adjudicating incompetence, our Supreme Court has addressed this issue. In *In re Ward,* 337 N.C. 443, 446 S.E.2d 40 (1994), our Supreme Court held that an interested party to an incompetency adjudication who was entitled to notice of the incompetency proceeding, was also authorized, pursuant to N.C.G.S. § 35A–1115, to appeal from the order adjudicating incompetence. *Id.* at 448–49, 446 S.E.2d at 43.

In *In re Ward,* the respondent was in an automobile accident in Texas on 23 December 1987. *Id.* at 445, 446 S.E.2d at 41. The accident involved the respondent's U–Haul vehicle and a vehicle owned by the petitioner. *Id.* The respondent was injured as a result of the accident and filed an action against the petitioner in the United States District Court for the Middle District of North Carolina. *Id.* The petitioner filed a motion to dismiss based on a lack of personal jurisdiction and based on the expiration of the Texas two-year statute of limitations. *Id.* The respondent filed a motion for a change of venue. *Id.* The court granted the petitioner's motion to dismiss for lack of personal jurisdiction and respondent's motion for change of venue, but it declined to rule on the issue related to the statute of limitations. *Id.* The court then transferred the case to the United States District Court for the Southern District of Texas, where the respondent took a voluntary dismissal without prejudice. *Id.*

However, in *In re Ward,* prior to taking the voluntary dismissal, the respondent's attorney had filed a petition on 16 August 1990 for adjudication of incompetence and an application for appointment of guardian in North Carolina, seeking to have the respondent declared incompetent as of the date of the accident. *Id.* The petitioner was not listed in the petition as an interested party and did not receive notice of the hearing. *Id.* The Clerk of Superior Court in Durham County held a hearing and entered an order that the respondent "was rendered incompetent on 23 December 1987 as a result of the accident." *Id.* The Clerk also appointed the respondent's attorney as the respondent's guardian. *Id.*

The respondent's guardian filed suit against the petitioner in Texas state court on the day after the voluntary dismissal in federal court, and the petitioner then learned about the prior incompetency proceeding. *Id.* The petitioner sought to have the North Carolina ***149** incompetency proceeding reopened by filing a motion in the cause under N.C. Gen.Stat. § 35A–1207 (a). *Id.* The Clerk determined that the motion was improperly filed under N.C. Gen.Stat. § 35A–1207 but concluded that " 'in the interest of justice ... the motion [was] properly before the court pursuant to Article I of G.S. 35A.' " *Id.* at 446, 446 S.E.2d at 41. The Clerk further determined that the respondent would be deemed incompetent as of 16 August 1990, the date that the respondent's attorney filed the petition for adjudication of incompetence. *Id.* The petitioner appealed to the superior court and the respondent filed a motion to dismiss the appeal, which the superior court granted. *Id.* The petitioner then appealed to the Court of Appeals, which affirmed the superior court's dismissal. *Id.* at 446, 446 S.E.2d at 41–42.

On appeal, our Supreme Court noted that pursuant to N.C. Gen.Stat. § 35A–1109 ****414** (Supp.1993), the respondent's attorney, who filed the petition for adjudication of incompetence, was required to provide notice of the petition and notice of hearing to the alleged incompetent's next of kin and any other persons the clerk may designate. *Id.* at 447, 446 S.E.2d at 42. The Supreme Court recognized that "[b]ased on a purely literal reading of [N.C. Gen.Stat. § 35A–1109], [the respondent] [was] correct in contending that he followed the required notice procedure." *Id.* Nevertheless, the Supreme Court held that the petitioner was entitled to receive notice of the incompetency proceedings involving the respondent:

> Where a determination of the incompetency of a party to a lawsuit may effect the tolling of an otherwise expired statute of limitations, ... the interest of the opposing party clearly falls within the intended scope of [N.C. Gen.Stat. § 35A–1109] and should be protected by notice to that party of the hearing.

Id.

Our Supreme Court also recognized that "nothing in Chapter 35A expressly provides for the rehearing of an incompetency adjudication." *Id.* However, it further held that the case was appropriate for application of Rule 60(b) of the North Carolina Rules of Civil Procedure. *Id.* The Court determined that "[t]he lack of notice to [the petitioner] of the original incompetency proceeding would clearly justify granting it relief pursuant to Rule 60(b)(6)." *Id.* at 448, 446 S.E.2d at 43. Most importantly for purposes of the case before us, the Supreme Court in *In re Ward* held that "*N.C.G.S. § 35A–1115 authorized*

[the petitioner] to appeal from the ... order which resulted from ***150** the rehearing, and the Court of Appeals erred in affirming the superior court's dismissal of the appeal." *Id.* at 448–49, 446 S.E.2d at 43 (emphasis added).

Likewise, in the present case, Mr. Winstead was entitled to notice of the incompetency proceeding and was an interested party to that proceeding. *See* N.C. Gen.Stat. § 35A–1109 (2007) (providing that "[t]he petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the respondent's next of kin alleged in the petition[.]"). Moreover, Mr. Winstead, as an interested party to the incompetency proceeding, was authorized, pursuant to N.C.G.S. § 35A–1115, to appeal from the order on petition for adjudication of incompetence. *See In re Ward,* 337 N.C. at 448–49, 446 S.E.2d at 43.

Our decision is also supported by a recent case from the Court of Appeals of Ohio, Second District. In *In re Guardianship of Richardson,* 172 Ohio App.3d 410, 875 N.E.2d 129 (2007), the Ohio Court of Appeals, Second District, recognized that pursuant to Rule 4(A) of the Ohio Rules of Appellate Procedure, "a notice of appeal from a final order or judgment authorized by App.R. 3 may be filed by a 'party' to the action in which the judgment or order was entered." *Id.* at 133. The court held that the alleged incompetent person's next of kin, "who [was] entitled by R.C. 2111.04(A)(2)(b) to notice of the guardianship application[,] ... [had] an interest in the proceeding concerning her mother that confer[red] on [the next of kin] the status of a 'party' for purposes of App.R. 4(A). Therefore, [the next of kin] [did] not lack standing to appeal." *Id.* at 134.

For the reasons stated above, we hold that Mr. Winstead had standing to appeal the order on petition for adjudication of incompetence. Accordingly, the trial court erred by dismissing Mr. Winstead's appeal. We remand the matter to the Superior Court for reinstatement of Mr. Winstead's appeal and for other proceedings consistent with this opinion. *See In re Ward,* 337 N.C. at 449, 446 S.E.2d at 43.

[3] We next address Mr. Winstead's standing to appeal the order on application for appointment of guardian. Mr. Winstead argues that his appeal from this order is also governed by N.C.G.S. § 35A–1115. However, Petitioner argues that N.C. Gen.Stat. § 1–301.3 controls.

As recited above, N.C.G.S. § 35A–1115 provides: "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals." Based upon the ***151** plain language of this section, this statute has no application to appeals from an order appointing ****415** a guardian. Therefore, N.C.G.S. § 35A–1115 is inapplicable to Mr. Winstead's appeal from the order on application for appointment of guardian. N.C. Gen.Stat. § 1–301.3(a) (2007) provides: "This section applies to matters arising in the administration of testamentary trusts and of estates of decedents, incompetents, and minors." N.C. Gen.Stat. § 1–301.3(c) (2007) provides: "A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of entry of the order or judgment." We hold that N.C.G.S. § 1–301.3(c) governs Mr. Winstead's appeal from the order appointing a guardian. *See In re Simmons,* 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (recognizing that guardianship proceedings are not strictly civil actions nor are they special proceedings; they are more in the nature of estate matters). We further hold that pursuant to N.C.G.S. § 1–301.3(c), Mr. Winstead must show that he was a "party aggrieved" by the Assistant Clerk of Superior Court's ruling.

[4] "A 'party aggrieved' is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court." *Selective Ins. Co. v. Mid–Carolina Insulation Co., Inc.,* 126 N.C.App. 217, 219, 484 S.E.2d 443, 445 (1997). On this issue, Petitioner concedes that "Mr. Winstead is possibly aggrieved by the appointment of someone other than him as his wife's guardian. However, [Petitioner] continues to maintain that Mr. Winstead must be both a party to the action and aggrieved by the court's decision to seek appeal. [Mr. Winstead] is not a party."

Professor John L. Saxon has recently explained that "[t]he parties in a proceeding to appoint a guardian for an allegedly incapacitated adult are the petitioner (or petitioners), the respondent, [and] any person other than the petitioner who files an application requesting the appointment of a guardian for the respondent[.]" John L. Saxon, *North Carolina Guardianship Manual* (School of Government, The University of North Carolina at Chapel Hill), January 2008, § 4.1., at 45. Professor Saxon also specifically states that "[t]he respondent's next of kin or other interested persons may become parties to a pending guardianship proceeding by filing an application for the appointment of a guardian for the respondent pursuant to G.S. 35A–1210 [.]" *Id.* § 4.1(E.), at 47. In the present case, Mr. Winstead filed an application for letters of general guardianship for Mrs. Winstead, seeking to be appointed as her general guardian. We hold that Mr. Winstead was therefore a party to the guardianship proceedings.

***152** We further hold that Mr. Winstead was aggrieved by the appointment of Donna King, rather than himself, as Mrs. Winstead's general guardian. Accordingly, Mr. Winstead had standing to appeal the order on application for appointment of guardian. We remand the matter to the Superior Court for reinstatement of Mr. Winstead's appeal and for other proceedings consistent with this opinion.

Reversed and remanded.

Judges HUNTER and BRYANT concur.

Parallel Citations

657 S.E.2d 411

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114 N.C.App. 638
Court of Appeals of North Carolina.

In the Matter of Carolyn Louise EFIRD; Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker, Testamentary Guardians.

No. 9320SC380. | May 3, 1994.

After dispute arose between two sisters who were appointed testamentary guardians to a third sister, pursuant to last will and testament of their mother, Clerk of Superior Court revoked letters of testamentary guardianship, and appointed fourth sister as successor testamentary guardian. On appeal, the Superior Court, Stanly County, James M. Webb, J., affirmed order of Clerk, and appeal was again taken. The Court of Appeals, Orr, J., held that terms of will may not create guardianship for adult heir who has not been declared incompetent through provisions of Chapter 35A.

Vacated and remanded.

West Headnotes (1)

[1] **Mental Health**
Nature and Form of Proceedings

Terms of will may not create guardianship for adult heir who has not been declared incompetent through provisions of Chapter 35A. G.S. § 35A-1101 et seq.

Cases that cite this headnote

***638 **381** This action arises out of an order from the Clerk of Superior Court, Stanly County, in which he appointed Mable Juanita Efird ***639** Carriker as a successor "Testamentary Guardian" of Carolyn Louise Efird, and revoked the letters of testamentary guardianship of Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker, finding that "[i]t is not in the best interest of Carolyn Louise Efird that the Co-Guardianship of Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker continue."

Mrs. Almond and Mrs. Tucker were appointed "testamentary guardians" to their sister, Carolyn Louise Efird, pursuant to the last will and testament of their mother, Daisy Lee Hinson Efird, who died in Stanly County, North Carolina, on 29 February 1988. From 1988 through 1992, the sisters acted as guardians in behalf of Carolyn. All required accountings were submitted to the clerk, and no disputes arose among any of the parties until 1992. During 1992, a controversy apparently arose between the co-guardians.

As a result of the controversy the clerk, on his own motion, issued a notice to the guardians and their brothers and sisters stating that "[t]he purpose of this hearing is to review the Annual Account that was filed by the Guardians on July 30, 1992, and to determine if this guardianship should be allowed to continue with the present fiduciaries." A ****382** hearing on the matter was held on 20 August 1992. Upon taking of all the evidence, the clerk found:

> 1. That the Co-Testamentary Guardians cannot agree on the care and custody of Carolyn Louise Efird and they cannot work together in the best interest of Carolyn Louise Efird.
>
> 2. That Ruby Lee Efird Almond has refused on many occasions to allow Carolyn Louise Efird to visit in the home of Mary Elizabeth Efird Tucker and has refused to allow Carolyn Louise Efird to stay for any extended period of time in the home of Mary Elizabeth Efird Tucker.
>
> 3. That Mary Elizabeth Efird Tucker has complained and continues to complain to the Clerk of Superior Court that her sister and co-guardian, Ruby Lee Efird Almond will not allow Carolyn Louise Efird to travel to Oakboro, North Carolina to stay overnight or to live part-time in the residence of Mary Elizabeth Efird Tucker.

Based on these facts, the clerk revoked the sisters' guardianship of Carolyn Louise Efird. This order was appealed to the Superior Court by Ruby Lee Efird Almond. The superior court judge reviewed the findings and conclusions of the clerk's order, found ***640** that those facts were supported by competent evidence and affirmed the order of the clerk. No trial on the issue of incompetency has ever been held. The original testamentary guardians appeal the order of the clerk of the superior court and its subsequent affirmation by the trial judge. Those orders have been stayed pending the

outcome of this appeal.

Attorneys and Law Firms

Eugene C. Hicks, III, Charlotte, for appellants Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker.

No brief filed, for appellee.

Opinion

ORR, Judge.

The fundamental issue before this Court is whether a testatrix may appoint guardians for an adult daughter through the language of her will when the daughter has not been declared incompetent pursuant to the provisions of N.C.Gen.Stat. § 35A. The appellants, the "testamentary guardians" named in the will as guardians of their disabled sister, argue that the Clerk of the Superior Court was without authority to appoint them as guardians under their mother's last will and testament, and that he was accordingly without power to revoke their guardianship pursuant to the provisions of N.C.G.S. § 35A-1290(c)(8) and appoint a fourth sister as substitute guardian to Carolyn Louise Efird. We hold that the terms of a will may not create a guardianship for an adult heir who has not been declared incompetent through the provisions of Chapter 35A and therefore vacate all orders of the lower court and remand for the purposes set forth below.

In the instant case, the mother of all of these parties, Daisy Lee Hinson Efird, included the following provision in her will:

ITEM FOUR

> I hereby will, devise and bequeath to my beloved daughter, Carolyn Louise Efird, ... a lifetime interest in and to the real property hereinafter described and referred to as the "homeplace." I further direct that for so long as my said daughter shall continue to reside at the homeplace, the household and kitchen furnishings situated therein at the time of my death, ... shall remain at said premies [sic] for the use and enjoyment of my said daughter....
>
> I hereby will and devise the homeplace, subject to the life estate conveyed herein, to my daughters, Ruby Lee Efird ***641** Almond and Mary Elizabeth Efird Tucker, subject to the condition precedent that they care and provide for the said Carolyn Louise Efird, for so long as she may live. I further direct that Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker serve as the guardians of the person and property of Carolyn Louise Efird, for so long as she may live.... In the event that Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker should predecease Carolyn Louise Efird, or otherwise become unable to care and provide for the said Carolyn Louise Efird, ... I direct that my daughter, Mable Juanita Efird Carriker, ****383** shall care and provide for my said daughter, for so long as she might live....

Mrs. Daisy Efird died on 29 February 1988. Subsequent to her death, an application for letters of testamentary guardianship was filed with the clerk by Mrs. Almond and Mrs. Tucker on 8 June 1988. On the same date, the clerk issued an order finding that the above language created a guardianship and further finding that "said Carolyn Louise Efird is incompetent of want of understanding to manage her own affairs...." He then ordered letters of testamentary guardianship issued to the sisters.

It is commonly stated that "the intention of the testator shall govern 'unless it violates some rule of law, or is contrary to public policy.' " N. Wiggins and R. Braun, *Wills and Administration of Estates in North Carolina*, § 133 (3d Ed.1993). It is apparent that Mrs. Efird intended that Carolyn's sisters, appellants here, take care of Carolyn and her property for the rest of her life. While there is no evidence in the record, the appellants' brief indicates that Carolyn Efird has Down's Syndrome.

Under certain circumstances in North Carolina, a guardian may be appointed to handle the affairs of an adult if that adult is found to be incapable of doing so on his or her own. However, Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." N.C.G.S. § 35A-1102 (1987). In such cases, "[t]he clerk in each county shall have original jurisdiction over proceedings under this Subchapter." N.C.G.S. § 35A-1103 (1987). Upon petition for the adjudication of incompetence, the respondent is entitled to his own counsel or, alternatively, an attorney as guardian ad litem shall appointed by the clerk. Further, due process requirements must be met pursuant to Rule 4 of the Rules of Civil Procedure, and the respondent has a right to a jury trial.

***642** For purposes of the case at bar, the petitioners would be required to prove that their sister was "an adult ... who lacks sufficient capacity to manage [her] own affairs or to make or communicate important decisions concerning [her] person, family, or property whether such

lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (1987). "If the respondent is adjudicated incompetent, a guardian or guardians shall be appointed in the manner provided for in Subchapter II of this Chapter." N.C.G.S. § 35A-1120 (1987). Incompetency must be proven by clear, cogent, and convincing evidence. N.C.G.S. § 35A-1112(d) (1987). While it is true that pursuant to N.C.G.S. § 35A-1225 (1987), a "parent may by last will and testament recommend a guardian for any of his or her minor children, ..." a last will and testament cannot operate to appoint a guardian for an adult child regardless of the disability. The superior court judge reviewed only the revocation of the testamentary guardianship in this matter. While an "[a]ppeal from an order adjudicating incompetence shall be to the superior court for hearing *de novo* and thence to the Court of Appeals," N.C.G.S. § 35A-1115 (1987), "[i]n the appointment and removal of guardians, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk." *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966). The judge's order indicates that he made no finding as to competency, but rather reviewed "a hearing pursuant to N.C.G.S. 35A-1290 to determine if the testamentary guardians, Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker should be removed from their positions as said guardians of Carolyn Louise Efird." We find that as a matter of law, the clerk failed to proceed under Chapter 35A in adjudicating the incompetency of Carolyn Louise Efird, and that therefore the trial court, in its appellate review of the revocation of guardianship, did not address this error.

It may well be that the sisters of Carolyn Louise Efird feel that it is necessary or appropriate that Carolyn have a guardian to administer her life estate or manage any of her other affairs. If such is the case, they must proceed under Chapter 35A. We therefore vacate the order of the superior court and the previous orders of the clerk of court based on the erroneous determination ****384** and remand to the superior court for a hearing *de novo* on the issue of incompetency and the appointment of guardians, and if ***643** necessary, on the interpretation of the will. All orders surrounding the incompetence of Carolyn Louise Efird are hereby vacated, and we remand this matter for a hearing consistent with the above opinion.

Vacated and remanded.

COZORT and GREENE, JJ., concur.

Parallel Citations

442 S.E.2d 381

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113 N.C.App. 467
Court of Appeals of North Carolina.

In the Matter of the Estate of Britt Millis ARMFIELD, II, an incompetent.

No. 9318SC102. | Feb. 1, 1994.

Petition was filed to remove guardians of estate of incompetent ward. The Superior Court, Guilford County, Melzer A. Morgan, Jr., J., removed guardians, and appeal was taken. The Court of Appeals, Wells, J., held that removal was appropriate where guardians held ownership interests in corporations in which ward owned stock and thus had private interests that might tend to hinder carrying out their duties, even absent showing of actual adverse interest.

Affirmed.

West Headnotes (9)

[1] **Executors and Administrators**
Grounds in general

Cause for revocation of letters of administration exists if conditions arise after personal representative's appointment which will prevent him from faithfully and impartially executing duties which he has assumed. G.S. §§ 28A–1–1 et seq., 28A–9–1.

Cases that cite this headnote

[2] **Fraud**
Fiduciary or confidential relations

Person occupying place of trust and confidence may not place himself in position in which his own interest may conflict with interest of those for whom he acts.

Cases that cite this headnote

[3] **Mental Health**
Authority, duties, and liability of guardians in general

Guardianship is trust relation and, in that relationship, "guardian" is "trustee" who is governed by same rules that govern other trustees.

Cases that cite this headnote

[4] **Mental Health**
Authority, duties, and liability of guardians in general

Guardian, like a personal representative, acts in fiduciary capacity. G.S. §§ 32–2, 36A–1(a).

1 Cases that cite this headnote

[5] **Mental Health**
Authority, duties, and liability of guardians in general
Mental Health
Election for ward; exercise of powers; insurance rights

Guardian acts in fiduciary capacity and thus is charged with duty of acting for benefit of another party as to matters coming within scope of relationship. G.S. § 36A–1(a).

1 Cases that cite this headnote

[6] **Mental Health**
Authority, duties, and liability of guardians in general

In determining duties of guardian appointed for

incompetent ward, courts must honor tradition that duty of loyalty guardian owes as a fiduciary is unbending and inveterate. G.S. §§ 35A–1290(b)(7), 36A–1(a).

2 Cases that cite this headnote

[7] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

If language of statute is clear and unambiguous, courts must give statute its plain and definite meaning and are without power to interpolate or superimpose provisions and limitations not contained therein.

Cases that cite this headnote

[8] **Mental Health**
Grounds

Statute allowing termination of guardianship if guardian has private interest that "might tend" to hinder or be adverse to carrying out duties, authorizes removal of guardian if there is showing of any potential for conflict between interests of ward and those of guardian; guardian may be removed even absent showing of private interest of guardian that has actual and adverse effect on ward's interests. G.S. §§ 35A–1290(b)(7), 36A–1(a).

1 Cases that cite this headnote

[9] **Mental Health**
Grounds

Removal was appropriate for guardians appointed to represent interests of incompetent ward where guardians held ownership interests in corporations in which ward owned stock and thus had private interests that might tend to hinder carrying out their duties, even absent showing of actual adverse interest. G.S. §§ 35A–1290(b)(7), 36A–1(a).

1 Cases that cite this headnote

****216 *468** On 8 February 1991, Edward Armfield, Sr. filed a petition to remove Edward M. Armfield, Jr. and Everette C. Sherrill, respondents, as guardians of the estate of Britt Millis Armfield, II, the ward. On 29 April 1991, the Assistant Clerk of Superior Court ****217** entered an order staying the action pending resolution of two declaratory judgment actions filed in Surry County Superior Court. Petitioner appealed the order to the Superior Court, and, on 20 December 1991, Judge Peter M. McHugh entered an order vacating the order staying the proceeding and remanding the proceeding to the Clerk of Superior Court with directions to render a determination on the merits of the petition. On 17 January 1992, the respondents filed notice of appeal to this Court. By order dated 7 April 1992, this Court dismissed the appeal.

The Assistant Clerk of Superior Court held a hearing on the petition to remove respondents and on 10 July 1992 entered an order removing respondents as guardians of the ward, appointing First Citizens Bank and Trust Company as successor guardian, and directing respondents to deliver possession of all the assets of the estate of the ward to the successor guardian. On 29 July 1992, Judge Thomas W. Ross entered an order staying the order of the Assistant Clerk pending an appeal by respondents to Superior Court. On 13 October 1992, Judge Melzer A. Morgan, Jr. entered an order affirming the removal of respondents as guardians of Britt Millis Armfield, II. On 19 October 1992, respondents filed notice of appeal from Judge Morgan's order to this Court. On 20 October 1992, respondents filed a motion to stay the effect of the 13 October 1992 order pending appeal to this Court. On 3 November 1992, Judge Morgan denied the motion. On 6 November ***469** 1992, respondents renewed their notice of appeal from Judge McHugh's 20 December 1991 order and filed notice of appeal from Judge Morgan's 3 November 1992 order.

Attorneys and Law Firms

McNairy, Clifford & Clendenin, by R. Walton McNairy; and Wyatt, Early, Harris, Wheeler & Hauser, by Thomas E. Terrell, Jr.; High Point, for petitioner-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Lindsay R. Davis, Jr. and Richard J. Votta, Greensboro, for respondent-appellants.

Opinion

WELLS, Judge.

These proceedings were initiated and determined pursuant to the pertinent provisions of Chapter 35A, Incompetency and Guardianship, N.C.Gen.Stat. Chapter 35A (1987). The Clerk of Superior Court has the responsibility and authority to appoint guardians for incompetent persons. Article 5, Chapter 35A. Article 13 of the Act provides for termination of guardianship, and § 35A–1290 provides in pertinent part:

> (a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.
>
> (b) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interest in the following cases:
>
> * * * * * *
>
> (7) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out his duties as guardian.

In this case, the Assistant Clerk applied the provisions of § 35A–1290(b)(7) in finding and concluding that respondents had private interests, both direct and indirect, that might tend to hinder or be adverse to carrying out their duties as guardians. The questions presented to the Superior Court on appeal from the Assistant Clerk and to this Court on appeal from the Superior Court are: (1) whether the Assistant Clerk's findings of fact are supported by the evidence, and (2) whether those findings support the Assistant ***470** Clerk's conclusions and order. *In re Estate of Lowther*, 271 N.C. 345, 156 S.E.2d 693 (1967); *In re Estate of Moore*, 25 N.C.App. 36, 212 S.E.2d 184, *cert. denied*, 287 N.C. 259, 214 S.E.2d 430 (1975).

The Assistant Clerk's dispositive findings of fact, not challenged by respondents and therefore deemed to be supported by the evidence, are as follows:

FINDINGS OF FACT

1.

Britt Millis Armfield, II, born December 8, 1947, is a ward of this Court who was adjudicated incompetent by a Guilford ****218** County jury on December 23, 1968.... Letters of Trusteeship pursuant to former N.C.G.S. § 33–1 *et seq.* were issued to Edward M. Armfield, Jr. on February 18, 1969, and on November 28, 1979 letters were issued appointing Everette C. Sherrill as Co–Trustees (hereinafter "Co–Guardians").

2.

Petitioner, Edward M. Armfield, Sr. is the natural parent of the Ward. The Ward's mother, Mary McKissick Armfield, died on November 23, 1980.

3.

The Ward is one of Petitioner's four children: Jean A. Armfield Sherrill, Edward M. Armfield, Jr., Britt Millis Armfield, II, and Ellison M. Armfield. The co-guardian, Everette C. Sherill is married to the Ward's sister, Jean Armfield Sherrill.

4.

The Ward is expected to remain incompetent for the duration of his natural life.

5.

Among the assets of the guardianship estate are shares of stock in Armtex, Inc. ("Armtex") which is a closely held, family-owned corporation. The Armtex stock is owned as follows:

Edward M. Armfield, Sr.	81 ¼ shares	46.4%
Jean Armfield Sherrill	25 shares	14.3%
Edward M. Armfield, Jr.	25 shares	14.3%
Ellison M. Armfield	25 shares	14.3%
Britt M. Armfield, II	18 ¾ shares	10.7%

***471** As of December 31, 1991, Armtex had a book value or net worth of $21,362,989. The book value of Britt Armfield's Armtex stock was $2,285,840. The Co-guardians vote Britt Armfield's stock in Armtex. The Co-guardians have private interests in Armtex, direct and indirect, through stock ownership (Sherrill through his wife, Jean), employment, the exercise of day-to-day management, officer positions, and membership on its Board of Directors.

Edward Armfield, Jr. is the Chief Executive Officer and Chairman of the Board of Directors of Armtex. Everette Sherrill is the President of Armtex and a member of the Board of Directors. Jean Armfield Sherrill is a member of the Board of Directors....

6.

Surry Industries, Inc. ("Surry") is another closely held, family-owned corporation. Surry's major customer is Armtex. Armtex manages Surry pursuant to a management agreement for a fee. Its stock is owned as follows:

Edward M. Armfield, Sr.	228 shares	45.6%
Jean Armfield Sherrill	68 shares	13.6%
Edward M. Armfield, Jr.	68 shares	13.6%
Ellison M. Armfield	68 shares	13.6%
Britt M. Armfield, II	68 shares	13.6%

As of December 31, 1991, Surry had a book value or net worth of $26,678,713. The book value of Britt Armfield's stock was $3,628,305. Britt Armfield's stock in Surry Industries, Inc. is held in trust by Wachovia Bank & Trust Co. pursuant to an irrevocable Trust created by Mr. Armfield, Sr. and Mrs. Armfield in 1957. Edward, Jean and Ellison Armfield form an Advisory Committee which advises Wachovia Bank regarding that stock. Wachovia ****219** Bank, as Trustee, votes Britt Armfield's stock in Surry. The Co-guardians have private interests in Surry, direct and indirect, through stock ownership (Sherrill ***472** through his wife, Jean), management, as well as being officers and directors.

Everette Sherrill is the Chief Executive Officer and Chairman of the Board of Directors of Surry. Edward Armfield, Jr. is President of Surry and a member of the Board of Directors. Jean Armfield Sherrill is a member of the Board of Directors....

7.

