



Legal and Legislative
Services Division

Peter E. Powell
Legal and Legislative Administrator

PO Box 2448, Raleigh, NC 27602
T 919 890-1300 F 919 890-1914

MEMORANDUM

TO: Clerks of Superior Court and Assistant and Deputy Clerks of Superior Court

FROM: Amy L. Funderburk, Associate Legal Counsel

DATE: December 30, 2010

RE: Corporate Entities Serving as Guardians

Due to changes in how mental health, substance abuse and developmental disability services are provided and paid for, several counties are receiving petitions from Local Management Entities (LMEs) seeking the removal of the LME as Guardian. In most of the cases where the LME has asked to be removed as guardian, the LME has asked to have a corporation appointed in its place. It appears that in several counties, these corporations were formed by former employees of the LME.

This memo will provide some information and guidance for Clerks who are contemplating the appointment of a corporation, rather than an individual, to serve as Guardian.

BACKGROUND

Who can be appointed as a Guardian?

Clerks have several options when choosing a guardian. They may choose “an adult individual, a corporation, or a disinterested public agent.”¹ A “disinterested public agent” is defined as “[t]he director or assistant directors of a local human services agency,” or “[a]n adult officer, agent, or employee of a State human services agency.”²

Previously, the county Health Department, Department of Social Services, and the LME have filled the role of disinterested public agent. The General Statutes state that “[t]he fact that a disinterested public agent is employed by a State or local human services agency that provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian. [emphasis added]”³ This law has not changed, but what has changed is the position of the NC Department of Health and Human Services (DHHS) regarding the ability of LMEs to serve as guardians. Currently, it is the position of DHHS that LMEs should not serve as guardians due to a conflict of interest.

Local Management Entities (LMEs)

¹ 35A-1213(a)

² 35A-1202(4)

³ 35A-1202(4)

In April 2005, the NC Department of Health and Human Services (DHHS) began a pilot project whereby Medicaid funded mental health, substance abuse and developmental disability services were managed in a five county area by the LME formerly known as Piedmont Behavioral Healthcare. In May 2009, DHHS chose to expand the pilot project throughout the state.⁴ Rather than providing services directly to clients, several (but not necessarily all) LMEs will begin managing payment for mental health, substance abuse, and developmental disability services given to their clients. This new service is similar to the service provided by a managed care or insurance company, where the company (LME) makes the decision as to what services and treatment for the ward they will pay for.

You will frequently hear these changes referred to as the “waiver” program. The term waiver is used because the program by which LMEs are allowed to act in this new capacity involves a waiver of specific federal Medicaid laws. The waiver allows for the payment or delivery of services through a managed care plan like the new plans being implemented by LMEs.⁵

Several Clerks have received Petitions from LMEs seeking removal from their appointment as Guardian because the LMEs believe that it would create a conflict for them to serve as the guardian while also making decisions as to what treatment services would be authorized for the ward. Despite the language in G.S. 35A-1202 that “... treatment to a ward does not disqualify that person from being appointed as guardian ...” The LME may make the claim that there is a conflict under G.S. 35A-1213(d), which states:

... if at the time of the appointment or any time subsequent thereto the disinterested public agent believes that his role or the role of his agency in relation to the ward is such that his service as guardian would constitute a conflict of interest, or if he knows of any other reason that his service as guardian may not be in the ward's best interest, he shall bring such matter to the attention of the clerk and seek the appointment of a different guardian...

It is ultimately the Clerk’s decision as to whether or not a conflict exists and whether a new Guardian should be appointed.

CORPORATE GUARDIANS

As set out in statute, a Clerk may appoint a corporation as Guardian “only if it is authorized by its charter to serve as a guardian or in similar fiduciary capacities. [emphasis added]”⁶

Chapter 35A has few additional requirements for corporations serving as Guardians, *however*, a corporation is subject to certain legal and reporting requirements in order to stay in good standing and to retain the ability to carry out business in the State of North Carolina. These requirements are business law requirements and are not found in the guardianship section of the statutes.

What is a Charter?

A charter includes those documents that are filed with the NC Secretary of State to form or create a corporation. While the guardianship statutes refer to a corporate charter, you will more frequently see the terms “articles of incorporation” or “articles of organization” used.

What Must a Corporation do to Remain “In Good Standing” with the Secretary of State?

