UNC SCHOOL OF GOVERNMENT

NORTH CAROLINA Judicial COLLEGE

Incompetency and Adult Guardianship for Clerks

January 22-24, 2014
UNC School of Government, Chapel Hill, NC

Wednesday, January 22

9:00-9:30 a.m. Check in

9:30 a.m. Welcome and Introductions
Meredith Smith

9:45 a.m. **Key Points of Procedure and Practice: Incompetency and Guardianship**
Meredith Smith, Assistant Professor of Public Law and Government, School of Government

10:15 a.m. Break

10:30 a.m. **Bias and Perspective**
Jim Drennan, Professor of Public Law and Government (part-time, retired), School of Government

12:00 p.m. Lunch (Dining Hall)

1:00 p.m. **Medical Conditions that Impair Capacity**
Michael "Mick" Hill, MD, Professor and Director of Inpatient Psychiatry Services,
UNC School of Medicine

2:00 p.m. Break

2:15 p.m. **Clinical Assessments of Functional Incapacity**
Mick Hill, MD

3:15 p.m. Break

3:30 p.m. **Capacity in Action**
Mitchell T. Heflin, MD, MHS, Associate Professor of Medicine, Department of Geriatrics, Duke University School of Medicine
Cornelia Poer, MSW, LCSW, Department of Geriatrics, Duke University School of Medicine

5:30 p.m. Adjourn

6:00 p.m. Dinner at City Kitchen, Chapel Hill

Thursday, January 23

9:00 a.m. **The Court's Role in Adult Guardianship Hearings: ABA and NCPJ Standards**
Judge Tamara Curry, Associate Judge of Probate, Charleston County, SC

10:15 a.m. Break

10:30 a.m. **Judicial Determinations of Capacity**
Judge Tamara Curry

11:15 a.m. **Evidence**
Meredith Smith

12:15 p.m. Lunch (Dining Hall)

1:15 p.m. **Role of the Guardian ad Litem**
Robin Strickland, Attorney at Law, Raleigh, NC

2:15 p.m. **Public Guardianship**
Kent Flowers, Director, Craven County Department of Social Services
Bobbie N. Redding, Managing Attorney, Cumberland County Department of Social Services
Ann Roberts, Adult Services Social Work Program Manager, Forsyth County Department of Social Services
Aimee Wall, Thomas Willis Lambeth Distinguished Chair in Public Policy, School of Government

3:30 p.m. Break

3:45 p.m. **Ethics and Ex Parte Communications**
Jim Drennan

5:00 p.m. Adjourn

Friday, January 24

9:00 a.m. **Post- Appointment Issues and Management of Wards**
Stacey Skradski, Member Manager, Empowering Lives Guardianship Services, LLC
Winston-Salem, NC

9:45 a.m. **Restoration**
Meredith Smith
Stacey Skradski
Mark Pegram, Clerk of Superior Court, Rockingham County, NC

10:45 a.m. Break

11:00 a.m. **Mock Hearing**
Meredith Smith

12:15 p.m. Roundtable Discussion and Q&A

12:30 p.m. Adjourn

CLE Credit

General Hours:	14.25
Ethics Hours:	1.25
Total CLE Hours:	**15.50**

Incompetency and Adult Guardianship for Clerks

January 22-24, 2014

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PROMOTING JUDICIAL ACCEPTANCE AND USE OF LIMITED GUARDIANSHIP

Lawrence A. Frolik*

I. INTRODUCTION

Guardianship comes within the special province of judges.[1] In the great majority of guardianship hearings, there is no jury.[2] The presiding judge is the sole arbiter of whether the alleged incapacitated person meets the legal standard of mental incapacity and whether that person would benefit from the appointment of a guardian.[3] If a guardian is appointed, the judge determines the type and extent of the powers granted to the guardian.[4] Of course, the judge is not simply free to follow his or her own instincts or desires, for the judge is bound to determine the facts carefully and apply the law faithfully. Still, as the saying has it, "reasonable persons can disagree," and the judge has some latitude in how he or she responds to the facts and circumstances that arise during the guardianship hearing. Within that zone of discretion, the judge may have a range or set of choices, any of which is defensible on legal and ethical grounds. No matter which course of action the judge takes, his or her

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 Professor of Law, University of Pittsburgh School of Law. B.A., University of Nebraska, 1966; J.D., Harvard Law School, 1969; LL.M., Harvard Law School, 1972. I want to extend special thanks to Frank Johns for his insights, comments and encouragement, to Melanie Irwin for her research efforts, and to the many judges, lawyers, and academics who over the years have enriched my understanding of guardianship.

1. Mark D. Andrews, Student Author, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75, 99 (1997).

2. *Id.*

3. *Id.* Andrews also discusses the guardianship process from beginning to end, including the lack of due process rights. *Id.* at 86–111.

4. *E.g.* Fla. Stat. § 744.344(1) (2001) (directing the court to characterize the guardianship as either plenary or limited and, if limited, to specify the rights that have been removed); N.Y. Mental Hyg. Laws § 81.02(a)(2) (McKinney 1996) (directing the court to grant to the guardian only those powers that are necessary, based on the court's evaluation of necessity); Ohio Rev. Code Ann. § 2111.50(A)(2) (Anderson 1998) (granting the court discretion over the extent of power granted to the guardian).

decision is unlikely to be overturned on appeal.[5] How, then, does a judge decide what to do? Put another way, what motivates a judge who presides at a guardianship hearing and how do those motivations translate into judicial action?

II. WHY DO JUDGES RULE AS THEY DO?

Judges naturally want to do what is right, that is, what is legally correct, but they also want to do what will be best for the incapacitated person. Like most people, judges want to do what is "good."[6] Describing what is "good," however, is not easy. One way to begin is to consider what one may expect judges do *not* want to do. For one, judges do not want to appoint guardians for individuals who have sufficient mental capacity to handle their own affairs, nor do they want to appoint incompetent, corrupt, or uncaring individuals or institutions as guardians. Judges do not want to resort to guardianship if a less intrusive alternative exists. For example, if an individual is well served by durable powers of attorney and property-management devices such as a revocable trust and joint bank accounts, a judge might well conclude that, despite the individual's incapacity, no guardianship is necessary.[7]

Naturally, the foremost imperative for a judge presented with a guardianship petition is the welfare of the alleged incapacitated person. Protecting the person and the property of an adjudicated incompetent is the fundamental justification for the existence of guardianship.[8] So, above all, one may expect that

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5. *E.g. Estate of Haertsch*, 649 A.2d 719, 720 (Pa. Super. 1994) (holding that "[t]he selection of a guardian for a person adjudicated incapacitated lies within the discretion of the trial court whose decision will not be reversed absent an abuse of discretion.").

6. Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. Rich. L. Rev. 55, 66–67 (2001) (discussing how the ethical decision-maker becomes aware of what is good or right and uses it to make his decisions).

7. *E.g. In re Hodges*, 756 A.2d 389, 393 (D.C. 2000) (the individual was mentally ill, but a guardian was not necessary); *see In re Guardianship of Fuqua*, 646 S.2d 795, 796 (Fla. Dist. App. 1st 1994) (the individual was totally incapacitated, but the lower court should have considered a less restrictive alternative to total guardianship); *Guardianship of Collier*, 653 A.2d 898, 902 (Me. 1995) (the individual was severely mentally incapacitated, but there was evidence that he was still capable of handling his own affairs; thus, the lower court should have considered a less restrictive alternative, such as independent living in the community with supervision by mental-health providers without a guardian).

8. Jamie L. Leary, Student Author, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves against the Need to Guard Individual Autonomy*, 5 Va. J. Soc. Policy & L. 245,

judges want to make decisions and craft orders that promote the interests of the incapacitated person. Translating this basic and unarguable maxim into specific acts for particular individuals, however, is not automatic or formulaic. Because each individual's needs are different and the range of possible solutions will vary from case to case, judges must create individualized solutions.[9] That is, judges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result — a wood staff — is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be "released" by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it.

After assuring themselves that they have met the needs of the incapacitated person, judges also may attempt to address the concerns of the other parties represented at the guardianship hearing. The judge can satisfy the petitioner's request by finding the alleged incapacitated person to be legally incompetent and appointing as guardian the individual or institution requested by the petitioner. In most guardianship hearings, various family members will be present and may testify.[10] Although the judge owes no duty to the family, most judges understandably want to assuage the family trepidations[11] about the well-being of the incapacitated person. Representatives of social-service agencies that work with the elderly may also appear, and, as with family concerns, the judge may try to fashion a solution that meets the legitimate concerns of social-service providers. Of course,

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249-250 (1997) (discussing the purposes of guardianship).

9. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. Toledo L. Rev. 189, 192 (1994) (asserting that because the circumstances of each case are unique, the judge must consider each guardianship case differently).

10. Andrews, *supra* n. 1, at 103.

11. *E.g. In re Estate of Salley*, 742 S.2d 268, 271 (Fla. Dist. App. 3d 1997) (the family had genuine objections to the choice of guardian and should have received notice and an opportunity to be heard); *In re Guardianship of Braaten*, 502 N.W.2d 512, 513 (N.D. 1993) (the family was concerned that proper medical treatment was being avoided and nutritional needs were being neglected); *In re Guardianship of K.*, 2001 Wis. App. LEXIS 240 at *6 (Wis. Dist. App. 4th Mar. 8, 2001) (the family disagreed with the choice of guardian).

balancing the interests of all the parties may not always be possible. If not, the interests of the incapacitated person should take precedence.[12]

There is yet another limit on a judge's ability to meet all the interests of the parties as well as properly serve the need of the incapacitated person: the applicable statutory and common law. As much as judges might prefer to have a generalized power to do "justice," in reality their choices are limited by the state guardianship statute and case law. In almost all states, the most elemental restriction of guardianship law is that judges lack the power to initiate guardianship hearings.[13] All guardianship statutes require someone to file a guardianship petition.[14] After a petition has been filed, the judge's choice of action is constrained by the state guardianship statute. Still, once a petition has been filed, judges have a great deal of discretion because state guardianship statutes rarely force them to act in a way that they might think would be detrimental to the interests of the incapacitated person.[15]

The discretion afforded to judges permits them to attempt to implement the spirit and intent of the law rather than being bound to enforce the inflexible letter of the law. Historically, guardianship law was intended to protect an incapacitated individual's person and property.[16] Guardianship was a way in which society, acting through the courts, could assist and protect those whose mental infirmaries left them unable to fend for themselves. This was guardianship as benefice, or as an aspect of

12. *E.g.* Ind. Code Ann. § 29-3-5-5(b) (West 1994 & Supp. 2001) (granting the court discretion in choosing the guardian according to the incapacitated person's best interests); N.Y. Mental Hyg. Laws § 81.01 (declaring the legislature's intent to create a guardianship system that satisfies the needs of the incapacitated person while affording the greatest amount of independence and self-determination); Wis. Stat. Ann. § 880.33(5) (West 1991 & Supp. 2001) (mandating that the best interest of the incapacitated person prevail over opinions of the family to the contrary).

13. Andrews, *supra* n. 1, at 86. In a departure from the traditional prohibition of the courts from initiating a guardianship, Texas law permits a court, when it has probable cause to believe that an individual is mentally incapacitated, to appoint a guardian ad litem or court investigator to investigate and if necessary file an application for guardianship. The court also is granted the right to obtain information to help it establish probable cause. Tex. Rev. Civ. Stat. Ann. art. 683 (Vernon Supp. 2002).

14. *E.g.* Fla. Stat. § 744.3201(1) (2001); Ind. Code Ann. § 29-3-5-1 (West 1994); Ohio Rev. Code Ann. § 2111.03 (Anderson 1998).

15. *E.g.* N.Y. Mental Hyg. Laws § 81.01. As observed in *supra* note 12, the stated purpose of the guardianship act is to promote the best interests of incapacitated people.

16. Andrews, *supra* n. 1, at 79.

the therapeutic state.[17] Also, by appointing a guardian, the court created a responsible legal surrogate actor for the incapacitated person so that he or she could participate in those aspects of life subject to law, such as managing financial affairs and consenting to medical treatment.[18] This aspect of guardianship as a necessary component of a legal system presupposed that all actors were capable of reasoned choice or, if not, a surrogate would act on their behalf.

Until the wave of guardianship reform in the 1980s and 1990s, these therapeutic and legalistic aspects of guardianship not only provided its justification, but also were the guideposts for judges who ruled on guardianship matters. However, the guardianship-reform movement of the 1980s interjected new values into guardianship. Far from seeing guardianship as a benevolent act by the state, reformers claimed that guardianship was a massive intrusion upon the autonomy and independence of those adjudicated incompetent and in need of a guardian.[19] In the eyes of some, guardianship ceased to be a solution and became the problem.[20] Just as mental-health laws and practices relied excessively on commitment to mental-health facilities, according to its critics, so also the guardianship system was too dependent on plenary guardianship and failed to seek a "less restrictive alternative."[21]

Reformers offered many solutions to the excesses of guardianship. Some were procedural and some were substantive, but all reflected their suspicion, if not antagonism, to guardianship.[22] The procedural reforms, such as better notice to

17. Barbara A. Venesy, *1990 Guardianship Law Safeguards Personal Rights Yet Protects Vulnerable Elderly*, 24 Akron L. Rev. 161, 166 (1990) (explaining the therapeutic or functional approach, in which guardianship is intended to safeguard against a person's functional deficiencies in activities of daily living).

18. Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 Md. J. Contemp. Leg. Issues 143, 143 (1995-1996) (defining the guardian's purpose).

19. Andrews, *supra* n. 1, at 76–77.

20. *Id.* at 82.

21. Fell, *supra* n. 9, at 200–201.

22. *See generally* John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. Rich. L. Rev. 1273 (1998) (analyzing guardianship reforms in Virginia during 1997 and 1998); Kathleen Harris, *Guardianship Reform*, 79 Mich. B.J. 1658 (2000) (reporting on guardianship reforms in Michigan from the 1970s through 2000); Neil B. Posner, Student Author, *The End of Parens Patriae in New York: Guardianship under New Mental Hygiene Law Article 81*, 79 Marq. L. Rev. 603, 610–645 (1996) (analyzing the 1992 guardianship reform in New York, including a comparison to guardianship reforms in the 1970s).

the alleged incapacitated person of the hearing,[23] were both an attempt to ensure fairness and were meant also to discourage the filing of guardianship petitions. By making the process more costly and more time-consuming, reformers hoped to decrease the number of plenary guardianships. If nothing else, reformers hoped that the procedural changes would reduce the number of false positives, i.e., reduce the number of approved guardians in cases in which the alleged incapacitated person was not mentally incapacitated as defined in the state statute. The substantive changes, which included modifying the statutory definition of the degree of mental incapacity necessary to warrant the appointment of a guardian,[24] were overtly directed at reducing the number of persons for whom a guardian could be appointed. Finally, for cases in which guardianship could not be avoided, the reformers created the concept of a "limited guardianship" that would maximize the incapacitated person's autonomy and

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23. *E.g.* 20 Pa. Consol. Stat. § 5511 (West Supp. 2001). The statute contains the following passage on notice of the guardianship hearing:

> Written notice of the petition and hearing shall be given in large type and in simple language to the alleged incapacitated person. The notice shall indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. It shall include the date, time, and place of the hearing and an explanation of all rights, including the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the rights to have such counsel paid for if it cannot be afforded. The Supreme Court shall establish a uniform citation for this purpose. A copy of the petition shall be attached. Personal service shall be made on the alleged incapacitated person, and the contents and terms of the petition shall be explained to the maximum extent possible in language and terms the individual is most likely to understand. Service shall be no less than 20 days in advance of the hearing.

Id.

24. For example, compare the change in Pennsylvania law that appeared to narrow the statutory definition of a person in need of a guardian. In 1975, the statute read:

> "Incompetent" means a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety: (1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or (2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.

20 Pa. Consol. Stat. § 5501 (West 1975). By 2001, the threshold of incapacity seems to have been raised:

> "Incapacitated person" means an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

20 Pa. Consol. Stat. § 5501 (West Supp. 2001).

independence.[25]

Today, limited guardianship is almost always an option for someone in need of a guardian.[26] Yet it is rarely invoked.[27] If judges sincerely desire to implement both the letter and the spirit of the law — and there is no reason to doubt that this is true — why is it that they so infrequently appoint limited guardians? It is not because they are necessarily hostile to the concept (though some may be). There is no reason to believe that judges harbor an instinct distrust of limited guardianship. Rather, the very circumscribed use of limited guardianship suggests either that it is undesirable — that idea is explored later in this Article — or that structural aspects of guardianship help explain the continued judicial preference for plenary guardianship.[28] Judges apparently prefer plenary guardianship because it seems best to meet the needs of the incapacitated person while still conforming to other legitimate pressures of the legal system.[29] Perhaps, in a perfect world, only the needs of the incapacitated person would be considered. In such a world, limited guardianship would almost certainly be much more common. In the actual world, however, the needs of the incapacitated person, although paramount, are not the only judicial concern.

Solving the problem that the petitioner presents to the court, and doing so within the limits of the law, is perhaps the most basic judicial reaction to a guardianship petition. Although a few such petitions may be fraudulent or frivolous because the alleged incapacitated person is not incapacitated and has no need of a guardian, in the main, the filing of a guardianship petition is the result of something amiss, some problem that the petitioner believes can be solved best or only by the appointment of a guardian. If the petitioner can convince the judge of the reality of the problem, then, within the limitations of the law, the judge will want to solve, or at least ameliorate, the problem.

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25. *See* Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique, and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 652–660 (1981) (advocating the need for limited guardianship and the abolition of plenary guardianship); Sally Balch Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 Clearinghouse Rev. 660, 661 (1994) (noting that the purpose of limited guardianship is to promote the incapacitated person's independence and self-determination); Leary, *supra* n. 8, at 259–269 (outlining the basic goals of guardianship reform).

26. *E.g.* Cal. Prob. Code § 1860.5 (West 1991); Fla. Stat. §§ 744.1012, 744.344 (2001).

27. Hurme, *supra* n. 25, at 663.

28. Fell, *supra* n. 9, at 203.

29. *Id.*

For example, suppose the petitioner, fifty year old Ben, files a guardianship petition asking that he be named guardian for his eighty-five year old, widowed mother Mary. The petition alleges that Mary is suffering from the early stages of dementia and, as a result, is very susceptible to phone-and-mail solicitations. In the last six months, she has spent more than $7,000 (out of an annual income of only $20,000) on sweepstakes, magazines, household products, and the like, and even tickets for plays, although she rarely leaves the house and never leaves to go to a play. She also has pledged more than $3,000 to charitable solicitors. Ben has asked his mother not to respond to phone or mail solicitations and, though she has repeatedly agreed, she continues to buy, subscribe, enter, and pledge.

Although Ben has Mary's durable power of attorney and is also her representative payee for her Social Security benefits, she still has access to her savings and checking accounts as well as the monthly pension check that she receives. Ben requests that he be named her guardian so that he can deny her access to her checking or savings account and take control of her pension. He also intends to get her an unlisted phone number and have her mail sent to a mailbox to which only he has access. The medical evidence supports Ben's contention that Mary suffers from mild dementia which, over time, might or might not become more severe. The only defense offered is that Mary, other than her spending proclivities, is capable of handling her affairs.

Faced with these facts, a judge might well conclude that plenary guardianship is in order and reject any suggestion of limited guardianship. From the judicial perspective, plenary guardianship has several attractions. It will solve the problem as presented. Once Mary is a ward and Ben is her guardian, she will no longer be able to waste her money. Because plenary guardianship will both assuage Ben's concerns and enable him to protect Mary and her money, it will have met the "solve the problem" test. Next, plenary guardianship is expeditious. Although not the primary concerns of judges, judges are nonetheless cognizant of the desirability of timely and efficient resolution of conflicts, which is one result of the imposition of plenary guardianship. Plenary guardianship also offers cost savings for the parties. Once a guardianship is created, it is unlikely to create further litigation. Most guardians never return to the court because their appointment provides them with sufficient authority to deal with almost any contingency. To the

extent that the court monitors the guardian, the task is rarely complicated by questions as to whether the guardian exceeded his or her authority.[30] Nor need the guardian return to the court to ask for additional authority or for an interpretation as to the extent of his or her authority.[31]

The efficiency offered by plenary guardianship makes it very attractive.[32] It saves the time of the judges and the litigants and therefore is less costly than limited guardianship, which might require the guardian to return to the court for expanded powers if the ward suffers a further decline in capacity. If Mary's condition worsens, Ben can expand his control of her life without returning to the court for additional power to protect her. The finality of plenary guardianship, in the sense that it both solves the present problem and is expansive enough to meet future problems, makes it extremely appealing to petitioners and judges alike. Inconclusive, halfway measures or orders that need clarification or amendment can mean additional hearings at a cost of the judge's time and at added expense to the estate of the ward. Plenary guardianship is also preferred by third parties who deal with the guardian because they know that the guardian's authority is broad enough to support his or her actions. For example, if Ben, as guardian, asks Mary's bank to deny her access to her accounts, the bank can do so without fear that Ben might have exceeded his authority.

Judges are also mindful of the need to reach a decision and to craft an order that will not be overturned on appeal. Although there is nothing about plenary guardianship that renders it immune to an appeal, when there is an appeal, in guardianship what is typically challenged is the determination that the ward was mentally incapacitated.[33] Yet, in most guardianship hearings the mental incapacity of the ward is not seriously at issue,[34] and

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30. Frolik, *supra* n. 25, at 654.

31. *Id.*

32. Fell, *supra* n. 9, at 203.

33. *E.g. In re Guardianship of Fuqua*, 646 S.2d at 795 (the ward appealed the lower court's finding of incapacitation).

34. *See Computer Analysis Yields Portrait of Elderly Words*, L.A. Times A2 (Sept. 27, 1987) (reporting that, in a survey of 2,200 court cases dating back to 1980, judges approved 97% of the petitions; 34% were approved without a doctor's opinion). Most practitioners would agree that the rate of serious challenge to the issue of incapacity remains low despite the reforms since 1987. However, there is scant hard data on this topic due to "the dearth of research" in the area of due process and guardianship generally. Nancy Coleman, *Issue Brief: Due Process* (Nov. 30, 2001) (unpublished

so there is little likelihood that the decision to appoint a plenary guardian will be challenged. Sometimes parties appeal the decision to name a particular party as guardian, arguing that they would have been a better choice,[35] but they rarely challenge the correctness of the finding that the ward was legally incompetent.[36]

Plenary guardianship, then, has many advantages: it solves the problem presented to the court, it grants the petitioner's request (thus that party would not appeal), it is broad and flexible enough to meet future problems arising from the ward's diminished capacity, it is not likely to be the source of additional litigation, and it is not particularly susceptible to being overturned on appeal. As the saying goes, "What's not to like?" Well for those of us who favor limited guardianship, the answer is, "a lot." If examined in detail, limited guardianship has much to offer potential wards and not at a cost that should give jurists pause.

III. IS LIMITED GUARDIANSHIP BETTER FOR INCAPACITATED PERSONS?

The most basic challenge to proponents of limited guardianship is whether it is desirable for the incapacitated person. Put another way, does limited guardianship meet the needs of an incapacitated person better than plenary guardianship? The focus at this point is strictly on the ability of limited guardianship to satisfy the needs of the incapacitated person, not whether it is "best" for judges, guardians, petitioners and other parties. If limited guardianship is inappropriate or unsuc-cessful as to wards, then the inquiry ceases because it would be wrong to promote the use of limited guardianship if it is less effective in meeting the needs of the ward than is plenary guardianship. Only after the ward's interests have been served as best as they can should the inquiry shift to whether and how limited guardianship can meet the interests of other parties, such as the petitioner or the judge.

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manuscript prepared for Wingspan — The Second National Guardianship Conference) (on file with the *Stetson Law Review*).

35. *E.g. In re Guardianship of K*, 2001 Wis. App. LEXIS 240 at *6.

36. One exception is if the ward has a durable power of attorney. Sometimes the agent acting under such a power objects to the appointment of a plenary guardian, arguing that because of the power of attorney, no guardian is needed.

The operation of a guardianship should not be a compromise designed to alleviate the concerns of the various parties, nor should it be some utilitarian system with the goal of bringing the greatest good to the greatest number. Guardianship may have conflicting interests, but it has one primary goal: the protection and advancement of the life and property of the incapacitated person.[37] If limited guardianship is not the optimal solution for the incapacitated person, then it should not be used. But the obverse is also true. If limited guardianship would be better for the ward than plenary guardianship, it should be used irrespective of its effect on other parties or the judge.

In determining the efficiency of limited guardianship, it is necessary to begin with the nature or source of the individual's incapacity. The mentally incapacitated may be categorized as the old and demented, the mentally ill, and the mentally retarded. Of course, any one person can be old and demented and retarded, or old and demented and mentally ill, or retarded and mentally ill, but most incapacitated persons fit only a single category if we define "old and demented" very broadly to include stroke victims and those who suffer from other mental incapacities commonly associated with advanced age. A fourth possible category would comprise those persons who have lost consciousness, either permanently, temporarily, e.g., a coma, or who have lost consciousness as they approach death. The fourth category need not concern us, however, because such persons would appear to be obvious candidates for a plenary guardian, as they have no ability to act on their own behalf.

Individuals who are old and demented, mentally ill, or mentally retarded, however, can retain some degree of mental functioning and so raise the question of whether they might be better served by limited guardianship rather than plenary guardianship. For our purposes, the arguments that can be made on behalf of limited guardianship for the non-elderly mentally ill or mentally retarded are not relevant to the question of whether limited guardianship is better for an older person with reduced mental capacity, although the advocates of the mentally ill and mentally retarded were some of the most aggressive advocates of limited guardianship.[38] Those interested in the elderly were much

37. *E.g.* Cal. Prob. Code § 1800; N.Y. Mental Hyg. Laws § 81.01; 20 Pa. Consol. Stat. § 5502 (West Supp. 2001).

38. *E.g.* Maureen A. Sanders & Kathryn Wissel, Student Authors, *Limited*

less insistent about the need for limited guardianship. The difference in the degree to which the advocacy groups were interested in limited guardianship is easily explained. Advocates of the mentally ill and mentally retarded perceived limited guardianship as part and parcel of the drive to normalize life for their clients.[39] Advocates of the mentally ill and mentally retarded sought to deinstitutionalize the mentally-ill and mentally-retarded populations.[40] Following the doctrine of the least restrictive alternative,[41] advocates proposed to place mentally-ill and mentally-retarded individuals in the community in which they could live lives that were as "normal" as possible in light of each individual's particular disability.

Advocates saw plenary guardianship, however, as completely at odds with integrating the disabled individuals into the community. Individuals under a plenary guardianship were severely hobbled in their attempts to rejoin the community because they could not handle their financial affairs, make a valid contract, control their medical care, or even decide where to live. Advocates of the mentally ill argued that their clients should lose only such rights as were necessary to permit them to live in the community.[42] Otherwise, they should retain the fundamental rights that were part and parcel of living in the community. According to reformers, the state could not justify stripping the mentally ill of their rights as autonomous individuals merely because they had an illness.[43]

Guardianship for the Mentally Retarded, 8 N.M. L. Rev. 231 (1978) (advocating limited guardianship for the mentally retarded in New Mexico as part of a national movement).

39. Frolik, *supra* n. 25, at 653 (describing how plenary guardianship can prevent the mentally retarded from functioning to the limits of their abilities).

40. For articles discussing and advocating deinstitutionalization, see David L. Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107 (1972); Stephen L. Mikochik, *Advancing Deinstitutionalization*, 65 N.D. L. Rev. 143 (1989); Stephen J. Morse, *A Preference for Liberty: The Case against Involuntary Commitment of the Mentally Disordered*, 70 Cal. L. Rev. 54 (1982).

41. Ralph Slovenko, *The Hospitalization of the Mentally Ill Revisited*, 24 Pacific L.J. 1107, 1113–1114 (1993) (discussing the theory of the least restrictive alternative).

42. *Id.* at 1111–1117 (relating the theory of the least restrictive alternative to the emergence of community-based treatment of the mentally ill as an alternative to civil commitment).

43. *E.g.* Danielle Priola, Student Author, *Disability Law — Burden of Proof — An Individual Challenging the Capacity of a Developmentally-Disabled Person to Make an Independent Decision Bears the Burden of Proving by Clear and Convincing Evidence that the Disabled Person Has the Specific Incapacity to Decide — In re M.R., 135 N.J. 155, 638*

Advocates of the mentally retarded not only emphasized the need for the individual to retain personal rights if he or she were truly to be a functioning member of the community, but also made another compelling point. Retarded individuals, they contended, had more potential than our society had envisioned. These individuals, far from being candidates for a useless life, hidden away in an impersonal institution, were unique individuals with capabilities and possibilities like anyone else.[44] Hence, adoption of the Education for All Children Act[45] brought retarded and other developmentally-disabled children into the mainstream of education. Reformers hoped similarly to bring adult retarded individuals into the community.[46] Plenary guardianship, with its absolute labeling and stripping of rights, was seen as a barrier to inclusion.[47] To reformers, plenary guardianship was not a solution, but rather a problem. Limited guardianship, on the other hand, held the promise of crafting just the degree of protection and assistance needed by the mentally ill and mentally retarded.[48]

Advocates for the mentally ill and mentally retarded were correct about limited guardianship. It is adaptable for a ward with fluctuating capacity, as well as for a ward whose capacity is expanding but whose ability to care for himself or herself would otherwise be diminished by the imposition of plenary guardianship. Limited guardianship is the preferred paradigm for an individual who suffers from diminished or situational incapacity rather than the global incapacity that we associate, for example, with persons with advanced dementia of the Alzheimer's type.

But what of the elderly who are gradually (or even rapidly) *losing* mental capacity due to dementia or other mental disabilities? Although their desire, and that of their guardians, is that they be active, autonomous individuals, the reality is that

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A.2d 1274 (1994), 26 Seton Hall L. Rev. 407, 409 (1995) (discussing the New Jersey Supreme Court's view that a finding of mental incompetence does not necessitate an absolute deprivation of rights).

44. William Christian, Student Author, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 Tex. L. Rev. 409, 410–411 (1994) (arguing that mentally retarded individuals have capabilities like anyone else).

45. 20 U.S.C. § 1400 (1994 & Supp. 1999).

46. Christian, *supra* n. 44, at 410.

47. Frolik, *supra* n. 25, at 653.

48. *Id.*

they are often stranded on an ever-shrinking island of capability and capacity. There is no potential for autonomy; rather, there is the need to protect their lives and property. Limited guardianship seems a poor fit for someone in decline. Rather than a solution, it seems only to assure that the parties must return to the court to grant the guardian additional power as the ability of the ward to handle his or her life continues its inevitable decline. Indeed, seen in that light, limited guardianship seems almost a cruel joke to play on the families and guardians of the incapacitated elderly.

It is a pernicious overstatement, however, to argue that the elderly with decreasing capacity should be viewed no differently than the elderly with global incapacity. Many older persons suffer from limited or selective mental incapacity. Their incapacity, if not permanent, is at least temporarily stable or, alternatively, is in a very slow decline.[49] In short, their profile is closer to that of a retarded person. Some of these older persons are stroke victims.[50] Once stabilized, their mental condition is not likely to worsen unless and until they have another stroke or other debilitating illness or accident. They might, for example, have lost the ability to speak, but they are otherwise capable of handling their own affairs and would be mortified if labeled "mentally incapacitated" and were to have a plenary guardian appointed for them. Others will have dementia that is not progressive or that is advancing only at a very slow rate.[51] They, too, may be capable of handling some of their personal affairs. Their incapacity is not global, but situational or task specific. Perhaps they no longer have the capacity to manage their investments, but they may still be able to pay their bills and do their own shopping and may be expected to do so for the foreseeable future.

True, they need help, but they need a limited guardian, not a plenary guardian. For these older persons with reduced, but stable, capacity, limited guardianship provides all the assistance that they need while avoiding the excessive intrusion on their

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49. Fell, *supra* n. 9, at 192.

50. A stroke is defined as a heterogeneous group of vascular disorders that result in brain injury. Daily functioning in the workplace, home, and community is often reduced and many stroke patients are impaired in their ability to walk, see, and feel. Each year about 750,000 Americans have a stroke and about 150,000 of them die. *The Merck Manual of Geriatrics* 397–398 (Mark H. Beers & Robert Berkow eds., 3d ed., Merck Research Labs. 2000).

51. Dementia is a deterioration of intellectual function and other cognitive skills, leading to a decline in the ability to perform activities of daily living. *Id.* at 357.

lives as well as the sense of shame that may accompany plenary guardianship. For these elderly a limited guardian is the analogue to a physical caretaker. The older individuals receive just that degree of help that is needed. They are also spared being told by a judge that they are no longer autonomous, but rather, incapacitated, with no more legal rights than people in comas. For the elderly, limited guardianship is to plenary guardianship what an assisted-living facility is to a nursing home. It offers the proper balance of care and protection with dignity and autonomy.

Despite the attraction of limited guardianship in theory, the difficulty of tailoring the power of the limited guardian to the needs of the older person is sometimes cited as a serious impediment to its adoption.[52] That objection rings true if each court attempts to craft a unique, limited guardianship for each older ward who has limited capacity. To do so, the court would have to make detailed findings about the mental condition and capabilities of the potential ward,[53] which would require a time-consuming process both in the fact-finding stage and in the drafting of the order of guardianship. But this need not be the case.

Although guardianship orders never should become "off-the-shelf" standardized, "one size fits all" orders, they need not be handcrafted. The goal should be sufficient individualization to meet the degree of help needed by the elderly person, blended with the efficiencies gained using semi-standard court orders based on a limited number of categories of limited guardianship not unlike the federal classification of Medigap[54] plans into ten standardized plans. A court could create modules of limited guardianship, though not as inflexible or detailed as the Medigap program. In turn, guardianship petitioners could request a form of guardianship relief consistent with the preexisting modules and ask for any modifications deemed necessary because of the condition and needs of the incapacitated elderly person. Such a system also could inform petitioners about the proof of incapacity they will need to justify the appointment of a limited guardian with the requested powers. Armed with the knowledge of the universe of possible limited guardianship orders, the petitioner

52. Fell, *supra* n. 9, at 203.

53. Of course, some states require such findings even for plenary guardianships. *E.g.* 20 Pa. Consol. Stat. § 5511 (West 1975 & Supp. 2001).

54. 42 U.S.C. §§ 1395a, 1395b-2, 1395ss (1994 & Supp. 1999).

and the court could engage in an efficient hearing. The petitioner would know what evidence to present, while the court would know what order to issue as the proper response.

Still, the appointment of a limited guardian, although desirable, is not enough. The appointing court cannot merely appoint a guardian and proceed institutionally to "forget" about the incapacitated individual. Rather, the court must monitor the guardianship. It must oversee the acts of the guardian to ensure that the guardian is complying with the terms of the limited guardianship.[55] Just as monitoring of a plenary guardian by the use of mandatory reports and field inspections by court visitors is essential if courts are to fulfill their function as the protector of the mentally incapacitated,[56] so too must courts accept that it is their unique duty to see that the limited guardian acts according to the court order and in the best interests of the incapacitated person. The court also must be ready to amend or expand the powers of the limited guardian in response to the changing needs and conditions of the incapacitated person. If the courts fail in this critical role, then guardianship reform will be little more than a charade. Guardianship will be a world of court orders without compliance, paper reforms without reality, and a smug, self-satisfied system that turns a blind eye to the needs of the mentally incapacitated. Yet, it need not be so. Courts can and must monitor guardians and aggressively seek the resources necessary to support the effective oversight of guardians and the protection of persons adjudicated mentally incapacitated.

Assuming that courts and reformers indeed create a workable system of limited guardianship, in many cases, limited guardianship could be voluntary.[57] The elderly person might be aware of his or her limitations and welcome the opportunity to turn over part of his or her life to a guardian, comforted by the promise of court supervision and knowing that, if his or her capacity should decline, further protection will be present in the form of a trusted guardian whose powers the court can expand if necessary. If the older person acceded to the imposition of a limited guardian, the process could proceed more quickly, at less cost, and without the acrimony that can accompany plenary

55. Fell, *supra* n. 9, at 203.

56. *Id.* at 197.

57. The Uniform Probate Code provides for consensual guardianship. Unif. Prob. Code § 5-303, 8 U.L.A. 357 (1998).

guardianship. A compliant ward who understood and agreed with the need for assistance in the form of a guardian with limited powers, would convert guardianship from a "solution" imposed on the individual to a cooperative arrangement in which the court, the petitioner and, most importantly, the elderly person, together could create a limited guardianship that assists rather than oppresses.

Whether imposed or consensual, the greater use of limited guardianship would be in accord with the expressed intent of many reformed guardianship statutes.[58] If nothing else, having guardianship practice in compliance with the law is desirable. Otherwise, the stated custom of many statutes for a preference for limited guardianship[59] is little more than false advertising. Although the initial lack of use of limited guardianship in the years after the adoption of reformed guardianship could be attributed to the natural difficulty of instituting the new, unknown, and unusual, with the passage of years, it becomes less defensible to ignore the statutorily-stated preference for limited guardianship. If judges and lawyers do not really have any confidence in limited guardianship, then reformers should just admit that it was an idea whose time was never to come, amend the statutes by making limited guardianship a possible, but not preferred, outcome, and turn our attention to other guardianship concerns, such as how to supervise guardians properly.[60]

Reformers should also admit that limited guardianship is not a solution to all the problems of guardianship. It will not make guardianship hearings less expensive or less time-consuming. It will not stop relatives from fighting about the need for a guardian, even about a guardian with limited authority. And, because of the limits on the guardian's authority, limited guardianship creates the distinct possibility of future hearings to provide judicial clarification and amendment of the powers of the guardian.

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58. *E.g.* Fla. Stat. § 744.344(2) (2001) (directing the courts to order the least restrictive alternative); N.Y. Mental Hyg. Laws § 81.02(a)(2) (providing that the powers granted to a guardian "shall constitute the least restrictive form of intervention"). The Uniform Guardianship and Protective Proceedings Act provides that a court "shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs." Unif. Guardianship & Protective Proc. Act § 311(b), 8A U.L.A. 146 (Supp. 2001).

59. Leary, *supra* n. 8, at 264.

60. *See* Thomas L. Hafemeister & Paula Hannaford, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147 (1994) (discussing supervision of guardians).

Indeed, the difficulties of limited guardianship seem so well known or so real that they appear to have created an insurmountable obstacle to its adoption.[61] Unfortunately, these practical problems, these "real world" concerns, have triumphed over the "softer" values of personal autonomy, dignity, independence, and respect for individual freedom. For some reason, a complaint, such as that limited guardianship will require too much judicial time, seems more compelling than the importance of helping older persons retain their sense of self-respect while providing them with the assistance they need.

Complaints about limited guardianship miss the point. Instead of asking what limited guardianship will do to the guardianship system, society needs to ask what the guardianship system is doing to the elderly. The burden should not be on limited guardianship to prove its worth. Instead, the proponents of plenary guardianship should bear the burden of defending it. Consider the present system of plenary guardianship with its attendant costs, court proceedings, family squabbles, shortage of guardians, ill-prepared and unsupervised guardians, and lack of protection for wards; the list goes on and on. Yet, those who advocate limited guardianship continue to bear the burden to "prove" it will work or to demonstrate solutions to any and all objections. It need not be so. Of course, the widespread use of limited guardianship will be beset with problems. But so is the present world of plenary guardianship. The only way to create a workable system of limited guardianship is to put it into effect and address the problems as they arise. "Life in all its fullness must supply the answer . . . ."[62]

If limited guardianship were to be widely used, one can predict many benefits, but the fundamental attraction would be how it would change the relationship between the guardian and the ward. Limited guardianship will make it more obvious to guardians that they must take into account the wishes and wants of the ward who, after all, will remain in charge of many aspects of his or her life. A guardian acting under a limited guardianship often will need to consult and compromise with the ward as the

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61. Fell, *supra* n. 9, at 203.

62. *Welch v. Helvering*, 290 U.S. 111, 115 (1933). When the issue before the Supreme Court was the definition of "ordinary and necessary" business expenses for tax purposes, Justice Benjamin Cardozo resisted laying down a bright-line test. Rather, he concluded, "The standard set up by the statute is not a rule of law; it is a way of life. Life in all its fullness must supply the answer to the riddle." *Id.*

two of them attempt to act in concert to maintain and improve the ward's quality of life. And, although much is not known as to how limited guardianship would play out day to day, limited guardianship has the potential to change the relationship between the guardian and the ward from one of command and dominance to one of negotiation and compromise.

IV. WILL JUDGES USE LIMITED GUARDIANSHIP?

So how does society advance to this brave new world of limited guardianship? Judges and judicial attitudes are the keys. Certainly, no reform of guardianship will have much success unless the judges are supportive, and that, in turn, depends on judges being assured that they will have the time and resources to make limited guardianship successful. Judges do not live in the theoretical land of law reviews in which hope and idealism rule, and reality is often far removed. Because they preside in a world of real courts, real incapacitated persons, and real costs, their enthusiasm for guardianship reform is necessarily tempered by concern that proposed reforms are not only desirable, but also feasible. Judges are all too aware of the difficulty of translating a statute from the code book to the courtroom. For example, if judges are expected to appoint guardians with limited powers, then judges will need court investigators to help them understand the needs and capabilities of the alleged incapacitated person.[63] For that matter, judges need court investigators to alert them to instances in which the alleged incapacitated person might be a candidate for limited guardianship. Of course, the petitioner and the lawyer for the alleged incapacitated person (assuming there is one) should be capable of informing the court as to when a limited guardianship might be appropriate. But that model, the pure adversarial model with the court as the passive adjudicator, is not appropriate for guardianship hearings in which the court is supposed to promote the best interests of the ward. The ward's best interests may or may not be best advocated by the petitioner or even by counsel for the alleged incapacitated person.[64] Judges

63. Fell, *supra* n. 9, at 210.

64. *See* Alfreida B. Kenny, *Is Article 81 the Appropriate Vehicle to Address the Needs of the Mentally Ill?* 125 (P.L.I. N.Y. Prac. Skills Course Handbook Series, Guardianship Law, Aug. 21, 2001) (available in Westlaw at 106 PLI/NY 103) (reminding lawyers that so long as the client understands the consequences, a lawyer may not substitute his or her own judgment for that of the client, even if the lawyer believes the client is not acting in his or her own best interest).

need independent sources of information about the mental, physical, and economic conditions of the alleged incapacitated person if they are to employ limited guardianship successfully. Limited guardianship also requires post-guardianship monitoring for the court to know whether the guardian is carrying out the prescribed level of duties and whether the powers granted to the guardian are sufficient to protect the interests of the ward.