Technical Wire Products is another closely held family-owned corporation. Technical Wire is a New Jersey corporation with its stock owned as follows:

Edward M. Armfield, Sr.	1,253.3345	(50.1%)
Jean Armfield Sherrill	332.4468	
Edward M. Armfield, Jr.	332.4468	
Ellison M. Armfield	332.4468	
Britt M. Armfield, II	249.3351	

As of December 31, 1991, Technical Wire had a book value or net worth of $16,374,624. The book value of Britt Armfield's stock was $1,637,462. The Co-guardians vote Britt Armfield's stock in Technical Wire. The Co-guardians have a private interest, direct and indirect, in Technical Wire, through stock ownership (Sherrill through his wife, Jean) but are not officers. Edward M. Armfield, Sr., by virtue of stock ownership, controls Technical Wire.

* * * * * *

13.

Refloat, Inc. is a corporation owned entirely by Edward Armfield, Jr., Jean Armfield Sherrill, and Ellison M. Armfield who also serve with Co-guardian Everette Sherrill and Frank Lord, as officers and/or on the Board of Directors....

14.

Since 1986, Refloat has entered into numerous and substantial transactions in which it has leased equipment to Armtex, a corporation in which the Ward has a substantial minority interest.... The leasing transactions pay rent from Armtex, in which the Ward and Co-guardians have a private interest to Refloat, direct or indirect, and the Ward does not.

***473 15.**

From 1986 through December 31, 1991, Armtex paid Refloat, for real property leases, the sum of $2,993,200 and the sum of $15,590,151 for equipment leases. From 1986 through December 31, 1991, Refloat's increase in net worth was $8,483,818. Refloat's sole source of income, other than interest from investments, was from Armtex lease payments. On December 31, 1991, Refloat had a net worth of $12,007,912....

16.

Edward Armfield, Jr., Jean Armfield Sherrill and Ellison M. Armfield are also the sole owners of JE & E, a partnership formed in 1988. JE & E then borrowed $800,000 from Surry, a company in which the partners of JE & E and also the Ward own a substantial minority interest....

17.

The funds JE & E borrowed from Surry were used to construct a building which was leased to Armtex, a company in which the Ward owns a substantial minority interest.... The building was leased to Armtex as an office building (it also houses Refloat's offices at no cost to Refloat) for 15 years at a rent of $31,200 per quarter....

* * * * * *

20.

Edward M. Armfield, Jr. and Everette Sherrill have private interests, both direct ****220** and indirect, that might tend to hinder or be adverse to carrying out their duties as guardians.

* * * * * *

Upon the foregoing findings, the assistant clerk made the following conclusion:

CONCLUSIONS OF LAW

1.

Edward M. Armfield, Jr. and Everette Sherrill have private interests, both direct and indirect, that might tend to hinder or be adverse to carrying out their duties as guardians.

* * * * * *

***474** It was upon these findings and this conclusion that the Assistant Clerk applied the statute to order respondents' removal. We are not aware of any previous decision of our appellate courts interpreting § 35A–1290(b)(7), but we find guidance and direction in previous decisions of our courts in the area of the administration of estates and trusts.

Chapter 28A of our General Statutes, dealing with the administration of decedent's estates, contains a removal provision identical in legal context to § 35A–1290(b)(7). Respondents argue that the Superior Court erred in affirming the order of the Assistant Clerk granting the petition to remove respondents as guardians of Britt Millis Armfield, II because removal under § 35A–1290(b)(7) requires a showing that the private interest of the guardian has an actual and adverse effect upon the interests of the ward.

[1] [2] In *In re Moore*, 292 N.C. 58, 231 S.E.2d 849 (1977), our Supreme Court concluded that "it is not necessary to show an actual conflict of interest to justify a refusal to issue letters of administration; it is sufficient that the likelihood of a conflict is shown." Cause for revocation of letters under § 28A–9–1 exists "when conditions arise after [a personal representative's] appointment which will prevent him from faithfully and impartially executing the duties which he has assumed." *Id.* Consistently, this Court has held that, "a person occupying a place of trust and confidence may not place himself in a position where his own interest may conflict with the interest of those for whom he acts." *Moore v. Bryson*, 11 N.C.App. 260, 181 S.E.2d 113 (1971).

[3] [4] [5] [6] A guardianship is a trust relation and in that

relationship the guardian is a trustee who is governed by the same rules that govern other trustees. *Owen v. Hines*, 227 N.C. 236, 41 S.E.2d 739 (1947). A guardian, like a personal representative, acts in a fiduciary capacity. N.C.Gen.Stat. §§ 32–2 (1991) and 36A–1(a) (1991); *Moore, supra.* A fiduciary is charged with the duty of acting for the benefit of another party as to matters coming within the scope of the relationship. N.C.Gen.Stat. § 36A–1(a). The duties of a fiduciary include the duty of loyalty and the tradition surrounding this duty is "unbending and inveterate." *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E.2d 449 (1967) (*quoting Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928)). In interpreting § 35A–1290(b)(7), we must honor this tradition.

***475** [7] [8] When the language of a statute is clear and unambiguous, the courts must give the statute its plain and definite meaning and are without power to interpolate or superimpose provisions and limitations not contained therein. *State v. Camp*, 286 N.C. 148, 209 S.E.2d 754 (1974). The words "might tend" in § 35A–1290(b)(7) establish a minimal showing of possible conflicting interest for the removal of a guardian. The word "tend" is defined as "to be likely or to be disposed or inclined," and the word "might" is defined as "used to indicate a possibility or probability that is weaker than may." The American Heritage Dictionary (Second College Edition 1982). We hold, therefore, that § 35A–1290(b)(7) authorizes the removal of a guardian where there is a showing of any potential for conflict between the interests of the ward and those of the guardian.

[9] The record in this case discloses substantial potential for conflict between the interests of the ward and respondents. Because respondents are governed by the same rules that govern other trustees they are "held to something stricter than the morals of the marketplace. Not honesty alone, but ****221** the punctilio of an honor the most sensitive, is then the standard of behavior.... Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd." *Trust Co., supra* (*quoting Meinhard, supra*). The standard established by § 35A–1290(b)(7) acknowledges and confirms the "unbending and inveterate" tradition of fiduciary duty.

Applying the facts in this case to the foregoing principles of law, we hold that the trial court did not err in affirming the order of the Assistant Clerk removing respondents as guardians. The evidence supports the findings of fact and the findings support the conclusion of law that respondents have private interests, both direct and indirect, which might tend to hinder or be adverse to carrying out their duties as guardians.

Based upon our holding, respondents' other assignments of error are without merit and the order of the trial court is

Affirmed.

ARNOLD, C.J., and EAGLES, J., concur.

Parallel Citations

439 S.E.2d 216

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337 N.C. 443
Supreme Court of North Carolina.

In the Matter of Morgan Samuel WARD, III.

No. 476PA93. | July 29, 1994.

Defendant in action based on automobile collision, sought to have incompetency proceeding which had declared plaintiff driver incompetent, reopened. The Superior Court, held that plaintiff driver had been incompetent since date of accident. The Superior Court, Durham County, Thompson, J., dismissed defendant's notice of appeal, and the Court of Appeals, 112 N.C.App. 202, 435 S.E.2d 125, Orr, J., affirmed. On discretionary review, the Supreme Court, Whichard, J., held that: (1) clerk had authority to reopen proceeding, and (2) defendant could appeal.

Reversed and remanded in part; discretionary review improvidently allowed in part.

West Headnotes (4)

[1] **Mental Health**
Setting Aside or Vacating

Clerk of superior court had authority to reopen incompetency proceeding under relief from judgment rule, based on lack of notice to defendant in litigation brought by subject of incompetency proceeding based on automobile collision, and thus defendant was authorized to appeal from subsequent order which resulted from rehearing. G.S. § 35A-1115; Rules Civ.Proc., Rule 60(b), G.S. § 1A-1.

1 Cases that cite this headnote

[2] **Mental Health**
Persons Entitled to Notice

If determination of incompetency of party to lawsuit may effect tolling of otherwise expired statute of limitations, interest of opposing party clearly falls within intended scope of guardianship statute and should be protected by notice to that party of hearing. G.S. § 35A-1109.

1 Cases that cite this headnote

[3] **Mental Health**
Setting Aside or Vacating

Statute which permits interested person to file motion in cause with clerk in county in which guardianship is docketed to request modification of order appointing guardians or consideration of any other matter pertaining to guardianship does not relate to original adjudication of incompetency; rather, its purpose is to allow for modifications of guardianship appointments or for orders as to other aspects of guardianship proceedings. G.S. § 35A-1207(a).

1 Cases that cite this headnote

[4] **Mental Health**
Setting Aside or Vacating

Lack of notice, to defendant in litigation regarding automobile collision, of original incompetency proceeding regarding plaintiff, would have justified granting defendant relief with regard to original incompetency proceeding; if defendant had made motion expressly pursuant to relief from judgment rule, clerk would have been authorized to reopen incompetency proceeding thereunder. Rules Civ.Proc., Rule 60(b), G.S. § 1A-1.

1 Cases that cite this headnote

****40 *444** On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of a unanimous panel of the Court of Appeals, ****41** 112 N.C.App. 202, 435 S.E.2d 125

(1993), affirming an order dismissing petitioner's notice of appeal entered 11 August 1992 by Thompson, J., in Superior Court, Durham County. Heard in the Supreme Court 11 May 1994.

Attorneys and Law Firms

Haywood, Denny, Miller, Johnson, Sessoms & Patrick by George W. Miller, Jr. and Robert E. Levin, Chapel Hill, for petitioner-appellant, Imperial Trucking Co., Inc.

Constantinou Law Group, P.A. by John M. Constantinou, Durham, for respondent-appellee, Morgan Samuel Ward, III.

Opinion

***445** WHICHARD, Justice.

On 23 December 1987 respondent Morgan Samuel Ward, III, was in an automobile accident in Texas involving his U-Haul van and a tractor-trailer truck owned by petitioner Imperial Trucking Co., Inc. [hereinafter "Imperial"] and operated by its agent. Ward was injured, and on 26 January 1990 he filed suit in the United States District Court for the Middle District of North Carolina. Imperial filed a motion to dismiss based on lack of personal jurisdiction and on the expiration of the Texas two-year statute of limitations on personal injury claims. *See* Tex.Civ.Prac. & Rem.Code Ann. § 16.003(a) (1986). Ward filed a motion to change venue. The court granted Imperial's motion to dismiss for lack of personal jurisdiction and, finding subject matter jurisdiction, granted Ward's motion for change of venue but declined to rule on the statute-of-limitations question. The court then transferred the case to the United States District Court for the Southern District of Texas, where on 13 November 1990 Ward took a voluntary dismissal without prejudice.

On 16 August 1990, prior to Ward's voluntary dismissal of the federal action, John Constantinou, Ward's attorney, filed a Petition for Adjudication of Incompetence and Application for Appointment of Guardian in Durham County, seeking to have the Clerk of Superior Court, James Leo Carr, declare Ward incompetent as of 23 December 1987, the date of the accident. Imperial was not listed in the petition as an interested party and did not receive notice of the subsequent hearing. On 11 October 1990, following the hearing, the Clerk entered an order ruling that Ward was rendered incompetent on 23 December 1987 as a result of the accident. The Clerk appointed Constantinou as Ward's guardian and ordered that he "be allowed to file a personal injury action for the ward without further permission from this Court."

The day after Ward voluntarily dismissed his federal action, Constantinou, as Ward's guardian, filed suit in Texas state court against Imperial and its driver seeking personal injury damages. Imperial first learned of the prior incompetency proceeding at that time. Imperial then sought to have the incompetency proceeding reopened in Durham County by filing a motion in the cause denominated as under N.C.G.S. § 35A-1207(a). On 10 October 1991 the Clerk ordered the proceeding reopened, stating that Constantinou, as Ward's guardian, had agreed to the rehearing. The order was signed by attorneys for both parties to reflect their consent. Following a hearing in March ***446** 1992, the Clerk entered an order on 12 June 1992 which stated that Imperial's motion pursuant to N.C.G.S. § 35A-1207 was filed improperly because that statute addresses guardianships and has no application to an original incompetency determination. The order then stated:

> The court finds, however, that the Guardian has consented to the motion, and that both the Petitioner and the Guardian have requested a full hearing on the merits, therefore, the court concludes in the interest of justice that the motion is properly before the court pursuant to Article I of G.S. 35A.

The Clerk found as fact that Ward had been incompetent since the date of the accident, but determined that he was without authority to declare Ward legally incompetent prior to the institution of the incompetency determination proceeding. He then decreed that Ward was incompetent on 16 August 1990, the date the original Petition for Adjudication of Incompetence was filed.

Imperial gave notice of appeal to the superior court. Ward, through his attorney, moved to dismiss the notice, and the superior court granted his motion. Imperial then appealed to the Court of Appeals, which affirmed ****42** the superior court. On 27 January 1994 we allowed Imperial's petition for discretionary review.

[1] The issue is whether the Clerk had authority to reopen the incompetency proceeding and issue the order of 12 June 1992. If so, Imperial has the right to appeal to the superior court for a trial *de novo* pursuant to N.C.G.S. § 35A-1115, which provides: "Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals."

N.C.G.S. § 35A-1115 (1987). The Court of Appeals concluded that the order was null and void because the Clerk did not have the express authority under Chapter 35A, and therefore did not have jurisdiction, to rehear Ward's adjudication of incompetency. For reasons that follow, we hold that the Clerk had authority to reopen the proceeding, and, accordingly, we reverse the Court of Appeals.

The Clerk had original jurisdiction to appoint a guardian for Ward. N.C.G.S. § 35A-1203(a) (1987) ("Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the person, ... and of related proceedings brought or filed under this Subchapter."). The issue thus is not one of jurisdiction, but of whether the Clerk could reopen the incompetency ***447** proceeding, over which he clearly had jurisdiction under the foregoing statute, where an interested party was not notified of the original proceeding. Ward notes that all interested parties, as set forth in the statute, were notified. *See* N.C.G.S. 35A-1109 (Supp.1993) ("The petitioner, within five days after filing the petition, shall mail or cause to be mailed, ... copies of the notice and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate...."). Imperial was not notified because it was not one of Ward's next of kin and was not designated by the Clerk as an interested party.

[2] Based on a purely literal reading of the statute, Ward is correct in contending that he followed the required notice procedure. Where a determination of the incompetency of a party to a lawsuit may effect the tolling of an otherwise expired statute of limitations, however, the interest of the opposing party clearly falls within the intended scope of the statute and should be protected by notice to that party of the hearing.

[3] As the Court of Appeals held, and as Ward argues, nothing in Chapter 35A expressly provides for the rehearing of an incompetency adjudication. Imperial nominally filed its motion in the cause under N.C.G.S. § 35A-1207, which provides: "Any interested person may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship." N.C.G.S. § 35A-1207(a) (1987). As the Clerk noted in his order, this statute does not relate to the original adjudication of incompetency; rather, its purpose is to allow for modifications of guardianship appointments or for orders as to other aspects of guardianship proceedings.

[4] The lack of express authority in Chapter 35A for reopening the incompetency proceeding does not foreclose relief for Imperial, however. Though Imperial did not designate Rule 60(b) of the North Carolina Rules of Civil Procedure as the authority under which it sought relief, this case is an appropriate one for application of that rule, which provides:

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

***448** (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been ****43** reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

N.C.G.S. § 1A-1, Rule 60(b) (1990). Rule 60(c) authorizes the Clerk to exercise the powers Rule 60(b) grants to judges: "The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in section[ ] ... (b).... Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law." *Id.* § 1A-1, Rule 60(c). The lack of notice to Imperial of the original incompetency proceeding would clearly justify granting it relief pursuant to Rule 60(b)(6). If Imperial had made a motion expressly pursuant to that rule, the Clerk would have been authorized to reopen the incompetency proceeding thereunder.

While the motion and order to reopen the proceeding denominate N.C.G.S. § 35A-1207 as the applicable statute, the effect of the order is to treat the motion as one pursuant to Rule 60(b)(6). It results in allowance of the motion to reopen the proceeding for a "reason justifying relief from the operation of the [order of incompetency]," Rule 60(b)(6), *viz*, "so that all interested parties shall have the right to be heard, offer evidence, examine and cross-

examine any and all witnesses offered in support of the original Petition, and ... contest that proceeding as it relates to the alleged incompetency, and the date of onset of any incompetency....” The Clerk had authority under Rule 60(b) and (c)-especially in view of the consent of the parties-to reopen the proceeding for this altogether appropriate purpose. To deny the order this effect places form over substance. We thus treat the order as entered pursuant to Rule 60(b). So treated, N.C.G.S. § 35A-1115 authorized Imperial to appeal from the subsequent order ***449** which resulted from the rehearing, and the Court of Appeals erred in affirming the superior court’s dismissal of the appeal.

Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for reinstatement of petitioner’s appeal from the Clerk’s order and for other proceedings not inconsistent with this opinion. As to Imperial’s remaining issues, we conclude that discretionary review was improvidently allowed.

REVERSED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Parallel Citations

446 S.E.2d 40

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202 N.C.App. 509
Court of Appeals of North Carolina.

Sarah Isadora McKOY, Plaintiff,
v.
Willis Eugene McKOY, Defendant.

No. COA09–447. | Feb. 16, 2010.

Synopsis
Background: After child was adjudicated an incompetent adult and both mother and father were appointed guardians, mother and father separated, and mother moved for joint legal custody and primary physical custody of adult child. Father also sought custody of adult child. Mother then moved to dismiss for lack of jurisdiction. The District Court, Forsyth County, Chester C. Davis, J., denied the motion to dismiss, and entered award of joint legal custody and granted mother 60% physical time and father 40%. Mother appealed.

[Holding:] The Court of Appeals, Robert C. Hunter, J., held that the clerk of superior court had original and exclusive jurisdiction to determine custody dispute between the parents, who were already appointed guardians of incompetent adult child.

Reversed in part and vacated in part.

West Headnotes (6)

[1] **Appeal and Error**
Cases Triable in Appellate Court

Whether a trial court has subject matter jurisdiction is a question of law, reviewed de novo on appeal.

45 Cases that cite this headnote

[2] **Courts**
Jurisdiction of Cause of Action

"Subject matter jurisdiction" involves the authority of a court to adjudicate the type of controversy presented by the action before it.

13 Cases that cite this headnote

[3] **Courts**
In general; nature and source of judicial authority
Courts
Jurisdiction of Cause of Action

"Subject matter jurisdiction" derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law.

17 Cases that cite this headnote

[4] **Courts**
Time of making objection
Courts
Acts and proceedings without jurisdiction

When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, as if it had never happened; thus, the trial court's subject matter jurisdiction may be challenged at any stage of the proceedings.

27 Cases that cite this headnote

[5] **Clerks of Courts**
Judicial functions and proceedings
Mental Health
Particular courts

Clerk of superior court had original and

exclusive jurisdiction, after adult child was adjudicated incompetent, to appoint guardians and to determine disputes between guardians, and therefore, clerk of superior court was proper forum in which to bring custody dispute over adult child whose parents had been appointed guardians but who sought divorce in district court; although district court had concurrent jurisdiction with respect to custody of disabled adult children, it did not have jurisdiction over the custody of an adult disabled child already declared incompetent. West's N.C.G.S.A. §§ 35A–1103(a), 35A–1203(b, c), 35A–1241(1, 2), 50–13.8.

3 Cases that cite this headnote

[6] **Child Custody**
Age of child
Child Custody
Mental or emotional condition of child

Under statute indicating that a district court has jurisdiction to enter a custody order in a divorce proceeding involving a disabled adult child, such jurisdiction exists only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed. West's N.C.G.S.A. § 50–13.8.

1 Cases that cite this headnote

****591** Appeal by plaintiff from orders entered 5 September 2006 and 19 March 2007 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 4 November 2009.

Attorneys and Law Firms

Robinson & Lawing, LLP, by Michelle D. Reingold, Winston–Salem, for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

Opinion

HUNTER, ROBERT C., Judge.

***509** This appeal arises out of a custody dispute in district court between plaintiff Sarah Isadora McKoy and defendant Willis Eugene McKoy regarding their daughter T.M., who was previously adjudicated an incompetent adult by the clerk of superior court under Chapter 35A of the General Statutes. Plaintiff appeals from the trial court's orders (1) denying plaintiff's motion to dismiss for lack of subject-matter jurisdiction and (2) granting joint custody of T.M. to plaintiff and defendant. Plaintiff's sole contention on appeal is that the trial court should have dismissed the parties' custody action, which was part of their larger divorce and equitable distribution action, for lack of jurisdiction under Chapter 50 because, after the clerk of superior court adjudicated T.M. incompetent under Chapter 35A, the clerk retained exclusive jurisdiction to resolve all disputes regarding custody ***510** of T.M. We agree with plaintiff's contention, and, accordingly, reverse the trial court's order denying plaintiff's motion to dismiss and vacate the court's custody order.

Facts

Plaintiff and defendant were married on 29 March 1975. While married the McKoys had two children, M.M., born 1 July 1976, and T.M., born 4 March 1980. T.M. suffers from cerebral palsy, severe mental retardation, scoliosis, chronic kidney disease, high blood pressure, and vision problems. On 25 March 1998, after T.M.'s 18th birthday, the McKoys jointly petitioned the clerk of superior court to declare T.M. incompetent and to appoint both plaintiff and defendant as her guardians under Chapter 35A. On 9 April 1998, the clerk entered an order adjudicating T.M. as being an incompetent adult and finding that she should be appointed a guardian. In another order entered the same day, the clerk appointed both plaintiff and defendant as T.M.'s joint guardians.

Roughly six years later, on 20 February 2004, plaintiff and defendant separated. On 30 April 2004, plaintiff filed a complaint under Chapter 50 seeking equitable distribution, post-separation support and alimony, and joint legal custody and primary physical custody of T.M. (who was then 24). On 25 June 2004, defendant filed an answer and counterclaim, also seeking custody of T.M. Their divorce was finalized on 23 May 2005.

The trial court conducted a hearing on the issue of custody on 23–24 March 2006, which was continued until

20 April 2006. On 20 April 2006, prior to plaintiff finishing presenting her evidence in the custody hearing, plaintiff filed a motion to dismiss the Chapter 50 custody action, asserting that the clerk of superior court retained exclusive jurisdiction over T.M.'s guardianship under Chapter 35A and thus the trial court lacked jurisdiction to adjudicate the custody action. Plaintiff requested in the alternative that a guardian *ad litem* be appointed for T.M. pursuant to Rule 17(b) of the Rules of Civil Procedure.

****592** In an order entered 5 September 2006, the trial court denied plaintiff's motion to dismiss but appointed T.M. a guardian *ad litem*. After concluding the custody hearing on 9 February 2007, the trial court entered an order on 19 March 2007, finding that it had subject-matter jurisdiction and awarding plaintiff and defendant joint legal custody of T.M., with plaintiff having custody 60% of the time and defendant ***511** having custody 40% of the time. A final equitable distribution judgment was entered 2 September 2008. On 17 December 2008, plaintiff voluntarily dismissed her claim for post-separation support and alimony and appealed to this Court from the trial court's 5 September 2006 order denying her motion to dismiss and the court's 19 March 2007 custody order.

Discussion

[1] [2] [3] [4] Plaintiff's sole argument on appeal is that the trial court lacked subject-matter jurisdiction to determine custody of T.M. Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal. *Harper v. City of Asheville*, 160 N.C.App. 209, 213, 585 S.E.2d 240, 243 (2003). Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker–Volkening v. Haker*, 143 N.C.App. 688, 693, 547 S.E.2d 127, 130, *disc. review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001). Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978), *cert. denied sub nom. Peoples v. Judicial Standards Comm'n of N.C.*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979). "When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened." *Hopkins v. Hopkins*, 8 N.C.App. 162, 169, 174 S.E.2d 103, 108 (1970). Thus the trial court's subject-matter jurisdiction may be challenged at any stage of the proceedings. *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006).

[5] Here, the trial court determined that it had subject-matter jurisdiction under Chapter 50 to enter its custody order. Plaintiff contends, however, that once the clerk of superior court obtained jurisdiction to adjudicate T.M. as an incompetent adult and appointed plaintiff and defendant as her guardians under Chapter 35A, any modification of T.M.'s custody required filing a motion in the cause with the clerk under Chapter 35A rather than filing an action for custody in district court under Chapter 50. Issues of statutory construction are questions of law, reviewed de novo on appeal. *Moody v. Sears Roebuck & Co.*, 191 N.C.App. 256, 264, 664 S.E.2d 569, 575 (2008).

Chapter 35A "establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child." N.C. Gen.Stat. § 35A–1102 (2009). Pursuant to ***512** N.C. Gen.Stat. § 35A–1103(a) (2009), the clerk of superior court "ha[s] original jurisdiction over proceedings" determining competency. Here, as a result of a hearing conducted pursuant to N.C. Gen.Stat. § 35A–1112 (2009), T.M. was declared an "incompetent adult."[1]

After an adjudication of incompetence, N.C. Gen.Stat. § 35A–1203 (2009) provides the clerk with "original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings ...." In appointing a guardian, the clerk may conduct a hearing and receive evidence regarding, among other things, "[t]he nature and extent of the needed guardianship," N.C. Gen.Stat. § 35A–1212(a) (2009), and issue letters of appointment specifying the "powers and duties of the guardian or guardians," N.C. Gen.Stat. § 35A–1215(b) (2009). N.C. Gen.Stat. § 35A–1241 (2009) specifies the "powers and duties" of guardians of the person, including:

> ****593** (1) *The guardian of the person is entitled to custody of the person of the guardian's ward* and shall make provision for the ward's care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for the ward's training, education, employment, rehabilitation or habilitation....
>
> (2) The guardian of the person may establish the ward's place of abode within or without this State....

N.C. Gen.Stat. § 35A–1241(1)–(2) (emphasis added). Here, the clerk issued letters of appointment naming both plaintiff and defendant as T.M.'s "guardian [s] of the person" and authorizing them "to have ... custody, care and control of [T.M.]"

With respect to authority over guardians of incompetent persons, N.C. Gen.Stat. § 35A–1203 provides:

(b) The clerk shall retain jurisdiction following appointment of a guardian in order to assure compliance with the clerk's orders and those of the superior court. The clerk shall have authority to remove a guardian for cause and shall appoint a successor guardian .... after removal, death, or resignation of a guardian.

***513** (c) *The clerk shall have authority to determine disputes between guardians* and to adjust the amount of the guardian's bond.

N.C. Gen.Stat. § 35A–1203(b)–(c) (emphasis added). Chapter 35A also allows "[a]ny interested person [to] file a motion in the cause with the *clerk* ... to request modification of the order appointing a guardian or guardians or *consideration of any matter pertaining to the guardianship.*" N.C. Gen.Stat. § 35A–1207(a) (2009) (emphasis added).

Reading Chapter 35A's provisions *in pari materia, see Redevelopment Commission of Greensboro v. Security Nat. Bank of Greensboro,* 252 N.C. 595, 610, 114 S.E.2d 688, 698 (1960) ("It is a fundamental rule of statutory construction that sections and acts *in pari materia,* and all parts thereof, should be construed together and compared with each other."), we conclude that the clerk of superior court is the proper forum for determining custody disputes regarding a person previously adjudicated an incompetent adult and who has been provided a guardian under Chapter 35A. The Chapter provides that the clerk has the authority to appoint guardians for incompetent persons, N.C. Gen.Stat. § 35A–1203, and to specify the guardians' powers and duties, including custody of the person declared incompetent, N.C. Gen.Stat. § 35A–1241. Chapter 35A further specifies that the clerk retains jurisdiction to ensure compliance with "the clerk's orders and those of the superior court" and to "determine disputes between guardians." N.C. Gen.Stat. § 35A–1203(b), (c). In addition, interested parties are directed to file a motion in the cause with the clerk for "consideration of any matter pertaining to the guardianship." N.C. Gen.Stat. § 35A–1207(a).

The custody dispute between plaintiff and defendant—T.M.'s guardians who have already been granted custody of T.M.—is a "matter pertaining to the guardianship." The parties, therefore, should have filed a motion in the cause under § 35A–1207(a) with the clerk in order to resolve the dispute in accordance with § 35A–1203(c).

Although the trial court acknowledged that the clerk had jurisdiction over "issues of guardianship" in this case and that the court did not "ha[ve] any jurisdictional authority to become mixed up in a guardianship quarrel," the court reasoned that Chapter 50 provided jurisdiction to enter a custody order in the parties' divorce proceedings:

> In reading [N.C. Gen.Stat. § 50–13.5 (2009)] and [N.C. Gen.Stat. § 50–13.8 (2009),] it would appear that the legislature set into ***514** motion [ ] procedures for the court to hear a case identical to this and that this court would have exclusive jurisdiction to do so.

Thus the court concluded that the parties were permitted to "proceed[ ] in a custody matter in District Court to determine who would get custody and visitation of the minor child." The flaw in the trial court's reasoning is that the custody of a "minor child" is not at issue in this case: at the time she was adjudicated incompetent as well as at the time the trial court entered its custody order, T.M. was an adult.

