

Incompetency and Guardianship
NC Court of Appeals and NC Supreme Court
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February 4, 2014 – July 5, 2017

Rule 11

[In re Cranor](#) (COA15-541; May 17, 2016) (with dissent).

In this interesting but very fact-specific case, the trial court disciplined an attorney (the appellant) in its inherent authority and under Rule 11 and ordered her to pay substantial attorney fees to the opposing party and his attorney. The issues relate to the appellant's conduct in representing the respondent in an incompetency proceeding. The Court of Appeals reversed, with the majority holding that the record did not support the trial court's findings of fact regarding the bases for Rule 11 sanctions or sanctions imposed in its inherent authority. The dissenting judge opined in detail that, under the proper review standards for Rule 11 and disciplinary orders, the Court of Appeals should have affirmed the trial court's orders imposing discipline and awarding fees. (I will await a disposition by the Supreme Court, if there is one, to provide a more detailed summary of this case.) (*Summary by Ann Anderson*).

Action Abates at Death; Nunc Pro Tunc

[In re Thompson](#) (COA15-1380; Dec. 20, 2016)

The NC Court of Appeals vacated all orders entered after the death of a ward in an incompetency proceeding, noting that the matter abated upon the ward's death, rendering the matter moot. Since the trial court lacked subject matter jurisdiction once the matter abated, any orders entered after that point were invalid and of no effect. This was so even though the hearing was held while the ward was still alive, since the trial court's order was not actually entered until after the ward died.

This case involved a prior appeal in [In re Thompson](#), 232 N.C. App. 224 (2014) (summarized below), in which the NC Court of Appeals held an order incompetency order was invalid because it was improperly entered. The court remanded the case to the trial court for further proceedings. On remand, the clerk entered an order correcting its prior order *nunc pro tunc*. In this appeal, the court held that the clerk's failure to properly enter its prior order was a clerical error which the clerk had the authority to correct. Therefore, the clerk did not act improperly in entering its order *nunc pro tunc*, and because that order was the last one entered prior to the ward's death, it is the controlling order in the case.

(*Summary by Aly Chen*.)

Civ. Pro. Rule 58: Entry of Orders/Judgments

[In re Thompson](#), N.C. App. (Feb. 4, 2014)

Respondent adjudicated incompetent and guardian appointed. Clerk orally announced the ruling in court on both matters and signed and dated the order as well as letters appointing guardian.

Interested party filed motions challenging the incompetency and guardianship orders. Clerk denied the orders and entered sanctions against interested party. Interested party appealed. Trial court upheld the decision of the clerk. Interested party appealed to the NC Court of Appeals. NC Court of Appeals held:

- Regarding the Incompetency Order:
 - NC Rules of Civil Procedure apply to special proceedings. Under Rule 58, a judgment or order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.
 - The incompetency order failed to comply with Rule 58 because it lacked a stamp-file or other marking necessary to indicate a filing date and therefore was not entered. A signed and dated order is insufficient to be considered filed. An oral ruling announced in open court is not enforceable until it is entered.
 - Because the order was not entered, the appeal period did not run and therefore had not expired.
- Regarding the Guardianship Order:
 - Because the incompetency order was not entered, the clerk did not have the subject matter jurisdiction to appoint the guardian.
 - The appointment of the guardian and entry of sanctions against the appellant were without legal authority.

Appeal of Dismissal of Incompetency Proceeding

[In re Dippel](#) (COA16-54; Sept. 20, 2016).

Petitioner filed incompetency proceeding against his father, the respondent. The assistant clerk of court found there was not clear, cogent, and convincing evidence of the respondent's incompetency and entered an order dismissing the proceeding. The petitioner appealed the clerk's order. The superior court held that the petitioner lacked standing to appeal the order of the clerk as GS 35A-1115 did not provide a right of appeal from an order dismissing an incompetency proceeding. The NC Court of Appeals, applying GS 35A-1115 and GS 1-301.2, reversed the order of the superior court and held that an aggrieved party has the right to appeal from the clerk's order dismissing an incompetency proceeding. In this case, the court determined that the petitioner was an aggrieved party and could appeal from the clerk's order. However, the court did not provide any analysis as to how the petitioner is aggrieved by the clerk's order dismissing the incompetency proceeding against the respondent.

Jurisdiction between Ch. 50 Custody and Ch. 35A Guardianship of Minor

[Corbett v. Lynch](#) (COA16-221; Dec. 20, 2016).

Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.

Procedural History:

- August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court

- August 5, 2015, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.
- August 7, 2015, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, 2015, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

Holding: The NC Court of Appeals affirmed the district court’s dismissal of the custody action. The court held that the clerk of superior court had jurisdiction over the guardianship proceeding as the children had no “natural guardian” (no biological or adoptive parent). G.S. 35A-1221. The custody order did not divest the clerk of jurisdiction as G.S. 35A-1221(4) requires the application for guardianship to include a copy of any order awarding custody. **Guardianship of the person includes custody.** G.S. 35A-1241(a)(1) and -1202(10). NC statutes “provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person.” The clerk retains jurisdiction over the guardianship proceeding, including modifications. G.S. 35A-1203(b), (c). **The appointment of a general guardian in a Ch. 35A guardianship proceeding renders a Ch. 50 custody action moot.** The holding “does not affect any jurisdiction the district court may have to issue ex parte orders under Chapter 50 for temporary custody arrangements where the conditions of G.S. 50-13.5(d)(2)-(3) are met. (*Summary by Sara DePasquale.*)

Power of Attorney Executed After Adjudication of Incompetence
[O’Neal v. O’Neal \(COA16-1299; July 5, 2017\)](#)

The clerk adjudicated a ward incompetent upon a petition filed by the ward’s granddaughter and appointed the granddaughter as general guardian. After the adjudication and appointment of a guardian, the ward executed a durable power of attorney (POA) in favor of the guardian/granddaughter. The clerk subsequently removed the granddaughter as general guardian and appointed a new guardian of the estate. The new guardian of the estate revoked the POA and filed suit to declare the POA and three deeds conveyed by the granddaughter as agent under the POA void. The trial court entered an order declaring the POA and three deeds void *ab initio*. The NC Court of Appeals affirmed the trial court. The court held the subsequently executed POA was void as a matter of law. The ward’s incompetency to execute the POA was conclusively established, and not a rebuttable presumption, as to the granddaughter who was the petitioner in the incompetency proceeding and appointed guardian for the ward. The court noted that the holding poses no threat to subsequent good faith purchasers for value of real property as potential purchasers are on constructive notice of all information recorded in the land and court records, which includes an adjudication of incompetence in the special proceedings index.