Expecting courts to oversee guardians and, in particular, limited guardians, may not be realistic because it is asking an adjudicatory body to perform a supervisory function. Courts and judges are very skilled at finding facts, deciding cases, and creating remedies, but they are neither trained, nor do they have the staff support, to monitor the post-trial actions of the parties.[65] Normally, courts expect that the opposing party will have an interest in ensuring that judicial orders are carried out. But in guardianship, there may be no "opposing party" who can complain to the court if the guardian acts improperly. Although the ward has the right to inform or petition the court,[66] in most instances the reduced capacity of the ward makes the exercise of that right unlikely. Interested third parties, such as relatives, friends, or service providers, may seek out court help for wards whom they believe are not being properly cared for by the guardian,[67] but such intervention will not always occur. Rather, it is necessarily up to the courts, meaning the judges, to supervise guardians and guardianships and see that the interests of the ward are properly protected.[68] To perform this function, the courts must be funded adequately so that they can hire investigators and skilled personnel to direct the investigators.

Providing judges with the level of financial support required to institute, operate, and maintain a limited guardianship system is a necessary component, but is relatively useless unless judges understand and appreciate the potential advantages of limited

65. *See generally* Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 Stetson L. Rev. 867 (2002) (discussing the problems associated with courts acting as guardianship monitors, surveying various state attempts to solve these problems, and offering recommendations for reform).

66. *E.g.* Fla. Stat. § 744.3715 (2001) (providing that "any interested person, including the ward," may request the court to review the order of guardianship on the ground that the guardian is not acting in the best interests of the ward).

67. *E.g. id.*

68. Fell, *supra* n. 9, at 203, 210.

guardianship. One reason that limited guardianship is used so infrequently is that judges do not perceive that its advantages outweigh its drawbacks.[69] If judges really accepted the superiority of limited guardianship over plenary guardianship, there would be no need for essays such as this that extol its virtues. What is needed is judicial education about the benefits to wards of the greater use of limited guardianship, for it is, after all, the welfare of wards with which the judges are most concerned. Once the judges are won over, and once they believe they will have the resources to manage a limited guardianship system successfully, they will have little difficulty persuading attorneys who engage in guardianship practice to appreciate the advantages of limited guardianship.

Judges, then, are the key to the adoption of limited guardianship. How to educate them about the virtues of limited guardianship and how it might be successfully implemented should be the next steps. The answers to those questions will be found among the judges who must perceive that they can be the creators of a limited guardianship system and thus invested with the desire that it succeed. State-by-state, judicial conferences must convene and address the whys and hows of limited guardianship and create action plans for its adoption. There must be specific plans for monitoring guardians, both limited and plenary, with realistic cost estimates. It is pointless to claim that the guardianship system is "reformed" unless judges institute formal systems to fulfill their oversight function.

Finally, those who finance the courts must be persuaded of the need for adequate funding. Courts require not great sums, but critical dollars, if limited guardianship is to work and if the dignity and autonomy of the elderly are to be respected. With a judicial commitment and adequate funding, limited guardianship finally will move from the land of the ideal to the real world of the elderly with diminished capacity who are in need of help, but not at the cost of their personal freedom.

69. *Id.* at 202 (discussing perceived drawbacks to limited guardianship).

TAB 1

Chapter 35 - A

Chapter 35A.
Incompetency and Guardianship.
SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.
Article 1.
Determination of Incompetence.

§ 35A-1101. Definitions.

When used in this Subchapter:

(1) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain-functioning disorders.

(2) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.

(3) "Clerk" means the clerk of superior court.

(4) "Designated agency" means the State or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(5) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.

(6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(7) "Incompetent adult" means 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.

(8) "Incompetent child" means a minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.

(9) "Indigent" means unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.

(10) "Inebriety" means the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family.

(11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or

foreseeable risk of harm to the person's physical well-being or to the person's estate.

(12) "Mental illness" means an illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "lunacy", "unsoundness of mind", and "insanity".

(13) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.

(14) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(15) "Respondent" means a person who is alleged to be incompetent in a proceeding under this Subchapter.

(16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14), and includes group homes, halfway houses, and other community-based residential facilities.

(17) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1989, c. 473, s. 11; 1997-443, s. 11A.11.)

§ 35A-1102. Scope of law; exclusive procedure.

This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure. (1987, c. 550, s. 1; 2003-236, s. 4.)

§ 35A-1103. Jurisdiction; venue.

(a) The clerk in each county shall have original jurisdiction over proceedings under this Subchapter.

(b) Venue for proceedings under this Subchapter shall be in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility. If the county of residence or domicile cannot be determined, venue shall be in the county where the respondent is present.

(c) If proceedings involving the same respondent are brought under this Subchapter in more than one county in which venue is proper, venue shall be in the county in which proceedings were commenced first.

(d) If the clerk in the county in which a proceeding under this Subchapter is brought has an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested in any superior court judge residing or presiding in the district, and the jurisdiction of the superior court judge shall extend to all things which the clerk might have done. (1987, c. 550, s. 1.)

§ 35A-1104. Change of venue.

The clerk, on motion of a party or the clerk's own motion, may order a change of venue upon finding that no hardship or prejudice to the respondent will result from a change of venue. (1987, c. 550, s. 1.)

§ 35A-1105. Petition before clerk.

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human services agency through its authorized representative. (1987, c. 550, s. 1; 1989, c. 473, s. 22; 1997-443, s. 11A.12.)

§ 35A-1106. Contents of petition.

The petition shall set forth, to the extent known:

(1) The name, age, address, and county of residence of the respondent;

(2) The name, address, and county of residence of the petitioner, and his interest in the proceeding;

(3) A general statement of the respondent's assets and liabilities with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;

(4) A statement of the facts tending to show that the respondent is incompetent and the reason or reasons why the adjudication of incompetence is sought;

(5) The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;

(6) Facts regarding the adjudication of respondent's incompetence by a court of another state, if an adjudication is sought on that basis pursuant to G.S. 35A-1113(1). (1987, c. 550, s. 1.)

§ 35A-1107. Right to counsel or guardian ad litem.

(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.)

§ 35A-1108. Issuance of notice.

(a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the

clerk extends the time for good cause, for preparation of a multidisciplinary evaluation as provided in G.S. 35A-1111, or for the completion of a mediation.

(b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a notice to the parties that the hearing has been continued, the reason therefor, and the date, time, and place of the new hearing, which shall not be less than 10 days nor more than 30 days after service of such notice on the respondent.

(c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise. (1987, c. 550, s. 1; 2005-67, s. 2.)

§ 35A-1109. Service of notice and petition.

Copies of the petition and initial notice of hearing shall be personally served on the respondent. Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. A sheriff who serves the notice and petition shall do so without demanding his fees in advance. The 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 and any other persons the clerk may designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. (1987, c. 550, s. 1; 1989, c. 473, s. 18.)

§ 35A-1110. Right to jury.

The respondent has a right, upon request by him, his counsel, or his guardian ad litem, to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. The jury shall be composed of 12 persons chosen from the county's jury list in accordance with the provisions of Chapter 9 of the General Statutes. (1987, c. 550, s. 1.)

§ 35A-1111. Multidisciplinary evaluation.

(a) To assist in determining the nature and extent of a respondent's disability, or to assist in developing an appropriate guardianship plan and program, the clerk, on his own motion or the motion of any party, may order that a multidisciplinary evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be made in writing and filed with the clerk within 10 days after service of the petition on the respondent.

(b) If a multidisciplinary evaluation is ordered, the clerk shall name a designated agency and order it to prepare, cause to be prepared, or assemble a current multidisciplinary evaluation of the respondent. The agency shall file the evaluation with the clerk not later than 30 days after the agency receives the clerk's order. The multidisciplinary evaluation shall be filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of a guardian under Subchapter II of this Chapter, or both. Unless otherwise ordered by the clerk, the agency shall send copies of the evaluation to the petitioner and the counsel or guardian ad litem for the respondent not later than 30 days after the agency receives the clerk's order. The evaluation shall be kept under such conditions as directed by the clerk and its contents revealed only as directed by the clerk. The evaluation shall not be a public record and shall not be released except by order of the clerk.

(c) If a multidisciplinary evaluation does not contain medical, psychological, or social work evaluations ordered by the clerk, the designated agency nevertheless shall file the evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter,

the agency shall explain why the evaluation does not contain such medical, psychological, or social work evaluations.

(d) The clerk may order that the respondent attend a multidisciplinary evaluation for the purpose of being evaluated.

(e) The multidisciplinary evaluation may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian under Subchapter II of this Chapter, or both. (1987, c. 550, s. 1.)

§ 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-1113. Hearing when incompetence determined in another state.

When the petition alleges that the respondent is incompetent on the basis of an adjudication that occurred in another state, the clerk in his discretion may:

(1) Adjudicate incompetence on the basis of the prior adjudication, if the clerk first finds by clear, cogent, and convincing evidence that:
   a. The respondent is represented by an attorney or guardian ad litem; and
   b. A certified copy of an order adjudicating the respondent incompetent has been filed in the proceeding; and
   c. The prior adjudication was made by a court of competent jurisdiction on grounds comparable to a ground for adjudication of incompetence under this Article; and
   d. The respondent, subsequent to the adjudication of incompetence in another state, assumed residence in North Carolina and needs a guardian in this State; or

(2) Decline to adjudicate incompetence on the basis of the other state's adjudication, and proceed with an adjudicatory hearing as in any other case pursuant to this Article. (1987, c. 550, s. 1.)

§ 35A-1114. Appointment of interim guardian.

(a) At the time of or subsequent to the filing of a petition under this Article, the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian.

(b) The motion shall set forth facts tending to show:

(1) That there is reasonable cause to believe that the respondent is incompetent, and

(2) One or both of the following:

a. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention;

b. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest, and

(3) That the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

(c) Upon filing of the motion for appointment of an interim guardian, the clerk shall immediately set a date, time, and place for a hearing on the motion. The motion and a notice setting the date, time, and place for the hearing shall be served promptly on the respondent and on his counsel or guardian ad litem and other persons the clerk may designate. The hearing shall be held as soon as possible but no later than 15 days after the motion has been served on the respondent.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or

(2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest,

the clerk shall immediately enter an order appointing an interim guardian.

(e) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days; when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

(f) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to

the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 12.)

§ 35A-1115. Appeal from clerk's order.

Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals may request the Attorney General to represent the petitioner on any appeal by the respondent to the Appellate Division of the General Court of Justice, but the Department of Justice shall not be required to pay any of the costs of the appeal. (1987, c. 550, s. 1.)

§ 35A-1116. Costs and fees.

(a) Costs. – Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow, may be taxed against either party in the discretion of the court unless:

(1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or

(2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in subsection (b) or (c).

(b) Multidisciplinary Evaluation. – The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be assessed as follows:

(1) If the respondent is adjudicated incompetent and is not indigent, the cost shall be assessed against the respondent;

(2) If the respondent is adjudicated incompetent and is indigent, the cost shall be borne by the Department of Health and Human Services;

(3) If the respondent is not adjudicated incompetent, the cost may be taxed against either party, apportioned among the parties, or borne by the Department of Health and Human Services, in the discretion of the court.

(c) Witness. – Witness fees shall be paid by:

(1) The respondent, if the respondent is adjudicated incompetent and is not indigent;

(2) The petitioner, if the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding;

(2a) The petitioner for any of the petitioner's witnesses, and the respondent for any of the respondent's witnesses, when the clerk finds all of the following:

a. There were reasonable grounds to bring the proceeding.

b. The respondent was not adjudicated incompetent.

c. The respondent is not indigent.

(3) The Administrative Office of the Courts for witness fees for the respondent, if the respondent is indigent.

(c1) Mediator. – Mediator fees and other costs associated with mediation shall be assessed in accordance with G.S. 7A-38.3B.

(c2) Guardian Ad Litem. – The fees of an appointed guardian ad litem shall be paid by:

(1) The respondent, if:

a. The respondent is adjudicated incompetent; and

b. The respondent is not indigent.

(2) The respondent, if:

a. The respondent is not adjudicated incompetent;

b. The clerk finds that there were reasonable grounds to bring the proceeding; and
c. The respondent is not indigent.

(3) The petitioner, if:
a. The respondent is not adjudicated incompetent; and
b. The clerk finds that there were not reasonable grounds to bring the proceedings.

(4) The Office of Indigent Defense Services in all other cases.

(d) The provisions of this section shall also apply to all parties to any proceedings under this Chapter, including a guardian who has been removed from office and the sureties on the guardian's bond. (1987, c. 550, s. 1; 1989, c. 473, s. 15; 1995, c. 235, s. 9; 1997-443, s. 11A.118(a); 2005-67, s. 3; 2009-387, s. 1.)

§§ 35A-1117 through 35A-1119: Reserved for future codification purposes.

Article 2.
Appointment of Guardian.

§ 35A-1120. Appointment of guardian.

If the respondent is adjudicated incompetent, a guardian or guardians shall be appointed in the manner provided for in Subchapter II of this Chapter. (1987, c. 550, s. 1.)

§§ 35A-1121 through 35A-1129. Reserved for future codification purposes.

Article 3.
Restoration to Competency.

§ 35A-1130. Proceedings before clerk.

(a) The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion in the cause of the incompetency proceeding with the clerk who is exercising jurisdiction therein. The motion shall be verified and shall set forth facts tending to show that the ward is competent.

(b) Upon receipt of the motion, the clerk shall set a date, time, and place for a hearing, which shall be not less than 10 days or more than 30 days from service of the motion and notice of hearing on the ward and the guardian, or on the one of them who is not the petitioner, unless the clerk for good cause directs otherwise. The petitioner shall cause notice and a copy of the motion to be served on the guardian and ward (but not on one who is the petitioner) and any other parties to the incompetency proceeding. Service shall be in accordance with provisions of G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(c) At the hearing on the motion, the ward shall be entitled to be represented by counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services if the ward is indigent and not represented by counsel. Upon motion of any party or the clerk's own motion, the clerk may order a multidisciplinary evaluation. The ward has a right, upon request by him, his counsel, or his guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. Provided, if there is a jury in a proceeding for restoration to competency, it shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of the General Statutes.

(d) If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk shall enter an order adjudicating that the ward is restored to competency. Upon such adjudication, the ward is authorized to manage his affairs, make contracts, control

and sell his property, both real and personal, and exercise all rights as if he had never been adjudicated incompetent.

(e) The filing and approval of final accounts from the guardian and the discharge of the guardian shall be as provided in Subchapter II of this Chapter.

(f) If the clerk or jury fails to find that the ward should be restored to competency, the clerk shall enter an order denying the petition. The ward may appeal from the clerk's order to the superior court for trial de novo. (1987, c. 550, s. 1; 2000-144, s. 34.)

§§ 35A-1131 through 35A-1200: Reserved for future codification purposes.

SUBCHAPTER II. GUARDIAN AND WARD.

Article 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1201. Purpose.

(a) The General Assembly of North Carolina recognizes that:

(1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.

(3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.

(4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

(5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

(6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

(b) The purposes of this Subchapter are:

(1) To establish standards and procedures for the appointment of guardians of the person, guardians of the estate, and general guardians for incompetent persons and for minors who need guardians;

(2) To specify the powers and duties of such guardians;

(3) To provide for the protection of the person and conservation of the estate of the ward through periodic accountings and reports; and

(4) To provide for the termination of guardianships. (1987, c. 550, s. 1.)

§ 35A-1202. Definitions.

When used in this Subchapter, unless a contrary intent is indicated or the context requires otherwise:

(1) "Accounting" means the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.

(2) "Clerk" means the clerk of superior court.

(3) "Designated agency" means the State or local human services agency designated by the clerk in an order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(4) "Disinterested public agent" means the director or assistant directors of a county department of social services. Except as provided in G.S. 35A-1213(f), the fact that a disinterested public agent provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian.

(5) "Estate" means any interest in real property, choses in action, intangible personal property, and tangible personal property, and includes any interest in joint accounts or jointly held property.

(6) "Financial report" means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of the ward's money, sale of the ward's property, or other transactions involving the ward's property.

(7) "General guardian" means a guardian of both the estate and the person.

(8) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(9) "Guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.

(10) "Guardian of the person" means a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.

(11) "Incompetent person" means a person who has been adjudicated to be an "incompetent adult" or "incompetent child" as defined in G.S. 35A-1101(7) or (8).

(12) "Minor" means a person who is under the age of 18, is not married, and has not been legally emancipated.

(13) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(14) "Status report" means the report required by G.S. 35A-1242 to be filed by the general guardian or guardian of the person. A status report shall include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the guardian's performance of the duties set forth in this Chapter and in the clerk's order appointing the

guardian, and a report on the ward's condition, needs, and development. The clerk may direct that the report contain other or different information. The report may also contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons in loco parentis, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department of Health and Human Services, or any other interested persons including, if applicable to the ward's situation, group home parents or supervisors, employers, members of the staff of a treatment facility, or foster parents.

(15) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1997-443, s. 11A.13; 2012-151, s. 12(b).)

§ 35A-1203. Jurisdiction; authority of clerk.

(a) Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings brought or filed under this Subchapter. Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the estate for minors, for the appointment of guardians of the person or general guardians for minors who have no natural guardian, and of related proceedings brought or filed under this Subchapter.

(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, following the criteria set forth in G.S. 35A-1213 or G.S. 35A-1224, after removal, death, or resignation of a guardian.

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

(d) Any party or any other interested person may petition the clerk to exercise the authority conferred on the clerk by this section.

(e) Where a guardian or trustee has been appointed for a ward under former Chapter 33 or former Chapter 35 of the General Statutes, the clerk, upon his own motion or the motion of that guardian or trustee or any other interested person, may designate that guardian or trustee or appoint another qualified person as guardian of the person, guardian of the estate, or general guardian of the ward under this Chapter; provided, the authority of a guardian or trustee properly appointed under former Chapter 33 or former Chapter 35 of the General Statutes to continue serving in that capacity is not dependent on such motion and designation. (1987, c. 550, s. 1; 2003-13, s. 3.)

§ 35A-1204. Venue.

(a) Venue for the appointment of a guardian for an incompetent person is in the county in which the person was adjudicated to be incompetent unless the clerk in that county has transferred the matter to a different county, in which case venue is in the county to which the matter has been transferred.

(b) Venue for the appointment of a guardian for a minor is in the county in which the minor resides or is domiciled.

(c) Venue for the appointment of an ancillary guardian for a nonresident of the State of North Carolina who is a minor or who has been adjudicated incompetent in another state, and who has a guardian of the estate or general guardian in the state of his residence, is in any

county in which is located real estate in which the nonresident ward has an ownership or other interest, or if the nonresident ward has no such interest in real estate, any county in which the nonresident owns or has an interest in personal property. (1987, c. 550, s. 1.)

§ 35A-1205. Transfer to different county.

At any time before or after appointing a guardian for a minor or incompetent person the clerk may, on a motion filed in the cause or on the court's own motion, for good cause order that the matter be transferred to a different county. The transferring clerk shall enter a written order directing the transfer under such conditions as the clerk specifies. The clerk in the transferring county shall transfer all original papers, documents, and orders from the guardianship and the incompetency proceeding, if any, to the clerk of the transferee county, along with the order directing the transfer. The clerk in the transferee county shall docket and file the papers in the estates division as a basis for jurisdiction in all subsequent proceedings. The clerk in the transferring county shall close his file with a copy of the transfer order and any order adjudicating incompetence or appointing a guardian. (1987, c. 550, s. 1.)

§ 35A-1206. Letters of appointment.

Whenever a guardian has been duly appointed and qualified under this Subchapter, the clerk shall issue to the guardian letters of appointment signed by the clerk and sealed with the clerk's seal of office. In all cases, the clerk shall specify in the order and letters of appointment whether the guardian is a guardian of the estate, a guardian of the person, or a general guardian. (1987, c. 550, s. 1.)

§ 35A-1207. Motions in the cause.

(a) 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.

(b) The clerk shall treat all such requests, however labeled, as motions in the cause.

(c) A movant under this section shall obtain from the clerk a time, date, and place for a hearing on the motion, and shall serve the motion and notice of hearing on all other parties and such other persons as the clerk directs as provided by G.S. 1A-1, Rule 5 of the Rules of Civil Procedure, unless the clerk orders otherwise.

(d) If the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate, the clerk may enter an appropriate ex parte order to address the emergency pending disposition of the matter at the hearing. (1987, c. 550, s. 1.)

§ 35A-1208. Authority for health care decisions.

(a) A guardian of the person or general guardian of an incompetent adult may petition the Clerk, in accordance with G.S. 32A-22(a), for an order suspending the authority of a health care agent, as that term is defined in G.S. 32A-16(2).

(b) A guardian of the person or general guardian of an incompetent adult may not revoke a Declaration, as that term is defined in G.S. 90-321. (2007-502, s. 8.)

§ 35A-1209: Reserved for future codification purposes.

Article 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1210. Application before clerk.

Any individual, corporation, or disinterested public agent may file an application for the appointment of a guardian for an incompetent person by filing the same with the clerk. The application may be joined with or filed subsequent to a petition for the adjudication of incompetence under Subchapter I of this Chapter. The application shall set forth, to the extent known and to the extent such information is not already a matter of record in the case:

(1) The name, age, address, and county of residence of the ward or respondent;
(2) The name, address, and county of residence of the applicant, his relationship if any to the respondent or ward, and his interest in the proceeding;
(3) The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;
(4) A general statement of the ward's or respondent's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled; and
(5) Whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian, and whom the applicant recommends or seeks to have appointed as such guardian or guardians. (1987, c. 550, s. 1.)

§ 35A-1211. Service of application, motions, and notices.

(a) Application for appointment of a guardian and related motions and notices shall be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk shall direct.

(b) When the application for appointment of a guardian is joined with a petition for adjudication of incompetence, the application shall be served with and in the same manner as the petition for adjudication of incompetence. When the application is filed subsequent to the petition for adjudication of incompetence, the applicant shall serve the application as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk directs otherwise. (1987, c. 550, s. 1; 1989, c. 473, s. 25.)

§ 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.)

§ 35A-1212.1. Recommendation of appointment of guardian by will or other writing.

Any parent may by will recommend appointment of a guardian for an unmarried child who has been adjudicated an incompetent person and specify desired limitations on the powers to be given to the guardian. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. Such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the incompetent adult's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the incompetent adult would be best served by requiring the guardian to give bond. (2005-333, s. 1.)

§ 35A-1213. Qualifications of guardians.

(a) The clerk may appoint as guardian an adult individual, a corporation, or a disinterested public agent. The applicant may submit to the clerk the name or names of potential guardians, and the clerk may consider the recommendations of the next of kin or other persons.

(b) A nonresident of the State of North Carolina, to be appointed as general guardian, guardian of the person, or guardian of the estate of a North Carolina resident, must indicate in writing his willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointment must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence. The clerk shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties.

(c) A corporation may be appointed as guardian only if it is authorized by its charter to serve as a guardian or in similar fiduciary capacities. A corporation shall meet the requirements outlined in Chapters 55 and 55D of the General Statutes. A corporation will provide a written copy of its charter to the clerk of superior court. A corporation contracting with a public agency to serve as guardian is required to attend guardianship training and provide verification of attendance to the contracting agency.

(d) A disinterested public agent who is appointed by the clerk to serve as guardian is authorized and required to do so; provided, 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. A disinterested public agent who is appointed as guardian shall serve in that capacity by virtue of his office or employment, which shall be identified in the clerk's order and in the letters of appointment. When the disinterested public agent's office or employment terminates, his successor in office or employment, or his immediate supervisor if there is no successor, shall succeed him as guardian without further proceedings unless the clerk orders otherwise.

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987.

(f) An individual who contracts with or is employed by an entity that contracts with a local management entity (LME) for the delivery of mental health, developmental disabilities, and substance abuse services may not serve as a guardian for a ward for whom the individual or entity is providing these services, unless the individual is a parent of that ward. The prohibition provided in this subsection shall not apply to a member of the ward's immediate family who is under contract with a local management entity (LME) for the delivery of mental health, developmental disabilities, and substance abuse services and is serving as a guardian as of January 1, 2013. For the purposes of this subsection, the term "immediate family" is defined as a spouse, child, sibling, parent, grandparent, or grandchild. The term also includes stepparents, stepchildren, stepsiblings, and adoptive relationships. (1987, c. 550, s. 1; 2004-203, s. 31(a); 2012-151, s. 12(c).)

§ 35A-1214. Priorities for appointment.

The clerk shall consider appointing a guardian according to the following order of priority: an individual recommended under G.S. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward. (1987, c. 550, s. 1; 2005-333, s. 2.)

§ 35A-1215. Clerk's order; issuance of letters of appointment.

(a) When appointing a guardian, the clerk shall enter an order setting forth:

(1) The nature of the guardianship or guardianships to be created and the name of the person or entity appointed to fill each guardianship; and

(2) The powers and duties of the guardian or guardians, which shall include, unless the clerk orders otherwise, (i) with respect to a guardian of the person and general guardian, the powers and duties provided under G.S. 35A, Article 8, and (ii) with respect to a guardian of the estate and general guardian, the powers, and duties provided under G.S. 35A, Article 9 and Subchapter III; and

(3) The identity of the designated agency if there is one.

(b) If the clerk orders a limited guardianship as authorized by 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.

(c) The clerk shall issue the guardian or guardians letters of appointment as provided in G.S. 35A-1206. (1987, c. 550, s. 1; 2003-236, s. 2.)

§ 35A-1216. Rule-making power of Secretary of Health and Human Services.

The Secretary of the Department of Health and Human Services shall adopt rules concerning the guardianship responsibilities of disinterested public agents. The rules shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians. (1987, c. 550, s. 1; 1997-443, s. 11A.15.)

§ 35A-1217. Appointment of guardian ad litem for incompetent ward.

The clerk shall appoint a guardian ad litem to represent a ward in a proceeding under this Subchapter if the ward has been adjudicated incompetent under Subchapter I and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the guardian ad litem shall be in accordance with rules adopted by the Office of Indigent

Defense Services. Nothing herein shall affect the ward's right to retain counsel of his or her own choice. (2009-387, s. 2.)

§ 35A-1218: Reserved for future codification purposes.

§ 35A-1219: Reserved for future codification purposes.

Article 6.
Appointment of Guardian for a Minor.

§ 35A-1220. Absence of natural guardian.

When a minor either has no natural guardian or has been abandoned, and the minor requires services from the county department of social services, the social services director in the county in which the minor resides or is domiciled shall be the guardian of the person of the minor until the appointment of a general guardian or guardian of the person for the minor under this Subchapter or the entry of an order by a court of competent jurisdiction awarding custody of the minor or appointing a general guardian or guardian of the person for the minor. (1987, c. 550, s.1.)

§ 35A-1221. Application before clerk.

Any person or corporation, including any State or local human services agency through its authorized representative, may make application for the appointment of a guardian of the estate for any minor or for the appointment of a guardian of the person or general guardian for any minor who has no natural guardian by filing an application with the clerk. The application shall set forth, to the extent known:

(1) The minor's name, date of birth, address, and county of residence;
(2) The names and address of the minor's parents, if living, and of other persons known to have an interest in the application for appointment of a guardian; the name of and date of death of the minor's deceased parent or parents;
(3) The applicant's name, address, county of residence, relationship if any to the minor, and interest in the proceeding;
(4) If a guardian has been appointed for the minor or custody of the minor has been awarded, a statement of the facts relating thereto and a copy of any guardianship or custody order, if available;
(5) A general statement of the minor's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled;
(6) A statement of the reason or reasons that the appointment of a guardian is sought; whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian; and whom the applicant recommends or seeks to have appointed as such guardian or guardians; and
(7) Any other information that will assist the clerk in determining the need for a guardian or in appointing a guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 24; 1997-443, s. 11A.16.)

§ 35A-1222. Service of application and notices.

A copy of the application and written notice of the time, date, and place set for a hearing shall be served on each parent, guardian, and legal custodian of the minor who is not an applicant, and on any other person the clerk may direct, including the minor. Service shall be provided by G.S. 1A-1, Rule 4, Rules of Civil Procedure, unless the clerk directs otherwise.

When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered. (1987, c. 550, s. 1; 1989, c. 473, s. 19.)

§ 35A-1223. Hearing before clerk on appointment of guardian.

The clerk shall receive evidence necessary to determine whether a guardian of the person, a guardian of the estate, or a general guardian is required. If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest. (1987, c. 550, s. 1.)

§ 35A-1224. Criteria for appointment of guardians.

(a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.

(b) The clerk may appoint as guardian of the person or general guardian only an adult individual whether or not that individual is a resident of the State of North Carolina.

(c) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of the State of North Carolina or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) If the minor's parent or parents have made a testamentary recommendation pursuant to G.S. 35A-1225 for the appointment of a guardian, the clerk shall give substantial weight to such recommendation; provided, such recommendation may not affect the rights of a surviving parent who has not willfully abandoned the minor, and the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987. (1987, c. 550, s. 1; 1989, c. 473, s. 1.)

§ 35A-1225. Testamentary recommendation; guardian for incompetent minor.

(a) Parents are presumed to know the best interest of their children. Any parent may by last will and testament recommend a guardian for any of his or her minor children, whether born at the parent's death or en ventre sa mere, for such time as the child remains under 18 years of age, unmarried, and unemancipated, or for any less time. Such will may be made without regard to whether the testator is an adult or a minor. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. In the absence of a surviving parent, such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the minor's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the minor would be best served by requiring the guardian to give bond.

(b) Any person authorized by law to recommend a guardian for a minor by his last will and testament or other writing may direct that the guardian appointed for his incompetent child shall petition the clerk during the six months before the child reaches majority for an adjudication of incompetence and appointment of a guardian under the provisions of this

Chapter. If so directed, the guardian shall timely file such a petition unless the minor is no longer incompetent. Notwithstanding the absence of such provision in a will or other writing, the guardian of an incompetent child, or any other person, may file such petition during the six months before the minor reaches majority or thereafter. (1987, c. 550, s. 1.)

§ 35A-1226. Clerk's order; issuance of letters of appointment.

After considering the evidence, the clerk shall enter an appropriate order. If the clerk determines that a guardian or guardians should be appointed, the order may set forth:

(1) Findings as to the minor's circumstances, assets, and liabilities as they relate to his need for a guardian or guardians; and

(2) Whether there shall be one or more guardians, his or their identity, and if more than one, who shall be guardian of the person and who shall be guardian of the estate. The clerk shall issue the guardian or guardians letters of appointment as provided in G.S. 35A-1206. (1987, c. 550, s. 1.)

§ 35A-1227. Funds owed to minors.

(a) Certain insurance proceeds or other funds to which a minor is entitled may be paid to and administered by the public guardian or the clerk as provided in G.S. 7A-111.

(b) A devise of personal property to a minor may be distributed to the minor's parent or guardian with the approval of the clerk as provided in G.S. 28A-22-7.

(c) A personal representative or collector who holds property due a minor without a guardian may deliver the property to the clerk as provided in G.S. 28A-23-2.

(d) Inter vivos or testamentary transfers to minors may be made and administered according to the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes. (1987, c. 550, s. 1; 1989, c. 473, s. 23; 2011-284, s. 37.)

§ 35A-1228. Guardians of children of servicemen; allotments and allowances.

In all cases where a person serving in the Armed Forces of the United States has made an allotment or allowance to a resident of this State who is his child or other minor dependent as provided by the Wartime Allowances to Service Men's Dependents Act or any other act of Congress, the clerk in the county of the minor's residence may act as temporary guardian, or appoint some suitable person to act as temporary guardian, of the person's minor dependent for purposes of receiving and disbursing allotments and allowance funds for the benefit of the minor dependent, when:

(1) The other parent of the child or other minor dependent, or other person designated in the allowance or allotment to receive and disburse such moneys for the benefit of the minor dependent, dies or becomes mentally incompetent; and

(2) The person serving in the Armed Forces of the United States is reported as missing in action or as a prisoner of war and is unable to designate another person to receive and disburse the allotment or allowance to the minor dependent. (1987, c. 550, s. 1; 2011-183, s. 28.)

§ 35A-1229: Reserved for future codification purposes.

Article 7.
Guardian's Bond.

§ 35A-1230. Bond required before receiving property.

Except as otherwise provided by G.S. 35A-1212.1 and G.S. 35A-1225(a), no general guardian or guardian of the estate shall be permitted to receive the ward's property until he has given sufficient surety, approved by the clerk, to account for and apply the same under the

direction of the court, provided that if the guardian is a nonresident of this State and the value of the property received exceeds one thousand dollars ($1,000) the surety shall be a bond under G.S. 35A-1231(a) executed by a duly authorized surety company, or secured by cash in an amount equal to the amount of the bond or by a mortgage executed under Chapter 109 of the General Statutes on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least one and one-fourth times the amount of the bond; and further provided that the nonresident shall appoint a resident agent to accept service of process in all actions and proceedings with respect to the guardianship. The clerk shall not require a guardian of the person who is a resident of North Carolina to post a bond; the clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties. (1987, c. 550, s. 1; 1989, c. 473, s. 2; 2005-333, s. 3.)

§ 35A-1231. Terms and conditions of bond; increase on sale of realty or personal property.

(a) Before issuing letters of appointment to a general guardian or guardian of the estate the clerk shall require the guardian to give a bond payable to the State. The clerk shall determine the value of all the ward's personal property and the rents and profits of the ward's real estate by examining, under oath, the applicant for guardianship or any other person or persons. The penalty in the bond shall be set as follows:

(1) Where the bond is executed by personal sureties, the penalty must be at least double the value so determined by the clerk;

(2) Where the bond is executed by a duly authorized surety company, the penalty may be fixed at not less than one and one-fourth times the value so determined by the clerk;

(3) Provided, however, the clerk may accept bond in estates where the value determined by the clerk exceeds the sum of one hundred thousand dollars ($100,000), in a sum equal to one hundred and ten percent (110%) of the determined value.

The bond must be secured with two or more sufficient sureties, jointly and severally bound, and must be acknowledged before and approved by the clerk. The bond must be conditioned on the guardian's faithfully executing the trust reposed in him as such and obeying all lawful orders of the clerk or judge relating to the guardianship of the estate committed to him. The bond must be recorded in the office of the clerk appointing the guardian, except, if the guardianship is transferred to a different county, it must be recorded in the office of the clerk in the county where the guardianship is docketed.

(b) If the court orders a sale of the ward's real property, or if the guardian expects or offers to sell personal property that he knows or has reason to know has a value greater than the value used in determining the amount of the bond posted, the guardian shall, before receiving the proceeds of the sale, furnish bond or increase his existing bond to cover the proceeds if real estate is sold, or to cover the increased value if personal property is sold. The bond, or the increase in the existing bond, shall be twice the amount of the proceeds of any real property sold, or of the increased value of any personal property sold, except where the bond is executed by a duly authorized surety company, in which case the penalty of the bond need not exceed one and one-fourth times the amount of the real property sold or the increased value of the personal property sold. (1987, c. 550, s. 1; 1989, c. 473, s. 9.)

§ 35A-1232. Exclusion of deposited money in computing amount of bond.

(a) When it appears that the ward's estate includes money that has been or will be deposited in an account with a financial institution upon condition that the money will not be withdrawn except on authorization of the court, the court may, in its discretion, order that the money be so deposited or invested and exclude such deposited money from the computation of

the amount of the bond or reduce the amount of the bond in respect of such money to such an amount as it may deem reasonable.

(b) The applicant for letters of guardianship, or a general guardian or guardian of the estate, may deliver to any such financial institution any such money in the applicant's or the guardian's possession or may allow such financial institution to retain any such money already deposited or invested with it; in either event, the applicant or guardian shall secure and file with the court a written receipt including the agreement of the financial institution, duly acknowledged by an authorized officer of the financial institution, that the money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money from an applicant for letters of guardianship, the financial institution shall be protected to the same extent as though it had received the same from a general guardian or a guardian of the estate.

(c) The term "account with a financial institution" as used in this section means any account in a bank, savings and loan association, credit union, trust company, or registered securities broker or dealer.

(d) The term "money" as used in this section means the principal of the ward's estate and does not include the income earned by the principal, which may be withdrawn without any authorization of the court. (1987, c. 550, s. 1; 2009-309, s. 1.)

§ 35A-1233. Clerk's authority to reduce penalty of bond.

When a guardian has disbursed either income or income and principal of the estate according to law, for the purchase of real estate or the support and maintenance of the ward or the ward and his dependents or any lawful cause, and when the personal assets and income of the estate from all sources in the hands of the guardian have been diminished, the penalty of the guardian's bond may be reduced in the discretion of the clerk to an amount not less than the amount that would be required if the guardian were first qualifying to administer the personal assets and income. (1987, c. 550, s. 1.)

§ 35A-1234. Action on bond.

Any person injured by a breach of the condition of the guardian's bond may prosecute a suit thereon, as in other actions. (1987, c. 550, s. 1.)

§ 35A-1235. One bond sufficient when several wards have estate in common.

When the same person is appointed guardian for two or more minors or incompetent persons possessed of one estate in common, the clerk may take one bond only in such case, upon which each of the wards or their heirs or personal representatives may have a separate action. (1987, c. 550, s. 1.)

§ 35A-1236. Renewal of bond.

Every guardian who is required to post a bond and who does so other than through a duly authorized surety company shall renew his bond before the clerk every three years during the continuance of the guardianship. The clerk shall issue a citation against every such guardian failing to renew his bond, requiring the guardian to renew the bond within 20 days after service of the citation. On return of the citation duly served and failure of the guardian to comply, the clerk shall remove the guardian and appoint a successor. This section shall not apply to a guardian whose bond is executed by a duly authorized surety company. (1987, c. 550, s. 1.)

§ 35A-1237. Relief of endangered sureties.

Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file a motion in the cause before the clerk where the guardianship is docketed, setting forth the circumstances of his case and demanding relief. The guardian shall have 10 days after service

of the motion to answer the motion. If, upon the hearing, the clerk deems the surety entitled to relief, the clerk may order the guardian to give a new bond or to indemnify the surety against apprehended loss, or may remove the guardian from his trust. If the guardian fails to give a new bond or security to indemnify within a reasonable time when required to do so, the clerk must enter a peremptory order for his removal, and his authority as guardian shall cease. (1987, c. 550, s. 1; 1989, c. 473, s. 20.)

§ 35A-1238. Clerk's liability.

(a) If any clerk commits the estate of a ward to the guardianship of any person without taking good and sufficient bond for the same as required by law, the clerk shall be liable on his official bond, at the suit of the aggrieved party, for all loss and damages sustained for want of sufficient bond being taken; but if the sureties were good at the time of their being accepted, the clerk shall not be liable.

(b) If any clerk willfully or negligently does, or omits to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, the clerk shall be liable on his official bond, at the suit of the aggrieved party, for all loss and damages sustained from such act or omission. (1987, c. 550, s. 1.)

§ 35A-1239. Health and Human Services bond.

The Secretary of the Department of Health and Human Services shall require or purchase individual or blanket bonds for all disinterested public agents appointed to be guardians, whether they serve as guardians of the estate, guardians of the person, or general guardians, or one blanket bond covering all agents, the bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the State. The premiums shall be paid by the State. (1987, c. 550, s. 1; 1997-443, s. 11A.17.)

Article 8.
Powers and Duties of Guardian of the Person.

§ 35A-1240. Applicability of Article.

This Article applies only to guardians of the person, including general guardians exercising authority as guardian of the person. (1987, c. 550, s. 1.)

§ 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:

(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. The guardian of the person shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects that are with the ward.

(2) The guardian of the person may establish the ward's place of abode within or without this State. In arranging for a place of abode, the guardian of the person shall give preference to places within this State over places not in this State if in-State and out-of-State places are substantially equivalent. The guardian also shall give preference to places that are not treatment facilities. If the only available and appropriate places of domicile are treatment facilities, the guardian shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based.

(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; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority granted in the health care power of attorney unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208. 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.

(b) A guardian of the person is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in the performance of his duties as guardian of the ward's person.

(c) A guardian of the person, if he has acted within the limits imposed on him by this Article or the order of appointment or both, shall not be liable for damages to the ward or the ward's estate, merely by reason of the guardian's:

(1) Authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service, in a situation where the damages result from the negligence or other acts of a third person; or

(2) Authorizing medical treatment or surgery for his ward, if the guardian acted in good faith and was not negligent. (1987, c. 550, s. 1; 2003-13, s. 4; 2007-502, s. 9.)

§ 35A-1242. Status reports for incompetent wards.

(a) Any corporation or disinterested public agent that is guardian of the person for an incompetent person, within six months after being appointed, shall file an initial status report with the designated agency, if there is one, or with the clerk. Such guardian shall file a second status report with the designated agency or the clerk one year after being appointed, and subsequent reports annually thereafter. The clerk may order any other guardian of the person to file status reports. If a guardian required by this section to file a status report is employed by the designated agency, the guardian shall file any required status report with both the designated agency and the clerk.

(b) Each status report shall be filed under the guardian's oath or affirmation that the report is complete and accurate so far as he is informed and can determine.

(c) A clerk or designated agency that receives a status report shall not make the status report available to anyone other than the guardian, the ward, the court, or State or local human resource agencies providing services to the ward. (1987, c. 550)

§ 35A-1243. Duties of designated agency.

(a) Within 30 days after it receives a status report, the designated agency shall certify to the clerk that it has reviewed the report and shall mail a copy of its certification to the guardian.

(b) At the same time, the designated agency may:

(1) Send its written comments on the report to the clerk, the guardian, or any other person who may have an interest in the ward's welfare;

(2) Notify the guardian that it is able to help the guardian in the performance of his duties;

(3) Petition the clerk for an order requiring the guardian to perform the duties imposed on him by the clerk or this Article if it appears that the guardian is not performing those duties;
(4) Petition the clerk for an order modifying the terms of the guardianship or the guardianship program or plan if it appears that such should be modified;
(5) Petition the clerk for an order removing the guardian from his duties and appointing a successor guardian if it appears that the guardian should be removed for cause;
(6) Petition the clerk for an adjudication of restoration to competency; or
(7) Petition the clerk for any other appropriate orders.

(c) If the designated agency files such a petition, it shall cause the petition to be signed and acknowledged by the officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition, and it shall set forth all facts known to it that tend to support the relief sought by the petition.

(d) The clerk shall take appropriate action upon the petition in accordance with other provisions or requirements of this Chapter. (1987, c. 550, s. 1.)

§ 35A-1244. Procedure to compel status reports.

If a guardian of the person fails to file a status report as required, or renders an unsatisfactory report, the clerk shall, on his own motion or the request of an interested party, promptly order the guardian to render a full and satisfactory report within 20 days after service of the order. If, after due service of the order, the guardian does not file such report, or obtain further time in which to file it, on or before the return day of the order, the clerk may remove him from office or may issue an order or notice to show cause for civil or criminal contempt as provided in Chapter 5A of the General Statutes. In such proceedings, the defaulting guardian may be held personally liable for the costs of the proceeding, including the costs of service of all notices or motions incidental thereto, or the amount of the costs of the proceeding may be deducted from any commissions due to the guardian of the person. Where a corporation or disinterested public agent is guardian of the person, the president or director or person or persons having charge of the guardianship for the corporation or agency, or the person to whom the duty of making status reports has been assigned by the corporation or agency, may be proceeded against as herein provided as if he or they were the guardian personally, provided, the corporation or agency itself may also be fined and/or removed as guardian for such failure or omission. (1987, c. 550, s. 1.)