Chapter 50 is titled "Divorce and Alimony." Within Chapter 50 is Article 1: "Divorce, ****594** Alimony, and Child Support, Generally." Article 1 includes N.C. Gen.Stat. §§ 50–13.1 through 50–13.12 (2009), provisions relating to child support and custody. N.C. Gen.Stat. § 50–13.1(a), the provision establishing a cause of action for child custody, provides in pertinent part: "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a *minor child* may institute an action or proceeding for the custody of such child, as hereinafter provided...." (Emphasis added.) This statute, by its plain terms, provides for an action for custody of a "minor child" only.

In its order denying plaintiff's motion to dismiss, the trial court relied on N.C. Gen.Stat. § 50–13.5, concluding that it provided the district court with jurisdiction over "*all* custody matters." (Emphasis added.) The plain language of the statute, however, does not support such an expansive interpretation. N.C. Gen.Stat. § 50–13.5 only provides for the "procedure in actions for custody and support of *minor children....* " N.C. Gen.Stat. § 50–13.5(a). The statute also lists the "[t]ype[s]" of custody actions that may be maintained under N.C. Gen.Stat. § 50–13.5, none of which reference custody of an adult that has been adjudicated incompetent and provided a guardian under Chapter 35A. N.C. Gen.Stat. § 50–13.5(b).

The trial court also concluded that it had jurisdiction under N.C. Gen.Stat. § 50–13.8, which provides: "For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon

reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support." The plain language of § 50–13.8 provides that the district court has jurisdiction to enter a custody order involving a disabled adult child. *See Speck v. Speck,* 5 N.C.App. 296, 303, 168 S.E.2d 672, 678 (1969) (holding under prior version of statute providing for support as well as custody that trial court had authority to enter custody and support order although disabled child had attained majority).

***515** Thus the district court has concurrent jurisdiction with the clerk of superior court with respect to custody of disabled adult children. Here, for instance, plaintiff and defendant could have decided not to have T.M. declared an incompetent adult and the district court, in resolving the parties' other claims under Chapter 50, would have had jurisdiction under § 50–13.8 to determine custody of T.M. Chapter 35A, however, unequivocally provides that the clerk of superior court has exclusive jurisdiction over guardianship matters. Once the clerk of superior court exercised its jurisdiction under Chapter 35A, adjudicating T.M. an incompetent adult and providing a guardian, the clerk retained jurisdiction to resolve all matters pertaining to the guardianship. *See In re Greer,* 26 N.C.App. 106, 112, 215 S.E.2d 404, 408 (1975) ("It is the general rule that where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it."), *superseded on other grounds by statute as recognized in Taylor v. Robinson,* 131 N.C.App. 337, 508 S.E.2d 289 (1998); *In re James S.,* 86 N.C.App. 364, 365–66, 357 S.E.2d 430, 431–32 (1987) (holding that district court's jurisdiction over abuse, dependency, and neglect proceedings is in "abeyance" once adoption petition was filed in superior court, which had exclusive jurisdiction over adoption proceedings).

[6] We conclude that the district court obtains jurisdiction under § 50–13.8 to determine custody only when the disabled adult child at issue has not been declared incompetent and had a guardian appointed. While the superior court clerk retains jurisdiction over all guardianship matters under Chapter 35A, obviously not all disabled adult children are declared incompetent and provided guardians. In those instances, § 50–13.8 fills the gap, authorizing the district court to determine custody. As the clerk in this case had exercised its jurisdiction under Chapter 35A—to the exclusion of the district court under N.C. Gen.Stat. § 50–13.8—it retained jurisdiction to resolve the parties' dispute regarding custody of T.M. Thus, the parties were required to file a motion in the cause with the clerk to resolve the dispute. As the trial court in this case lacked jurisdiction to determine custody of T.M., we reverse the ****595** court's order denying plaintiff's motion to dismiss and vacate its custody order.

Reversed in part and vacated in part.

Judges CALABRIA and GEER concur.

Parallel Citations

689 S.E.2d 590

Footnotes

1 Chapter 35A defines an "incompetent adult" as "an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C. Gen.Stat. § 35A–1101(7) (2009).

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TAB 02

Medical Records as Evidence

Obtaining Medical Records for Hearings

Jill D. Moore, JD, MPH
Incompetency & Adult Guardianship
April 2015

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

Provider perspective on medical records for court proceedings

- Information is confidential
  - Protected under HIPAA
  - Privileged under state law
  - Other laws may apply also
- General rule: patient must give permission for information to be disclosed
- Exceptions to general rule require verification

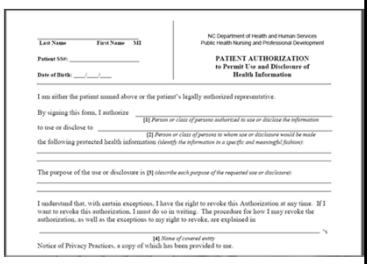
Law	Information covered
HIPAA privacy rule (federal)	**Protected health information (PHI)** – Information that identifies an individual and pertains to: • Health status or condition, or • Provision of health care, or • Payment for provision of health care.
Privilege laws (state)	**Privileged information –** Information that is subject to a privilege created by a statute. Physician-patient, psychologist-client, etc.
Other laws (federal or state)	**Confidential information –** Generic term for information made confidential under any law. E.g., mental health, substance abuse, communicable disease.

3 general ways to get info

1. Patient or personal representative gives provider written authorization to disclose information or records
2. Patient obtains information or record and provides it
3. Court order or other legal process compels disclosure of information or records

1. Written Authorization

- **HIPAA:** Required elements and statements
- **Other laws:** Additional elements or statements, or may require specific permission to disclose particular info



Last Name First Name MI

Patient SS#: _____

Date of Birth: ___/___/___

NC Department of Health and Human Services
Public Health Nursing and Professional Development

PATIENT AUTHORIZATION to Permit Use and Disclosure of Health Information

I am either the patient named above or the patient's legally authorized representative.

By signing this form, I authorize _____ [1] *Person or class of persons authorized to use or disclose the information*

to use or disclose to _____ [2] *Person or class of persons to whom use or disclosure would be made*

the following protected health information *(identify the information in a specific and meaningful fashion)*:

_____

_____

The purpose of the use or disclosure is [3] *(describe each purpose of the requested use or disclosure)*:

_____

_____

I understand that, with certain exceptions, I have the right to revoke this Authorization at any time. If I want to revoke this authorization, I must do so in writing. The procedure for how I may revoke the authorization, as well as the exceptions to my right to revoke, are explained in _____ [4] *Name of covered entity*'s Notice of Privacy Practices, a copy of which has been provided to me.

Who signs the form?

General rule: Individual

- Adult individual signs form authorizing disclosure of information or records.

Exception: Personal representative

- If adult is incapacitated, personal representative signs form authorizing disclosure of information or records.

Personal representative

HIPAA	NC law
A person who is authorized by law to make health care decisions for another individual is a personal representative.	If unable to make or communicate health care decisions: • Health care agent (POA) • Guardian • Spouse • Majority of parents *and* children ≥18 years of age • Majority of siblings ≥18 • Established relationship, good faith, can communicate wishes

2. Patient-obtained Info

- Patient generally has right of access to own records/ information (rare exceptions)
- Some health care providers may give notes or letters to patient or personal representative
- If more info needed, HCP not permitted to provide upon mere request; must go back to list of ways to get information

3. Court Order

- Both HIPAA and state privilege laws allow disclosure pursuant to a court order.
- State privilege law:
  - Requires finding that disclosure is necessary to proper administration of justice.
  - Doesn't address cases in which clerk has original and exclusive jurisdiction

Physician-patient privilege

"Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge."

G.S. 8-53.

3. Court Order (cont.)

- Orders for some types of information may require particular procedures or need to include additional elements.
  - Federally-assisted substance abuse facilities: court order must be accompanied by a subpoena and meet other requirements.
  - Records containing info about HIV & certain other diseases: patient or personal representative may request in camera review.

Subpoena vs. Court Order

State law	**HIPAA**
To disclose privileged information for proceeding, HCP needs: • Written authorization, or • A court order. Subpoena may accompany either of those, but subpoena alone is insufficient.	To disclose PHI for proceeding, HCP needs: • Written authorization, or • A court order, or • A subpoena that is accompanied by: – Notice to individual, or – Qualified protective order that meets specific requirements.

Discussion

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Medical Records or Other Protected Health Information in Adult Guardianship Proceedings

Jill D. Moore, MPH, JD, UNC School of Government
April 2015

Information about a person's health status or health care is potentially subject to a number of confidentiality laws. Of these, the HIPAA Privacy Rule[1] is likely the best known and the most generally applicable, but it is rarely the only law that applies. Other potentially applicable laws include:

- State laws creating evidentiary privileges, such as the physician-patient privilege or the psychologist-client privilege.[2]
- Federal laws that provide enhanced confidentiality protection to particular categories of information, such as information acquired and maintained by federally assisted substance abuse programs.[3]
- State laws that provide enhanced confidentiality protection to particular categories of information, such as information acquired and maintained by mental health professionals, or information identifying a person as having HIV or certain other communicable diseases.[4]

A health care provider who has records or information that is protected by one or more of these laws may disclose the information only if disclosure is permitted by all the applicable laws. Each law is complex in itself and considering all of them together can seem daunting. However, there is a general framework that is sufficient to resolve most disclosure questions.

> In general, confidential medical information or records may be disclosed to a third party if:
>
> - *Disclosure is authorized in writing* by the individual who is the subject of the information or his/her personal representative, or
> - *A statute or regulation specifically requires disclosure of the information* to the third party, or
> - *Disclosure is authorized by some other legal process*, such as a court order.

A patient or patient's personal representative may also obtain information or records directly from a health care provider and provide them to a third party. Patients have a right of access to their own health information and records (with rare exceptions). The right of access includes the right to obtain copies or summaries of records. Health care providers are permitted to charge the patient reasonable, cost-based fees for copies of records or preparation of summaries.[5]

---

[1] 45 C.F.R. Parts 160 and 164.
[2] G.S. 8-53 (physician-patient); 8-53.3 (psychologist-client).
[3] 42 C.F.R. Part 2.
[4] G.S. 122C-52 through -57 (mental health); G.S. 130A-143 (reportable communicable diseases).
[5] 45 C.F.R. 164.524.

Written Authorization

Health care providers are almost always permitted to disclose confidential health information with the permission of the individual or the individual's personal representative. However, the various confidentiality laws are not perfectly consistent on the questions of whether the permission may be oral or must be written, and if it is written, what must be included on the form. In practice, health care providers usually resolve these inconsistencies by using the HIPAA Privacy Rule's requirements for a written authorization form as their baseline, and then adding any additional elements imposed by other confidentiality laws that apply.

The Authorization Form

HIPAA requires an authorization form for the disclosure of protected health information (PHI) to be in writing and go contain specific elements.[6] In most cases, the authorization form must be a separate, free-standing form—not combined with a form consenting to medical treatment or any other document. Some health care providers may have additional elements in their authorization forms in order to comply with other confidentiality laws, such as the North Carolina mental health laws (G.S. Ch. 122C), the federal regulations that apply to federally assisted substance abuse programs (42 C.F.R. Part 2), or the North Carolina communicable disease confidentiality law (G.S. 130A-143). For example, a form directed to a substance abuse program covered by the federal regulations must include a statement notifying the recipient of the information that redisclosure of the information is restricted.[7] In addition, some health care providers have forms with boxes that the individual (or personal representative) must check to allow the disclosure of information that is subject to heightened confidentiality protections, such as information about HIV. No law specifically requires check boxes, but many health care providers use them as a way to ensure that the person signing the form intends to authorize the disclosure of information that may be particularly sensitive.

Who May Sign an Authorization Form

Ordinarily, the individual who is the subject of health information is the proper person to sign an authorization form. However, if the individual lacks the capacity to make health care decisions, the form may be signed by a personal representative—a person who is authorized by law to make health care decisions for the individual. In North Carolina, a state statute (G.S. 90-21.13) identifies the persons who are

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[6] 45 C.F.R. 164.508(c). The required elements include: name or other identification of the person requesting disclosure of PHI; name or other identification of the person/entity to whom PHI is to be disclosed; a specific and meaningful description of the information to be disclosed; the purpose of the disclosure ("at the request of the individual" is sufficient); expiration date or event, certain statements that are required to notify the individual of various matters including his or her right to revoke the authorization, and the potential that the PHI will no longer be protected and could be redisclosed by the recipient; signature of the individual or personal representative (if personal representative, a description of that person's authority to act on behalf of the individual); and date of signature.

[7] The complete requirements for authorization forms directed to substance abuse programs covered by the federal rules may be found in Subpart C of 42 C.F.R. Part 2.

authorized by law to make health care decisions for adults who are unable to make or communicate the decisions themselves. They are, in order of priority:

- A health care agent named in a health care power of attorney (executed pursuant to G.S. Ch. 32A, Art. 3).
- A guardian of the person or general guardian who has been authorized to make health care decisions for the individual (appointed pursuant to G.S. Ch. 35A, Art. 5).
- The individual's spouse.
- A majority of the individual's reasonably available parents and children who are 18 or older.
- A majority of the individual's reasonably available siblings who are age 18 or older.
- A person who has an established relationship with the individual, who is acting in good faith on the individual's behalf, and who can reliably convey the individual's wishes.

There may be a question about whether an individual who is a respondent in a guardianship proceeding has the capacity to sign a form authorizing the disclosure of PHI. If a GAL or other person involved in a proceeding is seeking medical records or information pursuant to an authorization and there is a question about who should sign the form, it may be useful to try to determine who has been making health care decisions for the individual. If the individual is presently making his or her own health care decisions, the individual is the appropriate person to sign the form. If the individual is receiving health care despite being unable to make or communicate decisions, it is likely that a person or group of persons from the above list has been making the decisions. The person(s) making the health care decisions may sign the form.

Disclosure Pursuant to a Statute or Regulation

North Carolina has a number of statutes and regulations that require health care providers to disclose medical records or health information without the individual's authorization. For example, in child protective services cases, both the DSS director and the child's guardian ad litem have statutory authority to demand information or records from a health care provider.[8] When a state law requires disclosure of PHI, the HIPAA Privacy Rule expressly allows the disclosure. 45 C.F.R. 164.512(a). The North Carolina adult guardianship statutes refer to multi-disciplinary evaluations and other information that is prepared or provided by health care providers. However, nothing in the statutes expressly requires health care providers to disclose this information to the guardian ad litem or other attorney representing the respondent.[9] Therefore, demanding disclosure pursuant to a statute or regulation is not a means for a GAL or any other person to obtain health information or records for an adult guardianship proceeding.

[8] G.S. 7B-302(e) (DSS director or director's representative); 7B-601(c) (guardian ad litem for a child alleged to be abused or neglected).

[9] Guardians ad litem in other contexts sometimes have express statutory authority to obtain information. For example, G.S. 7B-601(c) authorizes a GAL authorized to represent a child in a child protective services case to demand any information or records the GAL believes to be relevant to the case, including confidential medical records, except as prohibited by federal law.

Disclosure Pursuant to a Court Order

All of the federal and state confidentiality laws described in this document permit the disclosure of information for court proceedings, but the particulars of the laws vary and their interaction is complex. HIPAA expressly permits disclosure of PHI for court proceedings pursuant to a court order, a subpoena, or a discovery request. 45 C.F.R. 164.512(e).[10] However, North Carolina's provider-patient privilege laws are more restrictive than HIPAA. The physician-patient privilege statute, G.S. 8-53, states, in part:[11]

> Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6,[12] compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge.

In practice, this means that privileged information may not be disclosed in response to a subpoena alone. The authorization of the individual (or personal representative) or a court order is also required. A court order requires a determination that disclosure is necessary to a proper administration of justice.[13]

The statute's final sentence raises the question of whether the clerk of superior court is authorized to order disclosure of privileged information in a guardianship proceeding. It states that if the case is in superior court, the judge compelling disclosure shall be a superior court judge. However, it does not expressly acknowledge matters for which the clerk has original and exclusive jurisdiction. The statute is regrettably unclear, but it is likely the clerk does have the authority to compel disclosure of privileged information or records for these proceedings. There is no procedure for involving a superior court judge in ordering the production of evidence that is required for the clerk to make his or her decisions. Further, as a matter of statutory interpretation, arguably the last sentence is intended simply to clarify the preceding statement that refers to "any" resident or presiding judge in the district, to ensure that matters before the district court are directed to a district court judge and matters before the superior court are directed to a superior court judge.

---

[10] HIPAA attaches additional conditions to a subpoena that do not apply to a court order. A health care provider may not disclose PHI pursuant to a subpoena unless either (1) the individual who is the subject of the PHI is notified and provided an opportunity to object, or (2) the subpoenaing party or the provider obtains a qualified protective order (as defined by HIPAA) from the court. 45 C.F.R. 164.512(e).

[11] Privilege statutes for other health care providers, such as psychologists (G.S. 8-53.3) or nurses (G.S. 8-53.13), contain similar language regarding a judge's authority to compel disclosure if necessary to a proper administration of justice.

[12] G.S. 8-53-6 pertains only to disclosure of information in alimony and divorce actions.

[13] The North Carolina Supreme Court has held that a trial court judge has wide discretion in determining what is necessary to a proper administration of justice. Cates v. Wilson, 322 N.C. 1 (1987).

TAB 03

Medical Conditions that Impair Capacity

University of North Carolina School of Government-
Assessing Civil Competency

Dr. Samuel Gray, Psy.D
Licensed Psychologist
Carolina Psychology Group

1

OVERVIEW

My intention today is to provide a clear overview of

Discuss the process of civil competency evaluations,

- Review some common Mental Health/Developmental Disability diagnoses seen with civil incompetency matters,
- Review some of the Limited Guardianship/Least Restrictive interventions,
- Review sample report,
- Discuss what types of information might be useful to gather in the absence of a sound medical evaluation

2

Civil Competency/Multidisciplinary Evaluations

- Clinical / Forensic Questions
- Is there a medical / psychiatric / psychological disorder?
- If there is a disorder how does it impact the patient's legal status?
- Specific psycholegal constructs are addressed

3

Process of Evaluation

- Telephone referral:
- Regarding the need for the evaluation and the specific referral questions. Usually followed by court order and court papers.
- Includes clinical interview (often in the home), collateral interviews, specific testing (functional/ neuropsych/ IQ/ psychiatric), and record reviews as necessary (e.g., hospital, mental health or nursing home records).
- Completed written report shared with clerk/attorneys.
- Present findings/opinions in court if indicated and if subpoenaed.

4

Civil Competency Evaluation

- Focus of evaluation is on range of functions a respondent can perform not so much the nature of any mental illness
- Attempt to pinpoint what the allegedly incompetent person can and can not do.
- Can or are these weaknesses alleviated by assistance from others. (**context is important**)
- Are less restrictive alternatives available and reasonable (e.g., advanced directives, payees)
- Home visits can also be helpful

5

Limited Guardianship

- General versus Specific Guardianship
- Limited or specific Guardianships can be more respectful of a person's autonomy although this is rarely used
- Often this is due to the failure of respondents to provide specific information on the individual's limitations.
- Limited guardianships may also lead to inappropriate broadening of jurisdiction.

6

Least Restrictive Intervention

- Nursing home vs. Assisted Care Facility vs. Living with Assistance vs. Independent Living
- Level of assistance and level of care- CNA vs. LPN vs. RN
- Hours of assistance- 24/7, few hours per week
- Available resources- long term care insurances, savings, family members, neighbors, etc.
- How much can we involve this person in the decision making processes? Healthcare directives/ financial choices and spending/ social outings, etc.

7

Context, Context, Context

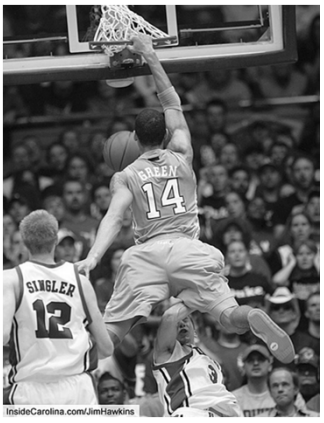
- Despite one's inability to function independently in certain areas, can one still manage to meet the challenges of everyday life with the acceptance of assistance from others?

8

What if I don't have an MDE/Evaluation?

- **Categories-**
- Memory/Orientation- communication, level of memory impairment, etc.
- Managing Money- financial ability, small and large matters, paying bills, etc. testamentary capacity, etc.
- Managing Home and Transportation- residential setting and ability to get places as needed, manage home safely, employment,
- Health and Safety- Proper nutrition, hygiene, health care decisions, personal safety, vulnerable to exploitation
- Social Adjustment- manage self in public, relationships, aggression
- **PLEASE REMEMBER CONTEXT**

9



10

You're Talking about Practice?

CAROLINA
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Winston-Salem, NC 27101
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Civil Competency/Multidisciplinary Evaluations (MDE)
Dr. Samuel Gray, Psy.D

Clinical / Forensic Questions-

Is there a medical / psychiatric / psychological disorder?
If there is a disorder how does it impact the patient's civil competence?

When to refer for an MDE/Civil Competency Evaluation?

Borderline cases where it is not quite clear from the start.
High conflict cases (angry parties sue).
High dollar amounts (to ensure best procedures followed)
Mental health issues aren't clearly leading to incompetence.
Very limited information/facts with which to proceed.

Referral Process-

Discuss the need for the evaluation and the specific referral questions. Usually followed by court order and court papers.
Includes clinical interview (often in the home), collateral interviews, specific testing (functional/ neuropsych/ IQ/ psychiatric), and record reviews as necessary (e.g., hospital, mental health or nursing home records).
Completed written report shared with clerk/attorneys.
Present findings/opinions in court if indicated and if subpoenaed.

Good Questions for Clerks to ask-

Does this person have a significant medical or mental impairment?
What is this person doing or not doing specifically in their life to make this a concern? (health and safety, managing money, taking care of home and transportation, memory, social)
Does this person have someone in their life that can assist them with their affairs and are the willing to trust and allow this person to assist them? Does this person seem trustworthy?
Are the reasons for this hearing being brought more about family conflict and disagreements than a person's actual level of impairment?
Is this person simply making poor judgments and decisions and is this sufficient enough to consider them incompetent?
Are these steps the least restrictive ones available or likely to be effective?

TAB 04

Evidentiary Issues in Guardianship Cases

Meredith Smith
UNC School of Government

Evidence for Clerks
Incompetency and Adult Guardianship Proceedings

Do the Rules of Evidence apply in incompetency and guardianship proceedings?

Yes. They apply in both proceedings, regardless of whether the trier of fact is the clerk or a jury. The rules of evidence in North Carolina apply unless there is a specific exception stating that they do not apply. G.S. 8C-1, Rule 1101. There is no exception in the rules for incompetency or guardianship proceedings. *Id.*

In determining the respondent's incompetency and questions related to guardianship, the clerk should rely only on competent, admissible evidence, even in those cases where the review on appeal is *de novo*. The clerk should disregard incompetent evidence and not rely on it in rendering a decision. In re Huff, 140 N.C. App. 288, 301 (2000).

What are the underlying purposes of the Rules of Evidence?

The rules are intended to ensure fairness, eliminate unjustifiable expense and delay, and promote the development of the law of evidence so that the truth may be ascertained and cases justly determined. G.S. 8C-1, Rule 102.

Who is entitled to present evidence?

Although the issues of competency and guardianship are often heard together in one joint proceeding presided over by the clerk, they are actually two different proceedings: the incompetency proceeding is filed as a special proceeding while the guardianship proceeding is filed as an estate proceeding and may be heard sequentially rather than simultaneously. Different standards apply with regard to who is entitled to present evidence in each proceeding.

- *Incompetency Proceeding*: In the incompetency proceeding, the only parties entitled to present evidence are the petitioner and the respondent. G.S. 35A-1112(b). The guardian ad litem may present evidence on behalf of respondent as the respondent's counsel. G.S. 35A-1107(a). If the respondent hires his or her own attorney, that attorney is entitled to present evidence as counsel for the respondent. *Id.* If respondent hires their own counsel and the clerk does not discharge the guardian ad litem, the guardian ad litem may still present evidence to the court as the guardian ad litem continues to represent the respondent until the petition is dismissed or a guardian is appointed. G.S. 35A-1107(b).

- *Guardianship Proceeding*: The parties to the guardianship proceeding include the petitioner, the respondent, and any person who files an application requesting the appointment of a guardian for the respondent. John L. Saxon, North Carolina Guardianship Manual, 2008, Section 4.1, page 45. Unlike the incompetency statutes, the statutes related to guardianship in Chapter 35A do not specify the parties entitled to present evidence related to guardianship. However, it likely

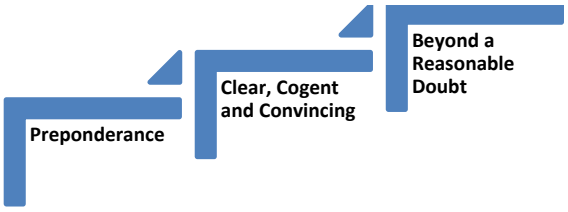
includes the petitioner, respondent, and any other guardianship applicant. In addition to those persons, G.S. 35A-1212(a) provides that the clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

- The nature and extent of the needed guardianship, including limited guardianship;
- The assets, liabilities, and needs of the ward; and
- Who in the clerk's discretion can most suitably serve as the guardian or guardians.

Therefore, it is in the clerk's discretion as to whether to allow persons or entities outside of the petitioner, the respondent, and any guardianship applicant to present evidence regarding the issues pertaining to guardianship listed above.

What is the burden of proof in each proceeding?

In the **incompetency** proceeding, the petitioner must prove, and the clerk must find, by **clear, cogent, and convincing evidence** that the respondent lacks sufficient capacity to either (i) manage his or her own affairs, or (ii) make or communicate important decisions concerning themselves, their family, or their property. G.S. 35A-1112(d); G.S. 35A-1101(7). The standard of clear, cogent, and convincing evidence is a high standard, higher than preponderance of the evidence but lower than beyond a reasonable doubt.



Once a respondent is adjudicated incompetent, the clerk *must* appoint a guardian or transfer the case. G.S. 35A-1201(a)(2); G.S. 35A-1120. The clerk's decision is dependent upon the **best interests** of the respondent/ward regarding both (i) the type of guardianship and (ii) the person to appoint as guardian. G.S. 35A-1214.

May the clerk call and ask questions of a witness?

Yes. Pursuant to Rule 614, the clerk may call a witness on its own motion or on the suggestion of any party. The clerk may ask questions of any witness, whether called by the clerk or any party. All parties are entitled to cross-examine witnesses that are called.

Does the clerk have the authority to determine the order of the presentation of evidence?

Yes. Under Rule 611, the clerk has the authority to reasonably control the mode and order of interrogating witnesses and presenting evidence. The clerk should make such determinations to (i)

make the interrogation and presentation effective for the ascertainment of the truth, (ii) avoid needless consumption of time, and (iii) protect witnesses from harassment or undue embarrassment.

Must a witness have personal knowledge?

Yes. Under Rule 602 of the Rules of Evidence, a witness may not testify to a matter unless the witness has personal knowledge of the testimony. Evidence must be introduced that is sufficient to show that the witness personally observed the fact about which they are testifying. This may be done by testimony of the witness himself or herself.

What is hearsay?

Hearsay is defined in Rule 801 as an out of court statement offered to prove the truth of the matter asserted. The declarant is the person who made the statement out of court. A statement may be oral, written or a gesture.

What are *some* key exceptions to the hearsay rule?