⁴ <http://www.ncdhhs.gov/mhddsas/waiver/index.htm>

⁵ <http://www.ncdhhs.gov/mhddsas/waiver/nccounciddwaiverhandout%20-5-20-10.pdf>

⁶ 35A-1213(c)

To remain in good standing, at a minimum a corporation must file annual reports with the NC Secretary of State and pay yearly income taxes. If these things are not done, the NC Secretary of State may take action to administratively dissolve the corporation, or to suspend the corporation. If these actions have been taken against a corporation, they will be reflected on the website of the NC Secretary of State.

For a list of Frequently Asked Questions as to the requirements a corporation is subject to in NC, or for a more complete list of items that may lead to a company's administrative dissolution, you may review the Secretary of State's website at:

<http://www.secretary.state.nc.us/corporations/corpfaq.aspx>

Practical Considerations for the Clerk

How can the Clerk determine if the required language is in the Charter?

The best practice is to obtain a copy of the charter and to review it to determine if the required language is there. You may require the prospective guardian to provide you with a copy of the charter, or you can obtain one from the website of the NC Secretary of State.

How can the Clerk determine if the Corporation is in good standing with the Secretary of State?

The Clerk can determine if a corporation is in good standing by going to the website of the North Carolina Secretary of State's Office and accessing the corporation's filings. If the Secretary of State has taken action against a corporation, or given the corporation notice of any problems, there will be a filing online on the Secretary of State's website.

This process may be time consuming and requires the Clerk to learn how to access and interpret filings at the Secretary of State's Office. Therefore, some Clerks may prefer to require that each corporate guardian provide the Clerk with a "Certificate of Existence" at the time they are appointed and each year thereafter. At the time of the writing of this memo, a Certificate of Existence could be obtained from the Secretary of State for ten dollars if ordered online.

If a corporation is not in good standing, how may that impact the performance of its duties as Guardian?

If a corporation is not in good standing or has been administratively dissolved, the corporation's acts may be void and have no legal effect. In a situation where the corporation is not in good standing or has been dissolved, any action taken for a ward may be invalid.

Does the LME serving as a managed care entity and guardian create an automatic conflict?

While there has not been a decision from the Courts as to whether an LME serving as a managed care entity creates an automatic conflict that would prevent the LME from serving as a guardian, some disability groups have expressed the opinion that it does. However, G.S. 35A-1202 states that the "fact that a disinterested public agent is employed by a State or local human services agency that provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian."

Again, it is up to the Clerk to determine whether or not the LME has a conflict that would keep the LME from being appointed as guardian.

How are corporate guardians paid?

As with other Guardians, a corporate Guardian may receive a commission of up to 5% of the estate over the life of the estate. Further, our office has been informed that some LMEs are reimbursing the corporate guardian at a fixed rate in exchange for their service as Guardian. When determining whether to appoint a corporate guardian, the Clerk should determine if there is any conflict imputed to the new Guardian by this payment plan (if there is one in place). In other words, if you decide

that the LME has a conflict and cannot serve as guardian, before appointing a corporate guardian that is paid for by the LME, you should determine if that payment creates a new conflict.

If you decide to appoint a corporation as guardian, what do you need to determine as to that corporation?

The Clerk should first determine if the corporation is in good standing and should then determine if the charter of the corporation authorizes the corporation to act as guardian. *The requirements that the corporation be in good standing and be authorized by its charter to serve as a guardian are ongoing* so it is a good practice for the Clerk to verify each year that both of these requirements have been met.

What documents or websites can assist the clerk?

1. Corporate charter (also referred to as Articles of Incorporation) – This document may be accessed directly by you at the Secretary of State’s website, or you may require the prospective guardian to provide it.
2. Certificate of Existence – You may direct the prospective corporate guardian to provide you with a copy of this document. The document is available from the Secretary of State and is not free.
3. NC Secretary of State website - <http://www.secretary.state.nc.us/Corporations/> - This site may provide you with general information regarding the corporation including corporate filings such as the Articles of Incorporation.

Unauthorized Practice of Law

While a corporation may represent itself in a small claims case, it may not otherwise engage in the practice of law.⁷ The practice of law is defined as:

...performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation...⁸

Clerks should remain mindful that if a corporate guardian attempts to do those things that are defined in statute as the practice of law, the corporation may be practicing law without a license. The clerk should also require the corporation to be represented by counsel when appearing before the clerk.

If you have any questions about corporate guardians, please feel free to contact Legal and Legislative Services.

cc: John W. Smith, Director, North Carolina Administrative Office of the Courts (NCAOC)
Barbara Moore, Executive Director, Conference of Clerks of Superior Court

⁷ G.S. 84-5

⁸ G.S. 84-2.1