§ 35A-1245. Procedure to permit the sterilization of a mentally ill or a mentally retarded ward in the case of medical necessity.

(a) A guardian of the person shall not consent to the sterilization of a mentally ill or mentally retarded ward unless an order from the clerk has been obtained in accordance with this section.

(b) If a mentally ill or mentally retarded ward needs to undergo a medical procedure that would result in sterilization, the ward's guardian shall petition the clerk for an order to permit the guardian to consent to the procedure. The petition shall contain the following:
(1) A sworn statement from a physician licensed in this State who has examined the ward that the proposed procedure is medically necessary and not for the sole purpose of sterilization or for the purpose of hygiene or convenience.
(2) The name and address of the physician who will perform the procedure.
(3) A sworn statement from a psychiatrist or psychologist licensed in this State who has examined the ward as to whether the mentally ill or mentally retarded ward is able to comprehend the nature of the proposed procedure and its consequences and provide an informed consent to the procedure.

(4) If the ward is able to comprehend the nature of the proposed procedure and its consequences, the sworn consent of the ward to the procedure.

(c) A copy of the petition shall be served on the ward personally. If the ward is unable to comprehend the nature of the proposed procedure and its consequences and is unable to provide an informed consent, the clerk shall appoint an attorney to represent the ward in accordance with rules adopted by the Office of Indigent Defense Services.

(d) Should the ward or the ward's attorney request a hearing, a hearing shall be held. Otherwise, the clerk may enter an order without the appearance of witnesses. If a hearing is held, the guardian and the ward may present evidence.

(e) If the clerk finds the following, the clerk shall enter an order permitting the guardian to consent to the proposed procedure:

(1) The ward is capable of comprehending the procedure and its consequences and has consented to the procedure, or the ward is unable to comprehend the procedure and its consequences.

(2) The procedure is medically necessary and is not solely for the purpose of sterilization or for hygiene or convenience.

(f) The guardian or the ward, the ward's attorney, or any other interested party may appeal the clerk's order to the superior court in accordance with G.S. 1-301.2(e). (2003-13, s. 1(a); 2005-250, s. 5.)

§§ 35A-1246 through 35A-1249: Reserved for future codification purposes.

Article 9.
Powers and Duties of Guardian of the Estate.

§ 35A-1250. Applicability of Article.

(a) This Article applies only to guardians of the estate, including general guardians exercising authority as guardian of the estate. A guardian of the estate or general guardian shall have all the powers and duties under this Article unless those are inconsistent with the clerk's order appointing a guardian, in which case the clerk's order shall prevail.

(b) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any court order creating or limiting the guardian's powers and duties. (1987, c. 550, s. 1.)

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

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:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(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.

(4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or his estate, or to refuse to complete the contracts, as the guardian determines to be in the ward's best interests, taking

into account any cause of action that might be maintained against the ward for failure to complete the contract.

(5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in a condition that it is of no benefit or value to the ward or his estate.

(5a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

(6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living expenses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or his estate.

(9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.

(10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.

(13) To pay from the ward's estate necessary expenses of administering the ward's estate.

(14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(15) To continue any business or venture or farming operation in which the ward was engaged, where that continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in the business.

(16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(17) a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the

ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order shall not exceed five thousand dollars ($5,000) per accounting period. When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed five thousand dollars ($5,000) in the current accounting period, a guardian may sell the item only as provided in subdivision (17)b.

b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon any other persons the clerk may direct, and the court may issue the order after conducting a hearing and upon any conditions that the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.

(18) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed or trust, or other lien securing the bond, note or other obligation, and to bid in the property at a foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(19) To borrow money for any periods of time and upon the terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber that portion of the ward's estate as may be required to secure the loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

(21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to his minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents;

and the ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons.

(22) To transfer to the spouse of the ward those amounts authorized for transfer to the spouse pursuant to 42 United States Code § 1396r-5.

(23) To create a trust for the benefit of the ward pursuant to 42 United States Code § 1396p(d)(4), provided that all amounts remaining in the trust upon the death of the ward, other than those amounts which must be paid to a state government and those amounts retained by a nonprofit association as set forth in 42 United States Code § 1396p(d)(4)(C), are to be paid to the estate of the ward.

(24) To petition the court for approval of the exercise of any of the following powers with respect to a revocable trust that the ward, if competent, could exercise as settlor of the revocable trust:

a. Revocation of the trust.
b. Amendment of the trust.
c. Additions to the trust.
d. Direction to dispose of property of the trust.
e. The creation of the trust, notwithstanding the provisions of G.S. 36C-4-402(a)(1) and (2).

The exercise of the powers described in this subdivision (i) shall not alter the designation of beneficiaries to receive property on the ward's death under that ward's existing estate plan; and (ii) shall be subject to the provisions of Articles 17, 18, and 19 of this Chapter concerning gifts. (1987, c. 550, s. 1; 1989, c. 473, ss. 3, 13; 1995, c. 235, ss. 6, 8; 1999-270, s. 9; 2004-199, s. 15; 2007-106, s. 52; 2008-87, s. 1.)

§ 35A-1252. Guardian's powers in administering minor ward's estate.

In the case of a minor 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:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, 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.

(4) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or his estate.

(4a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

(5) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(6) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(7) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(8) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(9) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal; provided, neither the existence of the estate nor the guardian's authority to make expenditures therefrom shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward.

(10) To pay from the ward's estate necessary expenses of administering the ward's estate.

(11) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(12) To continue any business or venture or farming operation in which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business.

(13) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(14) a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order shall not exceed five thousand dollars ($5,000) per accounting period. When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed five thousand dollars ($5,000) in the current accounting period, a guardian may sell the item only as provided in subdivision (14)b.

b. A guardian who is required by subdivision (14)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order

after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (9) of this section.

(15) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(16) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(17) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 4; 1995, c. 235, s. 7; 2008-87, s. 2.)

§ 35A-1253. Specific duties of guardian of estate.

In addition to any other duties imposed by law or by order of the clerk, a general guardian or guardian of the estate shall have the following specific duties:

(1) To take possession, for the ward's use, of all his estate.

(2) To diligently endeavor to collect, by all lawful means, all bonds, notes, obligations, or moneys due his ward.

(3) To pay income taxes, property taxes, or other taxes or assessments owed by the ward, out of the ward's estate, as required by law. If any guardian allows his ward's lands to be sold for nonpayment of taxes or assessments, he shall be liable to his ward for the full value thereof.

(4) To observe the standard of judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property. If the guardian has special skills or is named as guardian on the basis of representations of special skills or expertise, to use those skills.

(5) To obey all lawful orders of the court pertaining to the guardianship and to comply with the accounting requirements of this Subchapter.

Nothing in this section shall be construed as broadening the powers granted in G.S. 35A-1251 or G.S. 35A-1252. (1987, c. 550, s. 1.)

§§ 35A-1254 through 35A-1259: Reserved for future codification purposes.

Article 10.
Returns and Accounting.

§ 35A-1260. Applicability.

This Article applies only to general guardians and guardians of the estate. (1987, c. 550, s. 1.)

§ 35A-1261. Inventory or account within three months.

Every guardian, within three months after his appointment, shall file with the clerk an inventory or account, upon oath, of the estate of his ward; but the clerk may extend such time not exceeding six months, for good cause shown. (1987, c. 550, s. 1; 1989, c. 473, s. 26.)

§ 35A-1262. Procedure to compel inventory or account.

(a) In cases of default to file the inventory or account required by G.S. 35A-1261, the clerk must issue an order requiring the guardian to file the inventory or account within the time specified in the order, or to show cause why he should not be removed from office or held in civil contempt, or both. If after due service of the order, the guardian does not, within the time specified in the order, file such inventory or account, or obtain further time to file the same, the clerk may remove him from office, hold him in civil contempt as provided in Article 2 of Chapter 5A, or both.

(b) The guardian shall be personally liable for the costs of any proceeding incident to his failure to file the inventory or account required by G.S. 35A-1261. Such costs shall be taxed against him by the clerk and may be collected by deduction from any commissions that may be found due the guardian upon final settlement of the estate. (1987, c. 550, s. 1; 1989, c. 473, s. 27.)

§ 35A-1263. Repealed by Session Laws 1989, c. 473, s. 28.

§ 35A-1263.1. Supplemental inventory.

Whenever any property not included in the original inventory report becomes known to the guardian or whenever the guardian learns that the valuation or description of any property or interest therein indicated in the original inventory is erroneous or misleading, he shall prepare and file with the clerk a supplementary inventory in the same manner as prescribed for the original inventory. The clerk shall record the supplemental inventory with the original inventory. A guardian who fails to file a supplementary inventory as required by this section shall be subject to the enforcement provisions of G.S. 35A-1262. (1989, c. 473, s. 29.)

§ 35A-1264. Annual accounts.

Every guardian shall, within 30 days after the expiration of one year from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (1987, c. 550, s. 1.)

§ 35A-1265. Procedure to compel accounting.

(a) If any guardian omits to account, as directed in G.S. 35A-1264, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such guardian to render a

full and satisfactory account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if the guardian fails to appear or refuses to exhibit such account, the clerk may issue an attachment against him for contempt and commit him until he exhibits such account, and may likewise remove him from office. In all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceedings, including the costs of service of all notices or writs incidental to, or thereby acquiring, and also including reasonable attorney fees and expenses incurred by a successor guardian or other person in bringing any such proceeding, or other proceedings deemed reasonable and necessary to discover or obtain possession of assets of the ward in the possession of the defaulting guardian or which the defaulting guardian should have discovered or which the defaulting guardian should have turned over to the successor guardian. The amount of the costs and attorney fees and expenses of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate.

(b) Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for the corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of the corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may be fined and/or removed as such guardian for such failure or omission. (1987, c. 550, s. 1; 1989, c. 473, s. 16.)

§ 35A-1266. Final account and discharge of guardian.

Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability. (1987, c. 550, s. 1; 1989, c. 473, s. 32.)

§ 35A-1267. Expenses and disbursements credited to guardian.

Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (1987, c. 550, s. 1.)

§ 35A-1268. Guardian to exhibit investments and bank statements.

At the time the accounts required by this Article and other provisions of law are filed, the clerk shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account: Provided, such examination may be made by the clerk in the county in which such guardian resides or the county in which such securities are located and, when the guardian is a duly authorized bank or trust company, such examination may be made by the clerk in the county in which such bank or trust company has its principal office or in which such securities are located; the certificate of the clerk of such county shall be accepted by the clerk of any county in which such guardian is required to file an account; provided that banks organized under the laws of North Carolina or the acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian or in other fiduciary capacity, shall be exempt

from the requirements of this section, when a certificate executed by a trust examiner employed by a governmental unit, by a bank's internal auditors who are responsible only to the bank's board of directors or by an independent certified public accountant who is responsible only to the bank's board of directors is exhibited to the clerk and when said certificate shows that the securities have been examined within one year and that the securities were held at the time of the examination by the fiduciary or by a clearing corporation for the fiduciary and that the person making such certification has no reason to believe said securities are not still so held. Nothing herein contained shall be construed to abridge the inherent right of the clerk to require the production of securities, should he desire to do so. (1987, c. 550, s. 1.)

§ 35A-1269. Commissions.

The 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 executors, administrators and collectors under the provisions of G.S. 28A-23-3 and G.S. 28A-23-4. (1987, c. 550, s. 1; 1989, c. 473, s. 21.)

Article 11.
Public Guardians.

§ 35A-1270. Appointment; term; oath.

There may be in every county a public guardian, to be appointed by the clerk for a term of eight years. The public guardian shall take and subscribe an oath or affirmation faithfully and honestly to discharge the duties imposed upon him; the oath or affirmation so taken and subscribed shall be filed in the office of the clerk. (1987, c. 550, s. 1.)

§ 35A-1271. Bond of public guardian; increasing bond.

The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars ($6,000), payable to the State of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (1987, c. 550, s. 1.)

§ 35A-1272. Powers, duties, liabilities, compensation.

The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (1987, c. 550, s. 1.)

§ 35A-1273. When letters issue to public guardian.

The public guardian shall apply for and obtain letters of guardianship in the following cases:

(1) When a period of six months has elapsed from the discovery of any property belonging to any minor or incompetent person without guardian.

(2) When any person entitled to letters of guardianship shall request in writing the clerk to issue letters to the public guardian; but it is lawful and the duty of the clerk to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (1987, c. 550, s. 1.)

§§ 35A-1274 through 35A-1279: Reserved for future codification purposes.

Article 12.
Nonresident Ward Having Property in State.

§ 35A-1280. Appointment of ancillary guardian.

(a) A clerk may appoint an ancillary guardian whenever it appears by petition or application and due proof to the satisfaction of the clerk that:

(1) There is in the county of the clerk's jurisdiction real or personal property in which a nonresident of the State of North Carolina has an ownership or other interest; and

(2) The nonresident is incompetent or is a minor and a guardian of the estate or general guardian, or a comparable fiduciary, has been appointed and is still serving for the nonresident in the state of his or her residence; and

(3) That the nonresident ward has no guardian in the State of North Carolina.

(b) Except as otherwise ordered by the clerk or provided herein, an ancillary guardian shall have all the powers, duties, and responsibilities with respect to the nonresident ward's estate in the State of North Carolina as guardians otherwise appointed have. An ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of the real estate or any proceeds of sale.

(c) A certified or exemplified copy of letters of appointment or other official record of a court of record appointing a guardian for a nonresident in the state of his residence shall be conclusive proof of the fact of the ward's minority or incompetence and of the appointment of the guardian in the state of the ward's residence; provided, that the letters of appointment or other record shall show that the guardianship is still in effect in the state of the ward's residence and that the ward's incompetence or minority still exists.

(d) Upon the appointment of an ancillary guardian under this Article, the clerk shall notify the appropriate court in the county of the ward's residence and the guardian in the state of the ward's residence. (1987, c. 550, s. 1.)

§ 35A-1281. Removal of ward's personalty from State.

(a) For purposes of this section, the term "personal estate" means:

(1) Personal property;

(2) Personal property substituted for realty by decree of court;

(3) Any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this State; or in the hands of any executor, administrator, or other person holding for the ward; or, if not being adversely held and claimed, not in the lawful possession or control of any person.

(b) Where any ward residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, the ward's guardian or trustee duly appointed at the place where such ward resides, or, in the event no guardian or trustee has been appointed, the court or officer of the court authorized by the laws of such place to receive moneys belonging to any ward when no guardian or trustee has been appointed, may apply to have such estate removed to the residence of the ward by petition filed before the clerk in the county in which the property or some portion thereof is situated. Such petition shall be proceeded with as in other cases of special proceedings.

(c) The petitioner must show to the court a copy of his appointment as a guardian or trustee and bond duly authenticated, and must prove to the court that the bond is sufficient, in the ability of the sureties as well as in amount, to secure all the estate of the ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian or trustee of any person and is not required to execute a bond to qualify as guardian or trustee under the laws of the state in which such guardian or trustee

qualified and was appointed, and no sureties are or were required by the state in which said banking institution qualified as guardian or trustee, and this fact affirmatively appears to the court, then the personal estate of the ward may be removed from this State without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the ward is filed may order the transfer and removal of the property of the ward and the payment and delivery of the same to the nonresident guardian or trustee without regard to whether a nonresident guardian or trustee has filed a bond with sureties; and the finding of the court that the said guardian or trustee is a banking institution and has duly qualified and been appointed guardian or trustee under the laws of the state where the ward is resident shall be sufficient. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of Chapter 1A of the General Statutes. (1987, c. 550, s. 1.)

§§ 35A-1282 through 35A-1289: Reserved for future codification purposes.

Article 13.
Removal or Resignation of Guardian; Successor Guardian; Estates Without Guardians; Termination of Guardianship.

§ 35A-1290. Removal by Clerk.

(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 interests in the following cases:

(1) The guardian wastes the ward's money or estate or converts it to his own use.
(2) The guardian in any manner mismanages the ward's estate.
(3) The guardian neglects to care for or maintain the ward or his dependents in a suitable manner.
(4) The guardian or his sureties are likely to become insolvent or to become nonresidents of the State.
(5) The original appointment was made on the basis of a false representation or a mistake.
(6) The guardian has violated a fiduciary duty through default or misconduct.
(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.

(c) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests in the following cases:

(1) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competence.
(2) The guardian has been convicted of a felony under the laws of the United States or of any state or territory of the United States or of the District of Columbia and his citizenship has not been restored.
(3) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment as guardian due to a change in residence, a change in the charter of a corporate guardian, or any other reason.
(4) The guardian is the ward's spouse and has lost his rights as provided by Chapter 31A of the General Statutes.
(5) The guardian fails to post, renew, or increase a bond as required by law or by order of the court.

(6) The guardian refuses or fails without justification to obey any citation, notice, or process served on him in regard to the guardianship.
(7) The guardian fails to file required accountings with the clerk.
(8) The clerk finds the guardian unsuitable to continue serving as guardian for any reason.
(9) The guardian is a nonresident of the State and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent. (1987, c. 550, s. 1; 2004-203, s. 31(b).)

§ 35A-1291. Emergency removal; interlocutory orders on revocation.

The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate. In all cases where the letters of a guardian are revoked, the clerk may, pending the resolution of any controversy in respect to such removal, make such interlocutory orders and decrees as the clerk finds necessary for the protection of the ward or the ward's estate or the other party seeking relief by such revocation. (1987, c. 550, s. 1; 2004-203, s. 31(c).)

§ 35A-1292. Resignation.

(a) Any guardian who wishes to resign shall file a motion with the clerk setting forth the circumstances of the case. If a general guardian or guardian of the estate, at the time of making the application, also exhibits his final account for settlement, and if the clerk is satisfied that the guardian has fully accounted, the clerk may accept the resignation of the guardian and discharge him and appoint a successor guardian. The guardian so discharged and his sureties are still liable in relation to all matters connected with the guardianship before the discharge and shall continue to ensure that the ward's needs are met until the clerk officially appoints a successor. The guardian shall attend the hearing to modify the guardianship, if physically able.

(b) A general guardian who wishes to resign as guardian of the estate of the ward but continue as guardian of the person of the ward may apply for the partial resignation by petition as provided in subsection (a) of this section. If the general guardian also exhibits his final account as guardian of the estate for settlement, and if the clerk is satisfied that the general guardian has fully accounted as guardian of the estate, the clerk may accept the resignation of the general guardian as guardian of the estate, discharge him as guardian of the estate, and issue to him letters of appointment as guardian of the person, but the general guardian so discharged as guardian of the estate and his sureties are still liable in relation to all matters connected with the guardianship of the estate before the discharge. (1987, c. 550, s. 1; 2012-151, s. 12(d).)

§ 35A-1293. Appointment of successor guardian.

Upon the removal, death, or resignation of a guardian, the clerk shall appoint a successor guardian following the same criteria that would apply to the initial appointment of a guardian. (1987, c. 550, s. 1.)

§ 35A-1294. Estates without guardians.

(a) Whenever a general guardian or guardian of the estate is removed, resigns, or stops serving without making a full and proper accounting, the successor guardian, or the clerk if there is no successor guardian, shall initiate a proceeding to compel an accounting. The surety or sureties on the previous guardian's bond shall be served with notice of the proceeding.

(b) If no successor guardian has been appointed, the clerk may act as receiver or appoint some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due the ward, and to secure, lend, invest, or apply the same for the benefit and advantage of the ward, under the direction of the clerk until a successor guardian is appointed.

The accounts of the receiver shall be returned, audited, and settled as the clerk may direct. The receiver shall be allowed such amounts for his time, trouble, and responsibility as seem to the clerk reasonable and proper. Such receivership may continue until a suitable guardian can be appointed.

(c) When another guardian is appointed, he may apply by motion, on notice, to the clerk for an order directing the receiver to pay over all the money, estate, and effects of the ward. If no such guardian is appointed, the ward shall have the same remedy against the receiver on becoming age 18 or otherwise emancipated if the ward is a minor or on being restored to competence if the ward is an incompetent person. In the event of the ward's death, his executor, administrator, or collector, and the heir or personal representative of the ward shall have the same remedy against the receiver. (1987, c. 550, s. 1.)

§ 35A-1295. Termination of guardianship.

(a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward:

(1) Ceases to be a minor as defined in G.S. 35A-1202(12),

(2) Is adjudicated to be restored to competency pursuant to the provisions of G.S. 35A-1130, or

(3) Dies.

(b) Notwithstanding subsection (a), a guardian of the estate or a general guardian is responsible for all accountings required by Article 10 of this Chapter until the guardian is discharged by the clerk. (1989, c. 473, s. 31.)

§§ 35A-1296 through 35A-1300: Reserved for future codification purposes.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

Article 14.

Sale, Mortgage, Exchange or Lease of Ward's Estate.

§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease.

(a) Whenever used herein, the word "guardian" shall be construed to include general guardian, guardian of the estate, ancillary guardian, next friend, guardian ad litem, or commissioner of the court acting pursuant to this Article, but not a guardian who is guardian of the person only; and the word "mortgage" shall be construed to include deeds of trust.

(b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in his discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:

(1) The ward's interest would be materially promoted by such sale, mortgage, exchange, or lease, or

(2) The ward's personal estate has been exhausted or is insufficient for his support and the ward is likely to become chargeable on the county, or

(3) A sale, mortgage, exchange, or lease of any part of the ward's real estate is necessary for his maintenance or for the discharge of debts unavoidably incurred for his maintenance, or

(4) Any part of the ward's real estate is required for public purposes, or

(5) There is a valid debt or demand against the estate of the ward; provided, when an order is entered under this subdivision, (i) it shall authorize the sale

of only so much of the real estate as may be sufficient to discharge such debt or demand, and (ii) the proceeds of sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

The order shall specify particularly the property thus to be disposed of, with the terms of leasing or sale or exchange or mortgage, and shall be entered at length on the records of the court. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its order.

(c) In the case of a ward who is a minor, no sale, mortgage, exchange, or lease under this Article shall be made until approved by the superior court judge, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale, mortgage, exchange, or lease shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

(d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

(e) The procedure for a sale pursuant to this section shall be as provided by Article 29A of Chapter 1 of the General Statutes.

(f) Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases.

(g) On and after June 1, 1973, no sales of property belonging to minors or incompetent persons prior to that date by next friend, guardian ad litem, or commissioner of the court regular in all other respects shall be declared invalid nor shall any claim or defense be asserted on the grounds that said sale was not made by a duly appointed guardian as provided herein or on the grounds that said minor or incompetent person was not represented by a duly appointed guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 6.)

§ 35A-1302. Procedure when real estate lies in county in which guardian does not reside.

In all cases where a guardian is appointed under the authority of Chapter 35A and such guardian applies to the court for an order to sell, mortgage, or exchange all or part of his ward's real estate, and such real estate is situated in a county other than the county in which the guardian is appointed and qualified, the guardian shall first apply to the clerk of the county in which he was appointed and qualified for an order showing that the sale, mortgage, or exchange of his ward's real estate is necessary or that the ward's interest would be materially promoted thereby. The clerk to whom such application is made shall hear and pass upon the same and enter his findings and order as to whether said sale, mortgage, or exchange is necessary or would materially promote the ward's interest, and said order and findings shall be certified to the clerk of the county in which the ward's land, or some part of it, is located and before whom any petition or application is filed for the sale, mortgage, or exchange of said land. Such findings and orders so certified shall be considered by the court along with all other evidence and circumstances in passing upon the petition in which an order is sought for the sale, mortgage, or exchange of said land. In the case of a ward who is a minor, before such findings and orders shall become effective the same shall be approved by the superior court judge holding the courts of the district or by the resident judge. (1987, c. 550, s. 1.)

§ 35A-1303. Fund from sale has character of estate sold and subject to same trusts.

Whenever, in consequence of any sale under G.S. 35A-1301, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value

equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, or devised and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper. (1987, c. 550, s. 1; 2011-284, s. 38.)

§ 35A-1304: Repealed by Session Laws 1989, c. 473, s. 7.

§ 35A-1305. When timber may be sold.

In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. In addition, the guardian, with the consent of the clerk, may annually dispose of, use, or sell so much of the timber as is necessary to maintain good forestry practices. (1987, c. 550, s. 1.)

§ 35A-1306. Abandoned incompetent spouse.

(a) A guardian of a married person found incompetent who has been abandoned, whether the guardian was appointed before or after the abandonment, may initiate a special proceeding before the clerk having jurisdiction over the ward requesting the issuance of an order authorizing the sale of the ward's separate real property without the joinder of the abandoning spouse.

(b) The ward's spouse shall be served with notice of the special proceeding in accordance with G.S. 1A-1, Rule 4.

(c) If the clerk finds:

(1) That the spouse of the ward has willfully and without just cause abandoned the ward for a period of more than one year; and

(2) That the spouse of the ward has knowledge of the guardianship, or that the guardian has made a reasonable attempt to notify the spouse of the guardianship; and

(3) That an order authorizing the sale of the separate real property of the ward is in the best interest of the ward;

the clerk may issue such an order thereby barring the abandoning spouse from all right, title and interest in any of the ward's separate real property sold pursuant to such an order. (1987, c. 550, s. 1.)

§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real property.

Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution in this State, and who was living with the incompetent spouse at the time of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk to sell the real property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the superior court district or set of districts as defined in G.S. 7A-41.1 where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1987, c. 550, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 83; 1989, c. 473, s. 8.)

§§ 35A-1308 through 35A-1309: Reserved for future codification purposes.

Article 15.
Mortgage or Sale of Estates Held by the Entireties.

§ 35A-1310. Where one spouse or both incompetent; special proceeding before clerk.

In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. All petitions filed under the authority of this section shall be filed in the office of the clerk of the superior court of the county where the real estate or any part of same is situated. (1935, c. 59, s. 1; 1945, c. 426, s. 5; c. 1084, s. 5.; 1987, c. 550, s. 2.)

§ 35A-1311. General law applicable; approved by judge.

The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6; 1987, c. 550, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 84.)

§ 35A-1312. Proceeding valid in passing title.

Any mortgage, deed, or deed of trust executed under authority of this Article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3; 1987, c. 550, s. 2.)

§ 35A-1313. Clerk may direct application of funds; purchasers and mortgagees protected.

In all cases conducted under this Article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4; 1987, c. 550, s. 2.)

§ 35A-1314. Prior sales and mortgages validated.

Any and all special proceedings under which estates by the entireties have been sold or mortgaged prior to March 5, 1935, under circumstances contemplated in this Article are hereby

in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5; 1987, c. 550, s. 2.)

§§ 35A-1315 through 35A-1319: Reserved for future codification purposes.

Article 16.
Surplus Income and Advancements.

§ 35A-1320: Repealed by Session Laws 1989, c. 473, s. 14.

§ 35A-1321. Advancement of surplus income to certain relatives.

When any incompetent person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any incompetent person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to incompetency to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his incompetency, he contributed in whole or in part. (R.C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C.S., s. 2296; Ex. Sess. 1924, c. 93; 1971, c. 528, s. 32; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

§ 35A-1322. Advancement to adult child or grandchild.

When such incompetent person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

§ 35A-1323. For what purpose and to whom advanced.

Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of 21 years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (R.C., c. 57, s. 10; Code, s. 1678; Rev., s. 1901; C.S., s. 2297; 1987, c. 550, s. 3.)

§ 35A-1324. Distributees to be parties to proceeding for advancements.

In every application for such advancements, the guardian of the incompetent person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (R.C., c. 57, s. 11; Code, s. 1679; Rev., s. 1902; C.S., s. 2298; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

§ 35A-1325. Advancements to be equal; accounted for on death.

The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the incompetent person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (R.C., c. 57, s. 12; Code, s. 1680; Rev., s. 1903; C.S., s. 2299; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

§ 35A-1326. Advancements to those most in need.

When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (R.C., c. 57, s. 13; Code, s. 1681; Rev., s. 1904; C.S., s. 2300; 1925, c. 136, s. 2; 1987, c. 550, s. 3.)

§ 35A-1327. Advancements to be secured against waste.

It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (R.C., c. 57, s. 14; Code, s. 1682; Rev., s. 1905; C.S., s. 2301; 1987, c. 550, s. 3.)

§ 35A-1328. Appeal; removal to superior court.

Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (R.C., c. 57, s. 15; Code, s. 1683; Rev., s. 1906; C.S., s. 2302; 1987, c. 550, s. 3.)

§ 35A-1329. Advancements only when incompetence permanent.

No such application shall be allowed under this Article but in cases of such permanent and continued incompetence as that the incompetent person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion. (R.C., c. 57, s. 16; Code, s. 1684; Rev., s. 1907; C.S., s. 2303; 1987, c. 550, ss. 3, 3.1.)

§ 35A-1330. Orders suspended upon restoration of competence.

Upon such incompetent person's being restored to competence, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (R.C., c. 57, s. 17; Code, s. 1685; Rev., s. 1908; C.S., s. 2304; 1987, c. 550, ss. 3, 3.2.)

§§ 35A-1331 through 35A-1334: Reserved for future codification purposes.

Article 17.
Gifts from Income for Certain Purposes.

§ 35A-1335. Gifts authorized with approval of judge of superior court.

With the approval of the resident judge of the superior court of the district in which the guardian was appointed, upon a duly verified petition the guardian of a person judicially declared to be incompetent may, from the income of the incompetent, make gifts to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes, or to individuals including the guardian. References in this Article to the

"guardian" include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate. (1963, c. 111, s. 1; 1987, c. 550, s. 4; 1999-270, s. 1.)

§ 35A-1336. Prerequisites to approval by judge of gifts for governmental or charitable purposes.

The judge shall not approve gifts from income for governmental or charitable purposes unless it appears to the judge's satisfaction that all of the following apply:

(1) After making the gifts and the payment of federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability.

(3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(4) The aggregate of the gifts does not exceed the percentage of income fixed by federal law as the maximum deduction allowable for the gifts in computing federal income tax liability. (1963, c. 111, s. 2; 1987, c. 550, s. 4; 1999-270, s. 2.)

§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from income to individuals unless it appears to the judge's satisfaction that both the following requirements are met:

(1) After making the gifts and paying federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort, and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life;

(2) The judge determines that either:

a. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent, and each donee is entitled to one or more specific devises, or distributions of specific amounts of money, income, or property under the paper-writing or the revocable trust or both or is a residuary devisee or beneficiary designated in the paper-writing or revocable trust or both; or

b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of the approval of the gifts; or

c. The donee is the spouse, parent, descendent of the incompetent, or descendant of the incompetent's parent, and the amount of the gift does not exceed the federal annual gift tax exclusion.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death. (1999-270, s. 3; 2011-284, s. 39.)

§ 35A-1337. Fact that incompetent had not previously made similar gifts.

The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 111, s. 3; 1987, c. 550, s. 4.)

§ 35A-1338. Validity of gift.

A gift made with the approval of the judge under the provisions of this Article shall be deemed a gift by the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 111, s. 4; 1987, c. 550, s. 4.)

§ 35A-1339: Reserved for future codification purposes.

Article 18.

Gifts from Principal for Certain Purposes.

§ 35A-1340. Gifts authorized with approval of judge of superior court.

With the approval of the resident judge of the superior court of the district in which the guardian was appointed upon a duly verified petition, the guardian of a person judicially declared to be incompetent may, from the principal of the incompetent's estate, make gifts to the State of North Carolina, its agencies, counties or municipalities, or the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes, or to individuals including the guardian. The incompetent's estate shall consist of all assets owned by the incompetent, including nonprobate assets. For purposes of this Article, nonprobate assets are those which would not be distributable in accordance with the incompetent's valid probated will or the provisions of Chapter 29 at the incompetent's death. The incompetent's nonprobate estate would include nonprobate assets only. References in this Article to the "guardian" include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate. (1963, c. 112, s. 1; 1987, c. 550, s. 5; 1999-270, s. 4.)

§ 35A-1341. Prerequisites to approval by judge of gifts for governmental or charitable purposes.

The judge shall not approve any gifts from principal for governmental or charitable purposes unless it appears to the judge's satisfaction all of the following requirements are met:

(1) The making of the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and these dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability.

(3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(4) The making of the gifts will not jeopardize the rights of any creditor of the incompetent.

(5) It is improbable that the incompetent will recover competency during his or her lifetime.

(5a) Sufficient credible evidence is presented to the court that the proposed gift is of a nature which the incompetent would have approved prior to being declared incompetent.

(6) Either a. or b. applies:

a. All of the following apply:

1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.

2. Specific devises, or nondiscretionary distributions of specific amounts of money, income or property included in the paper-writing or revocable trust or both, will not be jeopardized by making the gifts.

3. All residuary devisees and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both, if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will and the spouse, if any, of the incompetent have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed, within the 10-day period.

b. Both of the following apply:

1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and

2. All persons who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed within the 10-day period. This notice

requirement shall be in addition to the notice requirements contained in G.S. 35A-1341(6)a.3. and (6)b.2. (1963, c. 112, s. 2; 1987, c. 550, s. 5; 1999-270, s. 5; 2011-284, s. 40.)

§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from principal to individuals unless it appears to the judge's satisfaction that all of the following requirements have been met:

(1) Making the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort, and welfare of the incompetent in order to maintain the incompetent and any dependents legally entitled to support from the incompetent in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) The making of the gifts will not jeopardize the rights of any existing creditor of the incompetent.

(3) It is improbable that the incompetent will recover competency during his or her lifetime.

(4) The judge determines that either a., b., c., or d. applies.

a. All of the following apply:

1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.

2. Each donee is entitled to one or more specific devises, or distributions of specific amounts of money, income, or property under either the paper-writing or revocable trust or both or is a residuary devisee or beneficiary designated in the paper-writing or revocable trust or both.

3. The making of the gifts will not jeopardize any specific devise, or distribution of specific amounts of money, income, or property.

b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval of the gifts.

c. The donee is a person who would share in the incompetent's nonprobate estate, if the incompetent died contemporaneously with the signing of the order of approval.

d. The donee is the spouse, parent, descendant of the incompetent, or descendant of the incompetent's parent, and the amount of the gift does not exceed the federal annual gift tax exclusion.

(5) If the incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent; then all residuary devisees and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of

approval of the gifts and the paper-writing was probated as the incompetent's will, the spouse, if any, of the incompetent and all persons identified in G.S. 35A-1341.1(7) have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed, within the 10-day period.

(6) If so far as is known, the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in G.S. 35A-1341.1(5) and (6) above.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death. (1999-270, s. 6; 2011-284, s. 41.)

§ 35A-1342. Who deemed specific and residuary devisees of incompetent under § 35A-1341.

For purposes of G.S. 35A-1341(6)a and G.S. 35A-1341.1(4) and (5), if the paper-writing provides for the residuary estate to be placed in trust for a term of years, or if the paper-writing names as beneficiary a revocable trust created by the incompetent, and the trust or trusts include dispositive provisions which provide that assets continue in trust for a term of years with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust or trusts, the designated beneficiaries shall be deemed to be specific devisees and beneficiaries and those taking the remaining income of the trust or trusts and, at the end of the term, the remaining principal shall be deemed to be residuary devisees and beneficiaries who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary devisee or beneficiary on the sole basis of prospective service as executor or trustee. (1963, c. 112, s. 3; 1987, c. 550, s. 5; 1999-270, s. 7; 2011-284, s. 42.)

§ 35A-1343. Notice to minors and incompetents under § 35A-1341 and § 35A-1341.1.

If any person, to whom notice must be given under the provisions of G.S. 35A-1341 and G.S. 35A-1341.1 is a minor or is incompetent, or is an unborn or unascertained beneficiary, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor, incompetent, unborn, or unascertained beneficiary has no guardian or representative, then a guardian ad litem shall be appointed by the judge and the

guardian ad litem shall be given the notice herein required. (1963, c. 112, s. 4; 1987, c. 550, s. 5; 1999-270, s. 8.)

§ 35A-1344. Objections to proposed gift; fact that incompetent had previously made similar gifts.

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 112, s. 5; 1987, c.550, s. 5.)

§ 35A-1345. Validity of gift.

A gift made with the approval of the judge under the provisions of this Article shall be deemed to be a gift made by the incompetent, and shall be as valid in all respects as if made by a competent person. (1963, c. 112, s. 6; 1987, c. 550, s. 5.)

§§ 35A-1346 through 35A-1349: Reserved for future codification purposes.

Article 19.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§ 35A-1350. Declaration and gift for certain purposes authorized with approval of judge of superior court.

When a person has created a revocable trust, reserving the income for life, and thereafter has been judicially declared to be incompetent, the guardian or trustee of such incompetent, with the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition may declare the trust to be irrevocable and make a gift of the life interest of the incompetent to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 113, s. 1; 1987, c. 550, s. 6.)

§ 35A-1351. Prerequisites to approval of gift.

The judge shall not approve the gift unless it appears to the judge's satisfaction that:

(1) It is improbable that the incompetent will recover competency during his or her lifetime;

(2) The estate of the incompetent, after making the gift and after payment of any gift taxes which may be incurred by reason of the declaration of irrevocability, will be sufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gift, of expenditures for the incompetent's support, maintenance, comfort and welfare);

(3) Each donee of any part of the life interest is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;

(4) Each donee of any part of the life interest is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(5) Either:

a. 1. The incompetent, prior to being declared incompetent, executed a paper-writing, with the formalities required by the laws of North Carolina for the execution of a valid will;

2. Specific devises of specific amounts of money, income or property included in such paper-writing, will not be jeopardized by making such gifts;

3. All residuary devisees designated in such paper-writing, who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts, and such paper-writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of superior court, of the county in which the guardian or trustee was appointed, within the 10-day period; or

b. 1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and

2. All persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed, within the 10-day period. (1963, c. 113, s. 2; 1987, c. 550, s. 6; 2011-284, s. 43.)

§ 35A-1352. Who deemed specific and residuary devisees of incompetent under § 35A-1351.

For purposes of G.S. 35A-1351(5)a. of this Article, if such paper-writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary devisees who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary devisee. (1963, c. 113, s. 3; 1987, c. 550, s. 6; 2011-284, s. 44.)

§ 35A-1353. Notice to minors and incompetents under § 35A-1351.

If any person, to whom notice must be given under the provisions of G.S. 35A-1351(5) of this Article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative, then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 113, s. 4; 1987, c. 550, s. 6.)

§ 35A-1354. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 113, s. 5; 1987, c. 550, s. 6.)

§ 35A-1355. Validity of declaration and gift.

Such declaration and gift, when made with the approval of the judge and under the provisions of this Article, shall be deemed to be the declaration and gift of the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 113, s. 6; 1987, c. 550, s. 6.)

§§ 35A-1356 through 35A-1359: Reserved for future codification purposes.

Article 20.

Guardians' Deeds Validated When Seal Omitted.

§ 35A-1360. Deeds by guardians omitting seal, prior to January 1, 1944, validated.

All deeds executed prior to the first day of January, 1944, by any guardian, acting under authority obtained by him from the superior court as required by law, in which the guardian has omitted to affix his seal after his signature and/or has omitted to affix the seal after the signature of his ward shall be good and valid, and shall pass the title to the land which the guardian was authorized to convey: Provided, however, this section shall not apply to any pending litigation. (1947, c. 531; 1987, c. 550, s. 9.)

§ 35A-1361. Certain private sales validated.

All private sales of real and personal property made by a guardian under Article 4 of this Chapter before June 1, 1985, that, under G.S. 1-339.36, should have been conducted as public sales because an upset bid was submitted, are validated to the same extent as if the guardian had complied with the procedures for a public sale. (1985, c. 654, s. 1(2); 1987, c. 550, s. 9).

§§ 35A-1362 through 35A-1369. Reserved for future codification purposes.

SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN.

Article 21.

Standby Guardianship.

§ 35A-1370. Definitions.

For purposes of this Article:

(1) "Alternate standby guardian" means a person identified in either a petition or designation to become the guardian of the person or, when appropriate, the general guardian of a minor child, pursuant to G.S. 35A-1373 or to G.S. 35A-1374, when the person identified as the standby guardian and the designator or petitioner has identified an alternate standby guardian.

(2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the parent or legal guardian. When more than one physician shares this responsibility, or when a physician is acting on the primary physician's behalf, any such physician may act as the attending physician pursuant to this section. When no physician has this responsibility,

a physician who is familiar with the petitioner's medical condition may act as the attending physician pursuant to this Article.

(3) "Debilitation" means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child.

(4) "Designation" means a written document voluntarily executed by the designator pursuant to this Article.

(5) "Designator" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological or adoptive parent, the guardian of the person, or the general guardian of a minor child. A designation under this Article may be made on behalf of a designator by the guardian of the person or the general guardian of the designator.

(6) "Determination of debilitation" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the debilitation of the petitioner or designator.

(7) "Determination of incapacity" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the incapacity of the petitioner or designator.

(8) "Incapacity" means a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of one's minor child, and a consequent inability to make these decisions.

(9) "Minor child" means an unemancipated child or children under the age of 18 years.

(10) "Petitioner" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological parent, the adoptive parent, the guardian of the person, or the general guardian of a minor child. A proceeding under this Article may be initiated and pursued on behalf of a petitioner by the guardian of the person, the general guardian of the petitioner, or by a person appointed by the clerk of superior court pursuant to Rule 17 of the Rules of Civil Procedure as guardian ad litem for the purpose of initiating and pursuing a proceeding under this Article on behalf of a petitioner.

(11) "Standby guardian" means a person appointed pursuant to G.S. 35A-1373 or designated pursuant to G.S. 35A-1374 to become the guardian of the person or, when appropriate, the general guardian of a minor child upon the death of a petitioner or designator, upon a determination of debilitation or incapacity of a petitioner or designator, or with the consent of a petitioner or designator.

(12) "Triggering event" means an event stated in the designation executed or order entered under this Article which empowers the standby guardian, or the alternate standby guardian, if one is identified and the standby guardian is unwilling or unable to serve, to assume the duties of the office, which event may be the death of a petitioner or designator, incapacity of a petitioner or designator, debilitation of a petitioner or designator with the petitioner's or designator's consent, or the consent of the petitioner or designator, whichever occurs first. (1995, c. 313, s. 1.)

§ 35A-1371. Jurisdiction; limits.

Notwithstanding the provisions of Subchapter II of this Chapter, the clerk of superior court shall have original jurisdiction for the appointment of a standby guardian for a minor child under this Article. Provided that the clerk shall have no jurisdiction, no standby guardian may be appointed under this Article, and no designation may become effective under this Article when a district court has assumed jurisdiction over the minor child in an action under Chapter 50 of the General Statutes or in an abuse, neglect, or dependency proceeding under Subchapter I of Chapter 7B of the General Statutes, or when a court in another state has assumed such jurisdiction under a comparable statute. (1995, c. 313, s. 1; 1998-202, s. 13(g).)

§ 35A-1372. Standby guardianship; applicability.