Availability of the Declarant Does Not Matter:

A. Admission by a Party Opponent – Rule 801(d)(A)

    a. Statement
    b. Offered against a party
    c. Party's own statement

B. Present Sense Impression – Rule 803(1)

    a. Statement
    b. Describing an event or condition
    c. Made while the declarant was actually perceiving the event or condition or immediately thereafter

C. Excited Utterance – Rules 803(2)

    a. Statement
    b. Relates to a startling event
    c. Made while the declarant was still under the stress of excitement caused by the event

D. Then Existing Mental, Emotional or Physical Condition- Rule 803(3)

    a. Statement
    b. Of the declarant's then existing

c. State of mind, emotion, sensation of physical condition
d. Does not include a statement of memory or belief to prove the fact remembered or believed unless it relates to a will

E. Business Records – Rule 803(6)

a. Memo, report, record, or data compilation, in any form
b. Of acts, events, conditions, opinions or diagnoses
c. Made at or near the time
d. By, or from information transmitted by, a person with knowledge of the acts, events, conditions, opinions, or diagnoses
e. If kept in the regular course of business
f. If it was the regular practice of the business to make such a document
g. As shown by the testimony of a custodian or other qualified witness

F. Public Records – Rule 803(8)
a. Records, reports, statements or data compilations, in any form
b. Of public offices or agencies
c. Setting forth
i. Activities of the office or agency, or
ii. Matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, or
iii. In civil actions and proceedings against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law

G. Catch All Exception – 803(24)
a. Statement
b. With equivalent circumstantial guarantees of trustworthiness to the other exceptions
c. If the court determines
i. The state is offered as evidence of a material fact, and
ii. The statement is more probative on the point than any other evidence that the proponent can procure through reasonable efforts, and
iii. The general purpose of these rules and interests of justice will best be served by admission of the statement into evidence.
d. Limitation: Proponent must give written notice, including the statement and the particulars of the declarant's name and address, to the opposing party significantly in advance of offering it into evidence

Declarant Must be Unavailable:

- Unavailability due to – 804(a)
  Privilege
  Refusal to testify
  Lack of Memory
  Death or disability
  Absence

A. Statement under Belief of Impending Death – 803(2)

   a. Statement
   b. By the declarant
   c. While believing his or her death was imminent
   d. About the cause or circumstances of what he or she believed to be his or her impending death
   e. *Note:* Do not actually have to die, but must be unavailable.

B. Statement Against Interest – 803(24)
   a. Statement
   b. Which at the time of its making
   c. Was so far contrary to the declarant's interest or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him or her against someone else
   d. That a reasonable man in his or her position would not have made the statement unless he or she believed it to be true

Evidence

Case Problems

Set the Order of the Witnesses

You walk into the hearing room and there is a room full of people. You only have one hearing on your calendar for the day. You take the bench, introduce yourself and the case. You then ask the parties there to introduce themselves. The following people are all present and all want to be heard on both the incompetency and guardianship matters:

a. Petitioner Bridget Fonda, respondent's daughter
b. Petitioner's attorney Johnny Carson
c. Guardian Ad Litem Tom Tucker
d. Respondent's husband Ted Turner
e. Ted Turner's attorney Anderson Cooper
f. Respondent's sister Meryl Streep
g. Respondent's daughter Susan Sarandon
h. Respondent's ex-husband Peter Fonda
i. Respondent Jane Fonda
j. Respondent's attorney Bob Newhart

1. Discuss with your table how you would set the order of the both the incompetency and guardianship proceedings and the testimony of each witness. Assume that every person present (except the attorneys) wants to be Jane's guardian.

2. Is there any other information you need to make a decision?

3. Do you decide to hear the matters simultaneously? Why or why not?

Hearsay

1. At the hearing on Jane's incompetence, Bridget testifies that while visiting Jane last week at her home, Jane told her "My name is Beyonce." Hearsay?

2. At issue is whether Bridget stole a ring from Jane. Ted testifies that Jane who took the ring. Ted states that "Jane pointed right at Bridget." Is Jane's pointing hearsay?

3. To prove that she is competent, Jane's attorney attempts to offer a note into evidence written on a prescription pad which states, "Jane is competent. Dr. Jack Russell." Hearsay?

4. Bridget testifies that she took Jane to see Dr. Doolittle and he gave Bridget a report of his exam of Jane. Bridget hands the clerk a copy of the report. It contains a summary of Jane's family, social and medical history; notes of the doctor's medical exam; a diagnosis that Jane suffers from mild to moderate dementia; and the doctor's conclusion that Jane is incompetent and incapable of handling her own affairs. It is dated three months before the hearing and is not signed but is stamped with Dr. Doolittle's name, address and phone number and has the initials DD, MD at the end of the report. Jane's attorney objects and asks you not to consider the report as evidence of Jane's alleged incompetence.

    a. Is there sufficient proof that the document is authentic?
    b. Is the copy admissible or do you need the original?
    c. Is the report hearsay?
        i. Identify the out of court statements.
        ii. Who is the declarant?
        iii. What are the statements being offered to prove?
    d. Would you admit it? Why or why not?

Hearsay and Exceptions

Bridget testifies that about 5 or 6 weeks ago, Ted called her and asked her to come get Jane. Bridget testifies that Ted told her that he couldn't take care of Jane because "her mind was starting to slip" and Jane was wandering at night, talking to herself and acting "crazy." She further testified that Ted told her that night on the phone that his right side had been hurting for weeks because he had been having to carry Jane back to bed each night. Ted's attorney objects to the admission of these statements as hearsay.

1. Identify each statement and whether it is hearsay.
2. Are there any exceptions applicable to the statements identified?
3. Do you sustain or object?

TAB 05

Role of the Guardian Ad Litem

Role and Responsibilities of Guardian Ad Litem

By Natalie J. Miller, Esq.

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NCGS § 35A-1107

- **Represent the respondent, unless private counsel retained**
- **Shall personally visit the Respondent**
- **Shall make EVERY reasonable effort to determine the Respondent's wishes**

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NCGS § 35A-1107 (Cont.)

- **MAY make recommendations to the clerk concerning the Respondent's best interest.**
- **SHALL consider the possibility of a limited guardianship**
- **SHALL make recommendations to clerk concerning rights, powers and privileges Respondent should retain under limited guardianship**

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ADVOCATE & COURT LIAISON

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GAL as Respondent's Attorney

You should expect the GAL to be a ZEALOUS advocate:

- **Do what is necessary to protect Respondent's rights and interest**

1) **Reasonable diligence and promptness**
2) **Strategy to the case and goal**

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GAL as Respondent's Attorney (Cont.)

3) **Use evidence to paint a picture**
4) **Subpoena witnesses**
5) **Notify the Respondent of the right to appeal**

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NC STATE BAR ETHICS RULES

Rules of Professional Conduct and Ethics Apply to GAL's Too

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SCENARIO 1:

- **Petition alleges:**
  - ✓ **Respondent is 40 years old male diagnosed with down syndrome**
  - ✓ **Petitioners are respondent's happily married parents.**
  - ✓ **At 18, respondent was declared incompetent by Minnesota Court. Parents were appointed Guardian.**
  - ✓ **Respondent owns a checking account, savings account and retirement account set up by the parents.**
- ❖ **IS THE RESPONDENT INCOMPETENT?**

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COMMUNICATIONS – RULE 1.4

Rules of Professional Conduct and Ethics Apply to GAL's Too

- ❖ **Client must be kept "reasonably informed"**
  - **Explain matter to extent reasonably necessary for the client to make informed decision**
  - **May be justification in delaying information such as when doctor says it would harm the client**
  - **Alleged competency of client or diminished capacity is no excuse.**
- ❖ **GAL cannot waive, compromise or settle respondent's case without consent of respondent.**

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Diminished Capacity – RULE 1.14

Rules of Professional Conduct and Ethics Apply to GAL's Too

- **Try to maintain normal attorney-client relationship as much as possible**
- **Emergency action to protect client:**
  - **Risk of Substantial Harm: substantial physical, financial, or other harm unless action is taken and cannot adequately act on their own.**
  - **Only act if you reasonably believe that there is no other attorney representing the respondent.**

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Diminished Capacity – RULE 1.14

Rules of Professional Conduct and Ethics Apply to GAL's Too

- **Use protective measures deemed necessary, such as:**
  - **Using powers of attorney**
  - **Consulting with support groups**
  - **Using reconsideration period**
  - **Confidential information should be released ONLY to extent reasonably necessary to protect the clients interest.**

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SCENARIO 1 (Cont.):

40 year old respondent with down syndrome who has been declared incompetent in Minnesota.

- **GAL personally visits Respondent and learns:**
  - ✓ **The Minnesota court required little from the Guardians.**
  - ✓ **Respondent has held a job since age 18**
  - ✓ **Although parents provide support and advice, respondent manages a checking account, savings account and retirement account.**
  - ✓ **After the GAL explained guardianship in North Carolina, respondent does not want a guardian because he feels he can do everything on his own.**

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SCENARIO 1 (Cont.):

- **RESULT:**
  - ✓ **GAL felt that respondent should not be declared incompetent because it could derail his progress**
  - ✓ **At the hearing, all parties agreed that with the proper support a guardianship would not be required.**
  - ✓ **Parents did NOT dismiss their case.**
  - ✓ **Respondent was adjudicated competent.**
  - ✓ **Remember, he as declared incompetent in Minnesota**

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SCENARIO 1 (Cont.):

MORAL OF THE STORY:

A diagnosis and determination of incompetency in another state DOES not make a person incompetent in North Carolina.

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SCENARIO 2:

- **Petition alleges the respondent has dementia and no short term memory**
- **GAL has met with the respondent and feels that Court ordered Mediation is appropriate.**
- **GAL is at the Courthouse and casually tells the Clerk, "I think this may be a case for mediation."**

❖ **HAS AN EX PARTE COMMUNICATION OCCURRED?**

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Ex Parte Communication

Rules of Professional Conduct and Ethics Apply to GAL's Too

- **Ex parte communication permitted if necessary to administer justice and attorney made diligent efforts to notify opposing counsel.**

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Ex Parte Communication (Cont.)

Rules of Professional Conduct and Ethics Apply to GAL's Too

- **Must follow these rules BEFORE any ex parte communication**
  - **Inform tribunal of ALL material facts so tribunal can make informed decision**
  - **Must disclose:**
    - ✓ **Lawyer is about to engage in ex parte communications**
    - ✓ **Why it is necessary to make ex parte communication**
    - ✓ **The authority that permits ex parte communication**
    - ✓ **The status of attempts to notify opposing party/counsel**

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SCENARIO 2 (Cont.):

GAL is at the Courthouse and casually tells the Clerk, "I think this may be a case for mediation." Is this ex parte communication?

- **YES, this was a ex parte communication: substantive value without an attempt to notify the other party'.**
- **What is a clerk to do?**
  - ✓ **Tell the GAL to discuss it with all parties. If they can agree, great. If not, may need a hearing on the matter.**
  - ✓ **DO NOT order the Mediation without all parties having an opportunity to be heard or at least an attempt at notice.**

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SCENARIO 2 (Cont.):

MORAL OF THE STORY:

Even a seemingly innocuous statement can be an ex parte communication.

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Prior To Hearing

- AT A MINIMUM GAL SHOULD:
  - **Personally visit the respondent**
  - **Explain to the respondent the nature, purpose and legal effects of a guardian's appointment**
  - **Tell the respondent the name of the person known to be seeking appointment as guardian**

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Prior To Hearing (Cont.)

- AT A MINIMUM GAL SHOULD:
  - **Explain to the Respondent the hearing procedure and their right to:**
    - ✓ **Contest the petition**
    - ✓ **Request limits on the guardian's powers (limited guardianship)**
    - ✓ **Object to a particular person being appointed guardian**
    - ✓ **Be present at the hearing**
    - ✓ **Retain a private attorney**

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Prior To Hearing (Cont.)

- AT A MINIMUM GAL SHOULD :
  - **Consider the wishes and values of the Respondent to the extent known**
  - **Consider the respondent's best interests**
  - **Consult with family members**

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Prior To Hearing (Cont.)

- AT A MINIMUM GAL SHOULD:
  - **Allow a reconsideration period to permit clarification or improvement of circumstances**
  - **Consider voluntary surrogate decision-making tools such as durable powers of attorney**
  - **Consult with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client**

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Prior To Hearing (Cont.)

- AT A MINIMUM GAL SHOULD:
  - **Determine whether there are more appropriate alternatives to a full guardianship, including:**
    - ✓ **Limited Guardianships, including powers and limitations**
    - ✓ **Durable Power of Attorney**
    - ✓ **Health Care Power of Attorney**
  - **Whether court ordered mediation is appropriate**

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Prior To Hearing (Cont.)

- AT A MINIMUM GAL SHOULD:
  - **Determine whether Respondent wants to be present at the hearing**
  - **Determine whether Respondent wants to contest the petition**
  - **Determine whether Respondent wants limits on guardian's powers**
  - **Determine whether Respondent objects to a specific person being guardian**

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Prior To Hearing (Cont.)

- GAL SHOULD OBTAIN EVIDENCE:
  - **Guardianship Questionnaire to assist GAL (Wake/Durham)**
  - **Issue subpoenas or obtain affidavits**
  - **"Dr. X told me" should not be enough without other evidence.**

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SCENARIO 3:

- **Petition alleges:**
  - ✓ **Respondent is 82 year old female diagnosed with dementia**
  - ✓ **Petitioners is respondent's daughter.**
  - ✓ **One daughter wants to be the Guardian and all children agree**
  - ✓ **Respondent has been told he cannot drive and is trying to purchase a car.**
- **GAL says she told respondent of his right to attend hearing**
- **Respondent is not present**

- **DO YOU PROCEED WITH AN INCOMPETENCY HEARING?**

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SCENARIO 3 (Cont.):

- **May be not:**
  - ✓ **All agree respondent cannot drive. Did he have a way of getting there?**
  - ✓ **Did he remember? Has GAL spoke with respondent in the past few days to remind him?**
  - ✓ **Did respondent assume a family member would bring them and they did not?**
  - ✓ **If the GAL believes the person is competent, why is the respondent not there?**

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SCENARIO 3 (Cont.):

MORAL OF THE STORY:

Clerk should inquire as to why the respondent is not present

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PRIVATE ATTORNEY RETAINED

(Assuming GAL has not been discharged)

- **GAL is no longer Respondent's attorney advocate**
- **GAL should make recommendations to the court**
- **GAL must still gather evidence for their recommendations.**
- **GAL cannot communicate with represented parties unless other attorney consents.**
- **GAL can obtain court order permitting the communication if necessary - Rule 4.2, Comment 7**

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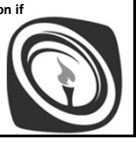

PRIVATE ATTORNEY RETAINED (CONT)

- SHOULD OBTAIN EVIDENCE IN SAME FASHION AS IF ATTORNEY ADVOCATE:
  - **Guardianship Questionnaire to assist GAL (Wake/Durham)**
  - **Issue subpoenas or obtain affidavits**
  - **"Dr. X told me" should not be enough without other evidence.**

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NC STATE BAR ETHICS RULES

Rules of Professional Conduct and Ethics STILL Apply

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Rules of Professional Conduct

For Non-Attorney Advocate GAL's

- **Rules specific to attorney-client relationship do not apply**
  - **Confidentiality (Rule 1.6)**
  - **Zealous advocacy (Rule 1.3)**
  - **Loyalty (Rule 1.7 through 1.10)**
  - **Evaluation of attorney for third persons (Rule 2.3)**

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Rules of Professional Conduct

For Non-Attorney Advocate GAL's

- **Rules applicable to all attorneys STILL apply:**
  - **Candor to the court (Rule 3.3)**
  - **Fairness to opposing party and counsel (Rule 3.4)**
  - **Ex parte communications (Rule 3.5)**
  - **Dishonesty, fraud, deceit, misrepresentations and conduct prejudicial to the administration of justice (Rule 8.4)**

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Interim Guardianships

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SCENARIO 4:

- **Petition alleges the respondent has dementia and no short term memory.**
- **Respondent has two children that do not get along**
- **The petitioner is one child, who has a power of attorney.**
- **There are allegations of theft by the attorney-in-fact.**
- **Respondent is present and does not believe he needs a guardian.**
- **At the interim hearing the Clerk finds a need for an interim guardian.**
- **Both children love the GAL and agree he should be interim guardian**

❖ **SHOULD THE GAL BE INTERIM GUARDIAN?**

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Interim Guardianships

No authority of GAL to act as interim guardian under NCGS § 35A-1107

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SCENARIO 4 (Cont.):

- **One Attorney's Perspective: There is a conflict.**
  - ✓ **GAL may be the respondent's attorney advocate**
  - ✓ **Could cause respondent to mistrust GAL and not be as upfront**
  - ✓ **Could bias GAL recommendations**
  - ✓ **Flat out does not look right.**

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SCENARIO 4 (Cont.):

MORAL OF THE STORY:

GAL should not be interim guardian.

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COMPETENCY HEARING

PRELIMINARY CONCERNS

- **Respondent does not have GAL or counsel present**
- **Respondent not actually given 10 days notice of hearing**
  - **No case law addressing whether GAL can waive this 10 day notice**
  - **Concern that lack of notice would interfere with respondent hiring their own attorney.**
- **Respondent not actually at the hearing**

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COMPETENCY HEARING (Cont.)

PRELIMINARY CONCERNS

- **Respondent not actually at the hearing**
  - **Best Practice → Confirm 10 day notice was given to respondent.**
  - **Best Practice → Confirm the GAL had personal contact with the respondent and is ready to proceed. If not, continue**

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COMPETENCY HEARING (Cont.)

DURING THE HEARING

- **GAL as witness:**
  - **Rules of evidence should apply. Careful with hearsay.**
  - **GAL report should be in writing.**
  - **Opposing party/attorney should receive a copy of the GAL report at the same time or prior to the time it is delivered to the court.**

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COMPETENCY HEARING (Cont.)

DURING THE HEARING

- **Respondent as witness:**
  - **Usually not called unless called by GAL or respondent's attorney**
  - **Clerk may swear in and question respondent if desired**
  - **As a courtesy, notify GAL/Respondent's attorney if going to question respondent so they can prepare the respondent**
  - **Should do so with other parties /attorneys present.**

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SCENARIO 5:

- **Interim guardianship hearing**
- **Petitioner is a former attorney, who has his own attorney**
- **Respondent has two attorney's present**
- **Daughter of respondent and her spouse are both attorneys**
- **Other daughter of respondent is not attorney**
- **At the interim hearing the Clerk asks for the GAL and respondent to meet in her chambers, where Clerk questions respondent.**

- **CAN THE CLERK QUESTION RESPONDENT IN CHAMBERS WITH GAL ONLY?**

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SCENARIO 5 (Cont.):

- **One Attorney's Perspective: No**
  - ✓ **GAL felt they could not disclose any information related to the "meeting" due to confidentiality.**
  - ✓ **All parties were left questioning what the Clerk discovered**
  - ✓ **Flat out does not look right.**
  - ✓ **In this case, the Respondent told the clerk she wanted a guardian and the remaining parties spent the next month arguing that fact.**
  - ✓ **In this case, we had a successful 11 hour mediation. About two hours could have been resolved with this information.**

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SCENARIO 5 (Cont.):

MORAL OF THE STORY:

All parties should be given access to all evidence.
No private meetings.

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LIMITED GUARDIANSHIP

POTENTIAL MIDDLE GROUND

- **NCGS § 35A-1107 REQUIRES the GAL to consider limited guardianship**
  - **Rule 1.14, Comment 1 acknowledges the potential need for a limited guardianship**
  - **Limited guardianship appears to comply with the protective actions permitted in Rule 1.4, Comment 5**
  - **Rights to be included or excluded from limited guardianship can be found at NCGS § 35A-8 and NCGS § 35A-9**

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MULTIDISCIPLINARY EVALUATION

GROUNDS FOR MDE

1. **Appears that a limited guardianship may be appropriate**
2. **Insufficient or conflicting evidence regarding alleged incapacity**
3. **Additional information is needed to develop a guardianship plan**
4. **Any party, including GAL, may move for a MDE**

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RESTORING COMPETENCY

- IDEALLY, GAL SHOULD PROVIDE EVIDENCE OF:
  - ✓ **Current treatment plan**
  - ✓ **Whether ward has adhered to the treatment plan for extended number of months**
  - ✓ **Ward has and acknowledges an emergency plan and support network in place in the event of relapse**
  - ✓ **Ward's ability to manage his/her daily affairs without assistance of guardian**
  - ✓ **GAL supports the motion for restoration**

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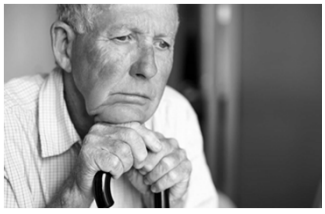
Thank you!!



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North Carolina Judicial College

April 30, 2015

THE ROLE OF THE GUARDIAN AD LITEM

IN

INCOMPETENCY PROCEEDINGS

By Natalie J. Miller, Esq.

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NCGS **§ 35A-1107. Right to counsel or guardian ad litem.** *[emphasis added]*

(a) The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to **represent the respondent** unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of this Chapter. After being appointed, the guardian ad litem shall **personally visit** the respondent as soon as possible and shall make every reasonable effort to **determine the respondent's wishes** regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall **present to the clerk the respondent's express wishes at all relevant stages** of the proceedings. The guardian ad litem also **may make recommendations to the clerk concerning the respondent's best interests** if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall **consider the possibility of a limited guardianship** and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain **under a limited guardianship**.

(1987, c. 550, s. 1; 2000-144, s. 33; 2003-236, s. 3.)

I.) Appointing A Guardian Ad Litem (GAL)

A. "It is important to appoint a guardian ad litem in whom the clerk has the utmost confidence." UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85(II)(C)(3), page 85.5 (2012).

B. "The Clerk should not appoint a guardian ad litem based on the recommendation of the petitioner or the petitioner's attorney." UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85(II)(C)(4), page 85.5 (2012).

C. Respondent's counsel or guardian ad litem must be served pursuant to N.C.G.S. § 1A-1, Rule 4. *N.C.G.S. § 35A-1109.* In practice, the guardian ad litem accepts service by signing the back of AOC-SP-201. UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85(II)(F)(4), page 85.7 (2012). Notices subsequent to the notice of hearing must be served on the parties as provided in G.S. § 1A-1, Rule 5. *N.C.G.S. § 35A-1108 (c).*

D. Two Roles of GAL:

   i. Representation of Respondent as the Attorney Advocate if no private attorney

   ii. Provide Recommendations to the Court

II.) Role of Guardian Ad Litem (absent a private attorney)

A. The GAL is the Respondent's attorney. They must be a zealous advocate!

   i. Exercise Reasonable diligence and promptness in representing a client. *RPC 1.3.*

   ii. Have a goal and a strategy as with any other case.

   iii. Use evidence and argument to paint a picture for the Court of the Ward's life and circumstances.

   iv. The GAL has the authority to subpoena witnesses and do anything necessary to protect the respondent's rights and interests.

   v. Attorney should notify client of right to appeal.

B. The GAL MUST put forth the Respondent's wishes and MUST personally meet with the Respondent per *N.C.G.S. §35A-1107(B).*

C. The Rules of Professional Conduct and Ethics Opinions apply.

i. Communication – *Rule 1.4*

1. The client must be kept "reasonably informed". The lawyer "shall explain the matter to the extent reasonably necessary to make informed decisions regarding the representation." But in some circumstances there may be justification in delaying informing the client. For example, when a doctor states the information would harm the client.

ii. Client with Diminished Capacity – *Rule 1.14*

1. Try to maintain the attorney-client relationship as normal as possible – *Rule 1.14, Comment 10.*
2. Emergency Action to Protect Client with Diminished Capacity's Interest:
    a. Risk of Substantial Harm: "When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian." *Rule 1.14(b).*
    b. Emergency legal action is permitted if there is a threat of imminent and irreparable harm, even if the client's capacity prevents the establishment of an attorney-client relationship. Only act if you reasonably believe that there is no other attorney representing the Respondent. The purpose is to maintain the status quo or otherwise avoid imminent and irreparable harm. The attorney still has the same duties as is customary for lawyers. *Rule 1.14, Comment 9.*
    c. Per *Rule 1.14, Comment 5* of the Revised Rules of Professional Conduct, the lawyer may "…take protective measures deemed necessary. Such measures could include: **consulting with**

family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

d. Confidential information should be released ONLY to the extent reasonably necessary to protect the client's interest.

III.) Prior To Hearing: Gathering Information to Determine GAL's Recommendations and, if necessary, Respondent's Desires

A. GAL must make every reasonable effort to determine respondent's wishes and present respondent's express wishes to the Court at all relevant stages. To do so the GAL must personally visit the respondent as soon as possible following the attorney's appointment.

B. At a minimum the GAL should:

i. Consult with family members,

ii. Allow a reconsideration period to permit clarification or improvement of circumstances,

iii. Consider voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client.

iv. Consider the wishes and values of the Respondent to the extent known,

v. Consider the respondent's best interests,

vi. Consider intruding into the respondent's decision-making autonomy to the least extent feasible while maximizing the respondent's capacities and respecting the respondent's family and social connections.

C. Obtain Evidence

i. Some clerk's uses a Guardianship Questionnaire to assist the guardian ad litem in collecting information. A copy of Wake County's questionnaire is attached as Exhibit A. Special thanks to Nicole N. Brinkley, Assistant Clerk, Office of Wake County Clerk of Superior Court for providing this document

ii. The GAL under *N.C.G.S §35A-1107* does not have a statutory right to the respondent's medical records or any other privileged or confidential information without the respondent's consent or unless authorized by law or a court order.

iii. The GAL can issue subpoenas.

IV.) <u>How Private Counsel effects the GAL's role</u>

A. The GAL is no longer the attorney advocate.

B. Assuming the GAL is not discharged, the GAL must make recommendations to the Court.

C. If the Respondent retains private Counsel, the GAL must obtain permission from the Respondent's private attorney. The GAL cannot communicate with represented parties, including the Respondent (if there is an independent attorney), children, parents, caretakers, etc. unless there is consent from the other attorney. *Rule 4.2(a).* If the GAL does not know, they can get a court order permitting the communication. *Rule 4.2, Comment 7.*

D. If Respondent has independent counsel and the GAL is not acting as attorney advocate:

i. Rules of Professional Conduct specific to the attorney client relationship do not apply, such as confidentiality (Rule 1.6), zealous advocacy (Rule 1.3), loyalty (Rule 1.7 through 1.10) or evaluations used for third persons (Rule 2.3).

ii. If the GAL is not acting as the attorney advocate, RPC 4.2 prohibiting communications with a represented party during the lawyer's representation of a client does not apply. *2006FEO19.*

iii. But, Rules of Professional Conduct applicable to all attorneys do apply, including ethical duty of candor to the Court (Rule 3.3), fairness to opposing party and counsel (Rule 3.4), ex parte communications (Rule 3.5) and dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4).

V.) Interim Guardians

A. No authority as GAL to act as interim guardian under N.C.GS. §35A-1107. John L. Saxon, *North Carolina Guardianship Manual (*Institute of Government *2008),* p. 24.

VI.) Competency Hearing

A. Before the Hearing

i. The clerk should not proceed with an incompetency hearing unless the respondent is represented by a guardian ad litem appointed by the clerk pursuant to G.S. § 35A-1107 and/or by counsel of his or her choice. UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85(III)(D), page 85.12 (2012).

ii. Before proceeding, the clerk should confirm that the respondent was given 10 days' notice of the hearing. This can be determined by reviewing the sheriff's return of service. UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85 (III)(C), page 85.12 (2012).

1. There is no case law addressing whether a guardian ad litem can waive the 10 days' notice requirement.
2. Some clerks allow the guardian ad litem to waive the 10 days' notice depending on the circumstances.
3. Other clerks do not allow the guardian ad litem to waive the 10 days' notice on the grounds that a waiver could interfere with the respondent's right to retain a private attorney.

iii. If the respondent is not present at the hearing.

1. Before beginning the proceeding, the clerk should confirm that the respondent was given notice of the proceeding and should confirm the presence and readiness of the guardian ad litem. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85, Appendix III, (I)(B)(1), page 85.29 (2012).
2. The clerk should confirm that the guardian ad litem has had personal contact with the respondent. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85, Appendix III, (I)(B(2)), page 85.29 (2012).
    a. Since N.C.G.S. § 35A-1107(b) requires the guardian ad litem to personally visit the respondent, the clerk should not continue the hearing if the guardian ad litem has not had contact with the respondent.
    b. The clerk may wish to determine whether there has been contact before the hearing.
3. The GAL does NOT have authority to waive, compromise or settle the respondent's substantive legal rights or consent to the entry of a judgment against the respondent without the respondent's consent. Saxon, John, *North Carolina Guardianship Manual*, (Institute of Government 2008), p. 25.

iv. The hearing is open to the public unless the respondent, respondent's counsel or the guardian ad litem requests otherwise. Upon such a request, the clerk must exclude all persons other than those directly involved in or testifying at the hearing. *N.C.G.S. §35A-1112*, UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85(III)(H), page 85.14 (2012).

v. GAL can request a jury trial. *N.C.G.S. §35A-1110*

vi. The GAL should request that the clerk record the entire hearing.