This Article provides two methods for appointing a standby guardian: by petition pursuant to G.S. 35A-1373 or by designation pursuant to G.S. 35A-1374. If a standby guardian is unwilling or unable to serve as a standby guardian and the designator or petitioner has identified an alternate standby guardian, then the alternate standby guardian shall become the standby guardian, upon the same conditions as set forth in this Article. (1995, c. 313, s. 1.)

§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing, order.

(a) A petitioner shall commence a proceeding under this Article for the appointment of a standby guardian of a minor child by filing a petition with the clerk of superior court of the county in which the minor child resides or is domiciled at the time of filing. A petition filed by a guardian of the person or a general guardian of the minor child who was appointed under this Chapter shall be treated as a motion in the cause in the original guardianship, but the provisions of this section shall otherwise apply.

(b) A petition for the judicial appointment of a standby guardian of a minor child shall:

(1) Identify the petitioner, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any;

(2) State that the authority of the standby guardian is to become effective upon the death of the petitioner, upon the incapacity of the petitioner, upon the debilitation of the petitioner with the consent of the petitioner, or upon the petitioner's signing of a written consent stating that the standby guardian's authority is in effect, whichever occurs first;

(3) State that the petitioner suffers from a progressively chronic illness or an irreversible fatal illness, and the basis for such a statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question;

(4) State whether there are any lawsuits, in this or any other jurisdiction, involving the minor child and, if so, identify the parties, the case numbers, and the states and counties where filed; and

(5) Be verified by the petitioner in front of a notary public or another person authorized to administer oaths.

(c) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a petitioner, and on any other person the clerk may direct, including the minor child. Service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(d) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(e) The petitioner's appearance at the hearing shall not be required if the petitioner is medically unable to appear, unless the clerk determines that the petitioner is able with reasonable accommodation to appear and that the interests of justice require that the petitioner be present at the hearing.

(f) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this Article for the appointment of a standby guardian have been satisfied. If the clerk finds that the petitioner suffers from a progressive chronic illness or an irreversible fatal illness, that the best interests of the minor child will be promoted by the appointment of a standby guardian of the person or general guardian, and that the standby guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or general guardian of the minor child, the clerk shall enter an order appointing the standby guardian named in the petition as standby guardian of the person or standby general guardian of the minor child and shall issue letters of appointment to the standby guardian. The order may also appoint the alternate standby guardian named in the petition as the alternate standby guardian of the person or alternate general guardian of the minor child in the event that the person named as standby guardian is unwilling or unable to serve as standby guardian and shall provide that, upon a showing of that unwillingness or inability, letters of appointment will be issued to the alternate standby guardian.

(g) Letters of appointment issued pursuant to this section shall state that the authority of the standby guardian or alternate standby guardian of the person or the standby guardian or alternate standby general guardian is effective upon the receipt by the guardian of a determination of the death of the petitioner, upon receipt of a determination of the incapacity of the petitioner, upon receipt of a determination of the debilitation of the petitioner and the petitioner's consent, whichever occurs first, and shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the petitioner pursuant to subsection (l) of this section.

(h) If at any time prior to the commencement of the authority of the standby guardian the clerk, upon motion of the petitioner or any person entitled to notice under subsection (c) of this section and after hearing, finds that the requirements of subsection (f) of this section are no longer satisfied, the clerk shall rescind the order.

(i) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the death of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of proof of death of the petitioner such as a copy of a death certificate or a funeral home receipt. The standby guardian shall file the proof of death in the office of the clerk who entered the order within 90 days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the clerk.

(j) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the incapacity of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of incapacity made pursuant to G.S. 35A-1375. The standby guardian shall file a copy of the determination of incapacity in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(k) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the debilitation of the petitioner, the standby guardian's authority

shall commence upon the standby guardian's receipt of a copy of the determination of debilitation made pursuant to G.S. 35A-1375, as well as a written consent signed by the petitioner. The standby guardian shall file a copy of the determination of debilitation and the written consent in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(l) Notwithstanding subsections (i), (j), and (k) of this section, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to such commencement, signed by the petitioner in the presence of two witnesses who are at least 18 years of age, other than the standby guardian or the alternate standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the two witnesses. The standby guardian shall file the written consent in the office of the clerk who entered the order within 90 days of the date of such written consent, or the standby guardian's authority may be rescinded by the clerk.

(m) The petitioner may revoke a standby guardianship created under this section by executing a written revocation, filing it in the office of the clerk who entered the order, and promptly providing the standby guardian with a copy of the revocation.

(n) A person appointed standby guardian pursuant to this section may at any time before the commencement of the person's authority renounce the appointment by executing a written renunciation and filing it with the clerk who entered the order and promptly providing the petitioner with a copy of the renunciation. Upon the filing of a renunciation, the clerk shall issue letters of appointment to the alternate standby guardian, if any. (1995, c. 313, s. 1.)

§ 35A-1374. Appointment by written designation; form.

(a) A designator may designate a standby guardian by means of a written designation, signed by the designator in the presence of two witnesses at least 18 years of age, other than the standby guardian or alternate standby guardian, who shall also sign the writing. Another person may sign the written designation on the behalf of and at the direction of the designator if the designator is physically unable to do so, provided that the designation is signed in the presence of the designator and the two witnesses.

(b) A designation of a standby guardian shall identify the designator, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any, and shall indicate that the designator intends for the standby guardian or the alternate standby guardian to become the minor child's guardian in the event that the designator either:

(1) Becomes incapacitated;
(2) Becomes debilitated and consents to the commencement of the standby guardian's authority;
(3) Dies prior to the commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or
(4) Consents to the commencement of the standby guardian's authority.

(c) The authority of the standby guardian under a designation shall commence upon the same conditions as set forth in G.S. 35A-1373(i) through (l).

(d) The standby guardian or, if the standby guardian is unable or unwilling to serve, the alternate standby guardian shall commence a proceeding under this Article to be appointed guardian of the person or general guardian of the minor child by filing a petition with the clerk of superior court of the county in which the minor child resides or is domiciled at the time of filing. The petition shall be filed after receipt of either:

(1) A copy of a determination of incapacity made pursuant to G.S. 35A-1375;

(2) A copy of a determination of debilitation made pursuant to G.S. 35A-1375 and a copy of the designator's written consent to such commencement;

(3) A copy of the designator's written consent to such commencement, made pursuant to G.S. 35A-1373(l); or

(4) Proof of death of the designator, such as a copy of a death certificate or a funeral home receipt.

(e) The standby guardian shall file a petition pursuant to subsection (d) of this section within 90 days of the date of the commencement of the standby guardian's authority under this section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to recommence only upon filing of the petition.

(f) A petition filed pursuant to subsection (d) of this section shall:

(1) Append the written designation of such person as standby guardian; and

(2) Append a copy of either (i) the determination of incapacity of the designator; (ii) the determination of debilitation of the designator and the written consent of the designator; (iii) the designator's consent; or (iv) proof of death of the designator, such as a copy of a death certificate or a funeral home receipt; and

(3) If the petition is by a person designated as an alternate standby guardian, state that the person designated as the standby guardian is unwilling or unable to act as standby guardian, and the basis for that statement; and

(4) State whether there are any lawsuits, in this State or any other jurisdiction, involving the minor child and, if so, identify the parties, the case numbers, and the states and counties where filed; and

(5) Be verified by the standby guardian or alternate standby guardian in front of a notary public or another person authorized to administer oaths.

(g) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a designator, and on any other person the clerk may direct, including the minor child. Service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(h) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(i) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this section have been satisfied. The clerk shall enter an order appointing the standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child if the clerk finds that:

(1) The person was duly designated as a standby guardian or alternate standby guardian;

(2) That (i) there has been a determination of incapacity; (ii) there has been a determination of debilitation and the designator has consented to the commencement of the standby guardian's authority; (iii) the designator has consented to that commencement; or (iv) the designator has died, such information coming from a document, such as a copy of a death certificate or a funeral home receipt;

(3) That the best interests of the minor child will be promoted by the appointment of the person designated as standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child;

(4) That the standby guardian or alternate standby guardian is fit to serve as guardian of the person or general guardian of the minor child; and

(5) That, if the petition is by a person designated as an alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve as standby guardian.

(j) The designator may revoke a standby guardianship created under this section by:

(1) Notifying the standby guardian in writing of the intent to revoke the standby guardianship prior to the filing of the petition under this section; or

(2) Where the petition has already been filed, by executing a written revocation, filing it in the office of the clerk with whom the petition was filed, and promptly providing the standby guardian with a copy of the written revocation. (1995, c. 313, s. 1.)

§ 35A-1375. Determination of incapacity or debilitation.

(a) If requested by the petitioner, designator, or standby guardian, an attending physician shall make a determination regarding the incapacity or debilitation of the petitioner or designator for purposes of this Article.

(b) A determination of incapacity or debilitation shall:

(1) Be made by the attending physician to a reasonable degree of medical certainty;

(2) Be in writing; and

(3) Contain the attending physician's opinion regarding the cause and nature of the incapacity or debilitation, as well as its extent and probable duration.

(c) The attending physician shall provide a copy of the determination of incapacity or debilitation to the standby guardian, if the standby guardian's identity is known to the physician.

(d) The standby guardian shall ensure that the petitioner or designator is informed of the commencement of the standby guardian's authority as a result of a determination of incapacity or debilitation and of the possibility of a future suspension of the standby guardian's authority pursuant to G.S. 35A-1376. (1995, c. 313, s. 1.)

§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.

In the event that the authority of the standby guardian becomes effective upon the receipt of a determination of incapacity or debilitation and the petitioner or designator is subsequently restored to capacity or ability to care for the child, the authority of the standby guardian based on that incapacity or debilitation shall be suspended. The attending physician shall provide a copy of the determination of restored capacity or ability to the standby guardian, if the identity of the standby guardian is known to the attending physician. If an order appointing the standby guardian as guardian of the person or general guardian of the minor child has been entered, the standby guardian shall, and the petitioner or designator may, file a copy of the determination of restored capacity or ability in the office of the clerk who entered the order. A determination of restored capacity or ability shall:

(1) Be made by the attending physician to a reasonable degree of medical certainty;

(2) Be in writing; and

(3) Contain the attending physician's opinion regarding the cause and nature of the parent's or legal guardian's restoration to capacity or ability.

Any order appointing the standby guardian as guardian of the person or general guardian of the minor child shall remain in full force and effect, and the authority of the standby guardian shall recommence upon the standby guardian's receipt of a subsequent determination of the petitioner's or designator's incapacity, pursuant to G.S. 35A-1373(j), or upon the standby guardian's receipt of a subsequent determination of debilitation pursuant to G.S. 35A-1373(k), or upon the receipt of proof of death of the petitioner or designator, or upon the written consent of the petitioner or designator, pursuant to G.S. 35A-1373(l). (1995, c. 313, s. 1.)

§ 35A-1377. Authority concurrent to parental rights.

The commencement of the standby guardian's authority pursuant to a determination of incapacity, determination of debilitation, or written consent shall not itself divest the petitioner or designator of any parental or guardianship rights, but shall confer upon the standby guardian concurrent authority with respect to the minor child. (1995, c. 313, s. 1.)

§ 35A-1378. Powers and duties.

A standby guardian designated pursuant to G.S. 35A-1374 and a guardian of the person or general guardian appointed pursuant to this Article have all of the powers, authority, duties, and responsibilities of a guardian appointed pursuant to Subchapter II of this Chapter. (1995, c. 313, s. 1.)

§ 35A-1379. Appointment of guardian ad litem.

(a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child.

(b) The duties of the guardian ad litem, when appointed, shall be to make an investigation to determine the facts, the needs of the minor child and the available resources within the family to meet those needs, and to protect and promote the best interests of the minor child until formally relieved of the responsibility by the clerk.

(c) The court may order the guardian ad litem to conduct an investigation to determine the fitness of the intended standby guardian and alternate standby guardian, if any, to perform the duties of standby guardian. (1995, c. 313, s. 1.)

§ 35A-1380. Bond.

The bond requirements of Article 7 of this Chapter shall apply to a guardian of the person or general guardian appointed pursuant to G.S. 35A-1373 or G.S. 35A-1374, provided that: (i) the clerk need not require a bond if the bond requirement is waived in writing by the petitioner or designator; and (ii) a general guardian appointed pursuant to G.S. 35A-1373 shall not be required to furnish a bond until a triggering event has occurred. (1995, c. 313, s. 1.)

§ 35A-1381. Accounting.

The accounting requirements of Article 10 of this Chapter apply to a general guardian appointed pursuant to this Article. (1995, c. 313, s. 1.)

§ 35A-1382. Termination.

Any standby guardianship created under this Article shall continue until the child reaches 18 years of age unless sooner terminated by order of the clerk who entered the order appointing the standby guardian, by revocation pursuant to this Article, or by renunciation pursuant to this Article. A standby guardianship shall terminate, and the authority of the standby guardian designated pursuant to G.S. 35A-1374 or of a guardian of the person or general guardian appointed pursuant to this Article shall cease, upon the entry of an order of the district court granting custody of the minor child to any other person. (1995, c. 313, s. 1.)

TAB 2

Guardianship Cases

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.

1 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.

1 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.

1 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

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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.

[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.

[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.

[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.

EAGLES and GREENE, JJ., concur.

Parallel Citations

374 S.E.2d 462

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.

[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.

[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.

[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.

[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

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.

[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.

****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.

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).

[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).

****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.

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

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.

[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.

[3] Guardian and Ward
Review

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

[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.

[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.

****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

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.

Parallel Citations

147 S.E.2d 231

MOORE, J., not sitting.

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.

[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.

[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).

[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).

****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

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.

***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

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.

[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.

[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.

[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.

[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....

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....

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:

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

End of Document

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.

26 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.

7 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.

11 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.

17 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).

TAB 3

Key Points of Procedure and Practice

TAB 4

Bias and Perspective

UCLA LAW REVIEW

Implicit Bias in the Courtroom

Jerry Kang
Judge Mark Bennett
Devon Carbado
Pam Casey
Nilanjana Dasgupta
David Faigman
Rachel Godsil
Anthony G. Greenwald
Justin Levinson
Jennifer Mnookin

ABSTRACT

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* The author team comprises legal academics, scientists, researchers, and even a sitting federal judge who seek to answer this question in accordance with behavioral realism. The Article first provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications that distinguish between explicit, implicit, and structural forms of bias. Next, the Article applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. This application involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed. Finally, the Article examines various concrete intervention strategies to counter implicit biases for key players in the justice system, such as the judge and jury.

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For their research assistance, we thank Jonathan Feingold and Joshua Neiman.

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INTRODUCTION

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias—attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions, people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases—without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: *What, if anything, should we do about implicit bias in the courtroom?* In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way—if at all—should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge[1] who seek to answer these difficult questions in accordance with behavioral realism.[2] Our general goal is to educate those in the legal profession who are

1. Judge Mark W. Bennett, a coauthor of this article, is a United States District Court Judge in the Northern District of Iowa.

2. Behavioral realism is a school of thought that asks the law to account for more accurate models of human cognition and behavior. *See, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit*

unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus.[3] We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III

Bias and the Law, 58 UCLA L. REV. 465, 490 (2010); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 997–1008 (2006). Jon Hanson and his coauthors have advanced similar approaches under the names of "critical realism," "situationism," and the "law and mind sciences." *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1339 n.28 (2010) (listing papers).

3. This paper arose out of the second symposium of PULSE: Program on Understanding Law, Science, and Evidence at UCLA School of Law, on March 3–4, 2011. We brought together leading scientists (including Anthony Greenwald, the inventor of the Implicit Association Test), federal and state judges, applied researchers, and legal academics to explore the state of the science regarding implicit bias research and to examine the various institutional responses to date. The Symposium also raised possibilities and complications, ranging from the theoretical to practical, from the legal to the scientific. After a day of public presentations, the author team met in a full-day closed session to craft the outlines of this paper. Judge Michael Linfield of the Los Angeles Superior Court and Jeff Rachlinski, Professor of Law at Cornell Law School, participated in the symposium but could not join the author team. Their absence should not be viewed as either agreement or disagreement with the contents of the Article.

examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. IMPLICIT BIASES

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments—even if those anchors are objectively wrong.[4] We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements.[5] We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday.[6] The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.[7]

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An *attitude* is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative.[8] A *stereotype* is an association between a concept (again, in this case a social group) and a trait.[9] Although interconnected, attitudes and stereotypes

4. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing anchoring).
5. *See generally* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).
6. *See generally* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).
7. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 CALIF. L. REV. 1051 (2000); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).
8. In both common and expert usage, sometimes the word "prejudice" is used to describe a negative attitude, especially when it is strong in magnitude.
9. If the association is nearly perfect, in that almost every member of the social group has that trait, then we think of the trait less as a stereotype and more as a defining attribute. Typically, when we use the word "stereotype," the correlation between social group and trait is far from perfect. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949 (2006).

should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions—attitudes and stereotypes about social groups—are explicit, in the sense that they are both consciously accessible through introspection *and* endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC),[10] have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks—one that seems consistent with some bias, the other inconsistent—as in the Implicit Association Test (IAT).[11]

10. Implicit social cognition (ISC) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. *See generally* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

11. *See* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464–66 (1998) (introducing the Implicit Association Test (IAT)). For more information on the IAT, see Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, *in* AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 265 (John A. Bargh ed., 2007).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for *both* White and harmless item; a different key is used for *both* African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly.[12] Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.[13]

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data[14] on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held),[15] large in magnitude (as compared to standardized measures of explicit bias),[16] dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are

12. *See* Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 17 (2007).

13. This D score, which ranges from –2.0 to 2.0, is a standardized score, which is computed by dividing the IAT effect as measured in milliseconds by the standard deviations of the participants' latencies pooled across schema-consistent and -inconsistent conditions. *See, e.g.*, Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003). If an individual's IAT D score is divided by its standard deviation of the population that has taken the test, the result is interpretable as the commonly used effect size measure, Cohen's *d*.

14. The most prominent dataset is collected at PROJECT IMPLICIT, http://projectimplicit.org (last visited Mar. 22, 2012) (providing free online tests of automatic associations). For a broad analysis of this dataset, see Nosek et al., *supra* note 12.

15. Lane, Kang & Banaji, *supra* note 10, at 437.

16. Cohen's d is a standardized unit of the size of a statistical effect. By convention, social scientists mark 0.20, 0.50, and 0.80 as small, medium, and large effect sizes. The IAT effect, as measured in Cohen's d, on various stereotypes and attitudes range from medium to large. *See* Kang & Lane, *supra* note 2, at 474 n.35 (discussing data from Project Implicit). Moreover, the effect sizes of implicit bias against social groups are frequently larger than the effect sizes produced by explicit bias measures. *See id.* at 474–75 tbl.1.

separate mental constructs),[17] and predicts certain kinds of real-world behavior.[18] What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them—by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind.[19] Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking.[20] In the psychology journals, John Jost and colleagues responded to sharp criticism[21] that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore.[22] Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology.[23] In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies—which synthesizes all the relevant scientific findings—and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.[24]

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart

17. *See* Anthony G. Greenwald & Brian A. Nosek, *Attitudinal Dissociation: What Does It Mean?*, *in* ATTITUDES: INSIGHTS FROM THE NEW IMPLICIT MEASURES 65 (Richard E. Petty, Russell E. Fazio & Pablo Briñol eds., 2008).
18. *See* Kang & Lane, *supra* note 2, at 481–90 (discussing evidence of biased behavior in perceiving smiles, responding to threats, screening resumes, and body language).
19. *See* Kang & Lane, *supra* note 2, at 473–90; *see also* David L. Faigman, Nilanjana Dasgupta & Cecilia L. Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008).
20. *See* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319–26 (2010).
21. *See, e.g.*, Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1108–10 (2006).
22. *See, e.g.*, John T. Jost et al., *The Existence of Implicit Prejudice Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 41 (2009).
23. *See id.*
24. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20 (2009). Implicit attitude scores predicted behavior in this domain at an average correlation of r=0.24, whereas explicit attitude scores had correlations at an average of r=0.12. *See id.* at 24 tbl.3.

out two case trajectories—one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue.[25] In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, *explicit* bias, it may be ineffective to adopt means that are better tailored to respond to *implicit* bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection *and* endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels "explicit" and "implicit" as adjectives to describe mental constructs—attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one's explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent's conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias.

25. *See generally* Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053 (2009); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1 (2011).

It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.[26]

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called "structural." Other names include "institutional" or "societal." These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong.[27] In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian's biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are *explicit* biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of *concealed* bias (explicit bias that is hidden to manage impressions).

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26. *See, e.g.*, Do-Yeong Kim, *Voluntary Controllability of the Implicit Association Test (IAT)*, 66 SOC. PSYCHOL. Q. 83, 95–96 (2003).

27. *See, e.g.*, Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1117–22 (2002) (applying lock-in theory to explain the inequalities between Blacks and Whites in education, housing, and employment); john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 795–800 (2008) (adopting a systems approach to describe structured racialization); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 743–48 (2000) (describing lock-in theory, drawing on antitrust law and concepts).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward meat. This is an *implicit* bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for $10 or a cheeseburger for $3. Unfortunately, she has only $5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of *structural* bias in favor of meat.

We disentangle these various mechanisms—explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces—because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms—explicit bias, implicit bias, and structural forces—are not mutually exclusive.[28] To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest

28. *See, e.g.*, GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 23–30 (2002) (discussing self-reinforcing stereotypes); john powell & Rachel Godsil, *Implicit Bias Insights as Preconditions to Structural Change*, POVERTY & RACE, Sept./Oct. 2011, at 3, 6 (explaining why "implicit bias insights are crucial to addressing the substantive inequalities that result from structural racialization").

that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.[29]

II. TWO TRAJECTORIES

A. The Criminal Path

Consider, for example, some of the crucial milestones in a criminal case flowing to trial. First, on the basis of a crime report, the police investigate particular neighborhoods and persons of interest and ultimately arrest a suspect. Second, the prosecutor decides to charge the suspect with a particular crime. Third, the judge makes decisions about bail and pretrial detention. Fourth, the defendant decides whether to accept a plea bargain after consulting his defense attorney, often a public defender or court-appointed private counsel. Fifth, if the case goes to trial, the judge manages the proceedings while the jury decides whether the defendant is guilty. Finally, if convicted, the defendant must be sentenced. At each of these stages,[30] implicit biases can have an important impact. To maintain a manageable scope of analysis, we focus on the police encounter, charge and plea bargain, trial, and sentencing.

1. Police Encounter

Blackness and criminality. If we implicitly associate certain groups, such as African Americans, with certain attributes, such as criminality, then it should not be surprising that police may behave in a manner consistent with those implicit stereotypes. In other words, biases could shape whether an officer decides to stop an individual for questioning in the first place, elects to interrogate briefly or at length, decides to frisk the individual, and concludes the encounter with an arrest versus a warning.[31] These biases could contribute to the substantial racial disparities that have been widely documented in policing.[32]

29. *See* Jerry Kang, *Implicit Bias and the Pushback From the Left*, 54 ST. LOUIS U. L.J. 1139, 1146–48 (2010) (specifically rejecting complaint that implicit bias analysis must engage in reductionism).
30. The number of stages is somewhat arbitrary. We could have listed more stages in a finer-grained timeline or vice versa.
31. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–77 (2002).
32. *See, e.g.*, Dianna Hunt, *Ticket to Trouble/Wheels of Injustice/Certain Areas Are Ticket Traps for Minorities*, HOUS. CHRON., May 14, 1995, at A1 (analyzing sixteen million Texas driving records and finding that minority drivers straying into White neighborhoods in Texas's major urban areas were twice as likely as Whites to get traffic violations); Sam Vincent Meddis & Mike Snider, *Drug War 'Focused' on Blacks*, USA TODAY, Dec. 20, 1990, at 1A (reporting findings from a 1989 *USA*

Since the mid–twentieth century, social scientists have uncovered empirical evidence of negative attitudes toward African Americans as well as stereotypes about their being violent and criminal.[33] Those biases persist today, as measured by not only explicit but also implicit instruments.[34]

For example, Jennifer Eberhardt, Philip Goff, Valerie Purdie, and Paul Davies have demonstrated a bidirectional activation between Blackness and criminality.[35] When participants are subliminally primed[36] with a Black male face (as opposed to a White male face, or no prime at all), they are quicker to distinguish the faint outline of a weapon that slowly emerges out of visual static.[37] In other words, by implicitly thinking *Black*, they more quickly saw a weapon.

Interestingly, the phenomenon also happens in reverse. When subliminally primed with drawings of weapons, participants visually attended to Black male faces more than comparable White male faces.[38] Researchers found this result not only in a student population, which is often criticized for being unrepresentative of the real world, but also among police officers.[39] The research suggests both that

Today study that 41 percent of those arrested on drug charges were African American whereas 15 percent of the drug-using population is African American); Billy Porterfield, *Data Raise Question: Is the Drug War Racist?*, AUSTIN AM. STATESMAN, Dec. 4, 1994, at A1 (citing study showing that African Americans were over seven times more likely than Whites to be arrested on drug charges in Travis County in 1993).

33. *See generally* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995).

34. In a seminal paper, Patricia Devine demonstrated that being subliminally primed with stereotypically "Black" words prompted participants to evaluate ambiguous behavior as more hostile. *See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). The priming words included "Negroes, lazy, Blacks, blues, rhythm, Africa, stereotype, ghetto, welfare, basketball, unemployed, and plantation." *Id.* at 10. Those who received a heavy dose of priming (80 percent stereotypical words) interpreted a person's actions as more hostile than those who received a milder dose (20 percent). *Id.* at 11–12; *see also* John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 238–39 (1996).

35. *See* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

36. The photograph flashed for only thirty milliseconds. *Id.* at 879.

37. *See id.* at 879–80. There was a 21 percent drop in perceptual threshold between White face primes and Black face primes. This was measured by counting the number of frames (out of a total of 41) that were required before the participant recognized the outlines of the weapon in both conditions. There was a 8.8 frame difference between the two conditions. *Id.* at 881.

38. Visual attendance was measured via a dot-probe paradigm, which requires participants to indicate on which side of the screen a dot flashes. The idea is that if a respondent is already looking at one face (for example, the Black photograph), he or she will see a dot flash near the Black photograph faster. *See id.* at 881 (describing dot-paradigm as the gold standard in visual attention measures).

39. *See id.* at 885–87 (describing methods, procedures, and results of Study 4, which involved sixty-one police officers who were 76 percent White, 86 percent male, and who had an average age of forty-two).

the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.

Even if this is the case, one might respond that extra visual attention by the police is not too burdensome. But who among us enjoys driving with a police cruiser on his or her tail?[40] Moreover, the increased visual attention did not promote accuracy; instead, it warped the officers' perceptual memories. The subliminal prime of weapons led police officers not only to look more at Black faces but also to remember them in a biased way, as having more stereotypically African American features. Thus, they "were more likely to falsely identify a face that was more stereotypically Black than the target when they were primed with crime than when they were not primed."[41]

We underscore a point that is so obvious that it is easy to miss. The primes in these studies were all flashed *subliminally*. Thus, the behavioral differences in visually attending to Black faces and in remembering them more stereotypically were all triggered implicitly, without the participants' conscious awareness.

Shooter bias. The implicit association between Blackness and weapons has also been found through other instruments, including other priming tasks[42] and the IAT. One of the tests available on Project Implicit specifically examines the implicit stereotype between African Americans (as compared to European Americans) and weapons (as compared to harmless items). That association has been found to be strong, widespread, and dissociated from explicit self-reports.[43]

Skeptics can reasonably ask why we should care about minor differentials between schema-consistent and -inconsistent pairings that are often no more than a half second. But it is worth remembering that a half second may be all

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In this study, the crime primes were not pictures but words: "violent, crime, stop, investigate, arrest, report, shoot, capture, chase, and apprehend." *Id.* at 886.

40. *See* Carbado, *supra* note 31, at 966–67 (describing existential burdens of heightened police surveillance).

41. Eberhardt et al., *supra* note 35, at 887.

42. *See* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 185–86 (2001). The study deployed a priming paradigm, in which a photograph of a Black or White face was flashed to participants for two hundred milliseconds. Immediately thereafter, participants were shown pictures of guns or tools. *Id.* at 184. When primed by the Black face, participants identified guns faster. *Id.* at 185.

43. For N=85,742 participants, the average IAT D score was 0.37; Cohen's *d*=1.00. By contrast, the self-reported association (that is, the explicit stereotype measure) was Cohen's *d*=0.31. *See* Nosek et al., *supra* note 12, at 11 tbl.2.

the time a police officer has to decide whether to shoot. In the policing context, that half second might mean the difference between life and death.

Joshua Correll developed a shooter paradigm video game in which participants are confronted with photographs of individuals (targets) holding an object, superimposed on various city landscapes.[44] If the object is a weapon, the participant is instructed to press a key to shoot. If the object is harmless (for example, a wallet), the participant must press a different key to holster the weapon. Correll found that participants were quicker to shoot when the target was Black as compared to White.[45] Also, under time pressure, participants made more mistakes (false alarms) and shot more unarmed Black targets than unarmed White targets, and failed to shoot more armed White targets (misses) than armed Black targets.[46] Interestingly, the shooter bias effect was not correlated with measures of explicit personal stereotypes.[47] Correll also found comparable amounts of shooter bias in African American participants.[48] This suggests that negative attitudes toward African Americans are not what drive the phenomenon.[49]

The shooter bias experiments have also been run on actual police officers, with mixed results. In one study, police officers showed the same bias in favor of shooting unarmed Blacks more often than unarmed Whites that student and civilian populations demonstrated.[50] In another study, however, although police officers showed a similar speed bias, they did not show any racial bias in the

44. Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315–17 (2002) (describing the procedure).

45. *Id.* at 1317.

46. *Id.* at 1319. For qualifications about how the researchers discarded outliers, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1493 n.16 (2005). Subsequent studies have confirmed Correll's general findings. *See, e.g.*, Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399 (finding similar results).

47. Correll et al., *supra* note 44, at 1323. The scales used were the Modern Racism Scale, the Discrimination and Diversity Scale, the Motivation to Control Prejudiced Responding Scale, and some questions from the Right-Wing Authoritarianism Scale and the Personal Need for Structure Scale for good measure. *Id.* at 1321. These are survey instruments that are commonly used in social psychological research. Shooter bias was, however, correlated with measures of societal stereotypes—the stereotypes that other people supposedly held. *Id.* at 1323.

48. *See id.* at 1324.

49. On explicit attitude instruments, African Americans show on average substantial in-group preference (over Whites). On implicit attitude instruments, such as the IAT, African Americans bell curve around zero, which means that they show no preference on average. *See* Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Web Site*, 6 GROUP DYNAMICS: THEORY RES. & PRACTICE 101, 105–06 (2002).

50. *See* E. Ashby Plant & B. Michelle Peruche, *The Consequences of Race for Police Officers' Responses to Criminal Subjects*, 16 PSYCHOL. SCI. 180, 181 (2005).

most important criterion of accuracy. In other words, there was no higher error rate of shooting unarmed Blacks as compared to Whites.[51]

Finally, in a study that directly linked implicit stereotypes (with weapons) as measured by the IAT and shooter bias, Jack Glaser and Eric Knowles found that "[i]ndividuals possessing a relatively strong stereotype linking Blacks and weapons [one standard deviation above the mean IAT] clearly show the Shooter Bias."[52] By contrast, recall that Correll found no such correlation with explicit stereotypes. These findings are consistent with the implicit stereotype story. Of course, it may also be true that participants were simply downplaying or concealing their explicit bias, which could help explain why no correlation was found.

In sum, we have evidence that suggests that implicit biases could well influence various aspects of policing. A fairly broad set of research findings shows that implicit biases (as measured by implicit instruments) alter and affect numerous behaviors that police regularly engage in—visual surveillance, recall, and even armed response.[53] It should go without saying that explicit biases, which often undergird unspoken policies of racial profiling, also play an enormous role in the differential policing of people of color. It also should go without saying that various structural forces that produce racially segregated, predominantly minority neighborhoods that have higher poverty and crime rates also have a huge impact on racialized policing. Nevertheless, we repeat these points so that readers internalize the idea that implicit, explicit, and structural processes should not be deemed mutually exclusive.

2. Charge and Plea Bargain

Journalistic investigations have uncovered some statistical evidence that racial minorities are treated worse than Whites in prosecutors' charging decisions.[54]

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51. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1010–13, 1016–17 (2007) (describing the results from two studies).

52. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164, 169 (2008).

53. For discussions in the law reviews, with some treatment of implicit biases, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657, 667–73 (2007) (providing a cognitive model based on automatic categorization in accordance with behavioral realism).

54. For example, in San Jose, a newspaper investigation concluded that out of the almost seven hundred thousand criminal cases reported, "at virtually every stage of pre-trial negotiation, whites are more successful than non-whites." Ruth Marcus, *Racial Bias Widely Seen in Criminal Justice System; Research Often Supports Black Perceptions*, WASH. POST, May 12, 1992, at A4. San Francisco Public Defender Jeff Brown commented on racial stereotyping: "It's a feeling, 'You've got a nice

Of course, there might be some legitimate reason for those disparities if, for example, minorities and Whites are not similarly situated on average. One way to examine whether the merits drive the disparate results is to control for everything except some irrelevant attribute, such as race. In several studies, researchers used regression analyses to conclude that race was indeed independently correlated with the severity of the prosecutor's charge.

For example, in a 1985 study of charging decisions by prosecutors in Los Angeles, researchers found prosecutors more likely to press charges against Black than White defendants, and determined that these charging disparities could not be accounted for by race-neutral factors, such as prior record, seriousness of charge, or use of a weapon.[55] Two studies also in the late 1980s, one in Florida and the other in Indiana, found charging discrepancies based on the race of the victim.[56] At the federal level, a U.S. Sentencing Commission report found that prosecutors were more apt to offer White defendants generous plea bargains with sentences below the prescribed guidelines than to offer them to Black or Latino defendants.[57]

While these studies are suggestive, other studies find no disparate treatment.[58] Moreover, this kind of statistical evidence does not definitively tell us that biases

person screwing up,' as opposed to feeling that 'this minority is on a track and eventually they're going to end up in state prison.'" Christopher H. Schmitt, *Why Plea Bargains Reflect Bias*, SAN JOSE MERCURY NEWS, Dec. 9, 1991, at 1A; *see also* Christopher Johns, *The Color of Justice: More and More, Research Shows Minorities Aren't Treated the Same as Anglos by the Criminal Justice System*, ARIZ. REPUBLIC, July 4, 1993, at C1 (citing several reports showing disparate treatment of Blacks in the criminal justice system).

55. *See* Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 615–19 (1985).

56. *See* Kenneth B. Nunn, *The "Darden Dilemma": Should African Americans Prosecute Crimes?*, 68 FORDHAM L. REV. 1473, 1493 (2000) (citing Martha A. Myers & John Hagan, *Private and Public Trouble: Prosecutors and the Allocation of Court Resources*, 26 SOC. PROBS. 439, 441–47 (1979)); Radelet & Pierce, *supra* note 55, at 615–19.

57. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 12 n.41 (2000), *available at* http://www.protectcivilrights.org/pdf/reports/justice.pdf (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)); *see also* Kevin McNally, *Race and Federal Death Penalty: A Nonexistent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004) (compiling studies on the death penalty).

58. *See, e.g.*, Jeremy D. Ball, *Is It a Prosecutor's World? Determinants of Count Bargaining Decisions*, 22 J. CONTEMP. CRIM. JUST. 241 (2006) (finding no correlation between race and the willingness of prosecutors to reduce charges in order to obtain guilty pleas but acknowledging that the study did not include evaluation of the original arrest report); Cyndy Caravelis et al., *Race, Ethnicity, Threat, and the Designation of Career Offenders*, 2011 JUST. Q. 1 (showing that in some counties, Blacks and Latinos are more likely than Whites with similar profiles to be prosecuted as career offenders, but in other counties with different demographics, Blacks and Latinos have a lesser likelihood of such prosecution).

generally or implicit biases specifically produce discriminatory charging decisions or plea offers by prosecutors, or a discriminatory willingness to accept worse plea bargains on the part of defense attorneys. The best way to get evidence on such hypotheses would be to measure the implicit biases of prosecutors and defense attorneys and investigate the extent to which those biases predict different treatment of cases otherwise identical on the merits.

Unfortunately, we have very little data on this front. Indeed, we have no studies, as of yet, that look at prosecutors' and defense attorneys' implicit biases and attempt to correlate them with those individuals' charging practices or plea bargains. Nor do we know as much as we would like about their implicit biases more generally. But on that score, we do know something. Start with defense attorneys. One might think that defense attorneys, repeatedly put into the role of interacting with what is often a disproportionately minority clientele, and often ideologically committed to racial equality,[59] might have materially different implicit biases from the general population. But Ted Eisenberg and Sheri Lynn Johnson found evidence to the contrary: Even capital punishment defense attorneys show negative implicit attitudes toward African Americans.[60] Their implicit attitudes toward Blacks roughly mirrored those of the population at large.

What about prosecutors? To our knowledge, no one has measured specifically the implicit biases held by prosecutors.[61] That said, there is no reason to

59. *See* Gordon B. Moskowitz, Amanda R. Salomon & Constance M. Taylor, *Preconsciously Controlling Stereotyping: Implicitly Activated Egalitarian Goals Prevent the Activation of Stereotypes*, 18 SOC. COGNITION 151, 155–56 (2000) (showing that "chronic egalitarians" who are personally committed to removing bias in themselves do not exhibit implicit attitudinal preference for Whites over Blacks).

60. *See* Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1545–55 (2004). The researchers used a paper-pencil IAT that measured attitudes about Blacks and Whites. *Id.* at 1543–45. The defense attorneys displayed biases that were comparable to the rest of the population. *Id.* at 1553. The findings by Moskowitz and colleagues, *supra* note 59, sit in some tension with findings by Eisenberg and Johnson. It is possible that defense attorneys are not chronic egalitarians and/or that the specific practice of criminal defense work exacerbates implicit biases even among chronic egalitarians.

61. In some contexts, prosecutors have resisted revealing information potentially related to their biases. For example, in *United States v. Armstrong*, 517 U.S. 456 (1996), defendants filed a motion to dismiss the indictment for selective prosecution, arguing that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses. *Id.* at 460–61. The claim foundered when the U.S. Attorney's Office resisted the defendants' discovery motion concerning criteria for prosecutorial decisions and the U.S. Supreme Court upheld the U.S. Attorney's Office's refusal to provide discovery. *Id.* at 459–62. The Court held that, prior to being entitled even to discovery, defendants claiming selective prosecution cases based on race must produce credible evidence that "similarly situated individuals of a different race were not prosecuted." *Id.* at 465.

presume attorney exceptionalism in terms of implicit biases.[62] And if defense attorneys, who might be expected to be less biased than the population, show typical amounts of implicit bias, it would seem odd to presume that prosecutors would somehow be immune. If this is right, there is plenty of reason to be concerned about how these biases might play out in practice.

As we explain in greater detail below, the conditions under which implicit biases translate most readily into discriminatory behavior are when people have wide discretion in making quick decisions with little accountability. Prosecutors function in just such environments.[63] They exercise tremendous discretion to decide whether, against whom, and at what level of severity to charge a particular crime; they also influence the terms and likelihood of a plea bargain and the length of the prison sentence—all with little judicial oversight. Other psychological theories—such as confirmation bias, social judgeability theory, and shifting standards, which we discuss below[64]—reinforce our hypothesis that prosecutorial decisionmaking indeed risks being influenced by implicit bias.

3. Trial

a. Jury

If the case goes to the jury, what do we know about how implicit biases might influence the factfinder's decisionmaking? There is a long line of research on racial discrimination by jurors, mostly in the criminal context. Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ("racial outgroups"). For example, White jurors will treat Black defendants worse than they treat comparable White defendants. The best and most recent meta-analysis of laboratory juror studies was performed by Tara Mitchell and colleagues, who found that the fact that a juror was of a different race than the defendant influenced

62. Several of the authors have conducted training sessions with attorneys in which we run the IAT in the days leading up to the training. The results of these IATs have shown that attorneys harbor biases that are similar to those harbored by the rest of the population. One recent study of a related population, law students, confirmed that they too harbor implicit gender biases. *See* Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 28–31 (2010).

63. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE L. REV. 795 (2012) (undertaking a step-by-step consideration of how prosecutorial discretion may be fraught with implicit bias).

64. *See infra* Part II.B.

both verdicts and sentencing.[65] The magnitude of the effect sizes were measured conservatively[66] and found to be small (Cohen's d=0.092 for verdicts, d=0.185 for sentencing).[67]

But effects deemed "small" by social scientists may nonetheless have huge consequences for the individual, the social category he belongs to, and the entire society. For example, if White juries rendered guilty verdicts in exactly 80 percent of their decisions,[68] then an effect size of Cohen's d=0.095 would mean that the rate of conviction for Black defendants will be 83.8 percent, compared to 76.2 percent for White defendants. Put another way, in one hundred otherwise identical trials, eight more Black than White defendants would be found guilty.[69]

One might assume that juror bias against racial outgroups would be greater when the case is somehow racially charged or inflamed, as opposed to those instances when race does not explicitly figure in the crime. Interestingly, many experiments have demonstrated just the opposite.[70] Sam Sommers and Phoebe Ellsworth explain the counterintuitive phenomenon in this way: When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes. By contrast, when the case is not racially charged, even though there is a Black defendant and a White victim, jurors are not especially vigilant about the possibility of racial bias influencing their

65. Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621, 627–28 (2005). The meta-analysis processed thirty-four juror verdict studies (with 7397 participants) and sixteen juror sentencing studies (with 3141 participants). *Id.* at 625. All studies involved experimental manipulation of the defendant's race. Multirace participant samples were separated out in order to maintain the study's definition of racial bias as a juror's differential treatment of a defendant who belonged to a racial outgroup. *See id.*

66. Studies that reported nonsignificant results (p>0.05) for which effect sizes could not be calculated were given effect sizes of 0.00. *Id.*

67. *Id.* at 629.

68. *See* TRACY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 221152, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1, 3 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf ("Seventy-nine percent of trials resulted in a guilty verdict or judgment, including 82% of bench trials and 76% of jury trials."); *see also* THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf (reporting the "typical" outcome as three out of four trials resulting in convictions).

69. This translation between effect size *d* values and outcomes was described by Robert Rosenthal & Donald B. Rubin, *A Simple, General Purpose Display of Magnitude of Experimental Effect*, 74 J. EDUC. PSYCHOL. 166 (1982).