B. During the Hearing:

i. Guardian Ad Litem as a Witness

1. In incompetency determinations, the guardian ad litem may be called to testify. The guardian ad litem must present the respondent's express wishes and may make recommendations to the clerk concerning the best interests of the respondent. *N.C.G.S. §35A-1107(b)*. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85(IV)(G)(6), page 85.18 (2012).
2. There is no prohibition on GAL from testifying as to the competency of the ward. *In re Farmer,* 60 N.C. App. 421, 299 S.E.2d 262, *disc. review denied,* 308 N.C. 191, 302 S.E.2d 243 (1981).
3. GAL Report: GAL report should be in writing.
    a. Unless an exception applies, ex parte communications with the court are prohibited. *RPC 237, 97FEO3, Rule 3.5(3)*
    b. The GAL must deliver a copy to opposing counsel/party at the same time or prior to the time the written communication is delivered to the judge. *97FEO5.*
        i. If there is no opposing counsel, must forward report in writing to unrepresented parties per *Rule 3.5(a)(3).*
    c. The clerk should take judicial notice of the GAL's report.

ii. Respondent as a Witness
1. Respondent as a witness. Generally the respondent is not questioned unless he or she is called as a witness by the guardian ad litem. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, *§85, Appendix III*, (II)(B), page 85.31 (2012).
    a. If the clerk believes that hearing from the respondent will be helpful, the clerk may swear and question the respondent.
    b. As a courtesy, to the extent possible, the clerk may wish to advise the guardian ad litem of this possibility before the hearing.

iii. Bench conferences. Sometimes during the proceeding an attorney will ask to approach the bench. Attorneys for both sides, including the guardian ad litem, should be allowed to approach. UNC School of Government, *Clerk of*

Superior Court Procedures Manual, Vol. 2, §85, Appendix III, (IV)(A), page 85.34 (2012).

VII.) Limited Guardianships:

A. Limited Guardianship is where the ward is permitted to retain certain legal rights. At a minimum the guardian's powers are limited to the extent the ward is permitted to retain these rights.

B. Per *NCGS §35A-1107(B)*, requires the GAL to "consider the possibility of a limited guardianship". The limited guardianship may be middle ground:

   i. "It is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions." *Rule 1.14, Comment 1.*

   ii. "In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." *Rule 1.14, Comment 5.*

C. If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so. *NCGS §35A-1212(A).*

   i. If the clerk orders a limited guardianship as authorized by N.C.G.S. §35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which the ward was entitled before the ward was adjudged incompetent. Any order of limited guardianship shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians. *NCGS §35A-1215(B)*

D. Rights to be included or excluded from limited guardianship are found in N.C.G.S. §35A-8 and N.C.G.S. §35A-9.

VIII.) Multidisciplinary Evaluation

A. An MDE should be ordered when there is "insufficient or conflicting evidence regarding the respondent's alleged incapacity, when it appears that a limited

guardianship may be appropriate or when additional information is needed in order to develop an appropriate guardianship plan." Saxon, John, *North Carolina Guardianship Manual*, (Institute of Government 2008), p. 62.

B. Any party, including the Guardian Ad Litem may move for a MDE. *N.C.G.S. § 35A-1111(a).*

C. Unless otherwise ordered by the clerk, the agency must file the MDE with the clerk no later than 30 days after the agency receives the clerk's order. The agency must send copies to the petitioner and respondent's counsel or **guardian ad litem** within the same time limit, unless the clerk orders otherwise. *N.C.G.S. § 35A-1111(b).*

D. GAL should review of the MDE in preparation for hearing,

IX.) GAL Role in Restoring Competency

A. Right to counsel or guardian ad litem. The ward is entitled to counsel or a guardian ad litem at the hearing. If the ward is indigent and not represented by counsel, the clerk must appoint a guardian ad litem. *N.C.G.S. § 35A-1130(c).*

   i. The clerk may choose to appoint the same guardian ad litem that served in the incompetency determination. UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85(VIII)(B), page 85.22 (2012)

B. Scheduling hearing. After filing of a motion to restore competency, the clerk must schedule a hearing for a date not less than 10 days or more than 30 days from service of the motion and notice of hearing, unless the clerk for good cause directs otherwise. *N.C.G.S. § 35A-1130(b).*

   i. There is no case law addressing whether a guardian ad litem can waive the 10 days' notice requirement. UNC School of Government, *Clerk of Superior Court Procedures Manual,* Vol. 2, §85(VIII)(C)(1), page 85.23 (2012)

   ii. Some clerks allow the guardian ad litem to waive the 10 days' notice depending on the circumstances. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85(VIII)(C)(2), page 85.23 (2012).

   iii. Other clerks do not allow the guardian ad litem to waive the 10 days' notice on the ground that a waiver could interfere with the ward's right to retain a

private attorney. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85(VIII)(C)(3), page 85.23 (2012)

C. Evidence provided by the GAL that may be helpful to the clerk in rendering a decision includes but is not limited to whether:
    i. the ward has a treatment plan in place;
    ii. the ward has adhered to a treatment/therapy plan over an extended number of months;
    iii. the ward acknowledges and understands the condition or cause that led to the order adjudicating the ward to be incompetent;
    iv. the ward acknowledges the risk of relapse and has an emergency plan in place in the event of a relapse along with a support network of people to contact in the event of relapse;
    v. the ward is able to manage his or her daily affairs without assistance from his or her guardian, such as making decisions about where to live, paying rent, maintaining employment, providing for food, and living safely without being a threat to himself or herself or others;
    vi. the guardian and/or the guardian ad litem support the motion for restoration;
    vii. the clerk finds any other information persuasive in making the decision to restore competency. Meredith Smith, *Restoration to Competency under G.S. 35A-1130: Common Issues and Questions*, UNC School of Government Social Services law Bulletin No. 44 (March 2015), page 17.

D. Right to a jury trial in restoration hearings.
    a. The ward has a right to a jury trial upon the ward's request, or upon the request of counsel or the guardian ad litem. If there is no request, jury trial is waived. *N.C.G.S. § 35A-1130(c).*

X.) <u>GAL Fees</u>

A. If the respondent is NOT indigent, and
    i. The respondent is adjudicated incompetent, the respondent pays the fees of the guardian ad litem. *N.C.G.S. § 35A-1116(c2)(1).*

ii. The respondent is not adjudicated incompetent but the clerk finds that there were reasonable grounds to bring the proceeding, the respondent pays the fees of the guardian ad litem. *N.C.G.S. § 35A- 1116(c2)(2).*

B. Regardless if the respondent is indigent or not, if the respondent is NOT adjudicated incompetent AND the clerk finds that there were not reasonable grounds to bring the proceeding, the petitioner pays the fees. *N.C.G.S. § 35A-1116(c2)(3).*

C. In all other cases, the Office of Indigent Defense Services pays the fees. *N.C.G.S. §35A-1116(c2)(4).*

D. The clerk sets the amount of the fee for the guardian ad litem. UNC School of Government, *Clerk of Superior Court Procedures Manual*, Vol. 2, §85(VI)(E)(3)(d), page 85.21 (2012).

XI.) Ex Parte Communications

A. A Lawyer may engage in ex parte communications regarding scheduling or administration matter if necessary to administer justice or there are extenuating circumstances and the attorney made diligent efforts to notify opposing counsel. *97FEO3*

1. When ex parte communication is permitted, the lawyer must follow certain rules:

a. The GAL must "inform the tribunal of ALL material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." *Rule 3.3(d); 97FEO5.*

b. The GAL must disclose: "(1) that the lawyer is about to engage in an ex parte communication; (2) why it is necessary to speak to the judge ex parte; (3) the authority (statute, case law or ethics rule or opinion) that permits the ex parte communication; and (4) the status of attempts to notify the opposing counsel or the opposing party if unrepresented. If these disclosures are made, the judge can decide whether an ex parte discussion with the lawyer is appropriate." *98FEO12*

2. Communications that are not about a particular case are not ex parte since there are no other "parties" to be potentially harmed by the communication. But, if the general communication relates to an issue in a particular case, it may be considered ex parte.

XII.) Rules of the Commission on Indigent Defense Services Apply

A. Must continue to represent the Respondent until the entry of appeal to the appellate division or the expiration of time for appeal. *IDS Rule 1.7(a).*

EXHIBIT A

GUARDIAN QUESTIONNAIRE

Guardian Questionnaire

Full Name _____

List ALL names and aliases you have ever used _____
_____

Date of Birth _____

What is your relationship to the respondent/ward? _____

How long have you known the respondent/ward? _____

Do you have any medical training? _____

Have you ever been convicted of a crime (felony or misdemeanor) or had a DUI/DWI? If so list the conviction(s) and the date(s) of convictions. NOTE: WE WILL DO A BACKGROUND CHECK AND YOUR FAILURE TO FULLY DISCLOSE THIS INFORMATION WILL PRECLUDE YOU FROM CONSIDERATION AS A GUARDIAN. List all convictions in North Carolina AND any other states.
_____

Do you consent to a criminal background check in other states where you have lived? _____

Have you ever been the subject of an Adult or Child Protective Services Investigation? If so explain. _____

Have you ever had any license issued to you revoked (driving or professional)? If so, please explain.
_____

Have you ever filed for bankruptcy? _____ If so, when? _____

Why do you want to be appointed guardian of the person?
_____
_____

What are the needs of the respondent/ward that must be met right now?
_____
_____

NOTE: If you are appointed guardian of the person, you will be required to attend a short guardianship orientation and training where the role of the guardian will be explained, and where you will be introduced to resources that may assist you in carrying out your duties as a guardian. If you do not attend the training within six months of your appointment, your authority to act as guardian will be revoked.

TAB 06-

Restoration of Competency

Restoration Case Problem

Sally petitioned to have her son, Bobby Valentine, adjudicated incompetent.

Bobby is a 26 year old male.

At the hearing on incompetency and guardianship, the clerk heard testimony from the following parties:

- Petitioner, Sally Valentine
- Respondent, Bobby Valentine
- Guardian Ad Litem, Ben Matlock
- Sister of the Respondent, Sarah Valentine

Based on a review of the petition and the testimony at the hearing, the clerk adjudicated Bobby to be incompetent and appointed Watchful Eye, LLC as his guardian on January 19, 2013.

The key evidence submitted at the hearing that served as the basis for the clerk's decision included the following:

- Bobby suffers from bipolar disorder and severe anxiety that causes him to have paranoid delusions. These delusions include that he is the CEO of a major corporation, he is helping the president run the country and he is best friends with a famous music artist.
- He has been arrested multiple times and charged with disturbing the peace.
- He regularly abuses drugs, including marijuana.
- He lived with his grandmother until she recently evicted him because of his paranoid violent behavior.
- He was found sleeping recently in the trunk of his car.
- He has not had a job for three years and maintains a small income as a result of a small business he started selling items on eBay.
- He was fired from his job at Food Lion because of the pending charges against him for disturbing the peace and other disruptive behavior while at work.
- He regularly makes harassing phone calls to various family members.
- He threatened to kill family members by burning them alive and his family members are terrified of him.
- He jumped in front of a moving car driven by his sister.
- He threw a rock at a car driven by his father.
- He regularly fails to follow through with the medical and psychological assistance made available to him to treat his mental health issues.
- He lacks capacity to make decisions regarding personal safety, health care, safe shelter, employment, and finances.
- He has capacity to make day to day decisions regarding nutrition, language and communication, and personal hygiene.

Eight months later, Bobby filed a Motion in the Cause petitioning for restoration of competency. A copy of the petition is attached.

1. Review the restoration petition and statement filed by the ward and determine whether they meet the standard set forth in G.S. 35A-1130.

2. Prepare a list of at least five key questions and issues that you feel need to be addressed at the hearing on restoration based on your review of the petition to allow the clerk to make a decision regarding restoration.

3. What types of evidence would you like to see at hearing? Who would you like to see testify at the hearing? How could you obtain that testimony if the petitioner does not present it as part of his case?

4. What weight would you give, if any, to the risk of relapse by Bobby?

UNC SCHOOL OF GOVERNMENT

SOCIAL SERVICES LAW BULLETIN NO. 44 | MARCH 2015

Restoration to Competency under G.S. 35A-1130: Common Issues and Questions

Meredith Smith

Guardianship is the legal relationship under which a person or entity is appointed by a court to make decisions and act on behalf of another person (the ward) with respect to the ward's personal affairs, financial affairs, or both.[1] This proceeding is governed by Chapter 35A of the North Carolina General Statutes (hereinafter G.S.) and presided over by the clerk of superior court, who has original and exclusive jurisdiction in the areas of incompetency and adult guardianship. Once the clerk[2] enters an order adjudicating a ward to be incompetent and appoints a guardian, that guardianship can be terminated in only two ways: upon death of the ward[3] or upon entry of an order by the clerk restoring the ward's competency pursuant to G.S. 35A-1130.[4] This bulletin analyzes ten common questions that arise in the context of a restoration proceeding under G.S. 35A-1130; these are as follows:

1. How is a restoration proceeding initiated? What type of document must be filed?
2. What happens if a motion for restoration is filed and it does not contain the required elements to initiate an action?
3. Is a medical report or doctor's note required to file for restoration? If the guardian, the guardian ad litem, or the clerk wants to obtain medical records or other medical evidence regarding the ward's condition, how do they go about obtaining them?
4. Does the petitioner have to have an attorney to file a motion for restoration?
5. To file a motion for restoration, does the ward have to be able to write or read the motion?

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1. John L. Saxon, North Carolina Guardianship Manual § 1.4-A at 7 (2008).

2. The majority of restoration cases are presided over and decided by the clerk. However, the ward has a right to trial by jury in a restoration proceeding under G.S. 35A-1130(d). A trial by jury may be requested by the ward, his or her attorney, or the guardian ad litem. *See* G.S. 35A-1130(c). Failure to request a trial by jury constitutes a waiver of that right. *Id.* The clerk, on his or her own motion, may require a trial by jury in accordance with G.S. 1A-1, Rule 39(b). *Id.* The right of the clerk to enter an order for a trial by jury is notwithstanding any request or failure to request a trial by jury by the ward, his or her counsel, or his or her guardian ad litem. *Id.* This bulletin focuses on non-jury restoration proceedings, but similar principals described herein apply to cases involving a jury.

3. *See* G.S. 35A-1295(a)(3).

4. *See* G.S. 35A-1130.

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6. Once a motion or other document is filed initiating the proceeding, when is the hearing held, what is the process for service, and who receives notice of the filing?
7. May the clerk appoint a guardian ad litem in the restoration proceeding? If so, who is responsible for payment of the guardian ad litem fees?
8. What is the burden of proof that the petitioner must meet at the hearing for restoration, and what may the clerk consider in making his or her ruling?
9. What rights are restored when the motion for restoration is granted by the clerk?
10. What is the applicable appeal period when the clerk denies the petitioner's request for restoration? What is the standard of review on appeal?

1. How is a restoration proceeding initiated? What type of document may be filed?

Any interested person, including a ward, a member of the ward's family, or a guardian, may file papers with the clerk of superior court to initiate a restoration proceeding.[5] There is no single document or form that must be filed. As set forth below, a document presented for filing with the clerk of superior court is sufficient to initiate the action as long as it is evident from the document itself that the filing party is seeking restoration for an identifiable ward and the document is properly verified and contains facts tending to show competence.

Article 3 of Chapter 35A governs the process of restoring competency after an adult[6] has been adjudicated incompetent under Article 1 of Chapter 35A. Article 3 provides, in part, that the guardian,[7] the ward[8] or any other interested person[9] "may petition for restoration of the ward to competency by filing a motion in the cause."[10] The use throughout the statute of the words "petition" and "petitioner" along with "motion in the cause" and "motion" often elicits confusion about what a person or entity must file to initiate the restoration process before the clerk of

5. *See* G.S. 35A-1130(a).

6. This bulletin focuses specifically on restoration of competency of an adult. Minors, defined as persons under the age of eighteen, are legally incompetent to transact business or give consent for most things until they reach the age of eighteen unless they are legally emancipated. *See* G.S. 35A-1201(a)(6); G.S. 48A-2. At the age of eighteen, a minor attains competency and must be adjudicated incompetent under Chapter 35A in order for the statute and any subsequent restoration proceeding to apply. A verified petition for adjudication of incompetence of a minor may be filed when the minor is 17.5 years old. *See* G.S. 35A-1105.

7. *See* G.S. 35A-1130(a). The guardian has an ethical duty to petition for restoration of the ward's competency if the guardian believes that the ward may no longer be legally incompetent. *See* John L. Saxon, Guardianship of Incapacitated Adults: A Summary of North Carolina Law 18 (Nov. 2004), www.sog.unc.edu/sites/www.sog.unc.edu/files/200411MasonGuardianship.pdf. A recent amendment to the North Carolina General Statutes provides that status reports filed by guardians must include a report of the guardian's efforts to restore competency. *See* G.S. 35A-1242(a1)(4).

8. One of the rights retained by the ward, despite an adjudication of incompetency, is the right to petition for restoration. *See* G.S. 35A-1130(a).

9. *Id.* If not the ward or the ward's guardian, the filing party must be an interested person. "Interested person" likely includes, but is not limited to, the ward's next of kin, a government entity or agency, such as a department of social services, a medical provider or other treatment provider of the ward, and any of the original parties to the incompetency/guardianship action.

10. *See* G.S. 35A-1130(a).

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superior court.[11] This confusion is exacerbated by the fact that although what is filed is treated as a motion in the cause, it has characteristics of both a motion and a petition.[12] It is like a traditional motion in that it is filed in the existing incompetency proceeding and a new special proceeding file is not opened for the restoration action.[13] It is like a petition in that a written filing is required,[14] it must be served by the petitioner in accordance with Rule 4 of the North Carolina Rules of Civil Procedure,[15] the document initiates the restoration proceeding, and the proceeding has a separate burden of proof that, if met, resolves the case upon the merits.[16]

While this language understandably creates some confusion, it is helpful to understand that it does not matter whether the document presented for filing is called a motion or a petition. A person may file *any* written document, whether handwritten or typed, to petition for restoration as long as the document contains:

(a) a statement that indicates that the filing party is seeking restoration of competency for an identifiable ward previously adjudicated incompetent under Chapter 35A,[17]
(b) facts tending to show that the ward is competent,[18] and
(c) a verification.[19]

Once a document that includes all three elements is filed, the clerk will treat it as a motion in the cause.[20] Below is a more detailed discussion of these three required elements. Reflecting the language used in the statute, this bulletin will refer to the document to be filed as a motion and the person filing the motion as the petitioner.

1.a. A Statement Seeking Restoration for an Identifiable Ward

The first requirement of a restoration motion is relatively easy to satisfy. If the clerk understands from reading the document that the filing party would like the clerk to consider restoring a ward's competency, it is likely that the first requirement has been met. Generally, under North Carolina law, pleadings and motions are interpreted liberally for purposes of initiating an action or raising an issue before the court, particularly when an unrepresented litigant is the filing party.[21] Therefore, when determining whether a filing is sufficient to initiate an action, a

11. *See generally* G.S. 35A-1130.
12. A historical underpinning for this confusion may be the fact that, prior to 1987, initiating a restoration action required the filing of a petition for restoration. *See* G.S. 35-4 (1986) ("When any insane person or inebriate becomes of sound mind and memory or becomes competent to manage his property . . . a petition on behalf of such person may be filed before the clerk . . . "); G.S. 35-1.39(a) (1986) ("The guardian, ward or any other interested person may file a petition with the clerk who appointed the guardian for the restoration of the ward to competency.").
13. *See* G.S. 35A-1130(a).
14. *Id.* Unlike motions, which sometimes may be made orally to a court, a written filing is required by statute to petition for restoration. *Id.* A request for restoration may not be made to the court informally by oral motion during a hearing. *Id.*
15. *See* G.S. 35A-1130(b).
16. *See* G.S. 35A-1130(d).
17. *See generally* G.S. 35A-1130.
18. *See* G.S. 35A-1130(a).
19. *Id* (stating that "the motion shall be verified").
20. *Id.*
21. *See generally* 1 G. Gray Wilson, North Carolina Civil Procedure § 7-4 (motions), § 8-1 (pleadings) (3d ed. 2007).

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considerable amount of leeway should be afforded to the filing party.[22] This is to allow the party the opportunity to prove his or her case at the hearing rather than restrict his or her access to restoration based on the technicalities of the documents filed.[23]

1.b. Facts Tending to Show Competency

The motion initiating the restoration proceeding must contain facts tending to show competency.[24] These facts may include, but are not limited to, a description through anecdotes or statements of the ward's ability to manage his or her affairs or to make and communicate decisions regarding the ward's finances, nutrition, personal hygiene, health care, personal safety, employment, and residence.[25] Examples of various statements tending to show competency can be found on the Administrative Office of the Courts (AOC) form SP-208, Guardianship Capacity Questionnaire.[26]

The motion does not have to contain all of the facts and evidence necessary to meet the burden of proof required for a restoration order.[27] There is a significant gap between what a party must include in a motion for the purpose of initiating a restoration action and what a petitioner must prove at a hearing on restoration to obtain a restoration order. The petitioner is afforded the opportunity to fill that gap and meet the burden of proof at the hearing through the presentation of evidence, including oral testimony and written exhibits. Thus, the motion for restoration does not have to contain enough facts and evidence in and of itself to prove the ward's competency. It simply must include some facts *tending* to show competency.[28]

1.c. Verification

Any document filed for the purpose of initiating a restoration proceeding must be verified.[29] Verification serves two key purposes. First, it binds the person filing the document under oath to his or her statement of facts, subject to the penalty of perjury for any falsity.[30] As one court noted, a verification is a reasonable method of assuring that the court exercises power only when an identifiable person "'vouches' for the validity of the allegations."[31] Second, and equally important, a proper verification is necessary to invoke the subject matter jurisdiction of the court over the matter.[32]

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22. *See id*.
23. *See id*.
24. *See* G.S. 35A-1130(a).
25. *See generally* Administrative Office of the Courts (AOC) Form SP-208 (Guardianship Capacity Questionnaire).
26. *See id.*
27. To obtain restoration of competency for the ward, the petitioner must prove by a preponderance of the evidence that the ward is competent. *See* G.S. 35A-1130(d). This burden of proof is discussed in greater detail in question 8, below.
28. *See* G.S. 35A-1130(a).
29. *See id*.
30. *See* G.S. 1A-1, Rule 11(b). *See also* 1 G. Gray Wilson, North Carolina Civil Procedure § 11-5 (3d ed. 2007).
31. *See In re* T.R.P., 360 N.C. 588, 592 (2006).
32. *See id.* at 591.

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To properly verify the motion, the petitioner must follow three steps. First, the motion must contain a statement that is substantially similar to the following:

> The contents of the [document] verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he or she believes them to be true.[33]

Second, the person filing the motion for restoration must swear to this or a similar statement under oath before a notary public or other officer of the court authorized to administer oaths, such as a magistrate, judge, or clerk of superior court.[34] To properly administer the oath, the notary or other authorized officer must be able to certify that at a single time and place the petitioner:

1. appeared in person before the notary,
2. was personally known to the notary or identified by the notary through satisfactory evidence, such as a driver's license, and
3. made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear."[35]

For the third and final step, the notary then notarizes the motion. The notary certification must contain at least the following information:[36]

1. the name of the petitioner who appeared in person before the notary unless the name of the petitioner is otherwise clear from the record itself,
2. an indication that the petitioner signed the document and certified to the notary under oath or affirmation the truth of the matters stated in the document,
3. the date of the oath or affirmation,
4. the signature and seal or stamp of the notary who took the oath or affirmation,
5. the notary's commission expiration date.

An example of a valid verification can be found on page 3 of AOC form SP-200, the Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian.[37] A copy of this verification is set forth in Figure 1, above.

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33. *See* G.S. 1A-1, Rule 11(b). *See also In re* the Triscari Children, 109 N.C. App. 285, 287 (1993) (holding that, in the context of a termination of parental rights proceeding, where a chapter requires a verified petition, and verification is not defined in the chapter, "the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified"); State v. Johnson, 198 N.C. App. 138, 140–41 (2009) (adopting the holding of *In re* the Triscari Children and stating that in the absence of specific requirements for a verified petition in a child custody case under Chapter 52C, the requirements for verification established by Rule of Civil Procedure 11(b) apply).

34. *See* G.S. 1A-1, Rule 11(b); G.S. 1-148. *See also* 1 G. Gray Wilson, North Carolina Civil Procedure § 11-7 (3d ed. 2007).

35. G.S. 10B-3(14).

36. *See* G.S. 10B-40(d). Pursuant to G.S. 10B-40(d), the notary certification is acceptable also if it is in the form set forth in G.S. 10B-43, which contains all of the information required under G.S. 10B-40(d) as well as some additional information, such as the county and state where the notary notarized the document.

37. *See* Administrative Office of the Courts, Form AOC-SP-200, www.nccourts.org (click on "Forms" at the top of the page).

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Figure 1. Form of proper verification (from page 2 of AOC-SP-200)

VERIFICATION	
I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.	
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	*Date*
Date / *Signature Of Person Authorized To Administer Oaths*	*Signature Of Petitioner*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*	
☐ *Notary* / *Date My Commission Expires*	
SEAL / *County Where Notarized*	

AOC-SP-200, Page Two, Rev. 6/14
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In contrast, AOC-E-415, the Motion in the Cause to Modify Guardianship form, does not contain a valid verification because the signature block requires only the signature of the petitioner and a notary.[38] This form is regularly relied upon in guardianship cases to modify an existing guardianship. Although the form is not drafted to specifically address an action for restoration, the petitioner can adapt the form to satisfy the requirements of a restoration motion. First, the petitioner could check the "Other/Comment" box on page 1 and write "enter an order for restoration to competency" to identify the relief requested. Second, the petitioner could notify the court that he or she is seeking to prove that the ward is competent by checking off the relevant competencies listed on page 2. Third, the petitioner could include any additional facts showing competency on page 3. Finally, the petitioner should attach a separate verification to the form to properly verify the document before filing it similar to AOC-SP-200, discussed above.

2. What happens if a motion for restoration is filed and it does not contain the required elements to initiate an action?

The hearing clerk[39] should analyze a motion for restoration after it is filed and before the hearing to ensure it complies with the requirements set forth in question 1, above. If the hearing clerk determines it is not clear that the petitioner is seeking restoration for an identifiable ward, or if the motion does not contain facts tending to show competency, the hearing clerk may give the

38. *See* Martin v. Martin, 130 N.C. 27, 28 (1902) (holding that the phrase "sworn and subscribed to" is defective as a verification); *In re* the Triscari Children, 109 N.C. App. 285, 287 (holding that petitions with only a signature and notary notarizing the signature were not in compliance with the statute requiring them to be verified).

39. The clerk at the counter who accepts filings does not review the motion to determine whether it meets the legal standard to initiate a restoration action. The clerk at the counter accepts the motion and clocks it in even if there appear to be deficiencies in the motion. The motion is then reviewed by the elected clerk or assistant clerk with the judicial authority to preside over the hearing on restoration. This is because the determination of whether the motion or other document filed meets the legal standard for initiating the restoration action is a judicial decision. It is not a decision to be made by a clerk accepting filings at the counter and acting in an administrative capacity.

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petitioner an opportunity to file an amendment to the motion to fix the deficiency in the filing prior to the hearing. However, if the motion filed is missing or lacks a proper verification, it is less clear whether the hearing clerk may give the petitioner an opportunity to amend the motion to correct or add the verification without potentially voiding any subsequent order entered in the proceeding. Where a motion lacks a proper verification, the best practice, as evidenced by the discussion below, is for the clerk to dismiss the motion without prejudice and allow the petitioner to re-file the action.

As noted above, a proper verification is necessary to invoke the subject matter jurisdiction of the clerk to hear the restoration matter.[40] If a motion for restoration is missing a verification or contains an invalid verification and the clerk subsequently enters an order in that proceeding, the order may be void and could later be vacated on appeal.[41] It is incumbent upon the clerk to review the verification to ensure that the motion was properly verified,[42] even if the parties do not raise the issue to the court.[43] Furthermore, the North Carolina Supreme Court has held that an invalid or missing verification may not be cured by consent of the parties.[44]

Although there are no North Carolina cases that address the requirement that a restoration motion under Chapter 35A be verified, there are a number of cases in the juvenile arena where the court vacated orders for abuse, neglect, and dependency and the termination of parental rights when the petitions in those cases were not properly verified.[45] These juvenile cases are similar to an action for restoration in that the relative underlying statutes each require verification of the petition or motion initiating the proceeding.[46] In *In re T.R.P.*, the North Carolina Supreme Court held that a challenge to subject matter jurisdiction could not be waived and

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40. *See* Boyd v. Boyd, 61 N.C. App. 334, 336 (1983) (holding that a proper verification at the time of filing is mandatory for jurisdiction when required by statute); Fansler v. Honeycutt, ___ N.C. App. ___, 726 S.E.2d 6, 8 (2012) (stating that "if an action is statutory in nature, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional" (internal quotation omitted)). Subject matter jurisdiction is the court's or the clerk's authority to hear and enter orders in a case. *See* Haker-Volkening v. Haker, 143 N.C. App. 688, 693 (2001). The clerk has original jurisdiction over restoration proceedings pursuant to G.S. 35A-1103(a).