70. *See, e.g.*, Samuel R. Sommers & Phoebe C. Ellsworth, *"Race Salience" in Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009).

decisionmaking. These findings are more consistent with an implicit bias than a concealed explicit bias explanation.[71]

So far, we know that race effects have been demonstrated in juror studies (sometimes in counterintuitive ways), but admittedly little is known about "the precise psychological processes through which the influence of race occurs in the legal context."[72] Our default assumption is juror unexceptionalism—given that implicit biases generally influence decisionmaking, there is no reason to presume that citizens become immune to the effects of these biases when they serve in the role of jurors. Leading scholars from the juror bias field have expressly raised the possibility that the psychological mechanisms might be "unintentional and even non-conscious processes."[73]

Some recent juror studies by Justin Levinson and Danielle Young have tried to disentangle the psychological mechanisms of juror bias by using the IAT and other methods. In one mock juror study, Levinson and Young had participants view five photographs of a crime scene, including a surveillance camera photo that featured a masked gunman whose hand and forearm were visible. For half the participants, that arm was dark skinned; for the other half, that arm was lighter skinned.[74] The participants were then provided twenty different pieces of trial evidence. The evidence was designed to produce an ambiguous case regarding whether the defendant was indeed the culprit. Participants were asked to rate how much the presented evidence tended to indicate the defendant's guilt or innocence and to decide whether the defendant was guilty or not, using both a scale of guilty or not guilty and a likelihood scale of zero to one hundred.[75]

The study found that the subtle manipulation of the skin color altered how jurors evaluated the evidence presented and also how they answered the crucial question "How guilty is the defendant?" The guilt mean score was M=66.97 for

71. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 255 (2001); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000). That said, one could still hold to an explicit bias story in the following way: The juror has a negative attitude or stereotype that he is consciously aware of and endorses. But he knows it is not socially acceptable so he conceals it. When a case is racially charged, racial bias is more salient, so other jurors will be on the lookout for bias. Accordingly, the juror conceals it even more, all the way up to making sure that his behavior is completely race neutral. This explicit bias story is not mutually exclusive with the implicit bias story we are telling.

72. Samuel R. Sommers, *Race and the Decision-Making of Juries*, 12 LEGAL & CRIMINOLOGICAL PSYCHOL. 171, 172 (2007).

73. *Id.* at 175.

74. Levinson & Young, *supra* note 20, at 332–33 (describing experimental procedures).

75. *Id.* at 334.

dark skin and M=56.37 for light skin, with 100 being "definitely guilty."[76] Measures of explicit bias, including the Modern Racism Scale and feeling thermometers, showed no statistically significant correlation with the participants' weighing of the evidence or assessment of guilt.[77] More revealing, participants were asked to recall the race of the masked robber (which was a proxy for the light or dark skin), but many could not recall it.[78] Moreover, their recollections did not correlate with their judgments of guilt.[79] Taken together, these findings suggest that implicit bias—not explicit, concealed bias, or even any degree of conscious focus on race—was influencing how jurors assessed the evidence in the case.

In fact, there is even clearer evidence that implicit bias was at work. Levinson, Huajian Cai, and Young also constructed a new IAT, the Guilty–Not Guilty IAT, to test implicit stereotypes of African Americans as guilty (not innocent).[80] They gave the participants this new IAT and the general race attitude IAT. They found that participants showed an implicit negative attitude toward Blacks as well as a small implicit stereotype between Black and guilty.[81] More important than the bias itself is whether it predicts judgment. On the one hand, regression analysis demonstrated that a measure of *evidence evaluation* was a function of both the implicit attitude and the implicit stereotype.[82] On the other hand, the IAT scores did not predict what is arguably more important: guilty verdicts or judgments of guilt on a more granular scale (from zero to one hundred).[83] In sum, a subtle change

76. *See id.* at 337 (confirming that the difference was statistically significant, F=4.40, p=0.034, *d=0.52*).
77. *Id.* at 338.
78. This finding built upon Levinson's previous experimental study of implicit memory bias in legal decisionmaking. *See* Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–406 (2007) (finding that study participants misremembered trial-relevant facts in racially biased ways).
79. Levinson & Young, *supra* note 20, at 338.
80. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Bias: The Guilty–Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010).
81. *Id.* at 204. For the attitude IAT, D=0.21 (p<0.01). *Id.* at 204 n.87. For the Guilty–Not Guilty IAT, D=0.18 (p<0.01). *Id.* at 204 n.83.
82. Participants rated each of the twenty pieces of information (evidence) in terms of its probity regarding guilt or innocence on a 1–7 scale. This produced a total "evidence evaluation" score that could range between 20 (least amount of evidence of guilt) to 140 (greatest). *Id.* at 202 n.70 (citation omitted). The greater the Black = guilty stereotype or the greater the negative attitude toward Blacks, the higher the guilty evidence evaluation. The ultimate regression equation was: Evidence = 88.58 + 5.74 x BW + 6.61 x GI + 9.11 x AI + e (where BW stands for Black or White suspect; GI stands for guilty stereotype IAT score; AI stands for race attitude IAT score; *e* stands for error). *Id.* at 206. In normalized units, the implicit stereotype β=0.25 (p<0.05); the implicit attitude β=0.34 (p<0.01); adjusted R^2=0.24. *See id.* at 206 nn.93–95.
83. *Id.* at 206 n.95.

in skin color changed judgments of evidence and guilt; implicit biases measured by the IAT predicted how respondents evaluated identical pieces of information.

We have a long line of juror research, as synthesized through a meta-analysis, revealing that jurors of one race treat defendants of another race worse with respect to verdict and sentencing. According to some experiments, that difference might take place *more* often in experimental settings when the case is *not* racially charged, which suggests that participants who seek to be fair will endeavor to correct for potential bias when the threat of potential race bias is obvious. Finally, some recent work reveals that certain IATs can predict racial discrimination in the evaluation of evidence by mock jurors. Unfortunately, because of the incredible difficulties in research design, we do not have studies that evaluate implicit bias in real criminal trials. Accordingly, the existing body of research, while strongly suggestive, provides inferential rather than direct support that implicit bias accounts for some of the race effects on conviction and sentencing.

b. Judge

Obviously, the judge plays a crucial role in various aspects of the trial, exercising important discretion in setting bail,[84] deciding motions, conducting and deciding what can be asked during jury selection, ruling on the admissibility of evidence, presiding over the trial, and rendering verdicts in some cases. Again, as with the lawyers, there is no inherent reason to think that judges are immune from implicit biases. The extant empirical evidence supports this assumption.[85] Jeff Rachlinski and his coauthors are the only researchers who have measured the implicit biases of actual trial court judges. They have given the race attitude IAT to judges from three different judicial districts. Consistent with the general population, the White judges showed strong implicit attitudes favoring Whites over Blacks.[86]

84. *See* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).

85. Judge Bennett, a former civil rights lawyer, shares his unnerving discovery of his own disappointing IAT results in Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010).

86. *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009). White judges (*N*=85) showed an IAT effect *M*=216 ms (with a standard deviation of 201 ms). 87.1 percent of them were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. Black judges (*N*=43) showed a small bias *M*=26 ms (with a standard deviation of 208 ms). Only 44.2 percent of Black judges were quicker to sort in the schema-consistent arrangement than in the schema-inconsistent one. *See id.*

Rachlinski and colleagues investigated whether these biases predicted behavioral differences by giving judges three different vignettes and asking for their views on various questions, ranging from the likelihood of defendant recidivism to the recommended verdict and confidence level. Two of these vignettes revealed nothing about race, although some of the judges were subliminally primed with words designed to trigger the social category African American. The third vignette explicitly identified the defendant (and victim) as White or Black and did not use subliminal primes. After collecting the responses, Rachlinski et al. analyzed whether judges treated White or Black defendants differently and whether the IAT could predict any such difference.

They found mixed results. In the two subliminal priming vignettes, judges did not respond differently on average as a function of the primes. In other words, the primes did not prompt them to be harsher on defendants across the board as prior priming studies with nonjudge populations had found.[87] That said, the researchers found a *marginally* statistically significant interaction with IAT scores: Judges who had a greater degree of implicit bias against Blacks (and relative preference for Whites) were harsher on defendants (who were never racially identified) when they had been primed (with the Black words). By contrast, those judges who had implicit attitudes in favor of Blacks were less harsh on defendants when they received the prime.[88]

In the third vignette, a battery case that explicitly identified the defendant as one race and the victim as the other,[89] the White judges showed equal likelihood of convicting the defendant, whether identified as White or Black. By contrast, Black judges were much more likely to convict the defendant if he was identified as White as compared to Black. When the researchers probed more deeply to see what, if anything, the IAT could predict, they did not find the sort of interaction that they found in the other two vignettes—in other words, judges with strong implicit biases in favor of Whites did not treat the Black defendant more harshly.[90]

Noticing the difference between White and Black judge responses in the third vignette study, the researchers probed still deeper and found a three-way interaction between a judge's race, a judge's IAT score, and a defendant's race. No effect was found for White judges; the core finding concerned, instead, Black

87. *See* Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483 (2004).

88. *See* Rachlinski et al., *supra* note 86, at 1215. An ordered logit regression was performed between the judge's disposition against the priming condition, IAT score, and their interaction. The interaction term was marginally significant at p=0.07. *See id.* at 1214–15 n.94.

89. This third vignette did not use any subliminal primes.

90. *See id.* at 1202 n.41.

judges. Those Black judges with a stronger Black preference on the IAT were less likely to convict the Black defendant (as compared to the White defendant); correlatively, those Black judges with a White preference on the IAT were more likely to convict the Black defendant.[91]

It is hard to make simple sense of such complex findings, which may have been caused in part by the fact that the judges quickly sniffed out the purpose of the study—to detect racial discrimination.[92] Given the high motivation not to perform race discrimination under research scrutiny, one could imagine that White judges might make sure to correct for any potential unfairness. By contrast, Black judges may have felt less need to signal racial fairness, which might explain why Black judges showed different behaviors as a function of implicit bias whereas White judges did not.

Put another way, data show that when the race of the defendant is explicitly identified to judges in the context of a psychology study (that is, the third vignette), judges are strongly motivated to be fair, which prompts a different response from White judges (who may think to themselves "whatever else, make sure not to treat the Black defendants worse") than Black judges (who may think "give the benefit of the doubt to Black defendants"). However, when race is not explicitly identified but implicitly primed (vignettes one and two), perhaps the judges' motivation to be accurate and fair is not on full alert. Notwithstanding all the complexity, this study provides some suggestive evidence that implicit attitudes may be influencing judges' behavior.

4. Sentencing

There is evidence that African Americans are treated worse than similarly situated Whites in sentencing. For example, federal Black defendants were sentenced to 12 percent longer sentences under the Sentencing Reform Act of 1984,[93] and Black defendants are subject disproportionately to the death penalty.[94]

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91. *Id.* at 1220 n.114.

92. *See id.* at 1223.

93. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence From the U.S. Federal Courts*, 44 J.L. & ECON. 285, 300 (2001) (examining federal judge sentencing under the Sentencing Reform Act of 1984).

94. *See* U.S. GEN. ACCOUNTING OFFICE, GAO GGD-90-57, REPORT TO THE SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) (finding killers of White victims receive the death penalty more often than killers of Black victims); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview,*

Of course, it is possible that there is some good reason for that difference, based on the merits. One way to check is to run experimental studies holding everything constant except for race.

Probation officers. In one study, Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words related to African Americans, such as "Harlem" or "dreadlocks." This subliminal priming led the officers to recommend harsher sentencing decisions.[95] As we noted above, Rachlinski et al. found no such effect on the judges they tested using a similar but not identical method.[96] But, at least in this study, an effect was found with police and probation officers. Given that this was a subliminal prime, the merits could not have justified the different evaluations.

Afrocentric features. Irene Blair, Charles Judd, and Kristine Chapleau took photographs from a database of criminals convicted in Florida[97] and asked participants to judge how Afrocentric both White and Black inmates looked on a scale of one to nine.[98] The goal was to see if race, facial features, or both correlated with actual sentencing. Using multiple regression analysis, the researchers found that after controlling for the seriousness of the primary and additional offenses, the race of the defendant showed no statistical significance.[99] In other words, White and Black defendants were sentenced without discrimination based on race. According to the

With Recent Findings From Philadelphia, 83 CORNELL L. REV. 1638, 1710–24 (1998) (finding mixed evidence that Black defendants are more likely to receive the death sentence).

95. *See* Graham & Lowery, *supra* note 87.

96. Priming studies are quite sensitive to details. For example, the more subliminal a prime is (in time duration and in frequency), the less the prime tends to stick (the smaller the effects and the faster it dissipates). Rachlinski et al. identified some differences between their experimental procedure and that of Graham and Lowery's. *See* Rachlinski et al., *supra* note 86, at 1213 n.88. Interestingly, in the Rachlinski study, for judges from the eastern conference (seventy judges), a programming error made their subliminal primes last only sixty-four milliseconds. By contrast, for the western conference (forty-five judges), the prime lasted 153 milliseconds, which was close to the duration used by Graham and Lowery (150 milliseconds). *See id.* at 1206 (providing numerical count of judges' prime); *id.* at 1213 n.84 (identifying the programming error). Graham and Lowery wrote that they selected the priming durations through extensive pilot testing "to arrive at a presentation time that would allow the primes to be detectable but not identifiable." Graham & Lowery, *supra* note 87, at 489. It is possible that the truncated priming duration for the eastern conference judges contributed to the different findings between Rachlinski et al. and Graham and Lowery.

97. *See* Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674, 675 (2004) (selecting a sample of 100 Black inmates and 116 White inmates).

98. *Id.* at 676. Afrocentric meant full lips, broad nose, relatively darker skin color, and curly hair. It is what participants socially understood to look African without any explicit instruction or definition. *See id.* at 674 n.1.

99. *Id.* at 676.

researchers, this is a success story based on various sentencing reforms specifically adopted by Florida mostly to decrease sentencing discretion.[100]

However, when the researchers added Afrocentricity of facial features into their regressions, they found a curious correlation. Within each race, either Black or White, the more Afrocentric the defendant looked, the harsher his punishment.[101] How much so? If you picked a defendant who was one standard deviation above the mean in Afrocentric features and compared him to another defendant of the same race who was one standard deviation below the mean, there would be a sentence difference of seven to eight months between them, holding constant any difference in their actual crime.[102]

Again, if the research provides complex findings, we must grapple with a complex story. On the one hand, we have good news: Black and White defendants were, overall, sentenced comparably. On the other hand, we have bad news: Within each race, the more stereotypically Black the defendant looked, the harsher the punishment. What might make sense of such results? According to the researchers, perhaps implicit bias was responsible.[103] If judges are motivated to avoid racial discrimination, they may be on guard regarding the dangers of treating similarly situated Blacks worse than Whites. On alert to this potential bias, the judges prevent it from causing any discriminatory behavior. By contrast, judges have no conscious awareness that Afrocentric features might be triggering stereotypes of criminality and violence that could influence their judgment. Without such awareness, they could not explicitly control or correct for the potential bias.[104] If this explanation is correct, we have further evidence that discrimination is being driven in part by implicit biases and not solely by explicit-but-concealed biases.

* * *

Where does this whirlwind tour of psychological research findings leave us? In each of the stages of the criminal trial process discussed, the empirical research

100. *Id.* at 677.

101. *Id.* at 676–77. Jennifer Eberhardt and her colleagues reached consistent findings when she used the same Florida photograph dataset to examine how Black defendants were sentenced to death. After performing a median split on how stereotypical the defendant looked, the top half were sentenced to death 57.5 percent of the time compared to the bottom half, which were sentenced to death only 24.4 percent of the time. *See* Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 384 (2006). Interestingly, this effect was not observed when the victim was Black. *See id.* at 385.

102. *See* Blair et al., *supra* note 97, at 677–78.

103. *See id.* at 678 (hypothesizing that "perhaps an equally pernicious and less controllable process [is] at work").

104. *See id.* at 677.

gives us reason to think that implicit biases—attitudes and beliefs that we are not directly aware of and may not endorse—could influence how defendants are treated and judged. Wherever possible, in our description of the studies, we have tried to provide the magnitude of these effects. But knowing precisely how much work they really do is difficult. If we seek an estimate, reflective of an entire body of research and not any single study, one answer comes from the Greenwald meta-analysis, which found that the IAT (the most widely used, but not the only measure of implicit bias) could predict 5.6 percent of the variation of the behavior in Black–White behavioral domains.[105]

Should that be deemed a lot or a little? In answering this question, we should be mindful of the collective impact of such biases, integrated over time (per person) and over persons (across all defendants).[106] For a single defendant, these biases may surface for various decisionmakers repeatedly in policing, charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer persuasiveness, guilt determination, sentencing recommendations, sentencing itself, appeal, and so on. Even small biases at each stage may aggregate into a substantial effect.

To get a more concrete sense, Anthony Greenwald has produced a simulation that models cumulating racial disparities through five sequential stages of criminal justice—arrest, arraignment, plea bargain, trial, and sentence. It supposes that the probability of arrest having committed the offense is 0.50, that the probability of conviction at trial is 0.75, and that the effect size of implicit bias is r=0.1 at each stage. Under this simulation, for a crime with a mean sentence of 5 years, and with a standard deviation of 2 years, Black criminals can expect a sentence of 2.44 years whereas White criminals can expect just 1.40 years.[107] To appreciate the full social impact, we must next aggregate this sort of disparity a second time over all defendants subject to racial bias, out of an approximate annual

105. *See* Greenwald et al., *supra* note 24, at 24 tbl.3 (showing that correlation between race attitude IAT (Black/White) and behavior in the meta-analysis is 0.236, which when squared equals 0.056, the percentage of variance explained).

106. *See* Rachlinski et al., *supra* note 86, at 1202; Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of 'Affirmative Action*,' 94 CALIF. L. REV. 1063, 1073 (2006).

107. The simulation is available at *Simulation: Cumulating Racial Disparities Through 5 Sequential Stages of Criminal Justice*, http://faculty.washington.edu/agg/UCLA_PULSE.simulation.xlsx (last visited May 15, 2012). If in the simulation the effect size of race discrimination at each step is increased from r=0.1 to r=0.2, which is less than the average effect size of race discrimination effects found in the 2009 meta-analysis, *see supra* note 105, the ratio of expected years of sentence would increase to 3.11 years (Black) to 1.01 years (White).

total of 20.7 million state criminal cases[108] and 70 thousand federal criminal cases.[109] And, as Robert Abelson has demonstrated, even small percentages of variance explained might amount to huge impacts.[110]

B. The Civil Path

Now, we switch from the criminal to the civil path and focus on the trajectory of an individual[111] bringing suit in a federal employment discrimination case—and on how implicit bias might affect this process. First, the plaintiff, who is a member of a protected class, believes that her employer has discriminated against her in some legally cognizable way.[112] Second, after exhausting necessary administrative remedies,[113] the plaintiff sues in federal court. Third, the defendant tries to terminate the case before trial via a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6). Fourth, should that fail, the defendant moves for summary judgment under FRCP 56. Finally, should that motion also fail, the jury renders a verdict after trial. Again, at each of these

108. *See* ROBERT C. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 3 (2011), *available at* http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf.

109. *See* Rachlinski et al., *supra* note 86, at 1202.

110. *See* Robert P. Abelson, *A Variance Explanation Paradox: When a Little Is a Lot*, 97 PSYCHOL. BULL. 129, 132 (1985) (explaining that the batting average of a 0.320 hitter or a 0.220 hitter predicts only 1.4 percent of the variance explained for a single at-bat producing either a hit or no-hit). Some discussion of this appears in Kang & Lane, *supra* note 2, at 489.

111. We acknowledge that *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), made it much more difficult to certify large classes in employment discrimination cases. *See id.* at 2553–54 (holding that statistical evidence of gender disparities combined with a sociologist's analysis that Wal-Mart's corporate culture made it vulnerable to gender bias was inadequate to show that members of the putative class had a common claim for purposes of class certification under FED. R. CIV. P. 23(b)).

112. For example, in a Title VII cause of action for disparate *treatment*, the plaintiff must demonstrate an adverse employment action "because of" the plaintiff's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006). By contrast, in a Title VII cause of action for disparate *impact*, the plaintiff challenges facially neutral policies that produce a disparate impact on protected populations. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). We recognize that employment discrimination law is far more complex than presented here, with different elements for different state and federal causes of action.

113. The U.S. Equal Employment Opportunity Commission (EEOC) process is critical in practical terms because the failure to file a claim with the EEOC within the quite short statute of limitations (either 180 or 300 days depending on whether the jurisdiction has a state or local fair employment agency) or to timely file suit after resorting to the EEOC results in an automatic dismissal of the claim. However, neither EEOC inaction nor an adverse determination preclude private suit. *See* 2 CHARLES SULLIVAN & LAUREN WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 12.03[B], at 672 (4th ed. 2012).

stages,[114] implicit biases could potentially influence the outcome. To maintain a manageable scope of analysis, we focus on employer discrimination, pretrial adjudication, and jury verdict.

1. Employer Discrimination

For many, the most interesting question is whether implicit bias helped cause the employer to discriminate against the plaintiff. There are good reasons to think that some negative employment actions are indeed caused by implicit biases in what tort scholars call a "but-for" sense. This but-for causation may be legally sufficient since Title VII and most state antidiscrimination statutes require only a showing that the plaintiff was treated less favorably "because of" a protected characteristic, such as race or sex.[115] But our objective here is not to engage the doctrinal[116] and philosophical questions[117] of whether existing antidiscrimination laws do or should recognize implicit bias-actuated discrimination. We also do not address what sorts of evidence should be deemed admissible when plaintiffs attempt to make such a case at trial.[118] Although those questions are critically important, our

114. As explained when we introduced the Criminal Path, the number of stages identified is somewhat arbitrary. We could have listed more or fewer stages.

115. Section 703(a) of Title VII of the 1964 Civil Rights Act states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of [an] individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

116. For discussion of legal implications, see Faigman, Dasgupta & Ridgeway, *supra* note 19; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Krieger & Fiske, *supra* note 2.

117. For a philosophical analysis, see Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010).

118. For example, there is considerable disagreement on whether an expert should be allowed to testify that a particular case is an instance of implicit bias. This issue is part of a much larger debate regarding scientists' ability to make reasonable inferences about an individual case from group data. John Monahan and Laurens Walker first pointed out that scientific evidence often comes to court at two different levels of generality, one general and one specific. *See* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). For instance, in a case involving the accuracy of an eyewitness identification, the general question might concern whether eyewitness identifications that are cross-racial are less reliable than same-race identifications; the specific question in the case would involve whether the cross-racial identification in this case was accurate. Interested in social science evidence, Monahan and Walker referred to this as "social framework" evidence, though their fundamental insight regarding frameworks applies to all scientific evidence. In the context of implicit biases, then, general research amply demonstrates the phenomenon in the population. However, in the courtroom, the issue typically concerns whether a particular decision or action was a product of implicit bias.

As a scientific matter, knowing that a phenomenon exists in a population does not necessarily mean that a scientist can reliably say that it was manifest in a particular case. This has led to a debate as to

task is more limited—to give an empirical account of how implicit bias may potentially influence a civil litigation trajectory.

Our belief that implicit bias causes some employment discrimination is based on the following evidence. First, tester studies in the field—which involve sending identical applicants or applications except for some trait, such as race or gender—have generally uncovered discrimination. According to a summary by Mark Bendick and Ana Nunes, there have been "several dozen testing studies" in the past two decades, in multiple countries, focusing on discrimination against various demographic groups (including women, the elderly, and racial minorities).[119] These studies consistently reveal typical "net rates of discrimination" that range from 20–40 percent.[120] In other words, in 20–40 percent of cases, employers treat subordinated groups (for example, racial minorities) worse than privileged groups (for example, Whites) even though the testers were carefully controlled to be identically qualified.

Second, although tester studies do not distinguish between explicit versus implicit bias, various laboratory experiments have found implicit bias correlations with discriminatory evaluations. For example, Laurie Rudman and Peter Glick demonstrated that in certain job conditions, participants treated a self-promoting and competent woman, whom the researchers termed "agentic," worse than an

whether experts should be limited to testifying only to the general phenomenon or should be allowed to opine on whether a particular case is an instance of the general phenomenon. This is a complicated issue and scholars have weighed in on both sides. For opposition to the use of expert testimony that a specific case is an instance of implicit bias, see Faigman, Dasgupta & Ridgeway, *supra* note 19, at 1394 ("The research . . . does not demonstrate that an expert can validly determine whether implicit bias caused a specific employment decision."); and John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 VA. L. REV. 1715, 1719 (2008) ("[Testimony] in which the expert witness explicitly linked general research findings on gender discrimination to specific factual conclusions . . . exceeded the limitations on expert testimony established by the Federal Rules of Evidence and by both the original and revised proposal of what constitutes 'social framework' evidence."). For advancement of allowing expert testimony that a particular case is an instance of some general phenomenon, see Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Proceedings*, 83 TEMPLE L. REV. 867, 876 (2011) ("Qualified social scientists who provide general, relevant knowledge and apply ordinary scientific reasoning may offer informal opinion about the individual case, but probabilistically.").

In the end, lawyers may be able to work around this dispute by using an expert to provide social framework evidence that identifies particular attributes that exacerbate biased decisionmaking, then immediately calling up another witness who is personally familiar with the defendant's work environment and asking that witness whether each of those particular attributes exists.

119. *See* Marc Bendick, Jr. & Ana P. Nunes, *Developing the Research Basis for Controlling Bias in Hiring*, 68 J. SOC. ISSUES (forthcoming 2012), *available at* http://www.bendickegan.com/pdf/Sent_to_JSI_Feb_27_2010.pdf.

120. *Id.* (manuscript at 15).

equally agentic man.[121] When the job description explicitly required the employee to be cooperative and to work well with others, participants rated the agentic female less hirable than the equally agentic male.[122] Probing deeper, the researchers identified that the participants penalized the female candidate for lack of social skills, not incompetence.[123] Explicit bias measures did not correlate with the rankings; however, an implicit gender stereotype (associating women as more communal than agentic)[124] did correlate negatively with the ratings for social skills. In other words, the higher the implicit gender stereotype, the lower the social skills evaluation.[125]

Third, field experiments have provided further confirmation under real-world conditions. The studies by Marianne Bertrand and Sendhil Mullainathan demonstrating discrimination in callbacks because of the names on comparable resumes have received substantial attention in the popular press as well as in law reviews.[126] These studies found that for equally qualified—indeed, otherwise identical candidates, firms called back "Emily" more often than "Lakisha."[127] Less attention has been paid to Dan-Olof Rooth's extensions of this work, which found similar callback discrimination but also found correlations between implicit stereotypes and the discriminatory behavior.[128] Rooth has found these correlations

121. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 757 (2001). Agentic qualities were signaled by a life philosophy essay and canned answers to a videotaped interview that emphasized self-promotion and competence. *See id.* at 748. Agentic candidates were contrasted with candidates whom the researchers labeled "androgynous"—they also demonstrated the characteristics of interdependence and cooperation. *Id.*

122. The difference was M=2.84 versus M=3.52 on a 5 point scale ($p<0.05$). *See id.* at 753. No gender bias was shown when the job description was ostensibly masculine and did not call for cooperative behavior. Also, job candidates that were engineered to be androgynous—in other words, to show both agentic and cooperative traits—were treated the same regardless of gender. *See id.*

123. *See id.* at 753–54.

124. The agentic stereotype was captured by word stimuli such as "independent," "autonomous," and "competitive." The communal stereotype was captured by words such as "communal," "cooperative," and "kinship." *See id.* at 750.

125. *See id.* at 756 (r=–0.49, $p<0.001$). For further description of the study in the law reviews, see Kang, *supra* note 46, at 1517–18.

126. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004). A search of the TP-ALL database in Westlaw on December 10, 2011 revealed ninety-six hits.

127. *Id.* at 992.

128. Dan-Olof Rooth, *Automatic Associations and Discrimination in Hiring: Real World Evidence*, 17 LABOUR ECON. 523 (2010) (finding that implicit stereotypes, as measured by the IAT, predicted differential callbacks of Swedish-named versus Arab-Muslim-named resumes). An increase of one standard deviation in implicit stereotype produced almost a 12 percent decrease in the probability that an Arab/Muslim candidate received an interview. *See id.*

with not only implicit stereotypes about ethnic groups (Swedes versus Arab-Muslims) but also implicit stereotypes about the obese.[129]

Because implicit bias in the *courtroom* is our focus, we will not attempt to offer a comprehensive summary of the scientific research as applied to the implicit bias in the *workplace*.[130] We do, however, wish briefly to highlight lines of research—variously called "constructed criteria," "shifting standards," or "casuistry"—that emphasize the *malleability of merit*. We focus on this work because it has received relatively little coverage in the legal literature and may help explain how complex decisionmaking with multiple motivations occurs in the real world.[131] Moreover, this phenomenon may influence not only the defendant (accused of discrimination) but also the jurors who are tasked to judge the merits of the plaintiff's case.

Broadly speaking, this research demonstrates that people frequently engage in motivated reasoning[132] in selection decisions that we justify by changing merit criteria on the fly, often without conscious awareness. In other words, as between two plausible candidates that have different strengths and weaknesses, we first choose the candidate we like—a decision that may well be influenced by implicit factors—and then justify that choice by molding our merit standards accordingly.

We can make this point more concrete. In one experiment, Eric Luis Uhlmann and Geoffrey Cohen asked participants to evaluate two finalists for police chief—one male, the other female.[133] One candidate's profile signaled *book smart*, the other's profile signaled *streetwise*, and the experimental design varied which profile attached to the woman and which to the man. Regardless of which attributes the male candidate featured, participants favored the male candidate and articulated their hiring criteria accordingly. For example, education (book

129. Jens Agerström & Dan-Olof Rooth, *The Role of Automatic Obesity Stereotypes in Real Hiring Discrimination*, 96 J. APPLIED PSYCHOL. 790 (2011) (finding that hiring managers (N=153) holding more negative IAT-measured automatic stereotypes about the obese were less likely to invite an obese applicant for an interview).

130. Thankfully, many of these studies have already been imported into the legal literature. For a review of the science, see Kang & Lane, *supra* note 2, at 484–85 (discussing evidence of racial bias in how actual managers sort resumes and of correlations between implicit biases, as measured by the IAT, and differential callback rates).

131. One recent exception is Rich, *supra* note 25.

132. For discussion of motivated reasoning in organizational contexts, see Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1029–34 (2005). Motivated reasoning is "the process through which we assimilate information in a self-serving manner." *Id.* at 1029.

133. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005).

smarts) was considered more important when the man had it.[134] Surprisingly, even the attribute of being family oriented and having children was deemed more important when the man had it.[135]

Michael Norton, Joseph Vandello, and John Darley have made similar findings, again in the domain of gender.[136] Participants were put in the role of manager of a construction company who had to hire a high-level employee. One candidate's profile signaled more education; the other's profile signaled more experience. Participants ranked these candidates (and three other filler candidates), and then explained their decisionmaking by writing down "what was most important in determining [their] decision."[137]

In the control condition, the profiles were given with just initials (not full names) and thus the test subjects could not assess their gender. In this condition, participants preferred the higher educated candidate 76 percent of the time.[138] In the two experimental conditions, the profiles were given names that signaled gender, with the man having higher education in one condition and the woman having higher education in the other. When the man had higher education, the participants preferred him 75 percent of the time. In sharp contrast, when the woman had higher education, only 43 percent of the participants preferred her.[139]

The discrimination itself is not as interesting as *how* the discrimination was justified. In the control condition and the man-has-more-education condition, the participants ranked education as more important than experience about half the time (48 percent and 50 percent).[140] By contrast, in the woman-has-more-education condition, only 22 percent ranked education as more important than experience.[141] In other words, what counted as merit was redefined, in real time, to justify hiring the man.

Was this weighting done consciously, as part of a strategy to manipulate merit in order to provide a cover story for decisionmaking caused and motivated by explicit bias? Or, was merit refactored in a more automatic, unconscious, dissonance-reducing rationalization, which would be more consistent with an implicit bias story? Norton and colleagues probed this causation question in another series of

134. *See id.* (M=8.27 with education versus M=7.07 without education, on a 11 point scale; p=0.006; d=1.02).
135. *See id.* (M=6.21 with family traits versus 5.08 without family traits; p=0.05; d=0.86).
136. Michael I. Norton et al., *Casuistry and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).
137. *Id.* at 820.
138. *Id.* at 821.
139. *Id.*
140. *Id.*
141. *Id.*

experiments, in the context of race and college admissions.[142] In a prior study, they had found that Princeton undergraduate students shifted merit criteria—the relative importance of GPA versus the number of AP classes taken—to select the Black applicant over the White applicant who shared the same cumulative SAT score.[143] To see whether this casuistry was explicit and strategic or implicit and automatic, they ran another experiment in which participants merely rated admissions criteria in the abstract without selecting a candidate for admission.

Participants were simply told that they were participating in a study examining the criteria most important to college admissions decisions. They were given two sample resumes to familiarize themselves with potential criteria. Both resumes had equivalent cumulative SAT scores, but differed on GPA (4.0 versus 3.6) versus number of AP classes taken (9 versus 6). Both resumes also disclosed the applicant's race. In one condition, the White candidate had the higher GPA (and fewer AP classes); in the other condition, the African American candidate had the higher GPA (and fewer AP classes).[144] After reviewing the samples, the participants had to rank order eight criteria in importance, including GPA, number of AP classes, SAT scores, athletic participation, and so forth.

In the condition with the Black candidate having the higher GPA, 77 percent of the participants ranked GPA higher in importance than number of AP classes taken. By contrast, when the White candidate had the higher GPA, only 63 percent of the participants ranked GPA higher than AP classes. This change in the weighting happened even though the participants did not expect that they were going to make an admissions choice or to justify that choice. Thus, these differences could not be readily explained in purely strategic terms, as methods for justifying a subsequent decision. According to the authors,

> [t]hese results suggest not only that it is possible for people to reweight criteria deliberately to justify choices but also that decisions made under such social constraints can impact information processing even prior to making a choice. This suggests that the bias we observed is not simply post hoc and strategic but occurs as an organic part of making decisions when social category information is present.[145]

142. Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 42 (2006).

143. *Id.* at 44.

144. *See id.*

145. *Id.* at 46–47. This does not, however, fully establish that these differences were the result of implicit views rather than explicit ones. Even if test subjects did not expect to have to make admissions determinations, they might consciously select criteria that they believed favored one group over another.

The ways that human decisionmakers may subtly adjust criteria in real time to modify their judgments of merit has significance for thinking about the ways that implicit bias may potentially influence employment decisions. In effect, bias can influence decisions in ways contrary to the standard and seemingly commonsensical model. The conventional legal model describes behavior as a product of discrete and identifiable motives. This research suggests, however, that implicit motivations might influence behavior and that we then rationalize those decisions after the fact. Hence, some employment decisions might be motivated by implicit bias but rationalized post hoc based on nonbiased criteria. This process of reasoning from behavior to motives, as opposed to the folk-psychology assumption that the arrow of direction is from motives to behavior, is, in fact, consistent with a large body of contemporary psychological research.[146]

2. Pretrial Adjudication: 12(b)(6)

As soon as a plaintiff files the complaint, the defendant will try to dismiss as many of the claims in the complaint as possible. Before recent changes in pleading, a motion to dismiss a complaint under FRCP 8 and FRCP 12(b)(6) was decided under the relatively lax standard of *Conley v. Gibson*.[147] Under *Conley*, all factual allegations made in the complaint were assumed to be true. As such, the court's task was simply to ask whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim."[148]

Starting with *Bell Atlantic Corp. v. Twombly*,[149] which addressed complex antitrust claims of parallel conduct, and further developed in *Ashcroft v. Iqbal*,[150] which addressed civil rights actions based on racial and religious discrimination post-9/11, the U.S. Supreme Court abandoned the *Conley* standard. First, district courts must now throw out factual allegations made in the complaint if they are merely conclusory.[151] Second, courts must decide on the plausibility of the claim based on the information before them.[152] In *Iqbal*, the Supreme Court held that

146. *See generally* TIMOTHY D. WILSON, STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS (2002).
147. 355 U.S. 41 (1957).
148. *Id.* at 45–46.
149. 550 U.S. 544 (2007).
150. 129 S. Ct. 1937 (2009).
151. *Id.* at 1951.
152. *Id.* at 1950–52.

because of an "obvious alternative explanation"[153] of earnest national security response, purposeful racial or religious "discrimination is not a plausible conclusion."[154]

How are courts supposed to decide what is "Twom-bal"[155] plausible when the motion to dismiss happens before discovery, especially in civil rights cases in which the defendant holds the key information? According to the Court, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[156]

And when judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.[157]

Moreover, consider what the directive to rely on common sense means in light of social judgeability theory.[158] According to this theory, there are social rules that tell us when it is appropriate to judge someone. For example, suppose your fourth grade child told you that a new kid, Hannah, has enrolled in school and that she receives free lunches. Your child then asks you whether you think she is smart. You will probably decline to answer since you do not feel entitled to make that judgment. Without more probative information, you feel that you would only be crudely stereotyping her abilities based on her socioeconomic status. But what if the next day you volunteered in the classroom and spent twelve minutes observing

153. *Id.* (quoting *Twombly*, 550 U.S. 544) (internal quotation marks omitted).
154. *Id.* at 1952.
155. *See In re* Iowa Ready-Mix Concrete Antitrust Litig., No. C 10-4038-MWB, 2011 WL 5547159, at *1 (N.D. Iowa Nov. 9, 2011) (referring to a *Twombly-Iqbal* motion as "Twom-bal").
156. *Iqbal*, 129 S. Ct. at 1940.
157. These schemas also reflect cultural cognitions. *See generally* Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).
158. *See* Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48 (1994).

Hannah interacting with a teacher trying to solve problems? Would you then feel that you had enough individuating information to come to some judgment?

This is precisely what John Darley and Paget Gross tested in a seminal experiment in 1983.[159] When participants only received economic status information, they declined to evaluate Hannah's intelligence as a function of her economic class. However, when they saw a twelve-minute videotape of the child answering a battery of questions, participants felt credentialed to judge the girl, and they did so in a way that was consistent with stereotypes. What they did not realize was that the individuating information in the videotape was purposefully designed to be ambiguous. So participants who were told that Hannah was rich interpreted the video as confirmation that she was smart. By contrast, participants who were told that Hannah was poor interpreted the same video as confirmation that she was not so bright.[160]

Vincent Yzerbyt and colleagues, who call this phenomenon "social judgeability," have produced further evidence of this effect.[161] If researchers told you that a person is either an archivist or a comedian and then asked you twenty questions about this person regarding their degree of extroversion with the options of "True," "False," or "I don't know," how might you answer? What if, in addition, they manufactured an illusion that you were given individuating information—information about the specific individual and not just the category he or she belongs to—even though you actually did not receive any such information?[162] This is precisely what Yzerbyt and colleagues did in the lab.

They found that those operating under the illusion of individuating information were more confident in their answers in that they marked fewer questions with "I don't know."[163] They also found that those operating under the illusion gave more stereotype-consistent answers.[164] In other words, the illusion of being informed made the target judgeable. Because the participants, in fact, had received no such individuating information, they tended to judge the person in accordance with their schemas about archivists and comedians. Interestingly, "in the debriefings,

159. *See* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 22–23 (1983).

160. *See id.* at 24–25, 27–29.

161. *See* Yzerbyt et al., *supra* note 158.

162. This illusion was created by having participants go through a listening exercise, in which they were told to focus only on one speaker (coming through one ear of a headset) and ignore the other (coming through the other). They were later told that the speaker that they were told to ignore had in fact provided relevant individuating information. The truth was, however, that no such information had been given. *See id.* at 50.

163. *See id.* at 51 (M=5.07 versus 10.13; p<0.003).

164. *See id.* (M=9.97 versus 6.30, out of 1 to 20 point range; p<0.006).

subjects reported that they did not judge the target on the basis of a stereotype; they were persuaded that they had described a real person qua person."[165] Again, it is possible that they were concealing their explicitly embraced bias about archivists and comedians from probing researchers, but we think that it is more probable that implicit bias explains these results.

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas. Just as Yzerbyt's illusion of individuating information entitled participants to judge in the laboratory, the express command of the Supreme Court may entitle judges to judge in the courtroom when they lack any well-developed basis to do so.

There are no field studies to test whether biases, explicit or implicit, influence how actual judges decide motions to dismiss actual cases. It is not clear that researchers could ever collect such information. All that we have are some preliminary data about dismissal rates before and after *Iqbal* that are consistent with our analysis. Again, since *Iqbal* made dismissals easier, we should see an increase in dismissal rates across the board.[166] More relevant to our hypothesis is whether certain types of cases experienced differential changes in dismissal rates. For instance, we would expect *Iqbal* to generate greater increases in dismissal rates for race discrimination claims than, say, contract claims. There are a number of potential reasons for this: One reason is that judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. Another reason is that we might expect some kinds of cases

165. *Id.*

166. In the first empirical study of *Iqbal*, Hatamyar sampled 444 cases under *Conley* (from May 2005 to May 2007) and 173 cases under *Iqbal* (from May 2009 to August 2009). *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 597 (2010). She found that the general rate of complaint dismissal rose from 46 percent to 56 percent. *See id.* at 602 tbl.2. However, this finding was not statistically significant under a Pearson chi-squared distribution test examining the different dismissal rates for *Conley*, *Twombly*, and *Iqbal* for three results: grant, mixed, and deny.

to raise more significant concerns about asymmetric information than do others. In contracts disputes, both parties may have good information about most of the relevant facts even prior to discovery. In employment discrimination cases, plaintiffs may have good hunches about how they have been discriminated against, but prior to discovery they may not have access to the broad array of information in the employer's possession that may be necessary to turn the hunch into something a judge finds plausible. Moreover, these two reasons potentially interact: the more gap filling and inferential thinking that a judge has to engage in, the more room there may be for explicit and implicit biases to structure the judge's assessment in the absence of a well-developed evidentiary record.

Notwithstanding the lack of field studies on these issues, there is some evidentiary support for these differential changes in dismissal rates. For example, Patricia Hatamayr sorted a sample of cases before and after *Iqbal* into six major categories: contracts, torts, civil rights, labor, intellectual property, and all other statutory cases.[167] She found that in contract cases, the rate of dismissal did not change much from *Conley* (32 percent) to *Iqbal* (32 percent).[168] By contrast, for Title VII cases, the rate of dismissal increased from 42 percent to 53 percent.[169] Victor Quintanilla has collected more granular data by counting not Title VII cases generally but federal employment discrimination cases filed specifically by Black plaintiffs both before and after *Iqbal*.[170] He found an even larger jump. Under the *Conley* regime, courts granted only 20.5 percent of the motions to dismiss such cases. By contrast, under the *Iqbal* regime, courts granted 54.6 percent of them.[171] These data lend themselves to multiple interpretations and suffer from various confounds. So at this point, we can make only modest claims. We merely suggest that the dismissal rate data are consistent with our hypothesis that *Iqbal*'s plausibility standard poses a risk of increasing the impact of implicit biases at the 12(b)(6) stage.