41. *See In re* the Triscari Children, 109 N.C. App. 285 (vacating a termination of parental rights order for lack of subject matter jurisdiction because the petition was not verified); *In re* Green, 67 N.C. App. 501 (vacating and dismissing a juvenile abuse and neglect case for want of subject matter jurisdiction because the department of social services representative failed to verify the petition). *See also* State *ex rel*. Hanson v. Yandle, 235 N.C. 532, 535 (1952) ("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 . . . " (internal citation omitted)).

42. The court has an inherent power to inquire into and determine whether it has subject matter jurisdiction. *See In re* McKinney, 158 N.C. App. 441, 448 (2003).

43. *See* Feldman v. Feldman, 236 N.C. 731, 734 (1953) (stating that "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.").

44. *See In re* Sauls, 270 N.C. 180, 186 (1967) (holding that subject matter jurisdiction "cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial" (quotation omitted)). *See also* Anderson v. Atkinson, 235 N.C. 300, 301 (1952).

45. *See generally In re* T.R.P., 360 N.C. 588 (2006).

46. *See* G.S. 7B-403(a) (requiring that to initiate a case for the abuse, neglect, or dependency of a juvenile, "the petition shall be drawn by the director, *verified* before an official authorized to administer oaths, and filed by the clerk, recording the date of filing" (emphasis added)); G.S. 7B-1104 (requiring that to initiate a termination of parental rights proceeding the "petition or motion . . . shall be *verified* by the petitioner or movant" (emphasis added)).

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quoted other court decisions that held that defects in jurisdiction such as an invalid or missing verification may not be "cured by waiver, consent, amendment, or otherwise."[47]

However, in the case of *Estate of Livesay*, the North Carolina Court of Appeals upheld an amendment to a complaint in a civil action where the sole purpose of the amendment was to add a signature and verification by the petitioner, which was lacking in the originally filed complaint.[48] The court in *Livesay* stated that the amended complaint, which was identical to the complaint except that it added a signature and proper verification, was an effective remedy to give the court subject matter jurisdiction.[49] In its holding, the court stated that Rule 11 allows prompt remedial measures to fix the lack of a signature and/or verification in the original pleading, thereby rectifying the omission and restoring the subject matter jurisdiction of the court.[50] Although the underlying facts of the case related to a signature by an attorney or a party under Rule 11(a), which specifically allows for remedial measures, the court's holding seemed to discuss Rule 11 more generally, including actions such as restoration, where a statute requires verification of a pleading by a party under Rule 11(b).[51]

There is at least one other case, *Alford v. Shaw*, where the court held that a party could amend the initial pleading to add the missing the verification.[52] In that case, unlike in *Livesay*, the underlying statute did require that the petition be verified.[53] A later decision by the North Carolina Supreme Court limited the court's holding in *Alford* and stated that "a shareholder derivative suit appears to be the only situation where a specific requirement that the pleadings be verified is not considered jurisdictional in nature."[54]

In contrast to the court's decision in *Livesay* and *Alford*, the North Carolina Court of Appeals, in the context of the divorce proceeding *Boyd v. Boyd*, upheld the decision of a trial court to dismiss the proceeding without prejudice where the plaintiff filed an unverified complaint and seven days later filed a verified complaint.[55] The court looked to the governing divorce statute for guidance, and it required verification of a divorce complaint.[56] Given the statutory language, the court held that where a statute requires verification for a complaint to be valid, the complaint must be verified at the time it is filed in accordance with Rule 11.[57] If it is not, then the complaint is not valid and the court never obtained jurisdiction over the case.[58] The court further stated that "[t]he want of a proper verification is a fatal defect and is a cause for dismissal of

47. 360 N.C. 588, 595 (2006) (quoting Anderson v. Atkinson, 235 N.C. 300, 301 (1952)).
48. 219 N.C. App. 183, 190 (2012).
49. *Id.* at 187.
50. *Id.* at 186.
51. The court in *Livesay* referenced the North Carolina Supreme Court's decision in *In re T.R.P* and interpreted language in *T.R.P.* to suggest that later filings may be sufficient to invoke the subject matter jurisdiction of the court and remedy the failure of the petitioner to initially verify the petition. *See id.* at 190.
52. 327 N.C. 526, 533 (1990).
53. *Id.*
54. *See In re* T.R.P., 360 N.C. 588, 591 (2006) (internal quotation omitted).
55. 61 N.C. App. 334, 336 (1983).
56. *Id.* at 335.
57. *Id.* at 335–36.
58. *Id.* at 336.

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the action."[59] The court advised that the plaintiff would have been better off taking a voluntary dismissal without prejudice and refiling the action at the point in time when the issue with the verification arose.[60] The court did not indicate that the plaintiff could have amended the original complaint to fix the mistake.[61] This holding appears at odds with the courts' decisions in *Livesay* and *Alford*. The *Boyd* decision indicates that if the original pleading is invalid, the court is not able to later obtain jurisdiction over the case, by amendment or otherwise, if the verification is required by statute.

One distinction between *In re T.R.P.* and *Boyd* on one side and *Livesay* and *Alford* on the other is that *Livesay* and *Alford* both dealt with civil actions where there was no specific requirement, outside of Rule 11, that the motion or petition be verified. In *T.R.P.* and *Boyd*, the statutes that served as the basis for the actions required the respective filings initiating the actions to be verified.[62] An action for restoration is more akin to these types of proceedings because the underlying statute in a restoration proceeding, G.S. 35A-1130(a), requires that the motion initiating the action be verified. Therefore, *Livesay* serves as some authority that may provide the clerk a basis for allowing a party that filed a motion for restoration with a missing or invalid verification to remedy the error by amending the motion to include a valid verification. However, because orders entered by a court that lacks subject matter jurisdiction are void, the safest practice where a motion lacks a proper verification in light of *T.R.P.* and *Boyd* may be for the clerk or the petitioner to dismiss the motion without prejudice and allow the petitioner to re-file the action.[63] If the matter is dismissed, the petitioner will have to pay another filing fee once the petitioner re-files the motion for restoration.

3. Is a medical report or doctor's note required to file for restoration? If the guardian, the guardian ad litem, or the clerk wants to obtain medical records or other medical evidence regarding the ward's condition, how do they go about obtaining them?

A medical report, doctor's note indicating the ward is competent, or other statement or documentation from a medical or mental health professional is *not* required to file a motion for restoration.[64] As long as the motion meets the requirements set forth in question 1 above, it is sufficient to initiate a restoration proceeding. Furthermore, statements by medical professionals or medical facts alleged in the motion initiating the action are not evidence. Generally, pleadings and motions contain allegations and statements for purposes of initiating an action or bringing an issue before the court and do not themselves constitute evidence to be considered by the court. Only evidence presented at the hearing should be considered by the clerk in rendering a decision on restoration to competency.

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59. *Id.* (quotation omitted).

60. *Id*.

61. *See generally id.*

62. *Id*. at 335. *See also supra* note 46.

63. *See* Boyd v. Boyd, 61 N.C. App. 334, 336 (1983) (affirming the trial court's dismissal of the plaintiff's divorce action because the complaint was not properly verified but noting that nothing prevented plaintiff from refiling the action).

64. *See generally* G.S. 35A-1130.

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When the ward will not or does not produce his or her own medical records as evidence, there are three primary ways to obtain medical records and other medical evidence in a restoration proceeding; these include (a) from the guardian, (b) from the guardian ad litem, and (c) pursuant to a multidisciplinary evaluation (MDE) ordered by the clerk.

3.a. Guardian Obtains Medical Records

The guardian of the person and the general guardian[65] generally have the authority to obtain medical records of the ward without a subpoena or any other court process, unless the order appointing the guardian provides otherwise.[66] It is advisable and helpful to the clerk for the guardian to appear with these records at the restoration hearing if they are relevant to the ward's competency.[67]

3.b. Guardian Ad Litem Obtains Medical Records

In contrast, the guardian ad litem (GAL) appointed by the clerk for purposes of the restoration proceeding does not have a right to obtain the ward's medical records without the guardian's written authorization, provided the guardian is authorized to make health care decisions for the ward. However, the GAL can seek an order from the court to obtain them.[68] Although these types of medical records typically contain privileged information, such as information protected by a physician–patient privilege or psychologist–patient privilege,[69] the court can enter an order compelling the disclosure of privileged information *provided* the court finds that the records are necessary for the proper administration of justice.[70] The statute dealing with the disclosure

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65. A health care agent appointed pursuant to a valid power of attorney that has not been suspended likely has the authority to obtain medical records on behalf of the ward, provided the health care power of attorney provides such authority to the agent. A guardian of the person or general guardian must file a separate proceeding to suspend a health care power of attorney after the appointment of the guardian of the person or general guardian. *See* G.S. 32A-22.

66. *See* G.S. 35A-1241. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) gives individuals the right of access to their medical records in most circumstances. 45 C.F.R. § 164.524. The right of access may be exercised by an individual's personal representative if the individual is incompetent. 45 C.F.R. § 164.502(g). A guardian of the person or general guardian who has been authorized to make health care decisions for a ward is a personal representative for HIPAA purposes.

67. The guardian has a duty to seek restoration and to provide for the ward's best interests. *See supra* note 7.

68. It is advisable for the GAL to locate and identify any relevant medical records or other health information prior to the hearing. Once the information is located, the GAL may file a motion requesting that the clerk enter an order compelling the disclosure of the records. Most federal and state confidentiality laws permit the disclosure of information pursuant to a court order. In order to avoid the additional restrictions and regulations imposed by HIPAA, it is advisable not to seek a subpoena of the records but instead to seek directly an order from the court compelling the disclosure of the records. 45 C.F.R. § 164.512(e). HIPAA expressly permits disclosure of protected health information for court proceedings pursuant to a court order. *Id.* There is one exception to this general rule. If the court order is for information maintained by a substance abuse program and the program is required to comply with the federal substance abuse confidentiality regulations in 42 C.F.R. Part 2, the court order must be accompanied by a subpoena. *See* 42 C.F.R. Part 2.

69. *See* G.S. 8-53, -53.3.

70. *Id*. Typically, the court is granted wide discretion in determining what is necessary for the proper administration of justice for the purpose of compelling the disclosure of medical records subject to privilege. *See* State v. Westbrook, 175 N.C. App. 128, 131 (2005).

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of records subject to privilege states that if the case is in district court, the judge compelling the disclosure shall be a district court judge and that if the case is in superior court, the judge compelling the disclosure shall be a superior court judge.[71] The statute does not address who can compel disclosure if the case is before the clerk. Because clerks have original and exclusive jurisdiction in all matters related to incompetency of an adult under Chapter 35A, it is likely that the clerk does have the authority to compel the disclosure of these records, but, as noted, the statute on disclosure does not make that clear.

3.c. The Clerk Orders an MDE

If the clerk determines that evidence related to the ward's medical condition is necessary to his or her decision, the clerk may order an MDE on the clerk's own motion or on the motion of any party to the proceeding.[72] An MDE is an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and may include evaluations of other professionals in other disciplines, such as occupational therapy, psychiatry, and vocational therapy.[73] The MDE is current if it was conducted "not more than one year from the date on which it is presented to or considered by the court."[74] The MDE must set forth the nature and extent of the ward's disability and recommend a guardianship plan or program.[75] This may include a treatment plan, steps for attaining restoration, and assessments by professionals of whether or not restoration is appropriate given the ward's condition.[76] An MDE may be helpful in those restoration cases where there is insufficient or conflicting evidence regarding the ward's capacity, when it appears that limited guardianship may be appropriate instead of restoration, or when additional information is needed to modify or develop an appropriate guardianship plan.

G.S. 35A-1130 regarding restoration does not specifically set out details related to the ordering, completion, and maintenance of the MDE in the court records.[77] The clerk or any party requesting an MDE may do so by using AOC-SP-901M, the Request and Order for Multidisciplinary Evaluation form developed to request an MDE in the original incompetency

71. *Id.*

72. *See* G.S. 35A-1130(c).

73. *See* G.S. 35A-1101(14).

74. *See id.* A new or updated MDE should be ordered by the clerk if (one) the motion for restoration is filed within one year of an adjudication of incompetency, (two) an MDE was obtained during the course of the proceeding to adjudicate a ward incompetent, and (three) an MDE is requested in connection with the restoration proceeding.

75. *See* G.S. 35A-1101(14).

76. *Id.*

77. A party's request for an MDE in the original incompetency proceeding must be filed with the clerk within ten days after service of the incompetency petition. *See* G.S. 35A-1111(a). This may provide some guidance to the clerk when considering the timeliness of a request for an MDE by a party to the restoration proceeding. Although there is no hard-and-fast rule in the restoration statute, the clerk may decide that a request is not timely if it was made at the hearing on restoration, immediately preceding the hearing on restoration, or substantially outside of ten days from the filing of the motion for restoration. There is no time limit on the clerk's authority to order an MDE. *See* G.S. 35A-1130. It is always within the clerk's discretion whether or not to order an MDE. *See* G.S. 35A-1130(c) ("the clerk may order a multidisciplinary evaluation").

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proceeding.[78] Because the statute on restoration is silent as to the details of the MDE, the clerk should include in the MDE order the following information, even in the absence of a request by a party:

1. the state or local human services agency ordered to prepare the report,
2. the deadline for filing the MDE with the court if different from the thirty days set forth in the form,
3. the parties entitled to receive copies of the MDE,
4. a statement that the contents should be revealed only as directed by the clerk and that the MDE will not be a public record,
5. a request that the agency identify whether and to what extent restoration is appropriate and whether a limited guardianship may be appropriate instead, and
6. the party or entity charged with paying the costs of the MDE (see below).[79]

While the law does not specify where the clerk should file the MDE, it would be logical to file it in the incompetency file upon receipt from the agency that prepared it.[80] The Administrative Office of the Courts suggests that the copy of the MDE that is filed with the clerk be placed in a sealed envelope marked "Multidisciplinary Evaluation: Do Not Open."[81]

As noted above, the statute on restoration also does not specify who pays the costs of an MDE.[82] In the clerk's order on restoration, the clerk should include how the costs of the MDE are to be paid. If the clerk follows a pattern similar to how the costs are taxed in the original incompetency proceeding, the costs of the MDE would be taxed as follows in the restoration proceeding:

- If the clerk enters an order in favor of the petitioner and the ward is not indigent, the ward pays the costs of the fees.
- If the clerk enters an order in favor of the petitioner and the ward is indigent, the Department of Health and Human Services (DHHS) pays the fees.
- If the clerk denies the motion but finds there were reasonable grounds to bring it, the costs may be taxed against the petitioner, the ward if not the petitioner, or DHHS, in the clerk's discretion.
- If the clerk denies the motion and finds that there were no reasonable grounds to bring the motion, the costs are taxed against the petitioner.[83]

78. *See* Administrative Office of the Courts, Form AOC-SP-901M, www.nccourts.org (click on "Forms" at the top of the page).

79. *See* G.S. 35A-1111(a) and (b) (related to an MDE ordered in the original incompetency and guardianship proceeding before the clerk).

80. *See* G.S. 35A-1130 (a motion for restoration proceedings is filed in the original incompetency special proceeding file).

81. *See* Saxon, *supra* note 1, § 5.9-D at 62.

82. *See* G.S. 35A-1130.

83. *See* G.S. 35A-1111.

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4. Does the petitioner have to have an attorney to file a motion for restoration?

The guardian, the ward, or any other interested person who petitions for restoration does *not* need to have any attorney to file the motion or appear at the hearing on restoration. There is one exception to this rule. If the petitioner is a corporation, including nonprofit corporations, or a limited liability company, the petitioner must be represented by a duly-admitted and licensed attorney.[84] An officer, shareholder or other agent of the corporation or limited liability company that is not a lawyer may not file or appear in court proceedings on the entity's behalf.[85] Therefore, if a corporate guardian desires to file for restoration, it may do so only through an attorney. In the event a corporation or other entity files for restoration without an attorney, the party may be able to cure the defect. The North Carolina Court of Appeals seemed to indicate in at least one case that the defect of filing by a non-attorney party on an entity's behalf could later be cured if an attorney appeared at the hearing on behalf of the petitioning entity.[86]

5. To file a motion for restoration, does the ward have to be able to write or read the motion?

No. There is no literacy prerequisite to petitioning for restoration, and the ward may receive assistance in preparing and filing the motion and presenting his or her case at the hearing before the clerk. Whether a ward can read and/or write is not determinative of legal competency under Chapter 35A.

6. Once a motion or other document is filed initiating the proceeding, when is the hearing held, what is the process for service, and who receives notice of the filing?

Once the motion for restoration is filed, the clerk schedules the matter for hearing. The hearing date should not be less than ten days nor more than thirty days from the date that the motion and notice of hearing are served on the ward and the guardian. The clerk may alter this timeline

84. *See* Lexus-Nexus v. Travishan Corp., 155 N.C. App. 205, 209 (2002) (holding that a corporation must be represented by an attorney and cannot be represented by an agent of the corporation, such as an officer or shareholder); Bodie Island Beach Club Ass'n, Inc. v. Wrap, 215 N.C. App. 283, 290 (2011) (extending the application of *Lexus-Nexus* to limited liability corporations); Willow Bend Homeowners Ass'n, Inc. v. Robinson, 192 N.C. App. 405, 414 (2008) (acknowledging that nonprofit corporations also must be represented by an attorney).

85. *See* G.S. 84-5 ("It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . "); *Lexus-Nexus*, 155 N.C. App. at 209. There are some exceptions to this general rule. For example, a corporation may prepare legal documents. *See* State v. Pledger, 257 N.C. 634, 637–38 (1962). In addition, a corporation may process litigation without an attorney in a small claims action. *See* Duke Power Co. v. Daniels, 86 N.C. App. 469, 472 (1987). Finally, a corporation may make an appearance in court through its vice president to avoid default. *See* Roland v. W & L Motor Lines, Inc., 32 N.C. App. 288, 290 (1977).

86. *See* Reid v. Cole, 187 N.C. App. 261, 265 (2007) (affirming the ruling of a trial court which allowed the plaintiff estate administrator to file a pleading on behalf of the estate without an attorney given that the plaintiff later retained counsel and appeared by counsel in subsequent proceedings).

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for good cause.[87] For example, if the clerk orders an MDE and the professionals completing the MDE need additional time, the clerk may find good cause to extend the hearing date to a time outside of thirty days from the service of the motion.

It is the petitioner's obligation under the statute to serve the motion for restoration. The petitioner must serve notice of the hearing and a copy of the motion for restoration on:

1. the guardian, if the guardian is not the petitioner;
2. the ward, if the ward is not the petitioner; and
3. any other party to the original incompetency proceeding.[88]

The petitioner is required to serve the notice of hearing and motion for restoration on these parties pursuant to Rule 4 of the North Carolina Rules of Civil Procedure.[89] When a party entitled to service is incompetent, such as the ward when the ward is not the petitioner, Rule 4(j) of the North Carolina Rules of Civil Procedure requires that the ward and his or her guardian are both served. The ward must be served with the notice of hearing and motion in the same manner as any competent person is served. This includes service by any one of following:

- personal delivery to the ward by someone authorized to serve process;
- leaving copies at the ward's home or usual place of abode with some person of suitable age and discretion residing there;
- delivering copies to an agent authorized to accept service of process on behalf of the ward;
- mailing copies via registered or certified mail, return receipt requested;
- mailing copies by signature confirmation, delivering to the ward; or
- depositing with a designated delivery service, followed by a delivery receipt.[90]

In addition, because at the time of the filing the ward is considered disabled, the rule requires that the ward's guardian is served by one of the methods listed above in order to effectuate proper service on the ward.[91] The guardian is also required to be served pursuant to G.S. 35A-1130(b). If the guardian is served with the notice of hearing and the motion by one of

87. *See* G.S. 35A-1130(b).

88. *See id.* Parties to the original incompetency proceeding include the original petitioner, the respondent/ward, and the guardian ad litem. The ward's next of kin and any other interested party who received notice of the original incompetency proceeding also may be entitled to notice. *See In re* Ward, 337 N.C. 443, 447 (1994) (holding that where a determination of the incompetency of a party to a lawsuit effects the tolling of an otherwise expired statute of limitations, the interest of the opposing party to the lawsuit entitles that party to notice of the incompetency proceeding); *In re* Winstead, 189 N.C. App. 145, 149–50 (2008) (holding that a next of kin who received notice of the original incompetency proceeding was entitled to appeal the incompetency determination as an aggrieved party). The question raised by these decisions is whether next of kin and interested persons are entitled to notice of the restoration proceeding and whether they must be served with the restoration motion pursuant to Rule 4, which is required for parties to the original incompetency proceeding under G.S. 35A-1130(b), or pursuant to Rule 5, which is the same manner they are served in the original incompetency proceeding under G.S. 35A-1109. It is likely that a clerk may conclude that next of kin and interested parties are not parties to the original incompetency proceeding, even though they may be entitled to notice of the original action and have standing to appeal an incompetency proceeding because they are not entitled to present evidence under G.S. 35A-1112(b) and require Rule 5 service only in the restoration proceeding.

89. *See* G.S. 35A-1130(b).

90. *See* G.S. 1A-1, Rule 4(j)(1).

91. *See* G.S. 1A-1, Rule 4(j)(2)(b).

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the means listed above, that is sufficient to satisfy the requirements of serving the ward under Rule 4 and the guardian under G.S. 35A-1130(b). The guardian does not have to be served twice.

7. May the clerk appoint a guardian ad litem in the restoration proceeding? If so, who is responsible for payment of the guardian ad litem fees?

The clerk may appoint a guardian ad litem to represent the ward at the restoration hearing.[92] The clerk will likely appoint the same guardian ad litem from the original incompetency proceeding, if that attorney is available. However, the clerk is not required to appoint the same guardian ad litem. During the original incompetency proceeding, the guardian ad litem is charged with presenting the respondent's express wishes to the court as well as making any recommendations to the court regarding the respondent's best interests.[93] The statute on restoration does not specify a role for the guardian ad litem during the restoration hearing that is different from the original incompetency proceeding. Therefore, the guardian ad litem appointed for a restoration proceeding should likely provide a similar detailed report to the court. It is advisable that the guardian ad litem deliver the report to the clerk in writing prior to the hearing and provide copies of the report to each of the parties to the proceeding. As a basis for the report, the guardian ad litem should (i) meet with the ward in person where the ward lives prior to the hearing, (ii) diligently work to obtain medical records and other evidence of the ward's capacity, and (iii) meet with and interview the ward's guardian and other family members and interested persons. The report of the guardian ad litem should also include recommendations to the court regarding limited guardianship when restoration may not be appropriate.

The ward is entitled to be represented by counsel at the hearing on restoration and may elect to retain his or her own attorney in addition to any guardian ad litem appointed by the clerk.[94] If the ward retains his or her own attorney, the role of the guardian ad litem becomes less clear. The guardian ad litem should still provide a report to the court that is based on the diligence described above and include recommendations regarding the ward's best interests and, if appropriate, limited guardianship. The counsel hired by the ward will be charged with zealously representing his or her client and presenting the ward's express interests to the court.[95]

If the clerk appoints a guardian ad litem, the fees of the guardian ad litem are paid as follows:

- by the ward, if the ward is not indigent;
- by the movant if relief is not granted and there were no reasonable grounds to bring the proceeding; and
- in all other cases, by the Office of Indigent Defense Services.[96]

92. *See* G.S. 35A-1130(c).

93. *See* G.S. 35A-1107(b).

94. *See id.*

95. For a more in-depth discussion of the role of the guardian ad litem, refer to the *North Carolina Guardianship Manual*, which provides a lengthy discussion of the dual role of the guardian ad litem and how that may conflict with retained counsel by the ward. Saxon, *supra* note 1, chapter 2, at 20–37.

96. *See* North Carolina Office of Indigent Defense Services and Administrative Office of the Courts, North Carolina Proceedings That Involve Guardians Ad Litem (GALs) (Oct. 2014), www.ncids.org/Rules%20&%20Procedures/GAL_Chart.pdf.

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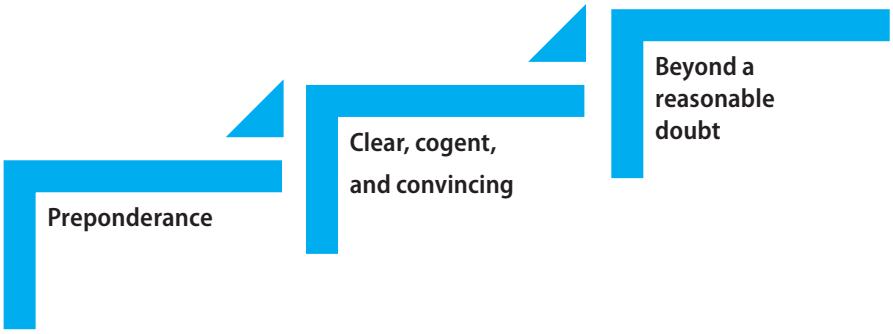
Figure 2. Burdens of proof to adjudicate someone incompetent under Chapter 35A



8. What is the burden of proof that the petitioner must meet at the hearing for restoration, and what may the clerk consider in making his or her ruling?

To enter an order restoring competency of the ward, the clerk must find that the ward is competent by a preponderance of the evidence.[97] This means that the clerk must find that the greater weight of the evidence shows that the ward is competent.[98] In other words, the clerk must find that it is more likely than not that the ward is competent. Preponderance of the evidence is a lower standard than what is required to adjudicate someone incompetent under Chapter 35A, which may occur only if there is clear, cogent, and convincing evidence that the ward is incompetent (see Figure 2).[99]

In considering whether or not the ward is competent, the clerk may consider admissible[100] oral testimony and written evidence presented at the hearing. There are two key issues the clerk should be aware of when making a decision on restoration. First, the motion for restoration filed by the petitioner and the facts contained therein constitute allegations, not evidence. Therefore, the clerk should not rely on the motion as evidence in entering an order on restoration but only on evidence presented at the hearing.

Second, if the evidence submitted by the parties at the hearing includes affidavits, including affidavits from doctors and other medical professionals, the clerk should be cautious in relying on them in rendering a final decision.[101] The North Carolina Court of Appeals has stated that an

97. *See* G.S. 35A-1130(d).

98. *See* 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 41 (7th ed. 2011).

99. *See* G.S. 35A-1112(d). *See also In re* D.R.B., 182 N.C. App. 733, 735 (2007) (discussing the various standards of proof and stating that clear, cogent, and convincing evidence is stricter than preponderance of the evidence but less stringent than beyond a reasonable doubt).

100. A discussion of admissibility of evidence is beyond the scope of this bulletin. In general, the clerk should not consider inadmissible evidence in making his or her decision regarding restoration. Rules of evidence, including rules on hearsay, apply. For a more in-depth discussion of hearsay and other rules of evidence, see "Evidence," N.C. Superior Court Judges' Benchbook, http://benchbook.sog.unc.edu/benchbook_section/5.

101. Although affidavits are generally a permissible form of evidence with regard to the appointment of the original guardian, no such similar statute applies in the context of incompetency and restoration. *See* G.S. 35A-1223; *see also generally* G.S. 35A.

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affidavit is "inherently weak as a method of proof."[102] The court noted that affidavits are made without notice to the other party and under circumstances that afford ample opportunity to lead the person making the affidavit.[103] Furthermore, the affidavit may include only matters that are deemed helpful to the party who submits the affidavit and may exclude anything negative, contain half-truths, and omit important matters.[104] Most importantly to the court, the statements in the affidavit are not able to be subjected to the "searching light" of cross-examination, which allows the court the best opportunity to assess the value of testimony.[105] However, the court has also recognized that affidavits may be properly admitted as evidence "in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure."[106] The clerk may find it necessary to consider affidavits in making his or her decision on restoration, particularly given that many wards may lack the resources to pay for medical experts to appear in person to testify. If the clerk elects to consider affidavits, the clerk should keep in mind that the affidavit may lack credibility, that a party has the right to dispute the truthfulness of the affidavit, and that an affidavit is not determinative or controlling of the clerk's decision. Despite the potential weaknesses or risks related to using affidavits, a clerk may find them to be useful evidence, particularly where there are no objections disputing their truth or authenticity and the credentials of the person making the affidavit are verifiable, relevant to the restoration proceeding, and not called into question.

Whether evidence is submitted through affidavits, oral testimony, or other documents, the clerk must ultimately determine whether the ward is competent. A ward is competent if he or she has the capacity to manage his or her own affairs and to make or communicate important decisions concerning his or her family and property. Evidence that may be helpful to the clerk in rendering a decision, particularly in those cases where the ward suffers from mental health issues or substance abuse, includes but is not limited to whether:

- the ward has a treatment plan in place;
- the ward has adhered to a treatment/therapy plan over an extended number of months;
- the ward acknowledges and understands the condition or cause that led to the order adjudicating the ward to be incompetent;
- the ward acknowledges the risk of relapse and has an emergency plan in place in the event of a relapse along with a support network of people to contact in the event of relapse;
- the ward is able to manage his or her daily affairs without assistance from his or her guardian, such as making decisions about where to live, paying rent, maintaining employment, providing for food, and living safely without being a threat to himself or herself or others;
- the guardian and/or the guardian ad litem support the motion for restoration;
- the clerk finds any other information persuasive in making the decision to restore competency.

102. *See In re* Custody of Griffin, 6 N.C. App. 375, 378 (1969).
103. *See id.*
104. *See id.*
105. *See id.*
106. *See id.*

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If the burden of proof required for the clerk to enter an order granting restoration is not met, the clerk may hear evidence at the hearing that indicates that a limited guardianship may be appropriate if there is a change in the ward's capacity.[107] A limited guardianship is one where the guardian's authority is limited by the court and the ward obtains or retains certain legal rights and the ability to make decisions in certain aspects of his or her life.[108] The clerk may enter an order denying restoration but modifying the guardianship to allow the ward, for example, to manage small amounts of money or decide where he or she wants to live, go to church, work, or spend time. Limited guardianship can be used as a stepping stone to restoration when a full restoration may not be appropriate.

9. What rights are restored when the motion for restoration is granted?

Once a ward's competency has been restored, he or she may exercise all rights as if he or she had never been adjudicated incompetent, with one exception.[109] The rights restored upon entry of the clerk's order include, but are not limited to, the following:

- executing advance directives and powers of attorney;
- controlling and selling real and personal property;
- giving any consent or approval that may be necessary to enable the former ward to receive medical, legal, psychological, or other professional care, counseling, treatment, or service;
- determining where he or she will live; and
- otherwise managing his or her financial affairs and taking care of himself or herself.[110]

At the time the order of restoration is entered by the clerk, the guardian no longer has authority over the ward or his or her financial affairs.[111] However, the guardian does have continuing duties to the court. The general guardian and the guardian of the estate must file, and the clerk must enter, an order approving a final accounting before the guardian is discharged from his or her duties.[112]

In preparing for a restoration hearing, the guardian may want to consider assisting the ward in drafting advance directives, such as a durable power of attorney or health care power of attorney. The ward could then execute them after the restoration order is entered and possibly avoid a future guardianship proceeding in the event the ward relapsed or encountered some other issue that results in a lack of competency. A durable power of attorney and health care power of attorney may serve to replace the need for any future guardianship through the courts.

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107. *See* G.S. 35A-1207(a) and (b); 35A-1212(a).

108. *See* Saxon, *supra* note 7, at 12.

109. *See* G.S. 35A-1130(d). The right to carry a firearm is not automatically restored upon entry of the clerk's order. The individual (former ward) is prohibited from purchasing a firearm through the National Instant Criminal Background Check System (NICS) until the individual obtains a separate order from a district court judge to remove the individual's disability designation under NICS. *See* G.S. 122C-54.1; 18 U.S.C. 922(g).

110. *See* G.S. 35A-1130(d).

111. *See id*.

112. *See* G.S. 35A-1130(e) & G.S. 35A, Subchapter II.

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10. What is the applicable appeal period when the clerk denies the petitioner's request for restoration? What is the standard of review on appeal?

In the event that the clerk determines that the petitioner failed to show by a preponderance of the evidence that the ward is competent, the clerk will then enter an order denying the restoration of the ward to competency.[113] The ward or the ward's attorney may appeal from the clerk's order to the superior court for a trial *de novo*.[114] At a trial *de novo*, the evidence regarding the ward's competency and suitability for restoration will be presented and heard again by the superior court judge.[115]

The time period for appeal is the same as for special proceedings generally, which is ten days from the entry of the order denying the restoration motion.[116] The order is entered, and thus the ten days starts tolling, when it is reduced to writing, signed by the clerk, and filed with the clerk's office.[117] The clerk is not required by statute to serve the order on the parties, and therefore the parties may not receive notice of the entry of the order and thus the commencement of the ten-day tolling period.[118] Notice of appeal must be in writing and is filed with the clerk.[119] The notice of appeal should be served by the appealing party on the guardian, the ward, and any other parties to the incompetency and restoration proceeding in accordance with the provisions of Rule 5 of the Rules of Civil Procedure.[120] The order of the clerk denying the restoration motion remains in effect until it is modified or replaced by an order of the superior court judge.[121] As a result, the guardianship remains in place pending the appeal.

113. *See* G.S. 35A-1130(f).

114. *Id.*

115. *See* Caswell Cnty. v. Hanks, 120 N.C. App. 489, 491 (1995) ("A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." (internal quotation omitted)).

116. *See* G.S. 1-301.2(e).

117. *See* G.S. 1A-1, Rule 58.

118. *See* G.S. 35A-1130(d); G.S. 1-301.2(f).

119. *See* G.S. 1-301.2(e).

120. *See* G.S. 35A-1130(b) (stating that service of the original motion for restoration shall be on the guardian, the ward, and any other parties to the incompetency proceeding). *See also* G.S. 1A-1, Rule 5. Because G.S. 35A-1130 does not specifically state that Rule 4 service is required for a notice of appeal, it is likely that only Rule 5 service is required.

121. *See* G.S. 1-301.2(e).

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TAB 07-

Presiding Over Cases w/ Unrep. Litigants

Pro Se Litigants

Cheryl Howell
February 2015
With Additions
A. Elizabeth Keever, May 1, 2015

Pro Se Litigants

- Nationwide numbers
  - 80% family cases have one
  - 50% family cases have two
- No North Carolina numbers
- Many reasons for high numbers

N.C. Response

- Forms and Self-Help Centers
- Guidelines for court staff
- Bar Association Task Force Recommendations
  - Unbundled legal services
  - Forms with instructions
  - Self-serve centers
  - Increased pro bono services

Judicial Guidance

- Not Much and Nothing Specific
- Code of Conduct
  - Promote public confidence in integrity and impartiality of court system
  - Be patient, dignified and courteous
  - Accord every person the full right to be heard

Case Law

- US Supreme Court
  - Pro se pleadings must be held to "less stringent standards than formal pleadings drafted by lawyers"
    - *Haines v. Kerner,* 404 US 519 (1972)
  - "No constitutional right to receive personal instruction from trial judge on courtroom procedure."
    - *McKaskle v. Wiggins,* 465 US 168 (1984)

Turner v. Rogers, 564 US (2011)

- Indicates that federal Due Process requires "procedural safeguards" for self-represented litigants
- Approved use of court forms
- Approved – and seemed to require under some circumstances – engaged judicial questioning

N.C. Case Law

- "Pro se defendant cannot expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of the defendant."
  - *State v. Lashley*, 21 NC App 83 (1974)
- "The North Carolina Rules of Civil Procedure must be applied equally to all parties, without regard to representation by counsel."
  - *Goins v. Puleo*, 350 NC 277 (1999)
  - *Cf. Shwe v. Jaber,* 147 NC App 148 (2001)

N.C. Case Law

- *Coleman,* 182 NC App 25 (2007)
  - Pro se pleadings same as others
- *Cf. Cordell v. Doyle,* 185 NC App 158 (2007)(unpublished)
  - Ok to consider "*pro se* nature of proceeding"
- *McIntosh v. McIntosh,* 184 NC App 697 (2007)
  - Failure to hire attorney is not "excusable neglect"

Judicial Responsibility (?)

- Provide meaningful opportunity for all to be heard
- Maintain impartiality and appearance of impartiality
- Protect against unfair advantage
- Meet statutory fact-finding requirements
- Determine best interest of children

Guidance for Judges

- "Judicial Techniques" article
  - The Judges' Journal Winter 2003
- Protocols
  - Minnesota, Idaho, Charlotte
- National Center for State Courts Best Practices

Suggestions from "Experts"

- Impartiality doesn't equal passivity
- Should question to obtain necessary general information
- Should explain:
  - The process
  - Elements of claims
  - Burdens of proof
  - Limitations on types of evidence

Guardianships

- Determination of Competency
- Appointment of Guardian

Determination of Competency GS 35A – 1112

- 1. Petitioner/Respondent Evidence
- 2. Specific Findings

Appointment of Guardian GS 35A – 1212

- Evidence deemed necessary by Clerk
- Clerk's Discretion – person who will best serve ward

§ 35A-1112. Hearing on petition; adjudication order.

(a) The hearing on the petition shall be at the date, time, and place set forth in the final notice of hearing and shall be open to the public unless the respondent or his counsel or guardian ad litem requests otherwise, in which event the clerk shall exclude all persons other than those directly involved in or testifying at the hearing.

(b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses.

(c) The clerk shall dismiss the proceeding if the finder of fact, whether the clerk or a jury, does not find the respondent to be incompetent.

(d) If the finder of fact, whether the clerk or the jury, finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk shall enter an order adjudicating the respondent incompetent. The clerk may include in the order findings on the nature and extent of the ward's incompetence.

(e) Following an adjudication of incompetence, the clerk shall either appoint a guardian pursuant to Subchapter II of this Chapter or, for good cause shown, transfer the proceeding for the appointment of a guardian to any county identified in G.S. 35A-1103. The transferring clerk shall enter a written order authorizing the transfer. The clerk in the transferring county shall transfer all original papers and documents, including the multidisciplinary evaluation, if any, to the transferee county and close his file with a copy of the adjudication order and transfer order.

(f) If the adjudication occurs in any county other than the county of the respondent's residence, a certified copy of the adjudication order shall be sent to the clerk in the county of the ward's legal residence, to be filed and indexed as in a special proceeding of that county.

(g) Except as provided in G.S. 35A-1114(f), a proceeding filed under this Article may be voluntarily dismissed as provided in G.S. 1A-1, Rule 41, Rules of Civil Procedure. (1987, c. 550, s. 1.)

§ 35A-1212. Hearing before clerk on appointment of guardian.

(a) The clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

(1) The nature and extent of the needed guardianship;

(2) The assets, liabilities, and needs of the ward; and

(3) Who, in the clerk's discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so.

(b) If a current multidisciplinary evaluation is not available and the clerk determines that one is necessary, the clerk, on his own motion or the motion of any party, may order that such an evaluation be performed pursuant to G.S. 35A-1111. The provisions of that section shall apply to such an order for a multidisciplinary evaluation following an adjudication of incompetence.

(c) The clerk may require a report prepared by a designated agency to evaluate the suitability of a prospective guardian, to include a recommendation as to an appropriate party or parties to serve as guardian, or both, based on the nature and extent of the needed guardianship and the ward's assets, liabilities, and needs.

(d) If a designated agency has not been named pursuant to G.S. 35A-1111, the clerk may, at any time he finds that the best interest of the ward would be served thereby, name a designated agency. (1987, c. 550, s. 1; 2003-236, s. 1.)

TURNER V. ROGERS: IMPROVING DUE PROCESS FOR THE SELF-REPRESENTED

Richard Zorza
Coordinator, Self-Represented Litigation Network

The U.S. Supreme Court's decision in Turner v. Rogers *(2011) stresses the due-process rights of self-represented litigants. Courts should see this decision as an opportunity to improve their services and programs for such litigants.*

On June 20, 2011, the United States Supreme Court, in its first trip to the self-represented courtroom in 25 years, issued a groundbreaking opinion in *Turner v. Rogers* (2011) about the due-process rights of the self-represented and what courts must do to ensure that they are given true access to justice. The decision challenges judges and court administrators to build consensus around innovations and improvements. This article briefly summarizes the core holding of *Turner*, including its broader due-process elements, suggests the approaches that courts and access-to-justice institutions might consider to deal with the broad implications of the decision, and offers concrete resources to assist in that process. The good news is that many of the needed access innovations are already being deployed and have now been effectively endorsed by the Supreme Court in this decision.

The *Turner* Decision

Significantly, the case as it came to the Supreme Court was in a posture that did little to suggest the ultimate broad reach of its holding—one very different from that sought by either of the parties. In the South Carolina Supreme Court, a child support obligor sought reversal of his civil-contempt-incarceration order on the grounds that he had lacked counsel. (The party seeking the incarceration order was not the state and also did not have counsel.) After South Carolina had rejected the claim, certiorari was granted. During briefing of the case, the solicitor general, representing the United States, urged rejection of both the self-represented litigant's right-to-counsel claim and the respondent's urging of affirmance. The solicitor general urged that although there was no categorical right to counsel in such cases, the failure of the trial court to follow available alternative procedures that would have protected the litigant's due-process rights required reversal.

. . .the Supreme Court's effective endorsement of innovations that are already being broadly deployed—such as greater judicial engagement and user-friendly forms—should be found by states to be reassuring that their access innovation efforts will find support at the highest judicial levels.

The Supreme Court agreed:

> And we consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of "the private interest that will be affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without "additional or substitute procedural safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement[s]." . . .
>
> [A]s the Solicitor General points out, there is available a set of "substitute procedural safeguards," *Mathews*, 424 U. S., at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. . . . The record indicates that *Turner* received neither counsel nor the benefit of alternative procedures like those we have described. . . . The court nonetheless found *Turner* in contempt and ordered him incarcerated. Under these circumstances

Turner's incarceration violated the Due Process Clause (*Turner v. Rogers*, 2011: slip opinion at 11, 14, 16).

There are a number of important points about the opinion as a whole that should be emphasized:

- While the decision itself focuses on incarceration (and, indeed, states the importance of the private interest at stake in such situations), it relies on the due-process clause, which is implicated in every case dealing with the potential deprivation by a court of a constitutionally protected interest—which means almost every nontrivial self-represented-litigant case.
- Moreover, since the case discusses the needs of the party seeking the deprivation, the decision supports the idea that due process applies to the person seeking the deprivation as well as the party potentially subject to it *Turner v. Rogers*, 2011: slip opinion at 13-14).
- The touchstone for whether procedures satisfy due process is whether they provide sufficient fairness and accuracy—in this case in determining the capacity to pay (*Turner v. Rogers*, 2011: slip opinion at 14-15)—thus potentially raising that key question in every self-represented litigant case.
- The Supreme Court explicitly approved—indeed in some cases required—the use of forms in self-represented-litigant cases, thereby putting to final rest any claim of their inappropriateness (*Turner v. Rogers*, 2011: slip opinion, 14-16).
- The Supreme Court similarly approved, and in some situations required, engaged judicial questioning, also shutting off any objection that such neutral questioning is forbidden (*Turner v. Rogers*, 2011: slip opinion, 14-16).
- The Court reached out to endorse the concept of neutral court staff providing assistance to litigants, even though the facts did not include such staffing (*Turner v. Rogers*, 2011: slip opinion, 14-15).
- The Court made clear that, notwithstanding its decision in *Turner*, there might well be situations in which there was a right to counsel. The court gave as possible examples situations similar to *Turner*, but in which the other side had counsel, or was the state itself (*Turner v. Rogers*, 2011: slip opinion, 15).
- Moreover, in what may be of greater immediate day-to-day significance for trial courts, the Court acknowledged that there might well be particular factual situations in which appointment of counsel is required to ensure fairness and accuracy (*Turner v. Rogers*, 2011: slip opinion, 16).

Some state court systems might respond to the decision by a cursory review of their procedures and conclude that since a) they do not use civil-contempt incarceration in child support cases, b) they provide counsel in such cases, or c) provide the notice, forms, questioning, and fact finding required in *Turner* in such cases, they do not need to pay attention to the case.

In the opinion of this writer, such an approach would be seriously flawed. It would fail to recognize the broad legal import of the decision, particularly its groundbreaking application of the due-process clause to the rights of the self-represented, and would fail to embrace the opportunity for expanding the already launched systemic access-to-justice improvements upon which the decision implicitly relies. Moreover, the Supreme Court's effective endorsement of innovations that are already being broadly deployed—such as greater judicial engagement and user-friendly forms—should reassure the states that their access-innovation efforts will find support at the highest judicial levels.

Implications for Judges and for Judicial Education

The decision, and its endorsement of an engaged role for judges in self-represented cases, provides clear permission for judges to continue on their current path of experimenting with ways to make sure that the self-represented are fully heard. Those who have felt inhibited in doing so for fear of being perceived as non-neutral should be reassured that they have received both Department of Justice (DOJ) and Supreme Court imprimatur for such engagement, provided, of course, that it is neutral and consistent with ethical rules. Those who have believed that their lack of engagement is required by the Constitution would be advised to reconsider their position.

It may be that part of the reason that DOJ felt able to support, and the Supreme Court endorsed, such judicial questioning is that there are now extensive research-based protocols for such neutral engagement. In any event, these protocols

demonstrate that questioning, particularly when carefully structured in an engaged context, runs little if any risk of being, or even appearing, non-neutral. Examples of such best practices are making clear in the "framing" of the case that questions are likely, but not an indication of sympathy or leanings, as are follow-up questions that elicit the detail needed to decide the case on sufficiently full information.

More generally, judges might be wise to bear in mind the teaching of *Turner* that in self-represented cases the procedures of the case as a whole must be sufficient to provide the accuracy and fairness appropriate to the stake and situation. *Turner* encourages judges to consider how their discretion in applying governing procedural rules can be used to ensure that there is such sufficient accuracy and fairness. Implicit in *Turner* is the perhaps obvious point that the many court opinions reiterating that the same rules must be applied, regardless of whether someone has a lawyer, do not and cannot mean that those rules have to be applied without taking into account the representation status of the parties. It must always be remembered that to refuse to consider an exercise of discretion is an abuse of discretion.

Moreover, judges might decide to remain alert in all cases to the possibility of insufficiency in meeting due-process standards. Moreover, to the extent that they viewed this (with good reason) as placing an impossible sua sponte burden on them, they might wish to ensure that the court has in place services and procedures sufficient to ensure that such standards are met, thereby freeing them of the ongoing review obligation.

Finally, they might find it constitutionally advisable to take appropriate action when they find, as suggested by *Turner*, that the facts, circumstances, and required procedures are such that without counsel it is not possible for them to manage the case in such a way as to provide the sufficient fairness and accuracy required by *Turner*. In such cases an appointment of counsel, using whatever inherent or other authority, and whatever financing mechanisms are available, is called for, and surely will be given deference by the rest of the system.

Judges and others responsible for judicial education might well regard *Turner* as an opportunity for a renewed focus on the many challenges involved in self-represented cases and for a sustained and multicomponent initiative on helping judges deal with those challenges. Such an initiative might, building on model resources already available, include developing state-specific bench books on the topic, presenting customized judicial educational programs, making videos about best practices, performing educational role playing of problems and best-practice solutions, and establishing judicial support networks for further discussion of these issues.

Implications for the Management of Cases in the Courthouse

While *Turner* identifies as "available" only two specific nonjudicial procedures that were desirable but absent in the facts of that case—notice of the key issue and forms—the analysis is clear that the totality of the procedures are to be considered in the due-process fairness-and-accuracy analysis.

Thus, the good news for court administrators is that there is already available and tested a wide range of effective innovations that can enhance fairness and accuracy. Many of these can be implemented at low or zero cost. *Turner* provides an opportunity to analyze court operations and to assess whether such innovations could enhance accuracy and fairness of outcomes in accordance with the requirements of the decision. Specifically:

- The deployment of plain-language forms, including easy-to-use, interactive online versions of those forms, can help ensure that needed information is provided to the court. This is far cheaper, both to deploy and maintain, if forms are standardized statewide. (In a time of financial crisis, statewide nonuniformity of such forms should be among the first casualties.)
- The provision or expansion of neutral, court-based, informational self-help services, already provided in some form in most states, can give litigants the kind of information and forms-completion assistance envisioned by *Turner* as helping ensure access and fairness. Such systems are most cost-effective when provided statewide through phone hotlines supplemented by online tools, as in Minnesota and Alaska.
- Courtroom-based services, integrated with the flow of the case, can help litigants focus on what is needed to move the case forward and provide the additional information needed by the court. Such assistance is now routine in states such as California and New Hampshire.

- The provision of unbundled or discrete task representation can be facilitated by the courts, in cooperation with the bar, through rules changes, training programs, and general promotion. The effect is low-cost representation for those cases in which it is most critical, responding to the concern of *Turner* that there may be cases in which attorney assistance is needed. Such programs cost the court nothing. Such programs are routine in Massachusetts and Maine, among many other states. New York is one state that has been effective in facilitating pro bono representation using this model.

Many of these innovations could easily be built into the reengineering programs that many courts are now starting. Indeed, they would help ensure that these reengineering efforts improve access as well as efficiency. (See the "Resources" section.)

Implications for Justice System Coordination and Innovation

The process of review and innovation envisioned by this article will not occur without leadership. For states with access-to-justice commissions, the choice of who should lead the process may be simple. The commissions have the credibility of being creatures of the court system, but also the leverage that comes from having members from a wide variety of constituencies. Moreover, they may be found to be more appropriate review vehicles than the state supreme court, given that the Court might ultimately be asked to rule on the sufficiency of the state's procedures under *Turner* due-process standards.

In such states, indeed, the state supreme court might find it appropriate to formally ask the access-to-justice commission to work with the state administrative office of the courts to conduct such a comprehensive *Turner* review of key case types for the self-represented, with a particular focus on those in which the stake for the litigants is greatest, such as loss of home or family integrity. In states without a commission, the court might find it appropriate to create a special body, one which might indeed evolve into a commission.

Conclusion

Turner v. Rogers may turn out to be a highly significant decision for the day-to-day operations of the courts, one that plays a major role in fulfilling the core promise of courts as institutions that offer access to justice for all. Court leaders and staff at all levels have the opportunity to participate in giving life and meaning to this vision and these values.

RESOURCES

Alaska Court System. *Self-Help Center: Family Law*. www.courts.alaska.gov/shcabout.htm

American Bar Association. *Resource Center for Access to Justice Initiatives*. www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html

Broccolina, F., and R. Zorza (2008). "Ensuring Access to Justice in Tough Economic Times," 92 *Judicature* 124.

Minnesota Judicial Branch. *Self-Help Center*. www.mncourts.gov/selfhelp/?page=2861

Self-Represented Litigation Network (2008a). "Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources," 2nd ed. National Center for State Courts, Williamsburg, Va. www.selfhelpsupport.org/library/item.223550-2008_edition_of_Best_Practices_in_CourtBased_Programs_for_the_SelfRepresent (requires a free membership for access)

— (2008b). "Court Leadership Package." National Center for State Courts, Williamsburg, Va. www.selfhelpsupport.org/library/folder.208521-2008_Court_Solutions_Conference (requires a free membership for access)

— (2008c). "Handling Cases Involving Self-Represented Litigants: A National Bench Guide for Judges." National Center for State Courts, Williamsburg, Va. www.selfhelpsupport.org/library/folder.177582-National_Bench_Guide (requires a free membership for access)

Self-Represented Litigation Network, National Center for State Courts, and National Judicial College (2007). "Curriculum Resource Materials: Access to Justice in the Courtroom for the Self-Represented." www.selfhelpsupport.org/library/folder.169512-CURRICULUM_RESOURCE_MATERIALS (requires a free membership for access)

Turner v. Rogers, 564 U.S. – (2011).

Zorza, R. (2012). "A New Day for Judges and the Self-Represented: The Further Implications of *Turner v. Rogers* in More Challenging Situations," 51:1 *Judges' Journal* 36.

— (2011a). "Access to Justice: The Emerging Consensus and Some Questions and Implications," 95 *Judicature* 156.

— (2011b). "A New Day for Judges and the Self-Represented: The Implications of *Turner v. Rogers*," 50:4 *Judges' Journal* 16.

Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants

Editor's Note: *The following text is the product of the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges.*

Judicial officers should use the following protocol during hearings involving pro se litigants:

1. Verify that the party is not an attorney, understands that he or she is entitled to be represented by an attorney and chooses to proceed pro se without an attorney.

2. Explain the process. "I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question."

3. Explain the elements. For example, in Order for Protection (OFP) cases: "Petitioner is requesting an Order for Protection. An Order for Protection will be issued if Petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm or that she was reasonably in fear of physical harm as a result of the conduct or statements of the Respondent. Petitioner is requesting a Harassment Restraining Order. A Harassment Restraining Order will be issued if Petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the Respondent that are intended to adversely affect the safety, security, or the privacy of the Petitioner."

4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in OFP cases: "Because the Petitioner has requested this order, she has to present evidence to show that a court order is needed. I will not consider any of the statements in the Petition that has been filed in this matter. I can only consider evidence that is presented in court today. If Petitioner is unable to present evidence that an order is needed, then I must dismiss this action."

5. Explain the kind of evidence that may be presented. "Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court reporter and then must be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence."

6. Explain the limits on the kind of evidence that can be considered. "I have to make my decision based upon the evidence that is admissible under the Rules of Evidence for courts in Minnesota. If either party starts to present evidence that is not admissible, I may stop you and tell you that I cannot consider that type of evidence. Some examples of inadmissible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as a witness: hearsay could be an oral statement that was overheard or a written statement such as a letter or an affidavit. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case."

7. Ask both parties whether they understand the process and the procedure.

8. Non-attorney advocates will be permitted to sit at counsel table with either party and provide support but will not be permitted to argue on behalf of a party or to question witnesses.

9. Questioning by the judge should be directed at obtaining general information to avoid the appearance of advocacy. For example, in OFP cases: "Tell me why you believe you need an order for protection. If you have specific incidents you want to tell me about, start with the most recent incident first and tell me when it happened, where it happened, who was present, and what happened."

10. Whenever possible the matter should be decided and the order prepared immediately upon the conclusion of the hearing so it may be served on the parties.

Note: Idaho has developed a draft protocol for its trial judges derived from the Minnesota protocol.

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Supreme Court
State of North Carolina
Raleigh

CHAMBERS OF
I. BEVERLY LAKE, JR.
CHIEF JUSTICE

BOX 1841
ZIP CODE 27602
TEL. (919) 733-3711

Memorandum

To: **All Employees of the Administrative Office of the Courts**

From: **Chief Justice I. Beverly Lake, Jr.** IBL

Re: **Guidelines for Providing Legal Information to the Public**

Date: **September 1, 2004**

In August 2003, I appointed an ad hoc committee of the State Judicial Council to review guidelines for court staff who provide legal information to the public. The Committee consisted of Judge Beth Keever, Clerk of Superior Court Tim Spear, Magistrate Jean Massengill, and Public Defender Angus Thompson. This Committee reviewed information from the Institute of Government, articles by a court consultant, and court rules from other states. After dedicated efforts, which are sincerely appreciated, the Committee recommended the following guidelines, which the Supreme Court adopted in late June of this year.

These guidelines are being sent to all employees of the Administrative Office of the Courts, and you are asked to use them as a guide in working with the public. The Judicial Branch is blessed with dedicated and public service minded employees, and these guidelines were developed to assist you as you go about your daily work.

I again thank the members of the ad hoc committee who worked diligently to offer the Court these well-researched guidelines.

IN THE SUPREME COURT OF NORTH CAROLINA

Order

Adopting Guidelines for Court Staff Providing Legal Information to the Public

Pursuant to the recommendations of a subcommittee of the North Carolina Judicial Council, the following guidelines are issued for the benefit of all court staff who provide legal information to the public.

I. **Purpose:** The purpose of these guidelines is to assist court staff in communicating with individual court users without practicing law. The guidelines are intended to enable court staff to provide the best service possible to individuals within the limits of the individual staff member's responsibility. The guidelines are not intended to restrict powers of court staff otherwise provided by statute or rule. The guidelines are not intended to list all assistance that can be provided. The guidelines recognize that the best service the court staff may provide in many proceedings is advising an individual to seek the assistance of an attorney.

II. **Impartiality:** Court staff shall remain impartial and may not provide or withhold assistance for the purpose of giving one party an advantage over another.

III. **Authorized Information and Assistance:** Court staff may do all of the following:

A. Provide public information contained in any of the following:

1. Dockets or Calendars
2. Case files
3. Indexes

B. Provide a copy of, or recite, any of the following:

1. State and local court rules
2. Court procedures
3. Applicable fees and costs

C. Inform an individual where to find statutes and rules without advising whether a particular statute or rule is applicable.

D. Identify and provide applicable forms and written instructions without providing recommendations as to any specific course of action.

E. Answer questions about how to complete forms, such as where to write in particular types of information, but not questions about how the individual should phrase his or her responses on the forms.

F. Define terms commonly used in court processes.

G. Provide phone numbers for lawyer referral services, local attorney rosters, or other assistance services, such as the AOC website and other attorney association websites, known to the court staff.

H. Provide appropriate aids and services for individuals with disabilities to the extent required by the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq*.