If, notwithstanding the plausibility-based pleading requirements, the case gets past the motion to dismiss, then discovery will take place, after which defendants will seek summary judgment under FRCP 56. On the one hand, this procedural posture is less subject to implicit biases than the motion to dismiss because more individuating information will have surfaced through discovery. On the

167. *See id.* at 591–93.
168. *See id.* at 630 tbl.D.
169. *See id.*
170. *See* Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of* Iqbal*'s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1 (2011). Quintanilla counted both Title VII and 42 U.S.C. § 1981 cases.
171. *See id.* at 36 tbl.1 ($p<0.000$).

other hand, the judge still has to make a judgment call on whether any "genuine dispute as to any material fact"[172] remains. Similar decisionmaking dynamics are likely to be in play as we saw in the pleading stage, for a significant quantum of discretion remains. Certainly the empirical evidence that demonstrates how poorly employment discrimination claims fare on summary judgment is not inconsistent with this view, though, to be sure, myriad other explanations of these differences are possible (including, for example, doctrinal obstacles to reaching a jury).[173]

3. Jury Verdict

If the case gets to trial, the parties will introduce evidence on the merits of the claim. Sometimes the evidence will be physical objects, such as documents, emails, photographs, voice recordings, evaluation forms, and the like. The rest of it will be witness or expert testimony, teased out and challenged by lawyers on both sides. Is there any reason to think that jurors might interpret the evidence in line with their biases? In the criminal trajectory, we already learned of juror bias via meta-analyses as well as correlations with implicit biases. Unfortunately, we lack comparable studies in the civil context. What we offer are two sets of related arguments and evidence that speak to the issue: motivation to shift standards and performer preference.

a. Motivation to Shift Standards

Above, we discussed the potential malleability of merit determinations when judgments permit discretion and reviewed how employer defendants might shift standards and reweight criteria when evaluating applicants and employees. Here, we want to recognize that a parallel phenomenon may affect juror decisionmaking. Suppose that a particular juror is White and that he identifies strongly with his Whiteness. Suppose further that the defendant is White and is being sued by a racial minority. The accusation of illegal and immoral behavior threatens the

172. FED R. CIV. P. 56(a).

173. *See, e.g.*, Charlotte L. Lanvers, *Different Federal Court, Different Disposition: An Empirical Comparison of ADA, Title VII Race and Sex, and ADEA Employment Discrimination Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia*, 16 CORNELL J.L. & POL'Y 381, 395 (2007); Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Research Paper No. 08-022, 2008), *available at* http://ssrn.com/abstract=1138373 (finding that civil rights cases, and particularly employment discrimination cases, have a consistently higher summary judgment rate than non–civil rights cases).

status of the juror's racial ingroup. Anca Miron, Nyla Branscombe, and Monica Biernat have demonstrated that this threat to the ingroup can motivate people to shift standards in a direction that shields the ingroup from ethical responsibility.[174]

Miron and colleagues asked White undergraduates at the University of Kansas to state how strongly they identified with America.[175] Then they were asked various questions about America's relationship to slavery and its aftermath. These questions clumped into three categories (or constructs): judgments of harm done to Blacks,[176] standards of injustice,[177] and collective guilt.[178] Having measured these various constructs, the researchers looked for relationships among them. Their hypothesis was that the greater the self-identification with America, the higher the standards would be before being willing to call America racist or otherwise morally blameworthy (that is, the participants would set higher confirmatory standards). They found that White students who strongly identified as American set higher standards for injustice (that is, they wanted more evidence before calling America unjust);[179] they thought less harm was done by slavery;[180] and, as a result, they felt less collective guilt compared to other White students who identified less with America.[181] In other words, their attitudes toward America were correlated with the quantum of evidence they required to reach a judgment that America had been unjust.

In a subsequent study, Miron et al. tried to find evidence of causation, not merely correlation. They did so by experimentally manipulating national identification by asking participants to recount situations in which they felt similar to other Americans (evoking greater identification with fellow Americans) or different from other Americans (evoking less identification with fellow Americans).[182]

174. Anca M. Miron, Nyla R. Branscombe & Monica Biernat, *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 769 (2010).
175. The participants were all American citizens. The question asked was, "I feel strong ties with other Americans." *Id.* at 771.
176. A representative question was, "How much damage did Americans cause to Africans?" on a "very little" (1) to "very much" (7) Likert scale. *Id.* at 770.
177. "Please indicate what percentage of Americans would have had to be involved in causing harm to Africans for you to consider the past United States a racist nation" on a scale of 0–10 percent, 10–25 percent, up to 90–100 percent. *Id.* at 771.
178. "I feel guilty for my nation's harmful past actions toward African Americans" on a "strongly disagree" (1) to "strongly agree" (9) Likert scale. *Id.*
179. *See id.* at 772 tbl.I (r=0.26, p<0.05).
180. *See id.* (r=–0.23, p<0.05).
181. *See id.* (r=–0.21, p<0.05). Using structural equation modeling, the researchers found that standards of injustice fully mediated the relationship between group identification and judgments of harm; also, judgments of harm fully mediated the effect of standards on collective guilt. *See id.* at 772–73.
182. The manipulation was successful. *See id.* at 773 (p<0.05, d=0.54.).

Those who were experimentally made to feel *less* identification with America subsequently reported very different standards of justice and collective guilt compared to others made to feel *more* identification with America. Specifically, participants in the low identification condition set lower standards for calling something unjust, they evaluated slavery's harms as higher, and they felt more collective guilt. By contrast, participants in the high identification condition set higher standards for calling something unjust (that is, they required more evidence), they evaluated slavery's harms as less severe, and they felt less guilt.[183] In other words, by experimentally manipulating how much people identified with their ingroup (in this case, American), researchers could shift the justice standard that participants deployed to judge their own ingroup for harming the outgroup.

Evidentiary standards for jurors are specifically articulated (for example, "preponderance of the evidence") but substantively vague. The question is how a juror operationalizes that standard—just how much evidence does she require for believing that this standard has been met? These studies show how our assessments of evidence—of how much is enough—are themselves potentially malleable. One potential source of malleability is, according to this research, a desire (most likely implicit) to protect one's ingroup status. If a juror strongly identifies with the defendant employer as part of the same ingroup—racially or otherwise—the juror may shift standards of proof upwards in response to attack by an outgroup plaintiff. In other words, jurors who implicitly perceive an ingroup threat may require more evidence to be convinced of the defendant's harmful behavior than they would in an otherwise identical case that did not relate to their own ingroup. Ingroup threat is simply an example of this phenomenon; the point is that implicit biases may influence jurors by affecting how they implement ambiguous decision criteria regarding both the quantum of proof and how they make inferences from ambiguous pieces of information.

b. Performer Preference

Jurors will often receive evidence and interpretive cues from performers at trial, by which we mean the cast of characters in the courtroom who jurors see, such as the judge, lawyers, parties, and witnesses. These various performers are playing roles of one sort or another. And, it turns out that people tend to have stereotypes about the ideal employee or worker that vary depending on the segment of the labor

183. In standards for injustice, M=2.60 versus 3.39; on judgments of harm, M=5.82 versus 5.42; on collective guilt, M=6.33 versus 4.60. All differences were statistically significant at p=0.05 or less. *See id.*

market. For example, in high-level professional jobs and leadership roles, the supposedly ideal employee is often a White man.[184] When the actual performer does not fit the ideal type, people may evaluate the performance more negatively.

One study by Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran, and Gary Blasi found just such performer preference with respect to lawyers, as a function of race.[185] Kang and colleagues measured the explicit and implicit beliefs about the ideal lawyer held by jury-eligible participants from Los Angeles. The researchers were especially curious whether participants had implicit stereotypes linking the ideal litigator with particular racial groups (White versus Asian American). In addition to measuring their biases, the researchers had participants evaluate two depositions, which they heard via headphones and simultaneously read on screen. At the beginning of each deposition, participants were shown for five seconds a picture of the litigator conducting the deposition on a computer screen accompanied by his name. The race of the litigator was varied by name and photograph. Also, the deposition transcript identified who was speaking, which meant that participants repeatedly saw the attorneys' last names.[186]

The study discovered the existence of a moderately strong implicit stereotype associating litigators with Whiteness (IAT D=0.45);[187] this stereotype correlated with more favorable evaluations of the White lawyer (ingroup favoritism since 91% of the participants were White) in terms of his competence ($r=0.32$, $p<0.01$), likeability ($r=0.31$, $p<0.01$), and hireability ($r=0.26$, $p<0.05$).[188] These results were confirmed through hierarchical regressions. To appreciate the magnitude of the effect sizes, imagine a juror who has no explicit stereotype but a large implicit stereotype (IAT D=1) that the ideal litigator is White. On a 7-point scale, this juror would favor a White lawyer over an identical Asian American

184. *See, e.g.*, Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); Alice H. Eagly, Steven J. Karau & Mona G. Makhijani, *Gender and the Effectiveness of Leaders: A Meta-Analysis*, 117 PSYCHOL. BULL. 125 (1995); *see also* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 213–17 (2000) (discussing how conceptions of merit are designed around masculine norms); Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007).

185. *See* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010).

186. *See id.* at 892–99 (describing method and procedure, and identifying attorney names as "William Cole" or "Sung Chang").

187. *See id.* at 900. They also found strong negative implicit attitudes against Asian Americans (IAT D=0.62). *See id.*

188. *Id.* at 901 tbl.3.

lawyer 6.01 to 5.65 in terms of competence, 5.57 to 5.27 in terms of likability, and 5.65 to 4.92 in terms of hireability.[189]

This study provides some evidence that potential jurors' implicit stereotypes cause racial discrimination in judging attorney performance of basic depositions. What does this have to do with how juries might decide employment discrimination cases? Of course, minority defendants do not necessarily hire minority attorneys. That said, it is possible that minorities do hire minority attorneys at somewhat higher rates than nonminorities. But even more important, we hypothesize that similar processes might take place with how jurors evaluate not only attorneys but also both parties and witnesses, as they perform their various roles at trial. To be sure, this study does not speak directly to credibility assessments, likely to be of special import at trial, but it does at least suggest that implicit stereotypes may affect judgment of performances in the courtroom.

We concede that our claims about implicit bias influencing jury decisionmaking in civil cases are somewhat speculative and not well quantified. Moreover, in the real world, certain institutional processes may make both explicit and implicit biases less likely to translate into behavior. For example, jurors must deliberate with other jurors, and sometimes the jury features significant demographic diversity, which seems to deepen certain types of deliberation.[190] Jurors also feel accountable[191] to the judge, who reminds them to adhere to the law and the merits. That said, for reasons already discussed, it seems implausible to think that current practices within the courtroom somehow magically burn away all jury biases, especially implicit biases of which jurors and judges are unaware. That is why we seek improvements based on the best understanding of how people actually behave.

Thus far, we have canvassed much of the available evidence describing how implicit bias may influence decisionmaking processes in both criminal and civil cases. On the one hand, the research findings are substantial and robust. On the other hand, they provide only imperfect knowledge, especially about what is actually happening in the real world. Notwithstanding this provisional and limited knowledge, we strongly believe that these studies, in aggregate, suggest that implicit bias in the trial process is a problem worth worrying about. What, then, can be done? Based on what we know, how might we intervene to improve the trial process and potentially vaccinate decisionmakers against, or at least reduce, the influence of implicit bias?

189. These figures were calculated using the regression equations in *id.* at 902 n.25, 904 n.27.

190. *See infra* text accompanying notes 241–245.

191. *See, e.g.*, Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 267–70 (1999).

III. INTERVENTIONS

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance.[192] Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups?[193] One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

192. In a 1999 survey by the National Center for State Courts, 47 percent of the American people doubted that African Americans and Latinos receive equal treatment in state courts; 55 percent doubted that non–English speaking people receive equal treatment. The appearance of fairness is a serious problem. *See* NAT'L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 37 (1999), *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf. The term "cosmetic compliance" comes from Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

193. For analysis of the nature versus nurture debate regarding implicit biases, see Jerry Kang, *Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132 (Justin D. Levinson & Robert J. Smith eds., 2012).

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college.[194] One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased.[195] By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.[196]

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays.[197] Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White).[198] In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.[199]

If increasing direct contact with a diverse but countertypical population is not readily feasible, what about vicarious contact, which is mediated by images,

194. *See* Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004).

195. *See id.* at 651.

196. *See id.* at 651–53.

197. *See* Nilanjana Dasgupta & Luis M. Rivera, *From Automatic Antigay Prejudice to Behavior: The Moderating Role of Conscious Beliefs About Gender and Behavioral Control*, 91 J. PERSONALITY & SOC. PSYCHOL. 268, 270 (2006).

198. *See* Rachlinski et al., *supra* note 86, at 1227.

199. *See* Correll et al., *supra* note 51, at 1014 ("We tentatively suggest that these environments may reinforce cultural stereotypes, linking Black people to the concept of violence.").

videos, simulations, or even imagination and which does not require direct face-to-face contact?[200] Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans.[201] These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.[202]

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident.[203] Situating African Americans in a positive setting produced lower implicit bias scores.[204]

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom.[205] But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only

200. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1166–67 (2000) (comparing vicarious with direct experiences).

201. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 807 (2001). The IAT effect changed nearly 50 percent as compared to the control (IAT effect M=78ms versus 174ms, p=0.01) and remained for over twenty-four hours.

202. Irene V. Blair, Jennifer E. Ma & Alison P. Lenton, *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828 (2001). *See generally* Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242 (2002) (literature review).

203. *See* Bernd Wittenbrink et al., *Spontaneous Prejudice in Context: Variability in Automatically Activated Attitudes*, 81 J. PERSONALITY & SOC. PSYCHOL. 815, 818–19 (2001).

204. *Id.* at 819.

205. How long does the intervention last? How immediate does it have to be? How much were the studies able to ensure focus on the positive countertypical stimulus as opposed to in a courtroom where these positives would be amidst the myriad distractions of trial?

during their typically brief visit to the court.[206] Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.[207]

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated.[208] Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable, we focus on the two key players in the courtroom: judges and jurors.[209]

1. Judges

a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in "avoid[ing] racial prejudice in decisionmaking"[210] relative to other judges attending the same conference. That is, obviously, mathematically impossible.

206. *See* Kang, *supra* note 46, at 1537 (raising the possibility of "debiasing booths" in lobbies for waiting jurors).
207. Rajees Sritharan & Bertram Gawronski, *Changing Implicit and Explicit Prejudice: Insights From the Associative-Propositional Evaluation Model*, 41 SOC. PSYCHOL. 113, 118 (2010).
208. *See* Jennifer A. Joy-Gaba & Brian A. Nosek, *The Surprisingly Limited Malleability of Implicit Racial Evaluations*, 41 SOC. PSYCHOL. 137, 141 (2010) (finding an effect size that was approximately 70 percent smaller than the original Dasgupta and Greenwald findings, *see supra* note 201).
209. Other important players obviously include staff, lawyers, and police. For a discussion of the training literature on the police and shooter bias, see Adam Benforado, *Quick on the Draw: Implicit Bias and the Second Amendment*, 89 OR. L. REV. 1, 46–48 (2010).
210. *See* Rachlinski et al., *supra* note 86, at 1225.

(One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible.[211] Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled "Gary" or the candidate profile labeled "Lisa" for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills.[212] Half the participants were primed to view themselves as objective.[213] The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations.[214] But those who were manipulated to think of themselves as objective evaluated the male candidate higher (M=5.06 versus 3.75, p=0.039, d=0.76).[215] Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective (M=3.12 versus 1.94, p=0.023, d=0.86).[216] In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot—the belief

211. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

212. *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210–11 (2007).

213. This was done simply by asking participants to rate their own objectivity. Over 88 percent of the participants rated themselves as above average on objectivity. *See id.* at 209. The participants were drawn from a lay sample (not just college students).

214. *See id.* at 210–11 (M=3.24 for male candidate versus 4.05 for female candidate, p=0.21).

215. *See id.* at 211.

216. *See id.* Interestingly, the gender of the participants mattered. Female participants did not show the objectivity priming effect. *See id.*

that others are biased but we ourselves are not.[217] In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and behaviors.[218] After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers.[219] By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group.[220] These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair.[221] Social psychologists generally agree that motivation is an important determinant of checking biased behavior.[222] Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.[223]

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and

217. *See generally* Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37 (2007).

218. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 574 (2007). The intervention article was 1643 words long, excluding references. *See id.* at 575.

219. *See id.* at 575 (M=5.29 where 6 represented the same amount of bias as peers).

220. *See id.* For the treatment group, their self-evaluation of objectivity was M=5.88, not statistically significantly different from the score of 6, which, as noted previously, meant having the same amount of bias as peers. Also, the self-reported objectivity of the treatment group (M=5.88) differed from the control group (M=5.29) in a statistically significant way, p=0.01. *See id.*

221. For a review, see Margo J. Monteith et al., *Schooling the Cognitive Monster: The Role of Motivation in the Regulation and Control of Prejudice*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 211 (2009).

222. *See* Russell H. Fazio & Tamara Towles-Schwen, *The MODE Model of Attitude–Behavior Processes*, *in* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 97 (Shelly Chaiken & Yaacov Trope eds., 1999).

223. *See* Dasgupta & Rivera, *supra* note 197, at 275.

awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion.[224] The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias.[225] It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias.[226] Before and after watching the documentary, participants were asked to what extent they thought "a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups."[227] Before viewing the documentary, approximately 16 percent chose "rarely-never," 55 percent chose "occasionally," and 30 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 20 percent chose "occasionally," and 79 percent chose "most-all."[228]

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose "rarely-never," 45 percent chose "occasionally," and 45 percent chose "most-all." After viewing the documentary, 1 percent chose "rarely-never," 14 percent chose "occasionally," and 84 percent

224. Several of the authors of this Article have spoken to judges on the topic of implicit bias.

225. *See* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), *available at* http://www.ncsc.org/IBReport.

226. The program was broadcast on the Judicial Branch's cable TV station and made available streaming on the Internet. *See The Neuroscience and Psychology of Decisionmaking*, ADMIN. OFF. COURTS EDUC. DIV. (Mar. 29, 2011), http://www2.courtinfo.ca.gov/cjer/aoctv/dialogue/neuro/index.htm.

227. *See* CASEY ET AL., *supra* note 225, at 12 fig.2.

228. *See id.*

chose "most-all."[229] These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments[230] support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, "I will apply the course content to my work." In California, 90 percent (N=60) reported that they agreed or strongly agreed.[231] In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed.[232] Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias.[233] In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit

229. *Id.* at 12 fig.3.

230. Comments included: "raising my awareness of prevalence of implicit bias," "enlightened me on the penetration of implicit bias in everyday life, even though I consciously strive to be unbiased and assume most people try to do the same," and "greater awareness—I really appreciated the impressive panel of participants; I really learned a lot, am very interested." *See* CASEY ET AL., *supra* note 225, at 11.

231. *See id.* at 10.

232. *See id.* at 18. Minnesota answered a slightly different question: 81 percent gave the program's applicability a medium high to high rating.

233. *See id.* at 20. The strategies that were identified included: "concerted effort to be aware of bias," "I more carefully review my reasons for decisions, likes, dislikes, and ask myself if there may be bias underlying my determination," "Simply trying to think things through more thoroughly," "Reading and learning more about other cultures," and "I have made mental notes to myself on the bench to be more aware of the implicit bias and I've re-examined my feelings to see if it is because of the party and his/her actions vs. any implicit bias on my part."

bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing.[234] But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking,[235] which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases.[236]

234. There are also ways to deploy more automatic countermeasures. In other words, one can teach one's mind to respond not reflectively but reflexively, by automatically triggering goal-directed behavior through internalization of certain if-then responses. These countermeasures function implicitly and even under conditions of cognitive load. *See generally* Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCHOL. BULL. 512, 514–15, 520 (2010); Monteith et al., *supra* note 221, at 218–21 (discussing bottom-up correction versus top-down).

235. *See* Galen V. Bodenhausen et al., *Happiness and Stereotypic Thinking in Social Judgment*, 66 J. PERSONALITY & SOC. PSYCHOL. 621 (1994).

236. *See* Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009). The researchers found that implicit bias against gays and lesbians could be increased more by making participants feel disgust than by making participants feel anger. *See id.* at 588. Conversely, they found that implicit bias against Arabs could be increased more by making participants feel angry rather than disgusted. *See id.* at 589; *see also* David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOL. SCI. 319 (2004).

In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling;[237] Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling.[238] These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges often cannot slow down. So, it makes sense

237. Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees*, 125 Q. J. ECON. 1859, 1885 (2010) ("We find that players have up to 4% fewer fouls called against them and score up to 2½% more points on nights in which their race matches that of the refereeing crew. Player statistics that one might think are unaffected by referee behavior [for example, free throw shooting] are uncorrelated with referee race. The bias in foul-calling is large enough so that the probability of a team winning is noticeably affected by the racial composition of the refereeing crew assigned to the game.").

238. Christopher A. Parsons et al., *Strike Three: Discrimination, Incentives, and Evaluation*, 101 AM. ECON. REV. 1410, 1433 (2011) ("Pitches are slightly more likely to be called strikes when the umpire shares the race/ethnicity of the starting pitcher, an effect that is observable only when umpires' behavior is not well monitored. The evidence also suggests that this bias has substantial effects on pitchers' measured performance and games' outcomes. The link between the small and large effects arises, at least in part, because pitchers alter their behavior in potentially discriminatory situations in ways that ordinarily would disadvantage themselves (such as throwing pitches directly over the plate).").

to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

2. Jurors

a. Jury Selection and Composition

Individual screen. One obvious way to break the link between bias and unfair decisions is to keep biased persons off the jury. Since everyone has implicit biases of one sort or another, the more precise goal would be to screen out those with excessively high biases that are relevant to the case at hand. This is, of course, precisely one of the purposes of voir dire, although the interrogation process was designed to ferret out concealed explicit bias, not implicit bias.

One might reasonably ask whether potential jurors should be individually screened for implicit bias via some instrument such as the IAT. But the leading scientists in implicit social cognition recommend against using the test as an individually diagnostic measure. One reason is that although the IAT has enough test-retest reliability to provide useful research information about human beings generally, its reliability is sometimes below what we would like for individual assessments.[239] Moreover, real-word diagnosticity for individuals raises many more issues than just test-retest reliability. Finally, those with implicit biases need not

239. The test-retest reliability between a person's IAT scores at two different times has been found to be 0.50. For further discussion, see Kang & Lane, *supra* note 2, at 477–78. Readers should understand that "the IAT's properties approximately resemble those of sphygmomanometer blood pressure (BP) measures that are used to assess hypertension." *See* Anthony G. Greenwald & N. Sriram, *No Measure Is Perfect, but Some Measures Can Be Quite Useful: Response to Two Comments on the Brief Implicit Association Test*, 57 EXPERIMENTAL PSYCHOL. 238, 240 (2010).

be regarded as incapable of breaking the causal chain from implicit bias to judgment. Accordingly, we maintain this scientifically conservative approach and recommend against using the IAT for individual juror selection.[240]

Jury diversity. Consider what a White juror wrote to Judge Janet Bond Arterton about jury deliberations during a civil rights complaint filed by Black plaintiffs:

> During deliberations, matter-of-fact expressions of bigotry and broad-brush platitudes about "those people" rolled off the tongues of a vocal majority as naturally and unabashedly as if they were discussing the weather. Shocked and sickened, I sat silently, rationalizing to myself that since I did agree with the product, there was nothing to be gained by speaking out against the process (I now regret my inaction). *Had just one African-American been sitting in that room, the content of discussion would have been quite different.* And had the case been more balanced—one that hinged on fine distinction or subtle nuances—a more diverse jury might have made a material difference in the outcome.
>
> I pass these thoughts onto you in the hope that the jury system can some day be improved.[241]

This anecdote suggests that a second-best strategy to striking potential jurors with high implicit bias is to increase the demographic diversity of juries[242] to get a broader distribution of biases, some of which might cancel each other out. This is akin to a diversification strategy for an investment portfolio. Moreover, in a more diverse jury, people's willingness to express explicit biases might be muted, and the very existence of diversity might even affect the operation of implicit biases as well.

In support of this approach, Sam Sommers has confirmed that racial diversity in the jury alters deliberations. In a mock jury experiment, he compared the deliberation content of all-White juries with that of racially diverse juries.[243] Racially diverse juries processed information in a way that most judges and lawyers would consider desirable: They had longer deliberations, greater focus on the actual evidence, greater discussion of missing evidence, fewer inaccurate statements, fewer

240. For legal commentary in agreement, see, for example, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 856–57 (2012). Roberts suggests using the IAT during orientation as an educational tool for jurors instead. *Id.* at 863–66.

241. Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1033 (2008) (quoting letter from anonymous juror) (emphasis added).

242. For a structural analysis of why juries lack racial diversity, see Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65, 68–71 (2008).

243. The juries labeled "diverse" featured four White and two Black jurors.

uncorrected statements, and greater discussion of race-related topics.[244] In addition to these information-based benefits, Sommers found interesting predeliberation effects: Simply by knowing that they would be serving on diverse juries (as compared to all-White ones), White jurors were less likely to believe, at the conclusion of evidence but before deliberations, that the Black defendant was guilty.[245]

Given these benefits,[246] we are skeptical about peremptory challenges, which private parties deploy to decrease racial diversity in precisely those cases in which diversity is likely to matter most.[247] Accordingly, we agree with the recommendation by various commentators, including Judge Mark Bennett, to curtail substantially the use of peremptory challenges.[248] In addition, we encourage consideration of restoring a 12-member jury size as "the most effective approach" to maintain juror representativeness.[249]

b. Jury Education About Implicit Bias

In our discussion of judge bias, we recommended that judges become skeptical of their own objectivity and learn about implicit social cognition to become motivated to check against implicit bias. The same principle applies to jurors, who must be educated and instructed to do the same in the course of their jury service. This education should take place early and often. For example, Judge

244. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

245. *See* Sommers, *supra* note 242, at 87.

246. Other benefits include promoting public confidence in the judicial system. *See id.* at 82–88 (summarizing theoretical and empirical literature).

247. *See* Michael I. Norton, Samuel R. Sommers & Sara Brauner, *Bias in Jury Selection: Justifying Prohibited Peremptory Challenges*, 20 J. BEHAV. DECISION MAKING 467 (2007); Samuel R. Sommers & Michael I. Norton, *Race and Jury Selection: Psychological Perspectives on the Peremptory Challenge Debate*, 63 AM. PSYCHOLOGIST 527 (2008) (reviewing literature); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 LAW & HUM. BEHAV. 261 (2007) (finding that race influences the exercise of peremptory challenges in participant populations that include college students, law students, and practicing attorneys and that participants effectively justified their use of challenges in race-neutral terms).

248. *See, e.g.*, Bennett, *supra* note 85, at 168–69 (recommending the tandem solution of increased lawyer participation in voir dire and the banning of peremptory challenges); Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155 (2005).

249. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 427 (2009).

Bennett spends approximately twenty-five minutes discussing implicit bias during jury selection.[250]

At the conclusion of jury selection, Judge Bennett asks each potential juror to take a pledge, which covers various matters including a pledge against bias:

> I pledge ***:
>
> I will not decide this case based on biases. This includes gut feelings, prejudices, stereotypes, personal likes or dislikes, sympathies or generalizations.[251]

He also gives a specific jury instruction on implicit biases before opening statements:

> Do not decide the case based on "implicit biases." As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, "implicit biases," that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common

250. Judge Bennett starts with a clip from *What Would You Do?*, an ABC show that uses hidden cameras to capture bystanders' reactions to a variety of staged situations. This episode—a brilliant demonstration of bias—opens with a bike chained to a pole near a popular bike trail on a sunny afternoon. First, a young White man, dressed in jeans, a t-shirt, and a baseball cap, approaches the bike with a hammer and saw and begins working on the chain (and even gets to the point of pulling out an industrial-strength bolt cutter). Many people pass by without saying anything; one asks him if he lost the key to his bike lock. Although many others show concern, they do not interfere. After those passersby clear, the show stages its next scenario: a young Black man, dressed the same way, approaches the bike with the same tools and attempts to break the chain. Within seconds, people confront him, wanting to know whether the bike is his. Quickly, a crowd congregates, with people shouting at him that he cannot take what does not belong to him and some even calling the police. Finally, after the crowd moves on, the show stages its last scenario: a young White woman, attractive and scantily clad, approaches the bike with the same tools and attempts to saw through the chain. Several men ride up and ask if they can help her break the lock! Potential jurors immediately see how implicit biases can affect what they see and hear. *What Would You Do?* (ABC television broadcast May 7, 2010), *available at* http://www.youtube.com/watch?v=ge7i60GuNRg.

251. Mark W. Bennett, Jury Pledge Against Implicit Bias (2012) (unpublished manuscript) (on file with authors). In addition, Judge Bennett has a framed poster prominently displayed in the jury room that repeats the language in the pledge.

> sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases.[252]

Juror research suggests that jurors respond differently to instructions depending on the persuasiveness of each instruction's rationale. For example, jurors seem to comply more with an instruction to ignore inadmissible evidence when the *reason* for inadmissibility is potential unreliability, not procedural irregularity.[253] Accordingly, the implicit bias instructions to jurors should be couched in accurate, evidence-based, and scientific terms. As with the judges, the juror's education and instruction should not put them on the defensive, which might make them less receptive. Notice how Judge Bennett's instruction emphasizes the near universality of implicit biases, including in the judge himself, which decreases the likelihood of insult, resentment, or backlash from the jurors.

To date, no empirical investigation has tested a system like Judge Bennett's—although we believe there are good reasons to hypothesize about its benefits. For instance, Regina Schuller, Veronica Kazoleas, and Kerry Kawakami demonstrated that a particular type of reflective voir dire, which required individuals to answer an open-ended question about the possibility of racial bias,

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252. *Id.* In all criminal cases, Judge Bennett also instructs on explicit biases using an instruction that is borrowed from a statutory requirement in federal death penalty cases:

> You must follow certain rules while conducting your deliberations and returning your verdict:
>
> * * *
>
> Reach your verdict without discrimination. In reaching your verdict, you must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex. To emphasize the importance of this requirement, the verdict form contains a certification statement. Each of you should carefully read that statement, then sign your name in the appropriate place in the signature block, if the statement accurately reflects how you reached your verdict.

The certification statement, contained in a final section labeled "Certification" on the Verdict Form, states the following:

> By signing below, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant was not involved in reaching his or her individual decision, and that the individual juror would have returned the same verdict for or against the defendant on the charged offense regardless of the race, color, religious beliefs, national origin, or sex of the defendant.

This certification is also shown to all potential jurors in jury selection, and each is asked if they will be able to sign it.

253. *See, e.g.*, Saul M. Kassin & Samuel R. Sommers, *Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046 (1997) (finding evidence that mock jurors responded differently to wiretap evidence that was ruled inadmissible either because it was illegally obtained or unreliable).

appeared successful at removing juror racial bias in assessments of guilt.[254] That said, no experiment has yet been done on whether jury instructions specifically targeted at implicit bias are effective in real-world settings. Research on this specific question is in development.

We also recognize the possibility that such instructions could lead to juror complacency or moral credentialing, in which jurors believe themselves to be properly immunized or educated about bias and thus think themselves to be more objective than they really are. And, as we have learned, believing oneself to be objective is a prime threat to objectivity. Despite these limitations, we believe that implicit bias education and instruction of the jury is likely to do more good than harm, though we look forward to further research that can help us assess this hypothesis.

c. Encourage Category-Conscious Strategies

Foreground social categories. Many jurors reasonably believe that in order to be fair, they should be as colorblind (or gender-blind, and so forth.) as possible. In other words, they should try to avoid seeing race, thinking about race, or talking about race whenever possible. But the juror research by Sam Sommers demonstrated that White jurors showed race bias in adjudicating the merits of a battery case (between White and Black people) unless they perceived the case to be somehow racially charged. In other words, until and unless White jurors felt there was a specific threat to racial fairness, they showed racial bias.[255]

What this seems to suggest is that whenever a social category bias might be at issue, judges should recommend that jurors feel free to expressly raise and foreground any such biases in their discussions. Instead of thinking it appropriate to repress race, gender, or sexual orientation as irrelevant to understanding the case, judges should make jurors comfortable with the legitimacy of raising such issues. This may produce greater confrontation among the jurors within deliberation, and evidence suggests that it is precisely this greater degree of discussion, and even confrontation, that can potentially decrease the amount of biased decisionmaking.[256]

This recommendation—to be conscious of race, gender, and other social categories—may seem to contradict some of the jury instructions that we noted

254. Regina A. Schuller, Veronica Kazoleas & Kerry Kawakami, *The Impact of Prejudice Screening Procedures on Racial Bias in the Courtroom*, 33 LAW & HUM. BEHAV. 320 (2009).

255. *See supra* notes 70–71.

256. *See* Alexander M. Czopp, Margo J. Monteith & Aimee Y. Mark, *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 791 (2006).

above approvingly.[257] But a command that the race (and other social categories) of the defendant should not influence the juror's verdict is entirely consistent with instructions to recognize explicitly that race can have just this impact—unless countermeasures are taken. In other words, in order to make jurors behave in a colorblind manner, we can explicitly foreground the possibility of racial bias.[258]

Engage in perspective shifting. Another strategy is to recommend that jurors try shifting perspectives into the position of the outgroup party, either plaintiff or defendant.[259] Andrew Todd, Galen Bohenhausen, Jennifer Richardson, and Adam Galinsky have recently demonstrated that actively contemplating others' psychological experiences weakens the automatic expression of racial biases.[260] In a series of experiments, the researchers used various interventions to make participants engage in more perspective shifting. For instance, in one experiment, before seeing a five-minute video of a Black man being treated worse than an identically situated White man, participants were asked to imagine "what they might be thinking, feeling, and experiencing if they were Glen [the Black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary."[261] By contrast, the control group was told to remain objective and emotionally detached. In other variations, perspective taking was triggered by requiring participants to write an essay imagining a day in the life of a young Black male.

These perspective-taking interventions substantially decreased implicit bias in the form of negative attitudes, as measured by both a variant of the standard IAT (the personalized IAT) and the standard race attitude IAT.[262] More important, these changes in implicit bias, as measured by reaction time instruments,

257. *See* Bennett, *supra* note 252 ("[Y]ou must not consider the defendant's race, color, religious beliefs, national origin, or sex. You are not to return a verdict for or against the defendant unless you would return the same verdict without regard to his race, color, religious beliefs, national origin, or sex.").

258. Although said in a different context, Justice Blackmun's insight seems appropriate here: "In order to get beyond racism we must first take account of race." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

259. For a thoughtful discussion of jury instructions on "gender-, race-, and/or sexual orientation-switching," see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 252–55 (2003); *see also id.* at 257–58 (quoting actual race-switching instruction given in a criminal trial based on Prof. Lee's work).

260. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, 100 J. PERSONALITY & SOC. PSYCHOL. 1027 (2011).

261. *See id.* at 1030.

262. Experiment one involved the five-minute video. Those in the perspective-shifting condition showed a bias of M=0.43, whereas those in the control showed a bias of M=0.80. Experiment two involved the essay, in which participants in the perspective-taking condition showed M=0.01 versus M=0.49. *See id.* at 1031. Experiment three used the standard IAT. *See id.* at 1033.

also correlated with behavioral changes. For example, the researchers found that those in the perspective-taking condition chose to sit closer to a Black interviewer,[263] and physical closeness has long been understood as positive body language, which is reciprocated. Moreover, Black experimenters rated their interaction with White participants who were put in the perspective-taking condition more positively.[264]

CONCLUSION

Most of us would like to be free of biases, attitudes, and stereotypes that lead us to judge individuals based on the social categories they belong to, such as race and gender. But wishing things does not make them so. And the best scientific evidence suggests that we—all of us, no matter how hard we try to be fair and square, no matter how deeply we believe in our own objectivity—have implicit mental associations that will, in some circumstances, alter our behavior. They manifest everywhere, even in the hallowed courtroom. Indeed, one of our key points here is not to single out the courtroom as a place where bias especially reigns but rather to suggest that there is no evidence for courtroom exceptionalism. There is simply no legitimate basis for believing that these pervasive implicit biases somehow stop operating in the halls of justice.

Confronted with a robust research basis suggesting the widespread effects of bias on decisionmaking, we are therefore forced to choose. Should we seek to be behaviorally realistic, recognize our all-too-human frailties, and design procedures and systems to decrease the impact of bias in the courtroom? Or should we ignore inconvenient facts, stick our heads in the sand, and hope they somehow go away? Even with imperfect information and tentative understandings, we choose the first option. We recognize that our suggestions are starting points, that they may not all work, and that, even as a whole, they may not be sufficient. But we do think they are worth a try. We hope that judges and other stakeholders in the justice system agree.

263. *See id.* at 1035.
264. *See id.* at 1037.

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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Implicit Bias: A Primer

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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Decision-making and Fairness References

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2. *Project Implicit® Web site*: **http://projectimplicit.net/**
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TAB 5

Medical Conditions that Impair Capacity

ASSESSING COMPETENCE

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2014

Decision-making Ability

- Depends on the functional elements necessary for competent decision-making
- These elements are **dimensional** – that is, people will have varying degrees of these abilities (and these abilities may vary over time within an individual)
- The four most frequently discussed elements include the ability to:
  - Understand (*what is being discussed*)
  - Appreciate (*the significance of the information*)
  - Reason (*apply it to the current context*)
  - Express a choice (*indicate a preference*)

Informed Consent
(for medical treatment)

- The legal rationale for informed consent is based on a person' s right to self-determination
- For informed 'consent' to be achieved:
  - The person must be *clinically* competent to make decisions regarding personal health care (i.e. have decision-making capacity)
  - The person must receive the *appropriate information* (to allow a reasoned and rational choice to be made)
  - The decision must be *voluntary* (i.e. not coerced) and can be withdrawn at any time
- Informed consent applies to both 'yes' and 'no' decisions about care
- Remember that competent individuals are 'allowed' to make foolish choices

What are the elements of competence?

- There are 4 'accepted' standard elements:
  - Communication of choice
  - Understanding of information
  - Appreciation of one's situation & risks/benefits of choices made
  - Rational decision-making
- Courts prefer the first two, psychiatry the latter

How is competency determined?

- Competence is not a pure, scientifically determinable state because it is colored by personal value judgments and social policy
- Competency is *contextual*. Only a minimal competency is necessary (maximal capacity is irrelevant) for the task at hand; some things require a higher degree of competence than others. People can be competent in some areas but not in others.
- Competency is 'fluid' and thus must be assessed 'at the moment'

Information Gathering

- Obtaining history is the most critical first step
  - Patient-provided history may not be reliable
  - Need info from relatives, friends and health-care providers
  - Most essential determination is '*what is the person's baseline and how does he/she differ from it now?*'
  - What are the decisions that need to be made

Assessment Goals

- Establish current functioning
- Establish baseline functioning
- Determine cause of any change
  - Especially interested in reversible causes
- Determine extent of impairment – is competence affected and if so for what types of decisions
- Determine prognosis – will it likely get better, stay the same, or worsen

Establishing Current F'n

- History (as noted above)
- Functional assessments
  - IADLS (financial competence, keeping appts, following directions, etc.) – what is baseline??
  - ADLs (toileting, grooming, eating, safety) – every competent person, if not physically impaired, should be able to do these things
- Physical assessment – can person hear and see? Do they have an expressive aphasia?
- Cognitive, emotional and thinking assessment -> mental status exam

What Is a Mental Status Exam?

- Assessment of cognitive, emotional, thinking & perceptual aspects of brain functioning
- It is current (i.e. 'Right now')
- It is objective (not judgmental)
- It is part of the neurological exam which is part of the physical exam
- It is mostly observational – though history can provide the context.

What Is the Purpose of a Mental Status Exam?

- To describe a person's current mental functioning
- To compare current functioning to past functioning (this is the historical context)
- To help make a diagnosis or suggest avenues for further exploration when changes in function are identified
- To help determine competence

How Is a Mental Status Exam Done?

- Ideally it is melded into a normal patient interview and includes elements of:
  - Observation
  - Listening
  - Active questioning
  - Specific instruments of assessment (esp. cognitive tools)

What Are the Components of a Mental Status Exam?

- A - Appearance and behavior
- S - Speech (rate, rhythm, etc.)
- S - Sensorium
  - Cognitive - memory, orientation, calculating, etc.
  - Perceptual - hallucinations, illusions
  - Intellectual - abstract thinking, judgment, insight, etc.
- E - Emotional state (mood, affect)
- T - Thought process and content

MSE in regards to competence

- Particular focus on cognitive function
  - Short-term memory, concentration, executive functioning -> a number of screening instruments and assessment tools can be used
- Also focus on insight and judgment
  - For example hallucinations and/or delusional thinking may greatly impair judgment
  - Mood changes can also influence this (grandiosity, hopelessness)

Cognitive Assessment Tools

- Screening Tools (quick and easy to use, need to be sensitive enough)
  - MMSE (Folstein mini-mental status exam)
    - Easy to administer, takes about 10-15 minutes
    - Little formal training needed
    - Applicable to all but those with very limited education (see graph)
    - Sensitivity: 87% Specificity: 82%
  - Clock-drawing test (very simple to do but interpretation of impairment difficult) – tests visuospatial and planning skills

MMSE 'norms' by Age and Educational Level

MMSE SCORES

AGE	0-4y	5-8y	9-12y	>12y
18-24		28	29	30
35-39		27	29	30
50-54		27	29	30
70-74		26	28	29
80-84		25	26	28

Other Assessment Tools

- List Generation – number of category items in one minute – normative data available, tests parietal lobe f'n. Very impaired in Alzheimer's.
- Trails B – most useful for determining frontal lobe (i.e. executive f'n) deficits
- Many other scales are available

Neuropsychological Testing

- Cognitive testing and functional testing are at odds or there is suspicion of early dementia in a high IQ individual with normal MMSE
- Mild impairment in a person with: low IQ or limited education, trouble with English, impairments less than 6 months
- *Determining capacity for legal purposes when deficits are mild*

Diagnostic Work-Up

- Physical and mental status exams may provide clues
- Laboratory work-up (chemistries, CBC, drug screens, etoh screen, urinalysis, thyroid, B12, RPR, etc)
- Other tests: CXR, EKG, Head imaging
- Specialized testing (when indicated): LP, genetic testing, functional imaging, neuropsych testing

HEALTH CARE POWER of ATTORNEY

- Competent adults can assign a HCPOA to act as their agent should they become incapacitated to make health decisions. (This is not quite the same as a POA)
- Patient technically can't do this when already impaired
- If patient 'not competent' then decision falls to the HCPOA
- *Doctor can usually make the determination about competence and thus avoid the guardianship process*

GUARDIANSHIP

- This is always decided by the courts.
- To have a full guardian appointed is to lose all *legal* decision-making capacity.
- Limited guardianship might focus on just a few abilities and allow some autonomy still
- Selection of appropriate guardian is important.
- Temporary guardianship (guardian ad litem) is used in emergencies to expedite process. <u>This is used particularly to address isolated issues and when patient is expected to regain competence</u>.
- Guardianship should be considered in almost all cases of dementia sooner rather than later.

Involuntary Commitment

- If a person is an 'imminent' danger to self or others AND this is due to a mental illness (such as dementia) then commitment is an option.
- Goals are *safety* and *treatment* – this can be used in lieu of guardianship in emergencies
- Guardianship can be considered after safety is assured – but remember: treatment may in fact restore a person to competence.

SUMMARY

- Competence (or decision-making capacity) is legally assumed until proven otherwise (people are allowed to be 'stupid'). Only minimal level of competence to do task is necessary
- Incompetence can be global or isolated, permanent or temporary.
- Medical procedures require informed consent.
- Informed consent requires an adequate level of competence to understand procedure, risks and benefits.
- Many things can impair competence and a basic understanding of mental functioning and the types of disorders that can impair competence are necessary tools for all mental health and geriatric clinicians.
- When competence is impaired guardianship may be needed to protect the individual (either temporary or permanent)
- Pre-existing POA or HCPOA can sometimes prevent the need for guardianship
- Involuntary commitment can sometimes prevent the need for guardianship (at least in the short run)

TAB 6

Assessments of Functional Incapacity

MEDICAL ASPECTS OF COMPETENCE

Causes of diminished capacity

What conditions might impair competence?

- Medical/Neurological disorders that impair cognition (i.e. thinking abilities) such as dementia, delirium, and intoxications - usually by impairing memory, concentration and/or judgment.
- Psychiatric disorders that impair thinking and/or judgment. The difference here is the inclusion of mood/emotional disorders and psychosis that may profoundly affect judgment even with clear cognition.

Ways In Which Competency Might Be Impaired

- *Cognitive impairment* – can't think straight, understand or remember what is being discussed (causes include dementia, delirium, epilepsy(post-ictal states), brain injury, mental retardation)
- *Emotional disorders* – reasoning is influenced by pathological emotionality (examples: depression, mania, severe anxiety, PTSD)
- *Thought impairment* – idiosyncratic or delusional thinking (e.g. schizophrenia, paranoid disorders)
- *Dissociative disorders* –patient 'not all there' to make decisions (e.g. fugue states, MPD)

Cognitive Disorders

- Impairments might be seen in memory (esp. short-term memory), orientation, concentration, abstract reasoning, etc.
- Mini-mental state exam (MMSE) is an easy and useful screening tool (18/30 – 24/30 is a borderline score regarding competence).
- *Complex reasoning may be impaired before significant impairments are seen on MMSE.*

Executive Function

- This is the 'highest' level of cognitive function (and likely separates humans from other primates)
- Represents the ability to plan ahead, anticipate consequences, abstract meanings, and arrive at appropriate judgments about things
- Requires 'intact' memory systems
- Last to develop; first to go (frontal lobe systems)
- Not everyone is blessed with the same level of competence in these areas

Types Of Cognitive Disorders

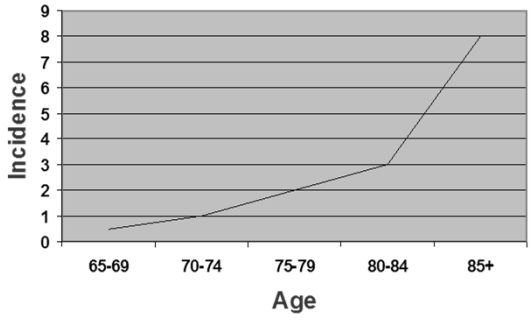
- DEMENTIA
  - Primary impairment is in Short-Term Memory- 'learning'. Can't remember appointments, medication changes, new people and faces, instructions, etc.
  - Social skills (*including casual conversation*) are often preserved early as is comprehension and long-term memory (i.e. memories of past events).
  - Also see problems with apraxia (motor memory), aphasia (speech and language memory), agnosia (recognition), visuospatial skills
  - *Abstract reasoning/executive function impairments are almost always present early in the course*
  - **Usually progressive and irreversible**
  - **Superimposed delirium is common (and this part may be reversible)**

Epidemiology: Prevalence of dementia increases with age

Age	Prevalence*	Age	Incidence
>65	5-10%	65-74	0.5-1%
>75	10-20%	75-84	2-4%
>85	25-50%	85+	6-8%
>95	40-70%	May level off or decline after age 100	

*Lower numbers represent moderate to severe dementia

Incidence Of Alzheimer's Disease by Age



Associated Findings in Dementia

- Personality change with impaired social judgment and insight
- Psychosis (usually related to memory failure)
- Depression and/or apathy/withdrawal
- Agitation/Aggression
- Delirium (sudden worsening)

Some Causes of Dementia

- Common causes: Alzheimer's disease, vascular dementia (usually in people with heart disease, hypertension, and/or diabetes), alcohol-induced, Lewy Body disease
- Less common causes: Drugs, AIDS, Parkinson's Disease, other neurological disorders, metabolic, Pick's disease, MAD-COW disease, etc.
- Some causes are reversible – low thyroid, B12 deficiency, normal-pressure hydrocephalus
- Some are relentlessly progressive – Alzheimer's disease, Lewy Body dementia
- Some are less predictable but usually progressive – vascular and alcohol dementias for example.

Types of Cognitive Disorders

- DELIRIUM
  - Global physiological disturbance of brain function (brain is not getting what it needs to function well)
  - *Impaired consciousness;* attention, orientation plus higher cognitive functions all impaired
  - Symptoms wax & wane
  - Often life-threatening
  - Very common in dementia and post-surgical patients, ICU patients, etc. DT's is a type of delirium. Many medical causes (Wernicke's, drug intoxications, eg.)
  - **Despite SEVERE impairments in thinking and judgment, the condition is usually reversible if recognized early and aggressively treated *But can't always tell what new baseline will be***

Types of Cognitive Disorders

- Amnesia – isolated short-term memory impairment
  - Medical causes include transient global amnesia, post-ictal or extended inter-ictal states, head trauma, Etoh-induced (Korsakoff's, 'blackouts')
  - Psychiatric causes include fugue states, dissociative identity disorder (i.e. MPD)
  - Many of these causes are 'temporary'

Traumatic Brain Injury (TBI)

- Caused by sudden trauma to the brain, can be mild to severe. (AKA concussion)
  - Usually have some LOC. Confusion, trouble with memory, concentration, attention and thinking are common
  - Most recover but time frame varies
- More serious head trauma can lead to stupor, coma or vegetative states

Intoxications

- Drug use can cause temporary states of diminished capacity
- Both prescribed meds and illicit substances can cause mentally-impairing conditions
- Prescribed medicines, even when taken at prescribed doses, can cause problems in susceptible individuals (such as the elderly)
- These conditions are usually temporary
- Addictions can lead to impaired judgment

CASE EXAMPLE

- 84 y/o male with dementia brought by family to have new glasses made. Patient keeps misplacing his old glasses and they have been lost again. Patient is pleasant, but disoriented and can't remember what is said to him for long but is worried about "his money". He says he doesn't have any money and so does not want new glasses.

EMOTIONAL DISORDERS

- DEPRESSION (*the illness*)- profound mood disturbance leading to dysfunctional behavior. Associated with sleep and appetite changes, suicidal ideation, & loss of pleasure (anhedonia). Cognitive impairment (pseudodementia) and delusions (psychotic depression) are common in severe cases.
  - Subtypes: **Dysthymia** (less severe), **Major Depression, Bipolar disorder, Adjustment disorder.**
- Rule out: normal grief (bereavement), unhappiness.

Depression (cont.)

- Demographics:
  - Age 65+: 1-2% prevalence of depression, 27% with depressive symptoms.
  - Lifetime prevalence: 10-15%.
  - Point-prevalence in U.S. – 8-10%
  - Very common in situations where autonomy has been reduced (i.e. Nursing homes)
- Insight is poor – patient often feels hopeless about treatment and may misjudge circumstances. Judgment may be severely affected if delusional. Decision-making is often unrealistic due to pessimism, helplessness and hopelessness.

Depression (cont.)

- *Depression is perhaps the most treatable common, serious, functionally impairing condition in the world.*
- Competence can be severely impaired but can often by completely restored with treatment.
- Patient's pessimism often leads them to forego treatment however. (Don't fall for the *'Fallacy of good reasons…')*
- Specific treatments are available. Many patients can no more 'suck it up' and get better than they can for heart disease or diabetes…
- *Sometimes 'guardianship' is needed to ensure treatment*

EMOTIONAL DISORDERS (cont.)

- MANIA:
  - Usually part of Bipolar Disorder (aka manic-depressive illness) but can be caused by other organic factors (steroids, stimulant drug use, hyperthyroidism, etc.).
  - Elevated mood, decreased sleep, rapid pressured speech, flight-of-ideas, and grandiosity are common. Psychotic symptoms (impaired reality testing) are often present.
  - *Judgment and insight are often severely impaired.* Patients engage in regrettable and/or unsafe behaviors (promiscuous sex, spending money, threatening bosses, etc.).
  - Responds nicely to treatment *if patient will comply*.

CASE EXAMPLE

- A *depressed* elderly female has a few badly rotting teeth that are probably abscessed. Her doctors are concerned about systemic infection without treatment. The patient does not appear demented. (MMSE 29/30). She seems to understand her predicament but is convinced she will die soon anyway and welcomes it "because life isn't worth living anymore". She sees no point in any dental procedure. The daughter thinks mom should "make her own decisions".

THOUGHT IMPAIRMENT

- This refers to *non-cognitive* disturbances in thought.
- SCHIZOPHRENIA is the classic thought disorder with impaired thought production, loosening of associations, distorted reasoning (paranoia for example), perceptual disturbances (such as hallucinations), poor motivation, poor social skills, and impaired reality testing (i.e. delusions).
- Related disorders include DELUSIONAL DISORDER, SCHIZOAFFECTIVE DISORDER & PSYCHOTIC DISORDER NOS. Organic disorders such as hallucinogen abuse, hyperthyroidism and some medicines can cause similar symptoms.

THOUGHT IMPAIRMENT

- While psychotic symptoms are common in dementia and delirium these are primarily cognitive disorders.
- INSIGHT is often severely lacking in these disorders. Delusions about physical symptoms and command hallucinations are not uncommon.
- People with *delusional disorder* are often quite intact in terms of their thought process and cognitive function but judgment can be very poor.

Thought Disorders

- Treatment can restore patients to competence but treatments are not as predictably effective as they are for mood disorders
- Also the concept of 'delusional thinking' is a tough one and can overlap with the concept of 'free will' (at what point do people's thoughts no longer represent free will??)
- Successful treatment usually requires 'compliance' which depends on insight among other factors.

CASE EXAMPLE

- An attractive 39 year old woman comes to her new dentist's office requesting corrective dental surgery. She says that her last dentist horribly disfigured her mouth and distorted her smile. She is very distressed and frequently tearful and seems desperate to get help. Upon examination her teeth and smile seem well within the normal range of people with her level of attractiveness. What should be done?

Summary

- A number of medical conditions can impair capacity to make decisions.
- Some of these conditions are treatable and reversible, others will wax and wane over time, and others are progressive.
- Most commonly, cognitive disorders that affect memory, orientation, judgment and planning are the causes. Many of these conditions are progressive.
- Other psychiatric conditions, by virtue of impairment in the process of thinking, perceptual disturbances and/or delusional beliefs can impair competence by limiting insight and altering judgment. Many of these are treatable to some degree.

TAB 7

Capacity in Action

"Capacity in Action"

Cornelia Poer and Mitch Heflin
Duke University
1/22/14

Decision making capacity and capability

Define capacity and its context—(versus competency)

a. Decision making ability—"evaluate process, not the decision itself" ---Cooney, 2004.
    i. Understand issues
    ii. Appreciate situation and consequences
    iii. Manipulate information rationally
    iv. Communicate a decision
b. Ability to carry out a decision (intentionality and voluntariness)
c. Activities that create hazard for self or others
d. Tools for assessment
    i. Executive function is critical domain—Clock drawing test, Trails Test
    ii. Historical evidence—Questions to ask
    iii. Referral to Geriatrician or Geriatric Psychiatrist

Reference:

Cooney LM, Kennedy GJ, Hawkins KA, Hurme SB. Who Can Stay at Home?: Assessing the Capacity to Choose to Live in the Community. Arch Intern Med. 2004;164:357-360.

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TAB 8

ABA and NCPJ Standards

THE COURT'S ROLE IN ADULT GUARDIANSHIP HEARINGS: ABA AND NCPJ STANDARDS

Tamara C. Curry
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Charleston County, South Carolina
January 2014

GUARDIANSHIPS AND CONSERVATORSHIPS FOR ADULTS

A **conservator** means a person appointed by a probate court to manage the estate of the respondent on a temporary and permanent basis.

A **guardian** is a court-appointed person responsible for the care, custody, and control of the respondent on a temporary or permanent basis.

A **respondent** is the subject of a guardianship/conservatorship proceeding.

(The term "respondent" is used rather than ward, protected person, etc., because it is not indicative of the final outcome of the proceeding.)

STANDARD 1.1 ACCESS TO JUSTICE

- Make procedures not unduly complicated or intimidated.
- Open proceedings.
- Make accommodations, time of hearing, interpreters, handicap accessible.
- Flexibility in scheduling.

STANDARD 1.2 EXPEDIATION AND TIMELINESS

- Dispose of cases expediently if possible.
- Control dockets.
- Rule from bench when possible, or if taken under advisement, as soon as possible.
- Implement mandatory changes promptly.
- Make staff aware of mandatory changes.

EQUITY AND FAIRNESS

- Lawfulness in orders, due process, fairness and right to confrontation.
- Impartial hearing, constitutional and statutory law.
- How compliance with orders should be maintained, clear language should be given to all parties in regards to expectations.

STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION

A. Reasonable compensation for services performed.
   - Defining what is reasonable can be a complex, thorny determination.

B. Fee guidelines or schedules.
   - Can be used to limit the need for probate courts to review fees on a case-by-case basis.
   - Essential that the fees set are reasonable and reflect or relate to customary time involvement.

C. When a dispute arises the court should consider the reasonableness of fees.

STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION

Factors to consider include:

- The usual and customary fees charged within that community;
- Responsibilities and risks (including exposure to liability) associated with the services provided;
- The size of the estate or the character of the services required including the complexity of the matters involved;
- The amount of time required to perform the services provided;
- The skill and expertise required to perform the services;
- The exclusivity of the service provided;
- The experience, reputation and ability of the person providing the services;
- The benefit of the services provided.

STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION

- Time expended should not be the exclusive criterion for determining fees. Consider:
  - Responsibility undertaken.
  - Results achieved.
  - Difficulty of the task.
  - Size of the matter.
- Services should be rendered in the most efficient and cost–effective manner feasible.

STANDARD 3.3.1 PETITIONS

A. Probate courts should adopt a clear, easy to complete petition form written in plain language for initiating guardianship/conservatorship proceedings.

B. The petition form, instructions, and an explanation of the process for obtaining a guardianship and conservatorship should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

STANDARD 3.3.1 PETITIONS

1. Name, age, address, and nationality of the respondent.
2. Address of the respondent's spouse, children, parents, siblings, or other close kin, if any, or an adult with whom the respondent has resided for at least the six months prior to the filing of the petition.
3. Name and address of any person responsible for the care or custody of the respondent.
4. Name and address of any legal representative of or representative payee for the respondent.
5. Name and address of the person(s) designated under any powers or attorney or health care directives executed by the respondent.
6. Name, address, and interest of the petitioner.
7. Reasons why a guardianship and/or conservatorship is being sought.
8. Description of the nature and extent of the limitations in the respondent's ability to care for herself/himself or to manage her or his financial affairs.
9. Representations that less intrusive alternatives to guardianship or conservatorship have been examined.
10. Guardianship/conservatorship powers being requested and the limits and duration of those powers.

STANDARD 3.3.1 PETITIONS

D. The petition should be accompanied by a written statement from a physician or licensed mental health services provider regarding the respondent's physical, mental, and/or emotional conditions that limit the respondent's ability to care for herself/himself.

E. The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship proceeding is complete.

STANDARD 3.3.2 INITIAL SCREENING

Probate courts should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings.

- Screening can minimize the expense, inconvenience, and possible indignity incurred by respondents for whom a guardianship is inappropriate, or for whom less intrusive alternatives exist, and conserve court resources.
- Petition should initially be reviewed for compliance with filing requirements, the completeness of the information supplied, and consideration of less intrusive alternatives.

STANDARD 3.3.2 INITIAL SCREENING

Possible alternatives to a full **guardianship** include:

- Advance health care directives including living wills;
- Voluntary or limited guardianships;
- Health care consent statutes;
- Instructional health care powers of attorney;
- Designation of a representative payee;
- Intervention techniques including adult protective services, respite support services, counseling, and mediation.

STANDARD 3.3.2 INITIAL SCREENING

Possible alternatives to a full **conservatorship** include:

- Establishment of trusts;
- Voluntary or limited conservatorships;
- Representative payees;
- Revocable living trusts;
- Durable powers of attorney;
- Custodial trust arrangements.

STANDARD 3.3.2 INITIAL SCREENING

- Avoid court action.
- May be able to use social service agencies and volunteer organizations.
- May be no more complex than instructing the court official who routinely receives petitions to initiate a guardianship to discuss possible alternatives with the petitioner.
- Should be done in a timely and expeditious manner. For example, respondent who is experiencing considerable pain and suffering may need court authorization for a medical procedure.

STANDARD 3.3.6 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR

- Immediate attention.
- Virtue of addressing an urgent need to provide needed assistance to a respondent that cannot wait until.
- When continued indefinitely, they bypass procedural protections to which the respondent would otherwise be entitled.
- Immediate service of written notice on the respondent, appoint counsel for the respondent, and allow the respondent an opportunity to be heard.

STANDARD 3.3.6 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR

- Exception, not the rule.
- Showing of actual risk to the respondent of an immediate and substantial risk of death or serious physical injury.
- Confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely.
- Should be scheduled.
- Infringe significantly upon the interests of the respondent with minimal due process.
- May be appropriate for the court to limit the ability of the temporary guardian or conservator to make certain decisions without prior court approval.
- Court should include a maximum duration in the order.

STANDARD 3.3.7 NOTICE

A. The respondent should receive timely written notice of the guardianship or conservatorship proceedings before a scheduled hearing.

B. Notice should also be given to family members, individuals having care and custody of the respondent, agents under financial health care powers or attorney, representative payees if known, and other entitled to notice regarding the proceedings. Notice may be waived.

C. Probate courts should implement a procedure whereby any interested person can file a request for notice.

STANDARD 3.3.9
DETERMINATIONS OF INCAPACITY

A. The imposition of a guardianship or conservatorship by the probate court should be based on clear and convincing evidence of the incapacity of the respondent and that a guardianship or conservatorship is necessary to protect the respondent's well-being or property.

B. The court may require evidence from professionals or experts whose training and expertise may assist in the assessment of the physical and mental condition of the respondent.

C. Mere physical illness is not enough to demonstrate that the specific symptom of the disorder interferes with making or communicating responsible decisions.

STANDARD 3.3.10
LESS INTRUSIVE ALTERNATIVES

A. Probate courts should find that no less intrusive alternatives exist before the appointment.

B. Always consider limited guardianships and conservatorships, or protective orders.

C. Taking into account the wishes of the respondent, probate courts should use their inherent or equity powers to limit the scope of and tailor the guardianship or conservatorship order to the particular needs, functional capabilities, and limitations of the respondent.

STANDARD 3.3.10
LESS INTRUSIVE ALTERNATIVES

Alternatives for financial decision-making:

- Use of a representative payee appointed by the Social Security Administration or other federal agency or a fiduciary appointed by the Department of Veterans Affairs to handle government benefits;
- Use of a single transaction protective order;
- Use of a properly drawn trust;
- Use of a properly drawn durable power of attorney;
- Establishment of a joint bank account with a trusted person;
- Electronic bill-paying and deposits.

STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES

Alternatives for health care decision-making:

- Use of properly drawn advance health care directives;
- Use of a properly drawn power of attorney for medical decisions.

Alternatives for crisis intervention and daily needs:

- Use of mediation, counseling, and respite support services;
- Engagement of community-based services.

STANDARD 3.3.11 QUALIFICATIONS AND APPOINTMENTS OF GUARDIANS AND CONSERVATORS

- Probate courts should appoint a guardian or conservator suitable and willing to serve as a guardian/conservator. Where appropriate, probate courts should appoint a person requested by the respondent or related to or known by the respondent.
- Probate court should consider training, education, and experience of potential guardian or conservator.

1. Is person competent to handle future problems.
2. Are they familiar with health decision making, residential placement, social service benefits.
3. Size and complexity of estate.

STANDARD 3.3.11 QUALIFICATIONS AND APPOINTMENTS OF GUARDIANS AND CONSERVATORS

- Should appoint persons respondent wants. A relative is not a conflict.
- Court should consider the appointment of a parent, spouse, child, when beneficial.
- It may also be appropriate to appoint as guardian or conservator a public administrator, a public guardian, a professional guardianship/conservatorship firm, a person or corporation having special qualifications, certification, or expertise that will be beneficial to the respondent, an attorney or other professional (e.g., the state guardianship association in NC).

STANDARD 3.3.13 ORDER

A. The order should be tailored to the facts and circumstances of the specific case, specifying the duties and powers of the guardian or conservator, limitations to the duties and powers, and the rights retained by the respondent.

B. Probate courts should inform newly appointed guardians and conservators regarding their responsibilities to the respondent and to the court.

STANDARD 3.3.13 ORDER

C. Following appointment, probate courts should require a guardian or conservator to:

1. Provide a copy of and explain to the respondent the terms of the order of appointment including the rights retained.
2. Complete statement of duties and powers.
3. Order should include a statement of the need for G/C to involve the respondent to the maximum extent possible.
4. Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding, and file proof of service with the court.
5. Record the order.
6. Establish such restricted accounts as may be necessary to protect the respondent's estate.

STANDARD 3.3.14 ORIENTATION, EDUCATION, AND ASSISTANCE

- Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators.
- Some states offer on-line training or printed manuals and information materials.
- Some states offer annual conferences for guardians and conservators on an on-going basis.
- Establishing a mentoring program through which experienced guardians and conservators can serve as mentors of less experienced guardians and conservators is another approach.

STANDARD 3.3.15
BONDS FOR CONSERVATORS

Except in unusual circumstances, probate courts should require for all conservators to post a surety bond in an amount equal to the liquid assets and annual income of the estate.

- Insurance against loss not punative.

STANDARD 3.3.17
MONITORING

Probate courts should monitor the well-being of the respondent and the status of the estate on an on-going basis, including, but not limited to:

- Determining whether a less intrusive alternative may suffice.
- Ensuring that plans, reports, inventories, and accountings are filed on time.
- Reviewing promptly the contents of all plans, reports, inventories, and accountings.
- Independently investigating the well-being of the respondent and the status of the estate, as needed.
- Assuring the well-being of the respondent and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.

INTERSTATE GUARDIANSHIPS AND CONSERVATORSHIPS

- Respondent, his or her guardian, or assets may be located outside of the jurisdiction of the court that established the guardianship.
- **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UGAPPJA)** now enacted in 31 states.
  - ✓ **Defines what state has primary jurisdiction.**
  - ✓ **Determines need and scope.**
  - ✓ **Lessens legal impediments.**
  - ✓ **Establishes the concept of "portability."**

STANDARD 3.4.1 COMMUNICATION AND COOPERATION BETWEEN COURTS

- Courts should communicate among themselves to resolve any problems or disputes.
- Court in which petition is filed should notify the foreign jurisdiction of the respondent's presence and relevant allegations.
- Trigger proper actions in that jurisdiction including "courtesy checks."

STANDARD 3.4.2 SCREENING, REVIEW, AND EXERCISE OF JURISDICTION

A. Probate courts should determine that the proposed guardianship or conservatorship is not a collateral attack.

B. When multiple states have jurisdiction, should determine:

1. Respondent's home state.
2. Whether respondent has a significant connection to the state in which the probate court is located and whether it is an appropriate jurisdiction.

STANDARD 3.4.2 SCREENING, REVIEW, AND EXERCISE OF JURISDICTION

Court should consider such factors as:

1. Expressed preference of the respondent.
2. Abuse, neglect, or exploitation of the respondent.
3. Length of time the respondent was physically present in or was a legal resident of the probate court's state or another state.
4. Distance of the respondent from the court in each state.
5. Financial circumstances.
6. Nature and location of the evidence.
7. Ability of the probate court to decide the issue expeditiously.
8. Familiarity of the court of each state with the facts.

NATIONAL PROBATE COURT STANDARDS

Borchard Foundation
Center on Law & Aging

SJI
State Justice Institute

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FOUNDATION

TASK FORCE ON REVISION OF THE NATIONAL PROBATE COURT STANDARDS

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- Our colleagues at the National Center for State Courts, including our many law student assistants, for their hard work and unstinting support.

NATIONAL PROBATE COURT STANDARDS

National College of Probate Court Judges

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Introduction

Evolution of Probate Courts

Although individual cases involving traditional probate matters such as wills, decedents' estates, trusts, guardianships, and conservatorships have garnered considerable public and professional attention, relatively little attention has been focused until recently on the courts exercising jurisdiction over these cases. Unlike other types of courts (e.g., criminal courts), the evolution of probate courts has differed considerably from state to state.

In England, probate court jurisdiction began in the separate ecclesiastical courts and the courts of chancery. The early probate courts in America exercised equity jurisdiction. Modern counterparts of these equity courts are chancery, surrogate, and orphan's courts. In other American jurisdictions, a judge within a court of broader jurisdiction would typically be given responsibility for probate cases (usually in addition to other duties) because of that judge's expertise or interest in the area or to expedite the handling of this group of cases. Over time, this caseload became sufficiently large to necessitate the assignment of full-time probate judges or the establishment of a separate probate court in some jurisdictions.

This evolution, however, occurred differently in every state, and even within different jurisdictions within a given state. As a result, there is considerable variation between (and often within) the various states in the way in which the state courts handle probate matters.

Need for National Probate Court Standards

This evolution has provided little opportunity for the development of uniform practices by courts exercising probate jurisdiction. Meanwhile, a call for the study of probate court procedures has come from both within and outside the probate courts, including judicial leaders and organizations, bar associations, academicians, and the public. The administration, operation, and performance of courts exercising probate jurisdiction have been identified as areas in need of attention.

In 1987, after numerous stories of abuses, the Associated Press (AP) conducted a study of the nation's guardianship/conservatorship system, resulting in a report, "Guardians of the Elderly: An Ailing System." The report described a "dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, and then fails to guard against abuse, theft, and neglect." Specifically identified problems were lack of resources to adequately monitor the activities of guardians/conservators and the financial and personal status of their wards; guardians/conservators who have little or no training; lack of awareness of alternatives to guardianship/conservatorship; and the lack of due process.[1]

Active involvement in guardianship/conservatorship issues provided the foundation for the sponsorship by the American Bar Association (ABA) of the 1988 Wingspread National Guardianship Symposium. Experts from across the country attended the meeting, including probate judges, attorneys, guardianship and conservatorship service providers, doctors, aging network representatives, mental health experts, government officials, law professors, a bioethicist, a state court administrator, a judicial educator, an anthropologist, and ABA staff. The symposium produced recommendations for reform of the national guardianship/conservatorship system, which were largely adopted by the ABA's House of Delegates in February 1989. The recommendations, especially those pertaining to judicial practices, reflected the need for improvement of practices and

[1] Associated Press, Guardians of the Elderly: An Ailing System (Special Report, September 1987). *See also* Fred Bayles & Scott McCartney, *Declared "Legally Dead": Guardian System is Failing the Ailing Elderly*, The Record (September 20, 1987); American Bar Association, Guardianship: An Agenda For Reform (1989).

procedures related to guardianship/conservatorship in probate courts.[2] These initial examinations of the exploitation, neglect, and/or abuse of persons under guardianship or conservatorship have been followed by additional articles in the press,[3] government and private studies,[4] state task forces,[5] and sets of national recommendations.[6]

Efforts to reform the administration of decedents' estates predate guardianship reform. A Model Probate Code was promulgated in 1946 and provided the basis for reform in the 1950s and 1960s. In 1969, the National Conference of Commissioners on Uniform State Laws and the ABA approved the Uniform Probate Code (UPC), which was drafted by which was jointly drafted by the Commissioners and by the ABA Section of Real Property, Probate and Trust Law. The UPC has been adopted by 18 jurisdictions, and has been adopted in part or has influenced reform in still others.[7] It has been revised numerous times since 1969, most recently in 2008, and has been followed by related uniform legislation such as the Uniform Guardianship and Protective Proceedings Act, the Uniform Guardianship and Protective Proceedings Jurisdiction Act, and the Uniform Trust Code.[8]

The need for reform of courts exercising probate jurisdiction has been expressed not only by those outside of the courts but also by the court leadership itself. In 1990, in order to determine the need for national probate court standards and to assess the support for a project to develop such standards, the National College of Probate Judges (NCPJ) and the National Center for State Courts (NCSC) polled 42 state representatives of the NCPJ. Responses were received from 30 of these representatives and four state court administrators in states that do not have separate probate courts or probate divisions of general or limited jurisdiction courts. The overwhelming number of respondents stated that current standards, including those of the ABA, did not sufficiently address the concerns of probate courts. Twenty-seven (79%) of the 34 respondents cited the need for separate probate court standards.

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[2] Recommendations for improved judicial practices include removal of barriers, use of limited guardianship/conservatorship and other less intrusive alternatives, creative use of non-statutory judicial authority, and enhanced judicial role in providing effective legal representation. American Bar Association, *supra,* note 1, at 19-22

[3] *See e.g.,* Paul Rubin, *Checks & Imbalances: How the State's Leading Private Fiduciary Helped Herself to the Funds of the Helpless*, Phoenix New Times (June 15, 2000); Carol D. Leonnig *et al.*, *Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims*, The Washington Post, (June 15-16, 2003); S. Cohen et al., *Misplaced Trust: Guardians in Control*, The Washington Post, (June 16, 2003); Kim Horner, Lee Hancock, *Holes in the Safety Net,* Dallas Morning News (January 12, 2005); S.F. Kovalski, *Mrs. Astor's Son to Give Up Control of Her Estate*, The New York Times, (October 14, 2006); Robin Fields, Evelyn Larrubia, Jack Leonard, *"Justice Sleeps While Seniors Suffer,"* Los Angeles Times (November 14, 2005); Kristin Stewart, *Some Adults' 'Guardians' Are No Angels,* The Salt Lake Tribune, (May 14, 2006); Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, Seattle Times (December 4, 2006); P. Kossan and R. Anglen, *Task Force to Probe Arizona Probate Court*, The Arizona Republic (May. 4, 2010); Todd Cooper, *Ward's Assets Vulnerable*, Omaha World Herald (August 16, 2010).

[4] *See e.g.*, Sen. Gordon.H. Smith & Sen. Herbert. Kohl, Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity (US Senate Special Committee on Aging, December 2007); Government Accountability Office, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors (GAO-10-1046, 2010); David. C. Steelman, Alicia. K. Davis, Daniel. J. Hall, Improving Protective Probate Processes: An Assessment of Guardianship and Conservatorship Procedures in the Probate and Mental Health Department of the Maricopa County Supreior Court (NCSC, July 2011); Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan A. Lawrence, Winsor.C. Schmidt, Jr., Marta S. Mendiondo, Wards of the State: A National Study of Public Guardianship (2005); Oversight of Probate Cases: Colorado Judicial Branch Performance Audit, (Colorado Legislative Audit Committee, 2006); Naomi Karp & Erica Wood, Guardianship Monitoring; A National Survey of Court Practices (AARP 2006); Ellen M. Klem, Volunteer Guardianship Monitoring Programs: A Win-Win Solution (ABA Commission on Law and Aging 2007); Pamela B. Teaster, Winsor C. Schmidt, Jr., Erica. F. Wood, Susan A, Lawrence, & Marta Mendiondo, Public Guardianship: In the Best Interest of Incapacitated People? (Praeger Publishers, 2007); Judicial Determination of Capacity of Older Adults in Guardianship Proceedings (ABA Commission on Law and Aging, American Psychological Association, National College of Probate Judges 2006); Naomi Karp and Erica Wood, Guarding the Guardians: Promising Practices for Court Monitoring (AARP 2007); Brenda.Uekert, Adult Guardianship Court Data and Issues: Results from an Online Survey (NCSC 2010).

[5] *See e.g.,* Ad hoc Committee on Probate Law and Procedure, Final Report to the Utah Judicial Council (February 23, 2009); Joint Review Committee on the Status of Adult Guardianships and Conservatorships in the Nebraska Court System, Report of Final Recommendations (2010); Committee on Improving Judicial Oversight and Processing of Probate Court Matters, Final Report to the Arizona Judicial Council (2011).

[6] Third National Guardianship Summit: Standards of Excellence, Guardian Standards and Recommendations for Action, 2012 Utah L. Rev. No. 3, 1191 (2013); Conference of State Court Administrators (COSCA), The Demographic Imperative: Guardianships and Conservatorships, 8 (December 2010). *Recommendations, Wingspan – The Second National Guardianship Conference* 31 Stetson Law Review 595 (2002); National Guardianship Network, National Wingspan Implementation Session: Action Steps on Adult Guardianship Progress (2004); Jeanne. Dooley, Naomi. Karp, Erica. Wood, Opening the Courthouse Door: An ADA Access Guide for State Courts (1992); Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future (American Bar Association and National Judicial College, 1991).

[7] http://www.uniformlaws.org/Act.aspx?title=Probate Code.

[8] http://www.uniformlaws.org/Act.aspx?title=Guardianship and Protective Proceedings Act; http://www.uniformlaws.org/Act.aspx?title=Adult Guardianship and Protective Proceedings Jurisdiction Act; http://www.uniformlaws.org/Act.aspx?title=Trust%20Code.

Even those who did not advocate special probate court standards believed that guidance in some areas, such as automated case processing, would be helpful to probate courts. Most respondents believed that national probate standards were needed in the areas of fees and commissions, court automation, judicial education, judicial officer and support staff, and financial and fund management, and to address the performance of courts exercising probate jurisdiction.

In sum, the need for reform and improvement of the administration, operations, and performance of courts exercising probate jurisdiction has been clearly expressed by groups and individuals both inside and outside of these courts.

Accordingly, the NCPJ, in cooperation with the NCSC, undertook a two-year project in 1991 to develop, refine, disseminate, and promulgate national standards for courts exercising probate jurisdiction—the National Probate Court Standards Project. Support was provided by a grant from the State Justice Institute, with a supplemental grant provided by the American College of Trust and Estate Counsel Foundation. The standards were intended to provide a common language to facilitate description, classification, and communication of probate court activities; and, most importantly, a management and planning tool for self-assessment and self-improvement of courts throughout the country exercising probate jurisdiction.

The National Probate Court Standards were prepared by a 15-member Commission on National Probate Court Standards (Commission) chaired by Hon. Evans V. Brewster of New York, then President of NCPJ,[9] assisted by NCSC staff led by Dr. Thomas Hafemeister.[10] Comments on the Standards were solicited and received from a number of individuals with expertise and interest in the operation of the probate courts, who served collectively as a Review Panel.

The National Probate Court Standards were published in 1993 and widely disseminated. In 1999, a chapter was added to address interstate guardianship matters. By 2010, it was recognized that much had changed in the court's world generally, and probate law specifically. Significant technological, legal, policy, procedural, and demographic developments that affect the way probate courts can and should operate include:

- The widespread use of automated case management systems that enable courts to exercise greater control over their dockets.
- The growing availability of electronic filing systems and the resulting greater use of electronic records, that provide courts with not only the capability of operating more efficiently, but also of more easily analyzing the information contained in those records to identify patterns and anomalies that may indicate abuses (*e.g.*, unwarranted expenditures by conservators, exorbitant fiduciary fees, and relationships between service providers and guardians that may constitute conflicts of interest).[11]
- The promulgation of new and revised uniform acts such as those cited earlier.
- The issuance of additional national recommendations regarding guardianship and conservatorship as a result of the 2001 "Wingspan" Second National Guardianship Conference, the 2004 Wingspan Implementation conference, the 2011 Third National Guardianship Summit, the reports by the US Government Accountability Office, the American Bar Association Commission on Law and Aging, the AARP, the Conference of Chief Justices/Conference of State Court Administrators

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[9] Other Commission members were: Hon. Arthur J. Simpson, Jr., retired judge, NJ Superior Court, Appellate Division (Vice-Chair); Hon. Freddie G. Burton, Chief Judge, Wayne County Probate Court, Detroit, MI; Hon. Ann P. Conti, Union County Surrogate's Court, Elizabeth, NJ; Hon. George J. Demis, Tuscarawas County Probate/Juvenile Court, New Philadelphia, OH; Hon. Nikki DeShazo, Probate Court, Dallas, TX; Hon. John Monaghan, St. Clair County Probate Court, Port Huron, MI; Hon. Frederick S. Moss, Probate Court, Woodbridge, CT; Hon. Mary W. Sheffield, Associate Circuit Judge, 25th Circuit Court, Division 1/ Probate Division, Rolla, MO; and Hon. Patsy Stone, Florence County Probate Court, Florence, SC.; Emilia DiSanto, Vice President of Operations, Legal Services Corporation Washington, DC; Hugh Gallagher, Deputy Court Administrator, Superior Court of Maricopa County, Phoenix, AZ; Prof. William McGovern, University of California-Los Angeles Law School, Los Angeles, CA; James R. Wade, Esq., Denver, CO; and Raymond M. Young, Esq., Boston, MA

[10] Other members of the staff were Dr. Ingo Keilitz, Dr. Pamela Casey, Shelley Rockwell, Hillery Efkeman, Brenda Jones, Thomas Diggs, and Paula Hannaford-Agor.

[11] *See* Winsor C. Schmidt, Fevzi Akinci, & Sarah A. Wagner, *The Relationship Between Guardian Certification Requirements and Guardian Sanctioning: A Research Issue in Elder Lay and Policy,* 25(5) Behavioral Sciences and the Law 641-653 (September/October 2007).

Joint Task Force on Elders and the Courts, the Conference of State Court Administrators, and the National Center for State Courts' Center on Elders and the Courts.

- Expanded services being provided directly to court users by probate courts including court staff serving as visitors/ investigators in guardianship and conservatorship cases
- Increased use of volunteer programs to monitor guardianships and conservatorships and the development of collaborative programs to improve the quality, delivery, and coordination of services to persons under the jurisdiction of probate courts
- Implementation of initiatives by probate courts around the nation to address problematic areas, especially in guardianship and conservatorship, such as assigning employees to screen all the filings and accountings and to perform both routine and spot investigations including interviewing the incapacitated person,
- The advent of State Supreme Court Commissions on elders and the courts, and, more negatively,
- The increasing instances of financial abuse in conservatorships/ guardianships, in decedent's estates, in trusts under court supervision, and in guardianships of minors.

Adding urgency to the need generated by these developments is the impact that the "Baby Boom" population bulge will have on the probate courts. Within the next decade, the number of Americans age 65 or older will increase by 50 percent, from nearly 40 million to about 60 million. This demographic bulge has had significant impact on various sets of courts at each stage of its life. In the 1960s and 1970s, teenage baby boomers strained the capacity, procedures, and resources of the juvenile courts. In the 1970s and 1980s, when this generation was in its most criminogenic years, the resulting "War on Crime" required sweeping changes in the way the criminal courts operated. In the 1990s and first decade of the 21st century, family cases including divorce, child custody, domestic violence, and neglect and abuse have dominated the court-reform landscape. The probate courts will be the next segment of the judicial system to be spotlighted by this demographic surge.[12]

Accordingly, with generous support from the State Justice Institute, the Borchard Foundation Center on Law and Aging, and the ACTEC Foundation, a new Task Force was formed including members of the leadership of NCPJ and representatives from the American Bar Association Section on Real Property, Trust and Estate Law, the American College of Trust and Estate Counsel, and the National Association for Court Management (NACM).[13] Staff support was again provided by NCSC.[14]

After defining the issues, staff conducted a web-based survey of members of NCPJ and NACM. The survey requested examples of effective practices and programs being used by probate courts to address the issues on the issues list and other key standards. Based on the issues list, the results of the survey, each section of the standards was revised with the drafts reviewed and modified by the Task Force. The revisions sought to update the standards in light of the developments, reports, and recommendations cited above, add examples of how courts have been able to implement the concepts and approaches contained in the standards, and decrease repetition of material (*e.g.*, by combining the original separate sections on guardianship and conservatorship of adults.). In addition, a new set of standards on guardianship and conservatorship of minors was prepared. This was an iterative process stretching over 18 months.

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[12] Richard Van Duizend, *The Implications of an Aging Population for the State Courts*, Future Trends in State Courts–2008 (Williamsburg, VA: NCSC, 2008), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=208.

[13] Task Force members include: Mary Joy Quinn, President, National College of Probate Judges, Director, Probate, Superior Court, San Francisco, CA; Hon. Tamara Curry, Associate Judge, Probate Court, Charleston, SC; Anne Meister, Register of Wills, Probate Division, Superior Court, Washington, DC; Hon. William Self, President-Elect, National College of Probate Judges, Judge, Probate Court, Macon, Georgia; Hon. Jean Stewart, Judge, Probate Court, Denver, CO; Hon. Mike Wood, Secretary-Treasurer, National College of Probate Judges, Judge, Probate Court No. 2, Houston, TX; Kevin Bowling Court Administrator, 20th Judicial Circuit Court, Ottawa County, MI (2011-2012)/Jude del Preore, Trial Court Administrator, Superior Court, Mount Holly, NJ (2010-2011), President, National Association for Court Management; Prof. Mary Radford, President, American College of Trust and Estate Counsel, Georgia State University College of Law, Atlanta, GA; and Robert Sacks, Esq., Los Angeles, CA; Observers, Edward Spurgeon Executive Director of the Borchard Foundation Center on Law and Aging; Prof. David English, Executive Director, Joint Editorial Board for Uniform Trust and Estate Acts.

[14] Richard Van Duizend, Standards Reporter, Dr. Brenda K. Uekert, Research Director.

Following completion of a full review draft, the Revised National Probate Court Standards were sent, for comment, to each member of NCPJ, members of the Conference of Chief Justices and the Conference of State Court Administrators, the Boards or Executive Committees of the National Association for Court Management, the American Bar Association Section of Real Property Trust and Estate Law, and the American College of Trust and Estate Counsel. Copies were also sent for comment to the American Bar Association Commission on Law and Aging, the National Council of Juvenile and Family Court Judges, the participants in the Third National Summit on Guardianship, and others. The Task Force reviewed the comments received and made necessary changes. The final draft was submitted for adoption to the membership of NCPJ at its November 2012 meeting.

Structure, Organization, and Caseloads of Probate Courts and Divisions of Courts in the United States

Seventeen states have specialized probate courts in all or a few counties. In the remaining 33 states, the District of Columbia and the Territories, jurisdiction over probate and related issues lies within courts of general jurisdiction, with assignment or designation periodically rotating among the several judges in circuits or districts having more than one judge. The following table based on data collected by NCPJ shows which approach states have taken.[15]

Caseload Volume and Composition

The level of public debate and directions in public policy tend to shift dramatically as the nation's media highlight particularly heinous or unfortunate cases (*e.g.*, neglected or abused wards in guardianship, estates depleted by unscrupulous executors). The rush to reform often leads to proposed solutions based more on ideology and doctrinal analysis than on fact. The absence of a national database on the volume and composition of cases handled by probate courts hinders attempts to answer critical broad-based questions about the scope and nature of the problem, or its possible solutions.[16]

The pragmatic justification for caseload statistics on wills, decedents' estates, trusts, conservatorships, and guardianships is compelling. Caseload statistics are the single best way to describe the courts' current activities as well as to predict what they will likely face in the future. Caseload statistics are analogous to the financial information used by the private sector to organize their operations. Well-documented caseload statistics provide powerful evidence for claims for needed resources.