IV. **Unauthorized Information and Assistance:** Court staff may not do any of the following:

A. Provide legal advice or recommend a specific course of action for an individual.

B. Apply the law to the facts of a given case, or give directions regarding how an individual should respond or behave in any aspect of the legal process.

C. Recommend whether to file a complaint or other pleading.

D. Recommend phrasing for or specific content of pleadings.

E. Fill in a form, unless required by the Americans With Disabilities Act of 1990.

F. Recommend specific persons against whom to file complaints or other pleadings.

G. Recommend specific types of claims or arguments to assert in pleadings or at trial.

H. Recommend what types or amounts of damages to seek or the specific individuals from whom to seek damages.

I. Recommend specific questions to ask witnesses or parties.

J. Recommend specific techniques for presenting evidence in pleadings or at trial.

K. Recommend which objections to raise regarding an opponent's pleadings or motions at trial or when and how to raise them.

L. Recommend when or whether an individual should request or oppose a continuance.

M. Recommend when or whether an individual should settle a dispute.

N. Recommend whether an individual should appeal a judge's decision.

O. Interpret the meaning or implications of statutes or appellate court decisions as they might apply to an individual case.

P. Perform legal research.

Q. Predict the outcome of a particular case, strategy, or action.

Adopted by the Court in Conference this the 24th day of June 2004. These guidelines shall be delivered to each employee of the Administrative Office of the Courts at the earliest practical and economical mailing by the Administrative Office of the Courts.

Brady, J.
For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 1st day of September 2004.

Christie Speir Cameron
Clerk of the Supreme Court

TAB 08-

Post-Appointment Issues

LIFE AFTER THE APPOINTMENT

UNC School of Government
May 1, 2015
Chapel Hill, NC

WHO AM I

Co-owner of Empowering Lives Guardianship Services LLC

NC Certified Guardian, NC Licensed Recreational Therapist and National Therapeutic Recreation Specialist

25+ years with adults who have an active diagnosis of mental health, developmental disability and substance abuse issues

Guardianship experience dating back to 1999, fulltime since 2006

Employed by LME/MCO as Guardian Representative prior to the inception of ELGS

ARE YOU LOOKING FOR ANYTHING SPECIFIC?

POST APPOINTMENT CONCERNS/ISSUES:

Guardian of the Person Letters Read:

"The Guardian of the Person is fully authorized and entitled under the laws of North Carolina to have custody, care and control of the ward, **but has no authority to receive, manage or administer the property, estate or business affairs.**

- Insurance companies will not divulge benefits information because the guardian of the person cannot "manage business affairs. Therefore GOP cannot secure medical services.
- Banks/Retirement Companies will not divulge financial information needed to secure Medicaid, Medicare, Food stamps, or Rental Assistance, because the guardian of the person cannot "manage business affairs.

POST APPOINTMENT CONCERNS/ISSUES… SPECIFIC TO SOCIAL SECURITY AND THE APPOINTMENT LETTERS

- GOP is no longer permitted to sign applications for disability, the Ward must sign themselves
- Social Security Administration or Medicare will only speak to the Representative Payee or the Person (at times)
- Representative Payees hold all the cards, because wards want money and that person can sabotage treatment goals. If they are not on board.
- Social Security only holds the Guardianship Letters at the local office, main call line cannot assist Guardian of the Person

POST APPOINTMENT CONCERNS/ISSUES:

- Communication Domain:
  - Not everyone has a phone
  - Not everyone has an address
  - Not everyone reads and writes
  - Not everyone stays in place to be seen
- Nutritional Domain:
  - Guardians cannot change the diet of an individual, a doctor must order a change when in a licensed facility
  - Can they follow a prescribed diet and will they, are two different things (cholesterol)
- Personal Care Domain:
  - Individuals have the right to refuse care – this includes showers, baths, brushing their teeth, comb their hair, make their bed, iron their cloths
- Personal Safety Domain:
  - There are no teeth to this law, you cannot force an individual to remain safe or follow rules

- Medical Domain:
  - Guardians cannot force people to take medications
  - People have the right to refuse care – including hospice
  - Having a Guardian does not speed up hospital discharge
  - Guardians cannot force treatment providers to provide treatment
  - Guardians cannot sign for sterilization without Clerks of Court's Order – MD try to force this issue
  - Medical Professionals only want to acknowledge the Guardianship when it is in their best interest -- letters get lost between floors (Bethesda Center) -- MDs don't understand why family wasn't appointed and want to talk to family not guardian or to question guardian about why they were appointed.
  - Hospitals feel like they can trump guardians by avoiding them, not returning phone calls
  - Guardians cannot sign people into treatment if the individual does not meet medical necessity
  - Guardians cannot sign individuals in substance abuse treatment unless the individual goes voluntarily

- Residential Domain:
  - Guardians cannot force people to live in facilities
  - People share rooms in almost all facilities, except Central Regional Hospital
  - Some individuals are institutionalized and only want to live at the State Hospital
    - That's all they know – it's home
    - Medically you can do things at the hospital that you can't do in the community
    - At CRH you can have your own room, your own bathroom, a job and a significant other
  - Placement difficulties due to DOJ settlement and additional PASRR requirements (Pre-Admission Screening and Resident Review)
- Social Domain:
  - Supports can be positive or negative – do they know the difference?
  - Legal Custody vs Emotional Custody
  - Dating, Loving, Marriage, Sex and Children

- Financial Domain:
  - Guardianship is not necessary to help someone manage their money
  - Every Guardian does not handle money
  - Limited financial information – who is Representative Payee, where is the money now, how much do we have to work with?
- General :
  - Lack of information - SSN, Birthdate, Family
  - Lack of funding: Social Services Block Grants (SSBG) from the Federal Government have decreased and corporate guardian alone have seen almost a 12% decrease in monthly billing.
- Civil Domain:
  - Some of our individuals are so well connected, that we spend a great amount of time dealing with legal issues because we are being sued.
  - Individuals with children in the juvenile system or custody require the GOP to attend all hearings and often order GOP beyond the scope of their responsibilities

ETHICAL ISSUES:

Quantity vs Quality? (DO/TS)

Who do you protect, the parent or the child? Being put in the middle of child custody matters.

Dignity of Risk vs Protection?

Privacy of the individual and their home vs restrictive measures (TF)?

Family vs No Family

Full Guardianship vs Limited Guardianship

RESOURCES TO DIVERT GUARDIANSHIP

- Power of Attorney
  - Health
  - Financial
  - Durable
- Representative Payee – if no other financial resources than Federal Funds
- Advanced Directives
  - Health
  - Mental Health
- WRAP http://www.mentalhealthrecovery.com
  http://www.youtube.com/watch?v=0BK_jLMToeM&feature=youtu.be/
- Crisis Plan – http://crisissolutionsnc.org/
- Trusting Relationship with others
- Mental Health First Aid for Adults and Teenagers
- Crisis Intervention Training

QUESTIONS? COMMENTS?

Mental Health First Aid USA

Mental Health First Aid is a public education program that introduces participants to risk factors and warning signs of mental illnesses, builds understanding of their impact, and overviews common supports. This 8-hour course uses role-playing and simulations to demonstrate how to offer initial help in a mental health crisis and connect persons to the appropriate professional, peer, social, and self-help care. The program also teaches the common risk factors and warning signs of specific types of illnesses, like anxiety, depression, substance use, bipolar disorder, eating disorders, and schizophrenia.

Mental Health First Aid is included on the Substance Abuse and Mental Health Services Administration's National Registry of Evidence-based Programs and Practices (NREPP).

COURSE DETAILS

Mental Health First Aid teaches participants a five-step action plan, ALGEE, to support someone developing signs and symptoms of a mental illness or in an emotional crisis:

- ***A***ssess for risk of suicide or harm
- ***L***isten nonjudgmentally
- ***G***ive reassurance and information
- ***E***ncourage appropriate professional help
- ***E***ncourage self-help and other support strategies

Like CPR, Mental Health First Aid prepares participants to interact with a person in crisis and connect the person with help. First Aiders do not take on the role of professionals — they do not diagnose or provide any counseling or therapy. Instead, the program offers concrete tools and answers key questions, like "what do I do?" and "where can someone find help?" Certified Mental Health First Aid instructors provide a list of community healthcare providers and national resources, support groups, and online tools for mental health and addictions treatment and support. All trainees receive a program manual to compliment the course material.

PROGRAM GROWTH

Mental Health First Aid was introduced in the U.S. in 2008 and, to date, more than 100,000 people from all 50 states, the District of Columbia, and Puerto Rico have taken the course. The course is offered to a variety of audiences, including hospital staff, employers and business leaders, faith communities, and law enforcement . In 2012, a Spanish adaptation of the course was released.

In 2012, Youth Mental Health First Aid was introduced to prepare trainees to help youth ages 12-18 that may be developing or experiencing a mental health challenge. The youth course is most appropriate for adults who regularly interact with youth, such as teachers or coaches, but may also be appropriate for youth who are 16 years and older.

To find a course or contact an instructor in your area, visit ***www.MentalHealthFirstAid.org***.

Mental Health First Aid USA is coordinated by the National Council for Behavioral Health, the Maryland Department of Health and Mental Hygiene, and the Missouri Department of Mental Health.

TAB 09

Presiding without Bias

Race & Ethnic Fairness in the Courts

Implicit Bias

A Primer for Courts

Jerry Kang

Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts

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ABOUT THE PRIMER

This Primer was produced as part of the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts. The Campaign seeks to mobilize the significant expertise, experience, and commitment of state court judges and court officers to ensure both the perception and reality of racial and ethnic fairness across the nation's state courts. The Campaign is funded by the Open Society Institute, the State Justice Institute, and the National Center for State Courts. Points of view or opinions expressed in the Primer are those of the author and do not represent the official position of the funding agencies. To learn more about the Campaign, visit www.ncsconline.org/ref.

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Schemas and Implicit Cognitions (or "mental shortcuts")

Stop for a moment and consider what bombards your senses every day. Think about everything you see, both still and moving, with all their color, detail, and depth. Think about what you hear in the background, perhaps a song on the radio, as you decode lyrics and musical notes. Think about touch, smell, and even taste. And while all that's happening, you might be walking or driving down the street, avoiding pedestrians and cars, chewing gum, digesting your breakfast, flipping through email on your smartphone. How does your brain do all this simultaneously?

It does so by processing through schemas, which are templates of knowledge that help us organize specific examples into broader categories. When we see, for example, something with a flat seat, a back, and some legs, we recognize it as a "chair." Regardless of whether it is plush or wooden, with wheels or bolted down, we know what to do with an object that fits into the category "chair." Without spending a lot of mental energy, we simply sit. Of course, if for some reason we have to study the chair carefully--because we like the style or think it might collapse--we can and will do so. But typically, we just sit down.

We have schemas not only for objects, but also processes, such as how to order food at a restaurant. Without much explanation, we know what it means when a smiling person hands us laminated paper with detailed descriptions of food and prices. Even when we land in a foreign airport, we know how to follow the crazy mess of arrows and baggage icons toward ground transportation.

These schemas are helpful because they allow us to operate without expending valuable mental resources. In fact, unless something goes wrong, these thoughts take place automatically without our awareness or conscious direction. In this way, most cognitions are implicit.

Implicit Social Cognitions (or "thoughts about people you didn't know you had")

What is interesting is that schemas apply not only to objects (e.g., "chairs") or behaviors (e.g., "ordering food") but also to human beings (e.g., "the elderly"). We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail--such as the elderly--we will not raise our guard. If we think that another category is foreign--such as Asians--we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias"

includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities. Do we, for instance, associate aggressiveness with Black men, such that we see them as more likely to have started the fight than to have responded in self-defense? Or have we already internalized the lessons of Martin Luther King, Jr. and navigate life in a perfectly "colorblind" (or gender-blind, ethnicity-blind, class-blind, etc.) way?

Asking about Bias (or "it's murky in here")

One way to find out about implicit bias is simply to ask people. However, in a post-civil rights environment, it has become much less useful to ask explicit questions on sensitive topics. We run into a "willing and able" problem.

First, people may not be willing to tell pollsters and researchers what they really feel. They may be chilled by an air of political correctness.

Second, and more important, people may not know what is inside their heads. Indeed, a wealth of cognitive psychology has demonstrated that we are lousy at introspection. For example, slight environmental changes alter our judgments and behavior without our realizing. If the room smells of Lysol, people eat more neatly. People holding a warm cup of coffee (versus a cold cup) ascribe warmer (versus cooler) personality traits to a stranger described in a vignette. The experiments go on and on. And recall that by definition, implicit biases are those that we carry without awareness or conscious direction. So how do we know whether we are being biased or fair-and-square?

Implicit measurement devices (or "don't tell me how much you weigh, just get on the scale")

In response, social and cognitive psychologists with neuroscientists have tried to develop instruments that measure stereotypes and attitudes, without having to rely on potentially untrustworthy self-reports. Some instruments have been linguistic, asking folks to write out sentences to describe a certain scene from a newspaper article. It turns out that if someone engages in stereotypical behavior, we just describe what happened. If it is counter-typical, we feel a need to explain what happened. (Von Hippel 1997; Sekaquaptewa 2003).

Others are physiological, measuring how much we sweat, how our blood pressure changes, or even which regions of our brain light up on an fMRI (functional magnetic resonance imaging) scan. (Phelps 2000).

Still other techniques borrow from marketers. For instance, conjoint analysis asks people to give an overall evaluation to slightly different product bundles (e.g., how do you compare a 17" screen laptop with 2GB memory and 3 USB ports, versus a 15" laptop with 3 GB of memory and 2 USB ports). By offering multiple rounds of choices, one can get a measure of how important each feature is to a person even if she had no clue to the question "How much would you pay for an extra USB port?" Recently, social cognitionists have adapted this methodology by creating "bundles" that include demographic attributes. For instance, how

would you rank a job with the title Assistant Manager that paid $160,000 in Miami working for Ms. Smith, as compared to another job with the title Vice President that paid $150,000 in Chicago for Mr. Jones? (Caruso 2009).

Scientists have been endlessly creative, but so far, the most widely accepted instruments have used reaction times--some variant of which has been used for over a century to study psychological phenomena. These instruments draw on the basic insight that any two concepts that are closely associated in our minds should be easier to sort together. If you hear the word "moon," and I then ask you to think of a laundry detergent, then "Tide" might come more quickly to mind. If the word "RED" is painted in the color red, we will be faster in stating its color than the case when the word "GREEN" is painted in red.

Although there are various reaction time measures, the most thoroughly tested one is the Implicit Association Test (IAT). It is a sort of video game you play, typically on a computer, where you are asked to sort categories of pictures and words. For example, in the Black-White race attitude test, you sort pictures of European American faces and African American faces, Good words and Bad words in front of a computer. It turns out that most of us respond more quickly when the European American face and Good words are assigned to the same key (and African American face and Bad words are assigned to the other key), as compared to when the European American face and Bad words are assigned to the same key (and African American face and Good words are assigned to the other key). This average time differential is the measure of implicit bias. [If the description is hard to follow, try an IAT yourself at Project Implicit.]

Pervasive implicit bias (or "it ain't no accident")

It may seem silly to measure bias by playing a sorting game (i.e. the IAT). But, a decade of research using the IAT reveals pervasive reaction time differences in every country tested, in the direction consistent with the general social hierarchies: German over Turk (in Germany), Japanese over Korean (for Japanese), White over Black, men over women (on the stereotype of "career" versus "family"), light-skinned over dark skin, youth over elderly, straight over gay, etc. These time differentials, which are taken to be a measure of implicit bias, are systematic and pervasive. They are statistically significant and not due to random chance variations in measurements.

These pervasive results do not mean that everyone has the exact same bias scores. Instead, there is wide variability among individuals. Further, the social category you belong to can influence what sorts of biases you are likely to have. For example, although most Whites (and Asians, Latinos, and American Indians) show an implicit attitude in favor of Whites over Blacks, African Americans show no such preference on average. (This means, of course, that about half of African Americans do prefer Whites, but the other half prefer Blacks.)

Interestingly, implicit biases are dissociated from explicit biases. In other words, they are related to but differ sometimes substantially from explicit biases--those stereotypes and attitudes that we expressly self-report on surveys. The best understanding is that implicit and explicit biases are related but different mental constructs. Neither kind should be viewed as the solely "accurate" or "authentic" measure of bias. Both measures tell us something important.

Real-world consequences (or "why should we care?")

All these scientific measures are intellectually interesting, but lawyers care most about real-world consequences. Do these measures of implicit bias predict an individual's behaviors or decisions? Do milliseconds really matter>? (Chugh 2004). If, for example, well-intentioned people committed to being "fair and square" are not influenced by these implicit biases, then who cares about silly video game results?

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decisionmaking in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias--how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).

With any new scientific field, there remain questions and criticisms--sometimes strident. (Arkes & Tetlock 2004; Mitchell & Tetlock 2006). And on-the-merits skepticism should be encouraged as the hallmark of good, rigorous science. But most scientists studying implicit bias find the accumulating evidence persuasive. For instance, a recent meta-analysis of 122 research reports, involving a total of14,900 subjects, revealed that in the sensitive domains of stereotyping and prejudice, implicit bias IAT scores better predict behavior than explicit self-reports. (Greenwald et al. 2009).

And again, even though much of the recent research focus is on the IAT, other instruments and experimental methods have corroborated the existence of implicit biases with real world consequences. For example, a few studies have demonstrated that criminal defendants with more Afro-centric facial features receive in certain contexts more severe criminal punishment (Banks et al. 2006; Blair 2004).

Malleability (or "is there any good news?")

The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit. Fortunately, there is evidence

that implicit biases are malleable and can be changed.

- An individual's motivation to be fair does matter. But we must first believe that there's a potential problem before we try to fix it.
- The environment seems to matter. Social contact across social groups seems to have a positive effect not only on explicit attitudes but also implicit ones.
- Third, environmental exposure to countertypical exemplars who function as "debiasing agents" seems to decrease our bias.
    - In one study, a mental imagery exercise of imagining a professional business woman (versus a Caribbean vacation) decreased implicit stereotypes of women. (Blair et al. 2001).
    - Exposure to "positive" exemplars, such as Tiger Woods and Martin Luther King in a history questionnaire, decreased implicit bias against Blacks. (Dasgupta & Greenwald 2001).
    - Contact with female professors and deans decreased implicit bias against women for college-aged women. (Dasgupta & Asgari 2004).
- Fourth, various procedural changes can disrupt the link between implicit bias and discriminatory behavior.
    - In a simple example, orchestras started using a blind screen in auditioning new musicians; afterwards women had much greater success. (Goldin & Rouse 2000).
    - In another example, by committing beforehand to merit criteria (is book smarts or street smarts more important?), there was less gender discrimination in hiring a police chief. (Uhlmann & Cohen 2005).
    - In order to check against bias in any particular situation, we must often recognize that race, gender, sexual orientation, and other social categories may be influencing decisionmaking. This recognition is the opposite of various forms of "blindness" (e.g., color-blindness).

In outlining these findings of malleability, we do not mean to be Pollyanish. For example, mere social contact is not a panacea since psychologists have emphasized that certain conditions are important to decreasing prejudice (e.g., interaction on equal terms; repeated, non-trivial cooperation). Also, fleeting exposure to countertypical exemplars may be drowned out by repeated exposure to more typical stereotypes from the media (Kang 2005).

Even if we are skeptical, the bottom line is that there's no justification for throwing our hands up in resignation. Certainly the science doesn't require us to. Although the task is challenging, we can make real improvements in our goal toward justice and fairness.

The big picture (or "what it means to be a faithful steward of the judicial system")

It's important to keep an eye on the big picture. The focus on implicit bias does not address the existence and impact of explicit bias--the stereotypes and attitudes that folks recognize and embrace. Also, the past has an inertia that has not dissipated. Even if all explicit and implicit biases were wiped away through some magical wand, life today would still bear the burdens of an unjust yesterday. That said, as careful stewards of the justice system, we

should still strive to take all forms of bias seriously, including implicit bias.

After all, Americans view the court system as the single institution that is most unbiased, impartial, fair, and just. Yet, a typical trial courtroom setting mixes together many people, often strangers, from different social backgrounds, in intense, stressful, emotional, and sometimes hostile contexts. In such environments, a complex jumble of implicit and explicit biases will inevitably be at play. It is the primary responsibility of the judge and other court staff to manage this complex and bias-rich social situation to the end that fairness and justice be done--and be seen to be done.

Glossary

Note: Many of these definitions draw from Jerry Kang & Kristin Lane, A Future History of Law and Implicit Social Cognition (unpublished manuscript 2009)

Attitude

An attitude is "an association between a given object and a given evaluative category." R.H. Fazio, et al., Attitude accessibility, attitude-behavior consistency, and the strength of the object-evaluation association, 18 J. EXPERIMENTAL SOCIAL PSYCHOLOGY 339, 341 (1982). Evaluative categories are either positive or negative, and as such, attitudes reflect what we like and dislike, favor and disfavor, approach and avoid. See also stereotype.

Behavioral realism

A school of thought within legal scholarship that calls for more accurate and realistic models of human decision-making and behavior to be incorporated into law and policy. It involves a three step process:

First, identify advances in the mind and behavioral sciences that provide a more accurate model of human cognition and behavior.

Second, compare that new model with the latent theories of human behavior and decision-making embedded within the law. These latent theories typically reflect "common sense" based on naïve psychological theories.

Third, when the new model and the latent theories are discrepant, ask lawmakers and legal institutions to account for this disparity. An accounting requires either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of "the prudential, economic, political, or religious reasons for retaining a less accurate and outdated view." Kristin Lane, Jerry Kang, & Mahzarin Banaji, Implicit Social Cognition and the Law, 3 ANNU. REV. LAW SOC. SCI. 19.1-19.25 (2007)

Dissociation

Dissociation is the gap between explicit and implicit biases. Typically, implicit biases are larger, as measured in standardized units, than explicit biases. Often, our explicit biases may be close to zero even though our implicit biases are larger.

There seems to be some moderate-strength relation between explicit and implicit biases. See Wilhelm Hofmann, A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures, 31 PERSONALITY & SOC. PSYCH. BULL. 1369 (2005) (reporting mean population correlation r=0.24 after analyzing 126 correlations). Most scientists reject the idea that implicit biases are the only "true" or "authentic" measure; both explicit and implicit biases contribute to a full understanding of bias.

Explicit

Explicit means that we are aware that we have a particular thought or feeling. The term sometimes also connotes that we have an accurate understanding of the source of that thought or feeling. Finally, the term often connotes conscious endorsement of the thought or feeling. For example, if one has an explicitly positive attitude toward chocolate, then one has a positive attitude, knows that one has a positive attitude, and consciously endorses and celebrates that preference. See also implicit.

Implicit

Implicit means that we are either unaware of or mistaken about the source of the thought or feeling. R. Zajonc, Feeling and thinking: Preferences need no inferences, 35 AMERICAN PSYCHOLOGIST 151 (1980). If we are unaware of a thought or feeling, then we cannot report it when asked. See also explicit.

Implicit Association Test

The IAT requires participants to classify rapidly individual stimuli into one of four distinct categories using only two responses (for example, in a the traditional computerized IAT, participants might respond using only the "E" key on the left side of the keyboard, or "I" on the right side). For instance, in an age attitude IAT, there are two social categories, YOUNG and OLD, and two attitudinal categories, GOOD and BAD. YOUNG and OLD might be represented by black-and-white photographs of the faces of young and old people. GOOD and BAD could be represented by words that are easily identified as being linked to positive or negative affect, such as "joy" or "agony". A person with a negative implicit attitude toward OLD would be expected to go more quickly when OLD and BAD share one key, and YOUNG and GOOD the other, than when the pairings of good and bad are switched.

The IAT was invented by Anthony Greenwald and colleagues in the mid 1990s. Project Implicit, which allows individuals to take these tests online, is maintained by Anthony Greenwald (Washington), Mahzarin Banaji (Harvard), and Brian Nosek (Virginia).

Implicit Attitudes

"Implicit attitudes are introspectively unidentified (or inaccurately identified) traces of past experience that mediate favorable or unfavorable feeling, thought, or action toward social objects." Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit attitudes and may not endorse them upon self-reflection. See also attitude; implicit.

Implicit Biases

A bias is a departure from some point that has been marked as "neutral." Biases in implicit stereotypes and implicit attitudes are called "implicit biases."

Implicit Stereotypes

"Implicit stereotypes are the introspectively unidentified (or inaccurately identified) traces of past experience that mediate attributions of qualities to members of a social category" Anthony Greenwald & Mahzarin Banaji, Implicit social cognition: attitudes, self-esteem, and stereotypes, 102 Psychol. Rev. 4, 8 (1995). Generally, we are unaware of our implicit stereotypes and may not endorse them upon self-reflection. See also stereotype; implicit.

Implicit Social Cognitions

Social cognitions are stereotypes and attitudes about social categories (e.g., Whites, youths, women). Implicit social cognitions are implicit stereotypes and implicit attitudes about social categories.

Stereotype

A stereotype is an association between a given object and a specific attribute. An example is "Norwegians are tall." Stereotypes may support an overall attitude. For instance, if one likes tall people and Norwegians are tall, it is likely that this attribute will contribute toward a positive orientation toward Norwegians. See also attitude.

Validities

To decide whether some new instrument and findings are valid, scientists often look for various validities, such as statistical conclusion validity, internal validity, construct validity, and predictive validity.

- Statistical conclusion validity asks whether the correlation is found between independent and dependent variables have been correctly computed.
- Internal validity examines whether in addition to correlation, there has been a demonstration of causation. In particular, could there be potential confounds that produced the correlation?
- Construct validity examines whether the concrete observables (the scores registered by some instrument) actually represent the abstract mental construct that we are interested in. As applied to the IAT, one could ask whether the test actually measures the strength of mental associations held by an individual between the social category and an attitude or stereotype
- Predictive validity examines whether some test predicts behavior, for example, in the form of evaluation, judgment, physical movement or response. If predictive validity is demonstrated in realistic settings, there is greater reason to take the measures seriously.

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TAB 10

Mock Hearing

EXHIBITS

PETITIONER EXHIBIT A

STATE OF NORTH CAROLINA, COUNTY OF MARSHALL

AFFIDAVIT

I, Ray Tucker, being first duly sworn, do hereby state as follows:

1. I am the brother of Sam Tucker.
2. My brother, Sam Tucker, is 25 years old.
3. My brother is bipolar and has severe anxiety.
4. I have not been able to see my brother for more than a few minutes at a time since he met his girlfriend six months ago.
5. In the past, he has hit rock bottom. He will be very depressed and doesn't eat, has no energy and can't focus. He won't get out of bed for days and is very irritable.
6. He will go from depression to mania very rapidly. During times of mania, he is very dangerous to himself and often puts himself at extreme risk. He goes out drinking, stays out all night and doesn't sleep for days.
7. He is easily exploited by others during both phases – depression and mania. He shuts out his family and people that love him in favor of people who will do what he wants.
8. When he takes his medication, he is happy, loving and stable.
9. Sam can't manage his affairs and needs a guardian. I want Sarah to be that guardian for our family.

_____

SWORN TO AND SUBSCRIBED before me
this ____ day of _____, 2014.

_____
NOTARY PUBLIC
SEAL
My commission expires: _____

RESPONDENT EXHIBIT A

Marshall Mental Health Center
3001 Brookshire Blvd.
Someplace, NC 28214

April 25, 2014

Re: Sam Tucker

To Whom It May Concern:

1. I am a physician duly licensed to practice medicine in the State of North Carolina.

2. I have provided medical care to Sam Tucker, a patient a Marshall Mental Health Center, since the time he was admitted as a patient on December 15, 2013.

3. Mr. Tucker is 25 years old.

4. Mr. Tucker's medical records indicate that he has bipolar disorder and severe anxiety. He was previously treated on an inpatient basis at Gaston Hospital and was discharged to this facility on December 15, 2013. During his stay Mr. Tucker's condition improved. He was prescribed medication, which stabilized his condition significantly.

5. Mr. Tucker's medical condition is such that he has only minor limitations with regard to his ability to perform daily activities. His medication causes drowsiness, nausea, vomiting, and trembling.

6. It is my professional opinion, based on a reasonable degree of medical certainty, that Ms. Tucker is competent to manage his own affairs and that he does not need the assistance of a guardian in order to do so.

7. If you need additional information, please page me at 704-693-2892.

_____
Dr. Don Draper

QUESTIONS

INTRODUCTION

FINDINGS OF FACT

CONCLUSIONS OF LAW

ORDER

Think about questions that you would ask to determine who will be the best guardian for Sam Tucker. Work as a group to write a list of questions that you would ask to help identify the best guardian for him.

_____
_____
_____
_____
_____
_____
_____

TAB 11

Notes

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