Comprehensive and reliable caseload statistics can increase understanding of the functioning of courts with probate jurisdiction and direct efforts to enhance and improve their performance.

Scope and Purpose of the Standards

The Revised National Probate Court Standards are intended to promote uniformity, consistency, and continued improvement in the operations of probate courts. The Standards and associated commentary, footnotes, and references to specific courts using promising practices bridge gaps of information, provide organization and direction, and set forth aspirational goals for both specialized probate courts and general jurisdiction courts with probate jurisdiction. Although the Standards include both concrete recommendations and the rationale behind them, they are not intended to serve as statements of what the law is or should be, nor otherwise infringe on the decision-making authority of probate court judges or state legislatures. They do not address every aspect of the nation's probate courts, but, rather, set forth some guiding principles to assist the evolution of these courts. They seek to capture the philosophy and spirit of an effective probate court and encourage effective use of limited resources.

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[15] http://www.ncpj.org/images/stories/StateProbateJurisdictions.pdf.

[16] CCJ/COSCA Joint Task Force on Elders and the Courts, Adult Guardianship Court Data and Issues: Results from an On-Line Survey (Williamsburg, VA: NCSC, 2010) http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=266; Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform*, Future Trends in State Courts – 2011 (NCSC, 2011), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1846.

These Standards may be used by individual probate courts and by state court systems in a number of ways, including as:

- A source of ideas for improving the quality of justice, the effectiveness of operations, and efficient use of resources;
- A basis for requests for needed budgetary support in those instances in which implementation of Standards-based improvements require additional resources;
- A tool for charting the path toward greater excellence and measuring the progress;
- A template for state standards reflecting state statutory requirements, rules of procedures, and demographic, geographic, organizational, and fiscal factors.

The Standards are divided into three major sections. Section 1 sets forth a set of guiding principles in four major areas: (1) access to justice, (2) expedition and timeliness, (3) equality, fairness and integrity, and (4) independence and accountability. Although tailored specifically for probate courts, this section draws upon the standards and commentary of the Trial Court Performance Standards applicable to all trial courts.[17]

Section 2 includes standards for administrative policies and procedures for courts exercising probate jurisdiction regarding: (1) jurisdiction and rule making, (2) caseflow management, (3) judicial leadership, (4) information and technology, and (5) referral to alternative dispute resolution.

Section 3 covers probate practices and proceedings relating to (1) common practices and proceedings, (2) decedents' estates, and (3) guardianship, and conservatorship of adults and minors. Other types of "probate" proceedings are considered only indirectly within the general areas of performance, administrative policies and procedures, and the common practices and proceedings category within the probate practices and proceedings section. These include adoptions, elder abuse and neglect, name change applications, marriages, divorces, assessment and collection of inheritance and estate taxes, hearings of petitions from minors whose parents refuse to consent to abortions, and involuntary civil commitment.

The standards and accompanying commentaries are presented in a common format. Each standard is presented in a succinct statement—the "blackletter." Commentary follows each standard to explain and clarify its underlying rationale. When there are "Promising Practices" that illustrate how jurisdictions have implemented the standard, they are presented in a highlighted box with appropriate references and links to further information. Footnotes accompany the commentary to illustrate examples of the issues discussed. Although the commentaries and notes may be extensive, they are explanatory and do not incorporate all available materials on the various points addressed. For example, when cases or statutes are cited as examples, one should not assume that they exhaust all available legal precedent. Rather, they are exemplary of the issue being discussed. Similarly, the Standards frequently refer to the Uniform Probate Code (UPC), the Uniform Guardianship and Protective Proceedings Act (UGPPA) the Uniform Guardianship and Protective Proceedings Jurisdiction Act (UGGPJA) and other Uniform Acts. The Standards do not endorse or adopt these Uniform Acts in their entirety, but they have influenced the content of portions of this report and serve as an important source for possible reform. Although the Standards cover a wide range of issues, they do not and could not address all potential issues. Given the diversity of probate courts, this would have been an impossible task.

The purpose of these Standards is not to supplant state laws or court rules. Rather, they seek to fill gaps left unaddressed by the various states and to provide goals and standards for judges regarding issues not directly covered by state laws or court rules. Judges exercising probate jurisdiction and the parties appearing before them must comply with applicable state law and state or local court rules. These Standards, based on a national perspective, suggest ways to improve the handling of probate matters

[17] Commission on Trial Court Performance Standards, Trial Court Performance Standards With Commentary (NCSC, 1990).

Jurisdiction in Probate Cases

Specialized Probate Courts

Alabama	Code of Ala. §12-13-1
Connecticut	Conn. Gen. Stat. §45a-98
Georgia	O.C.G.A. §15-9-30
Maine	4 M.R.S. §251
Maryland	MD. Estates & Trusts Code Ann. §2-101
Massachusetts	A.L.M. G.L .ch. 215 §3
Michigan	M.C.L. §205.210
New Hampshire	R.S.A. §547.3
New Mexico	N.M. Stat. Ann. §45-1-302
New York	NY CLS SCPA §§201 & 205
Ohio	O.R.C. §2101.01
Rhode Island	R.I. Gen. Laws §§8-9-9
South Carolina	S.C. Code Ann. §§62-1-301 & 302
Texas (urban areas only)	Tex. Prob. Code §4A
Vermont	4 V.S.A. §272

General Jurisdiction Trial Courts

Alaska	Alaska Stat. § 22.10.020
Arizona	A.R.S. §14-1302
Arkansas	A.C.A. §28-1-104
California	Cal. Prob. Code §§800, 7050
Colorado[1]	C.R.S. §§13-6-103 & 13-9-105
Delaware	10 Del.C. §341
District of Columbia	D.C. Code §11-921
Florida	Fla. Stat. §26-012
Hawaii	H.R.S. §603-21.6
Idaho	Idaho Code §1-2208
Illinois	Illinois Const., Art.VI §9
Indiana[2]	Burns Ind. Code Ann. §§33-28-1-2 & 33—31-1-10
Iowa	Iowa Code §633
Kansas	K.S.A. §20-301
Kentucky	K.R.S. §24A-120
Louisiana	LA. Constitution Art. V, §16
Minnesota	Minn. Stat §484.011
Mississippi	Miss. Code. Ann §9-5-83
Missouri[3]	§§478.070 & 461.076 R.S. MO
Montana	Mont Code Anno. §3-4-302
Nebraska	R.R.S. Neb §30-2211
Nevada	Nev. Rev. Stat. Ann §132.116§
New Jersey	NJ Stat. §3B:2-2
North Carolina	N.C. Gen. Stat. §47-1
North Dakota	N.D. Cent. Code §30.1-02-02
Oklahoma	58 Okl. Stat. §1
Oregon	O.R.S. §111.075
Pennsylvania	42 Pa. C. S. §§912 & 3131
South Dakota	S.D. Codified Laws §§6-6-8 & 29-1-301
Tennessee	Tenn. Code Ann. §§30-1-301, 32-2-101
Utah	Utah Code Ann. §§75-1-302
Virginia	Va. Code Ann. §64-1-75
Washington	Rev. Code Wash. 11.96A-040
West Virginia	W.Va. Code §41-5-4
Wisconsin	Wis. Stat. §§753.03 & §856.01
Wyoming	Wyo. Stat. §2-2-101

Notes:
[1] Except the Denver Probate Court.
[2] Except in St. Joseph County.
[3] Except in Greene, Jackson, & St. Louis Counties and St. Louis City.

that often lie with the inherent powers and duties of probate court judges. However, all the Standards need to be read in light of the applicable law of each particular state and it is recognized that all states may not be able to incorporate all of the Standards because of the requirements of their own state laws.

Because they are aspirational in nature, some Standards may assume the existence of resources that a particular probate court does not have. In general, however, the goals set by the Standards should be obtainable by probate courts that are provided with reasonable levels of resources.

Although these Standards focus on the probate court, they are also generally applicable to any judge responsible for a probate matter. Furthermore, the operation of an effective and efficient court is necessarily dependent upon the cooperation and assistance of all persons appearing before the court or otherwise employing the court's services. As a result, these Standards encompass and address such persons as well.

SECTION 1: PRINCIPLES FOR PROBATE COURT PERFORMANCE

The Trial Court Performance Standards (TCPS)[18] were the first in a series of efforts to create a framework for assessing the performance of trial courts in four key areas – Access; Timeliness; Equality, Fairness and Integrity; and Independence and Accountability. This section draws upon the TCPS provisions to establish the principles from which flow the more detailed standards contained in Sections 2 and 3 concerning the operation and performance of courts exercising probate jurisdiction (hereinafter referred to as probate courts). Adherence to these principles and the resulting standards will enhance greater public trust and confidence in probate courts.

1.1 ACCESS TO JUSTICE

A. Proceedings and other public business of the probate court should be conducted openly, except in those cases and proceedings that require confidentiality pursuant to statute or rule.
B. Probate court facilities should be safe, accessible, and convenient to use.
C. All interested persons who appear before the probate court should be given the opportunity to participate without undue hardship or inconvenience.
D. Judges and other probate court personnel should be courteous and responsive to the public and should treat with respect all who come before the court.
E. Access to the probate court's proceedings and records—measured in terms of money, time, or the procedures that must be followed—should be reasonable, fair, and affordable.

COMMENTARY

Probate courts should be open and accessible. Because location, physical structure, procedures, and the responsiveness of its personnel affect accessibility, the four principles grouped under Access to Justice urge probate courts to eliminate unnecessary barriers. Barriers to access can be physical, geographic, economic, linguistic, informational or procedural. Additionally, psychological barriers can be created by unduly complicated and intimidating court procedures. These principles should not be limited only to those who are represented by an attorney but should apply to all litigants, witnesses, jurors, beneficiaries of decedents in probate matters, parents of children before the court, guardians and other court appointees, persons seeking information from court-held public records, employees of agencies that regularly do business with the courts, and the public.[19]

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[18] Commission on Trial Court Performance Standards, Trial Court Performance Standards With Commentary (National Center for State Courts (NCSC), 1997), *available at* www.ncjrs.gov/pdffiles1/161570.pdf; *see also* NCSC, CourTools, (NCSC, 2005), *available at* www.courtools.org; Brian Ostrom & Roger Hanson, Achieving High Performance: A Framework for Courts (NCSC, Apr., 2010), *available at* http://ncsc.contentdm.oclc.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=1874; *High Performance Courts*, NCSC (2011), http://www.ncsc.org/information-and-resources/high-performance-courts.aspx.

[19] Probate courts are using a variety of approaches to facilitate access: *e.g.*, the establishment of an access center to provide information and assist *pro se* litigants in filling out forms (San Francisco, CA, Denver, CO); monthly clinics with volunteer lawyers (Los Angeles, CA), videos (Washington, DC); electronic access to information regarding probate matters (California, Washington, DC, Fort Worth, TX, GA Council of Probate Judges, Ottawa County, MI) electronic access to basic forms (California, Ottawa County, MI, Philadelphia, PA, Phoenix, AZ, SC); and access to public records through the internet and at kiosks (Phoenix, AZ). *See also Self-Representation Resource Guide*, NCSC, http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/Resource-Guide.aspx (July 10, 2012).

Probate courts should conduct openly all proceedings, contested or uncontested, that are public by law. There may be occasions when the court will properly hold proceedings in chambers or outside the courthouse (*e.g.*, in a nursing home or hospital), albeit open to the public. Because of the vulnerability of some of the parties in probate proceedings and the sensitivity of the matters in those proceedings (*e.g.*, guardianship/conservator proceedings) there are circumstances in which it is appropriate to deny access by the public. In order to ensure that such closures are carried out so as to protect both the interests of the litigants and those of the public, the standard recommends that the authority to close probate proceedings be defined by statute or rule.

Further, probate courts should ensure that proceedings are accessible and understandable to all participants, including litigants, court personnel, and other persons in the courtroom as well as attorneys, with special attention given to responding to the needs of persons with disabilities. Plain language should be used in these proceedings to the greatest extent possible. Language difficulties, mental impairments, or physical disabilities should not be permitted to stand in the way of complete participation or representation. Accommodations made by probate courts for individuals with a disability should include the provision of interpreters for hearing or speech-impaired persons and special courtroom arrangements or equipment for court participants who are visually or speech impaired.[20] Probate courts should be sensitive to the needs of persons who may benefit from dimmed or enhanced lighting, microphones, or special seating.

Probate courts should attend to the security of persons and property within the courthouse and its facilities, and the reasonable convenience and accommodation of those unfamiliar with the court's facilities and proceedings. They should be concerned about such things as:

- The centrality of their location in the community they serve
- The adequacy of parking, the availability of public transportation
- The degree to which the design of the court provides a secure setting
- The ease with which persons unfamiliar with the facility can find and enter the office or courtroom they need
- The availability of elevators and convenient, accessible restrooms
- Seating areas outside the courtroom
- The availability of electronic access to information about the court and the procedures for initiating, responding to, and participating in probate matters

Probate courts should also endeavor to adjust their calendaring procedures to permit effective participation by elderly or disabled litigants. Long calendar calls at which parties must be present should be avoided and hearings should be set for specific times to the greatest extent possible. Judges should exercise flexibility in taking breaks in hearings to accommodate litigant needs and try not to set matters involving elderly litigants early or late in the court day. Probate courts should also tailor their procedures (and those of others under their influence or control) to the reasonable requirements of the matter before the court. Means to achieve this include simplification of procedures and reduction of paperwork in uncontested matters, simplified pretrial procedures, fair control of pretrial discovery, and establishment of appropriate alternative methods for resolving disputes (*e.g.*, referral services for cases that might be resolved by mediation, court-annexed arbitration, early neutral evaluation, tentative ruling procedures, or special settlement conferences).

A responsive court ensures that judicial officers and other court employees are available to meet both routine and exceptional needs of those they serve. Court personnel should assist those unfamiliar with the court and its procedures by providing standard

[20] For example, ADA-compliant facilities, use of court or commercial interpreter services in various languages including sign language, audio-assist devices. Stetson University College of Law maintains a model courtroom designed to facilitate participation by elderly and disabled litigants. For a description, see *Eleazer Courtroom*, Stetson University College of Law, http://www.law.stetson.edu/academics/elder/home/eleazer-courtroom.php (July 11, 2012).

procedural information, though not legal advice. [21] In keeping with the public trust embodied in their positions, judges and other court employees should reflect, by their conduct, the law's respect for the dignity and value of all persons who come before or request information and assistance from the court. No court employee should by words or conduct demonstrate bias or prejudice of any kind. This should also extend to the manner in which court employees treat each other.

To facilitate access and participation in its proceedings, court fees should be reasonable. Fees and costs should be related to the time and work expended by the court. In addition, probate courts may consider either waiving fees for individuals who are economically disadvantaged or taking other steps to enable such individuals to participate in its proceedings.[22]

Probate courts should maintain records of their own public proceedings as well as important documents generated by others. These records must be readily available to those who are authorized to receive them in either physical or electronic form, or both. Probate courts should maintain a reasonable balance between their actual cost in providing documents or information and what they charge users.

RELATED STANDARDS

2.1.2 Rulemaking
2.2.2 Time Standards Governing Disposition
2.2.3 Scheduling Trial and Hearing Dates
2.4.1 Management Information System
2.5.1 Alternative Dispute Resolution
3.1.1 Notice
3.1.4 Attorney and Fiduciary Compensation
3.1.6 Sealing Court Records
3.2.1 Unsupervised Administration (of Estates)
3.2.4 Small Estates
3.3.1 Petition
3.3.4 Court Visitor
3.3.5 Appointment of Counsel
3.3.7 Notice
3.3.8 Hearing
3.3.11 Qualifications and Appointment of Guardians and Conservators
3.4.3 Transfer of Guardianship or Conservatorship
3.4.4 Receipt and Acceptance of a Transferred Guardianship/Conservatorship
3.5.1 Petition
3.5.2 Notice
3.5.4 Representation for the Minor
3.5.5 Participation of the Minor in the Proceedings

[21] For a discussion of the distinction between legal information and legal advice, see J.M. Greacen, *"No Legal Advice from Court Personnel": What Does That Mean?*, 34 Judges J. 10, (Winter 1995); Iowa Judicial Branch Customer Service Advisory Committee, Guidelines and Instructions for Clerks Who Assist *Pro Se* Litigants in Iowa's Courts 7 (July 2000), *available at* http://www.ajs.org/prose/pdfs/Iowa_Guidelines.pdf; *but see* Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999) – the practice of law includes selection and completion of forms.

[22] The amount and structure of the filing fees assessed in probate matters varies considerably. In some jurisdictions, the amount of the fee is based on the size of the estate (*e.g.*, CT, DC, and SC); in others it depends on the number of hearings and other proceedings (*e.g.*, CA); in a few there is a flat filing fee for all cases or no fee for certain types of cases such as guardianship (DC) or involuntary commitment (FL). Most jurisdictions have some provision to waive or defer fees in probate matters.

1.2 EXPEDITION AND TIMELINESS

A. Probate courts should establish and maintain guidelines for timely case processing.
B. Probate courts should promptly implement changes in law and procedure affecting court operations.

COMMENTARY

Unnecessary delay may have serious consequences for the persons directly concerned and cause injustice, hardship, and diminished public trust and confidence in the court. Timely disposition is defined in terms of the elapsed time a case requires for consideration by a court, including the time reasonably required for pleadings, discovery, trial, and other court events.[23] Any time beyond that necessary to prepare and to conclude a case constitutes delay.

Probate courts should control the time from case filing to trial or other final disposition.[24] Early and continuous control establishes judicial responsibility for timely disposition, identifies cases that can be settled, eliminates delay, and assures that matters will be heard when scheduled. During and following a trial or hearing, probate courts should make decisions in a timely manner. Judges should attempt to rule from the bench while the parties are present whenever possible, particularly where questions of status are involved (*e.g.*, when considering the establishment of a guardianship or conservatorship). When it is necessary for a probate court to take a relatively complex matter under advisement, the court should, nevertheless, issue its decision promptly. Ancillary and post-judgment or post-decree proceedings also need to be handled expeditiously to minimize uncertainty and inconvenience.

Probate courts should also manage their caseload to avoid backlog. For example, the court should consider the use of caseload management systems and periodic status reports.

If probate courts hold funds for others, timely and proper disbursement of those funds following a determination of who is entitled and the amount to be disbursed is particularly important. For some recipients, delayed receipt of funds may be an accounting inconvenience; for others, it may create personal hardships. Regardless of who is the recipient, when a court is responsible for the disbursement of funds, performance should be expeditious and timely.

Tradition and formality can obscure the reality that both the law and the procedures affecting court operations are subject to change.[25] Changes in statutes, case law, and court rules affect what is done in probate courts, how it is done, and who conducts business in the court. Probate courts should implement mandated changes promptly. Whether a probate court can anticipate and plan for change, or must react to change quickly, the court should make its own personnel aware of the changes, and notify court users of such changes to the extent practicable. This is particularly true when the court is the body that has implemented the change by court rule or other means. It is imperative that changes mandated by statute, case law, or court rules be integrated into court operations as they become effective.

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[23] *See* Richard Van Duizend, David C. Steelman & Lee Suskin, Model Time Standards for State Trial Courts, 32 (NCSC, 2011).

[24] *Id.* at 31-34; . Steelman & Davis, *supra*, note 4.

[25] The National College of Probate Judges posts links to the laws and rules governing probate matters as well as links to other organizations' publications on its website. National College of Probate Judges, http://www.ncpj.org/ (July 11, 2012).

RELATED STANDARDS

2.1.2	Rulemaking
2.2.1	Court Control
2.2.2	Time Standards Governing Disposition
2.2.3	Schedule Trial and Hearing Dates
2.4.2	Collection of Caseload Information
3.1.1	Notice
3.3.7	Notice
3.2.3	Timely Administration
3.3.3	Early Control and Expeditious Processing
3.4.5	Initial Hearing in the Court Accepting a Transferred Guardianship or Conservatorship
3.5.1	Notice

1.3 EQUALITY, FAIRNESS, AND INTEGRITY

A. The practices of the probate court should faithfully adhere to relevant laws, procedural rules, and established policies.
B. The probate court should give individual attention to cases, deciding them without undue disparity among like proceedings and upon legally relevant evidence.
C. Decisions of the probate court should address the issues presented with clarity and specify how compliance can be achieved.
D. The probate court should be responsible for the enforcement of its orders.
E. Records of all relevant probate court decisions and proceedings should be accurately maintained and securely preserved.

COMMENTARY

Probate courts should provide due process and equal protection of the law to all persons involved with matters and proceedings before it, as guaranteed by the federal and state constitutions. Integrity should characterize the nature and substance of probate courts procedures, decisions, and the consequences of those decisions. Integrity refers not only to the lawfulness of a court's actions (*e.g.*, compliance with constitutional rights to legal representation, a record of legal proceedings), but also to the results or consequences of its orders. A court's performance is diminished when, for example, its mechanisms and procedures for enforcing court orders are ineffective or nonexistent, or when the orders themselves are issued slowly. The court's authority and its orders should guide the actions of those under its jurisdiction both before and after a case is resolved.

Fairness should characterize all probate courts processes. This principle is derived from the concept of due process, which includes provision for notice and a fair opportunity to be informed and heard at all stages of the judicial process. Probate courts should respect the right to legal counsel and the rights of confrontation, cross-examination, impartial hearings, and, where applicable, jury trials. They should afford fair judicial processes through adherence to constitutional and statutory law, case precedent, court rules, and other authoritative guidelines, including policies and administrative regulations. Adherence to established law and court procedures contributes to achieving predictability, reliability, and integrity.

Litigants should receive individual attention without variation due to judge assignment or to legally irrelevant characteristics of the parties such as race, religion, ethnicity, gender, sexual orientation, color, age, disability, or political affiliation. Persons

similarly situated should receive similar treatment. The outcome of the case should depend solely upon legally relevant factors. This standard refers to all judicial decisions, including court appointments.[26]

An order or decision that sets forth consequences or articulates rights but fails to connect the actual consequences resulting from the decision to the antecedent issues breaks the connection required for reliable review and enforcement. A decision that is not clearly communicated poses problems both for the parties and for judges who may be called upon to interpret or apply it. In order to facilitate clarity and comprehension of decisions and orders by those who must apply or comply with them, plain language should be used to the greatest extent possible, and the excessive use of formal legal terms and Latin phrases should be avoided.

How compliance with court orders and judgments is to be achieved should be clear. An order that requires compliance within a stated time period, for example, is clearer and easier to enforce than one that establishes an obligation but sets no time frame for completion.

It is common and proper in some matters for courts to remain passive with respect to judgment satisfaction until called on to enforce the judgment. Nevertheless, probate courts should ensure that their orders are enforced. The integrity of the judicial process is reflected in the degree to which parties adhere to awards, settlements, and decisions arising out of this process. Noncompliance may indicate miscommunication, misunderstanding, misrepresentation, or lack of respect toward or confidence in probate courts.

Probate court responsibility for enforcement and compliance varies from jurisdiction to jurisdiction, program to program, case to case, and event to event. In some matters, particularly when affected individuals may be unlikely to voice their concerns (*e.g.*, in guardianship/conservatorship proceedings), probate courts may need to actively monitor compliance and enforce their orders. If a probate court becomes aware that an order is not being carried out by a party in a timely fashion, and the party is not represented by an attorney, direct notice should be given to the party as soon as possible.. If an attorney represents the party, both the attorney and the party should be put on notice of the failure to carry out the court's order. Monitoring and enforcement of proper procedures and interim orders while cases are pending are within the scope of this principle.

Probate courts should preserve an accurate record of all proceedings, decisions, orders, and judgments. Relevant court records include original wills, indexes, dockets, and various registers of court actions maintained to assist inquiry into the existence, nature, and history of actions at law. Documents associated with particular cases that make up official case files and the verbatim records of proceedings should be included as well. Preservation of the case record, whether in paper or digital form, entails the full range of records management systems. Because records may affect the rights and duties of individuals for generations, their protection and preservation over time are vital. Record systems must ensure that the location of case records is always known and whether the case is active and in frequent circulation, inactive, or in archive status. Inaccuracy, obscurity, loss of court records, or untimely availability of such records seriously compromises the court's integrity and subverts the judicial process.

At the same time, an effective records management program does not necessitate the retention of all records for all time. Most states have statutes addressing the creation, retention, and disposition of public records that apply to all branches of government. Although the public records law may dictate the basic parameters for retaining, maintaining, and storing probate records, probate courts retain considerable discretion in determining which records should be kept, how long they should be kept, what medium they should be stored in, and how they should be maintained. Failure to purge unneeded court records can exhaust available storage space and require probate courts to expend funds for the retention and maintenance of these records.

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[26] Kevin Burke & Steve Leben, Procedural Fairness: A Key Ingredient In Public Satisfaction: A White Paper of the American Judges Association, (American Judges Association, 2007), http://aja.ncsc.dni.us/pdfs/AJAWhitePaper9-26-07.pdf; E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice (Plenum Press, 1988); E. Allen Lind, Bonnie E. Erickson, Nehemia Freidland, & Michael Dickenberger, *Reactions to Procedural Models for Adjudicative Conflict Resolution,* 22 Conflict Res.. 318 (1978); Jonathan D. Casper, Tom Tyler, & Bonnie Fisher, *Procedural Justice in Felony Cases,* 22 Law & Soc. Rev. 483 (1988).

RELATED STANDARDS

2.2.1	Court Control
2.2.2	Time Standards Governing Disposition
2.4.1	Management Information Systems
2.4.2	Collection of Caseload Information
2.4.3	Confidentiality of Sensitive Information
2.5.1	Alternative Dispute Resolution
3.1.2	Fiduciaries
3.1.3	Representation by Persons Having Substantially Identical Interest
3.1.5	Accountings
3.2.2	Determination of Heirship
3.3.2	Initial Screening
3.3.4	Court Visitor
3.3.6	Emergency Appointment of a Temporary Guardian or Conservator
3.3.8	Hearing
3.3.9	Determination of Incapacity
3.3.10	Less Intrusive Alternative
3.3.11	Qualifications and Appointment of Guardians and Conservators
3.3.12	Background Checks
3.3.13	Order
3.3.14	Orientation, Education, and Assistance
3.3.15	Bonds for Conservators
3.3.16	Reports
3.3.17	Monitoring
3.3.18	Complaint Process
3.3.19	Enforcement of Orders; Removal of Guardians and Conservators
3.3.20	Final Report, Accounting, and Discharge
3.4.1	Communication and Cooperation Between Courts
3.4.2	Screening, Review, and Exercise of Jurisdiction
3.5.3	Emergency Appointment of a Temporary Guardian/Conservator for a Minor
3.5.6	Background Checks
3.5.7	Order
3.5.8	Orientation, Education, and Assistance
3.5.9	Bonds for Conservators
3.5.10	Reports
3.5.11	Monitoring
3.5.12	Complaint Process

1.4 INDEPENDENCE AND ACCOUNTABILITY

A. Probate courts should maintain their institutional integrity as part of the third branch of government and observe the principle of comity in its governmental relations.
B. Probate courts should make efficient, effective, and economic use of their resources.
C. Probate courts should use fair employment and appointment practices.
D. Probate courts should develop procedures to inform the community of their proceedings.
E. Probate courts should seek to adapt to changing conditions or emerging issues.

COMMENTARY

Independence and accountability engender public trust and confidence as they permit government by law, access to justice, and timely resolution of disputes with equality, fairness, and integrity. Because judicial independence protects individuals from the arbitrary use of government power and ensures the rule of law, it defines court management and legitimates the judiciary's claim for respect as the third branch of government. Courts possessing institutional independence and accountability protect judges from unwarranted pressures. They operate in accordance with their assigned responsibilities and jurisdiction within the state judicial system.

Independence is not likely to be achieved if a court is unwilling or unable to manage itself. Accordingly, probate courts should establish and support effective leadership, operate effectively within the state court system, develop plans of action, obtain resources necessary to implement those plans, measure their performance accurately, and account publicly for their performance.

An effective court resists being absorbed or managed by the other branches of government. A court compromises its independence when it serves primarily as a revenue- producing arm of government, or perfunctorily places its imprimatur on decisions made by others.[27] Effective court management enhances independent decision making by judges exercising probate jurisdiction.

The court's independent status, however, should be achieved without avoidable damage to the reciprocal relationships that must be maintained with others. Probate courts are necessarily dependent upon the cooperation of other components of the justice system over which they have little or no direct authority. For example, elected clerks of court are components of the justice system, but may function independently of the court. Sheriffs and process servers perform both a court-related function and a law enforcement function. If a court is to attain institutional independence, it must clarify, promote, and institutionalize effective working relationships with all the other components of the justice system. The boundaries and the effective relationships between the court and other segments of the justice system must, therefore, be apparent in both form and practice.

To appropriately carry out their responsibilities, probate courts should have sufficient financial resources and personnel. They should seek the resources required to meet their judicial responsibilities, use available resources prudently, and account for their use. If the legislative (or funding) branch of government does not provide the necessary funding, the court may, if necessary, need to resort to legal proceedings to acquire funding to accomplish its purposes.

Probate courts should use available resources efficiently to address multiple and often conflicting demands. Information collected by probate courts should be used in the courts' planning, monitoring, research, and assessment activities. Resource allocation to cases, categories of cases, and case processing is at the heart of court management. Assignment of personnel and allocation of other resources must be responsive to established case processing goals and priorities, implemented effectively, and evaluated continuously. Monitoring of staff and resources will provide information to evaluate whether needs are being met adequately and whether reallocation of resources is necessary.

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[27] For example, in Michigan, probate courts are charged with the responsibility of determining inheritance taxes, with those taxes collected upon the order of the probate court. MICH. COMP. LAWS ANN. § 205.213 (West 2012).

Because equal treatment of all persons before the law is essential to the concept of justice, probate courts should operate free from bias on the basis of race, religion, ethnicity, gender, sexual orientation, marital status, color, age, disability, or political affiliation in their personnel practices and decisions. Fairness in the recruitment, appointment, compensation, supervision, and development of court personnel helps ensure judicial independence, accountability, and organizational competence. A court's personnel practices and decisions should establish the highest standards of personal integrity and competence among its employees. Continuing competence can be enhanced through court-sponsored training programs.

Most members of the public have little direct contact with or knowledge of probate courts. Information about the court is filtered through, among others, the media, lawyers, litigants, jurors, political officeholders, and employees of other components of the justice system. Probate courts, either independently or in conjunction with the state court system, other local trial courts, the bar and other interested groups, should take steps to inform and educate the public. Descriptive informational brochures and annual reports help the public to understand and appreciate the administration of justice. Participation by court personnel on public affairs commissions, advisory committees, study groups, and boards should be encouraged.

An effective court recognizes and responds appropriately to emergent public issues such as the rapidly increasing proportion of persons over age 65 in the US population, the even more rapid increase in the proportion of persons over age 85, and the advances in medical care that enable persons with developmental disabilities as well as victims of catastrophic illnesses and accident to live longer.[28] A court that moves deliberately in response to emergent issues is a stabilizing force in society and acts consistent with its role of maintaining the rule of law. Responsiveness may also include informing responsible individuals, groups, or entities about the effects of emerging issues on the judiciary and about possible solutions. The creation of a task force consisting of, among others, bench and bar members can help to identify new problems and keep probate courts informed about new issues. Court-sponsored training for judges, probate court staff, attorneys, and appointees of probate courts can also help probate courts to adjust its operations to address new conditions or events.

RELATED STANDARDS

2.1.2	**Rulemaking**
2.2.1	**Court Control**
2.2.2	**Time Standards Governing Dispositions**
2.2.3	**Scheduling Trial and Hearing Dates**
2.3.1	**Human Resources Management**
2.3.2	**Financial Management**
2.3.3	**Performance Goals and Strategic Plan**
2.3.4	**Continuing Professional Education**
2.4.2	**Collection of Caseload Information**
3.3.2	**Initial Screening**
3.3.3	**Early Control and Expeditious Processing**
3.4.1	**Communication and Cooperation Between Courts**
3.4.2	**Screening, Review, and Exercise of Jurisdiction**
3.4.3	**Transfer of Guardianship or Conservatorship**
3.4.4	**Receipt and Acceptance of a Transferred Guardianship or Conservatorship**
3.5.13	**Coordination with Other Courts**

[28] Richard Van Duizend, The Implications of an Aging Population for the State Courts, 76 (NCSC, 2008), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/famct&CISOPTR=208.

SECTION 2: ADMINISTRATIVE POLICES AND PROCEDURES OF THE PROBATE COURT

In contrast to the standards provided in Section 1 (Probate Court Performance), the standards in this section emphasize the processes, the structures, and the means used by probate courts to accomplish their assigned duties. It is important that probate courts not overlook these aspects of their function. In addition, probate courts often are able to exercise direct control over the administrative policies and procedures they employ, and thus promptly effect needed change and reform.

The standards related to administrative policies and procedures are divided into five categories. **JURISDICTION AND RULE MAKING**, the first category, recommends that probate courts exert control over matters set before them by ensuring that the appropriate jurisdictional requirements are met, that their judgments are carried out in other jurisdictions, and that they have shaped, to the extent permitted, the rules that govern their functions. **CASEFLOW MANAGEMENT**, the second category, recommends that probate courts exert control by actively managing its caseload, by actively supervising the progress of their cases, by establishing timelines that govern the disposition of their cases, and by scheduling trial and hearing dates that ensure that cases move forward without unnecessary delay.

JUDICIAL LEADERSHIP, the third category, recommends that probate courts assume leadership in implementing an appropriate human resources management program; in obtaining, allocating, and managing their financial resources; and in instituting performance goals and a strategic plan that will allow them to determine whether they are meeting their responsibilities. **INFORMATION AND TECHNOLOGY**, the fourth category, recommends that probate courts take active steps to ensure that they carry out their duties in an efficient and responsible manner by instituting a management information system for the court's records, regularly monitoring and evaluating this system, implementing appropriate new technologies, collecting and reviewing caseload data, and establishing procedures to assure the confidentiality of information where needed. **ALTERNATIVE DISPUTE RESOLUTION**, the final category, recommends that probate courts encourage the use of non-litigation processes as a means to resolve cases.

2.1 JURISDICTION AND RULEMAKING

The standards in this category recognize the special nature of probate courts and the importance of probate courts being able to exert control over the cases brought before them, to hear those matters that fall within their expertise, and to ensure that their judgments are properly carried out.

STANDARD 2.1.1 JURISDICTION

A. Probate courts should fully exercise their jurisdiction over cases within their statutory, common law, or constitutional authorization, which commonly includes trusts, decedents' estates, guardianships, and conservatorships of adults and may also include guardianship and/or conservatorship of minors, and other matters. In jurisdictions in which general jurisdiction courts exercise probate jurisdiction, all probate matters should be assigned to a specialized probate division.

B. When a probate court in one jurisdiction properly issues a final judgment, that judgment should be afforded comity and respect in other jurisdictions, subject to each state's principles for resolving conflicts of laws.

COMMENTARY

Probate-related cases involve unique and complex issues and require specialized expertise by the judge. For example, the judge may be requested to resolve the validity of a will, rights of survival and wrongful death distributions, disputed property and creditors' claims, tax regulations, determination of death, disposition of last remains, the need for a protective order, guardianship, or conservatorship for a disabled adult or for a minor, or an individual's mental health status. Because of their accumulated experience in dealing with these cases, probate judges develop a specialized knowledge particularly well-suited for these cases. In addition, it may be more efficient to consolidate all matters related to such proceedings before probate courts.

Because of the mobility of today's society, interstate cooperation among courts is vital. Such cooperation promotes consistency, confidence in the judicial system, and the efficient use of judicial resources. As a result, comity and respect should be accorded a final order or judgment issued by a probate court when the parties subject to that order or judgment move to a different jurisdiction. The court issuing the order or judgment should also be sensitive to the possibility that the order or judgment may be applied in another jurisdiction and craft its language appropriately. At the same time, the court's jurisdiction may be subject to traditional choice of law provisions where a state as a matter of its own policy may decline to apply the law of other states. In general, however, it is preferable that there be good working relationships among the courts of the country, and, where no direct conflict of laws exists, the court exercising probate jurisdiction should respect the final order or judgment of a court from another jurisdiction. [See Standards 3.4.1 – 3.4.5.]

STANDARD 2.1.2 RULEMAKING

Probate courts should recommend changes to the state rules pertaining to probate courts consistent with these standards. Local rules may be utilized for special needs and circumstances provided they are not inconsistent with the statewide rules.

COMMENTARY

The procedural and administrative rules applicable to probate courts may suffer from various basic deficiencies. First, if each court institutes its own set of unique rules, the practice of law within that state may become unnecessarily complex and unwieldy as parties and their attorneys attempt to adhere to the various rules of each individual court. On the other hand, if all trial courts within a state are governed by one universal set of rules, those rules may fail to take into account the unique nature and responsibilities of probate courts in general and fail to allow sufficient flexibility for them to meet their needs. This is particularly likely to occur when those rules have been established by entities that are relatively unfamiliar

with probate courts. In addition, each individual court may need to be afforded sufficient discretion to modify these rules in responding to its own needs and responsibilities. When properly considered, such local rules can be accomplished without imposing substantial variations from the rules of other similarly situated courts within that jurisdiction.

Generally, a state's supreme court or, if applicable, the state legislature is responsible for articulating the general procedural and administrative rules applicable to probate courts.[29] Such an approach promotes uniformity in the rules governing the various probate courts. Where possible, a separate section of these general rules should be devoted to probate courts of that state and their special needs and responsibilities, based upon recommendations provided by the probate courts.[30] When permitted and where appropriate, however, a probate court may also find it necessary to take advantage of the opportunity to adapt these rules to meet its specific needs and circumstances by instituting local procedural and administrative rules that are not inconsistent with the state's general rules. By so doing, the probate court can increase its efficiency and ability to fulfill its duties, ensure itself of sufficient flexibility to meet emerging needs, and ensure that persons requiring access to its services encounter no unnecessary barriers. In making or proposing adaptations to the court's rules, the probate judge may wish to establish a task force consisting of court administrators, clerks, members of the local legal community, and other persons with special knowledge and experience in practice and procedure in the probate court. This will ensure that a wide range of perspectives is considered in drafting these changes and that their likely effect has been taken into consideration. Throughout this process, attention should be given to ensuring that the probate court's local rules are consistent with the state's general court rules. In addition, attempts should be made to encourage uniformity in the rules of all the probate courts of the state.

Rule revision should be completed as expeditiously as possible and resulting changes promptly published. Revision may be necessitated by changes effected by the state's supreme court or the legislature, which may require an immediate response by the probate court to bring its own rules into compliance. Where revisions are made, relevant forms (mandatory or instructive) should be produced and made available.

2.2 CASEFLOW MANAGEMENT

The standards in this category suggest several steps that probate courts may take to ensure that their heavy caseload is processed in a fair and expeditious manner.

STANDARD 2.2.1 COURT CONTROL

Probate courts should actively manage their cases.

COMMENTARY

To ensure prompt and fair justice to the parties appearing before them, probate courts should recognize the importance of controlling the progress of the cases over which they preside. To this end, the court should have in place written policies and procedures establishing and governing an appropriate caseflow management system. Scheduling of cases should, in general, reflect a realistic balance of the competing demands for a timely resolution of the matters placed before the court, the opportunity for relevant persons to participate in the proceedings, and careful consideration and exploration of the issues raised.

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[29] The general rules of the court may address such matters as what is needed to prove a will, what is needed procedurally to determine intestacy, what medical information is needed with a guardianship or conservatorship petition, or what is needed for a minor's personal injury settlement.

[30] *See, e.g.*, MICH. COMP. LAWS SERV. § 700.1302 (LexisNexis 2000).

> The court should monitor and control case progress from initiation, establish time expectations for completion of discovery and progress toward initial disposition, make an early appointment of counsel for a respondent when appropriate, use pretrial conferences and ADR to promote early resolution, and set an early date for trial or hearing. Although trials occur in only a small percentage of probate cases, they can consume a great deal of a judge's time. A trial management conference shortly before the scheduled trial date can help ensure effective use of trial time.[31]

Special considerations should be taken into account when implementing a caseflow management system. While the processing of normal, routine cases may proceed without particular attention by the court, certain parties or cases may require special handling or scheduling. The caseflow system should provide for the early identification of these parties and cases, and the court should be prepared to give them appropriate attention and accommodation. Instances where special attention may be needed include cases in which the issues raised are particularly complex; parties or witnesses have a physical or mental disability; parties or witnesses require an interpreter; or parties or witnesses are ill, elderly, or near death. The court should regularly review its caseflow management system to ensure that it addresses the needs of those parties and cases that come before the court, as well as the court's own needs and requirements. [See Commentary to Principle 1.1.]

The court's case management system should have adequate procedures to manage the motions docket and those cases requiring expeditious processing, such as authorizing or withholding life-sustaining medical treatment. In general, the system should be designed to permit resolution of most contested issues expeditiously.[32]

Ordinarily, a continuance should be granted only when the probate court finds that there is good cause and takes into consideration the interests of all parties. This case supervision, however, should not replace or supplant the attorneys' responsibility to move cases forward. Rather, it should create a joint responsibility between the bench and bar that will build upon their different perspectives in establishing appropriate case-processing timelines. Probate courts in many states now actively monitor and exercise control over caseflow [*e.g.*, Maricopa County (AZ) Superior Court, San Francisco County (CA) Superior Court, DC, FL, Franklin County (OH) Probate Court, PA, TX].

The use of standardized timelines to manage the flow of cases should be generally applicable to most cases. For special or complex cases, however, the court should adopt distinct or flexible timetables to meet the special needs and demands of such cases, subject to modification following periodic conferences with the relevant parties. A number of probate courts are beginning to apply differentiated case management to probate cases.

> Differentiated case management is an attempt to define case-specific features that distinguish among cases as to the level of case management required. Thus, the essence of differential case management is reorganization of the caseflow system to recognize explicitly that the speed and method of case disposition should depend on cases' actual resource and management requirements (both court and attorney), *not* on the order in which they have been filed.[33]

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[31] David C. Steelman, John A. Goerdt, & James E. McMillan, Caseflow Management: The Heart of Court Management in the New Millennium, 45 (NCSC, 2004).

[32] Some probate cases, such as those involving the appointment of a guardian or conservator or a decedents' large estate where the estate cannot be closed until the federal estate tax liability is settled (with the return not even due until nine months after the date of death), by their nature are going to be open ended and will extend over relatively long periods of time. Other cases, such as those involving decedents' estates where an extended period of time for the filing of claims by creditors is required, may have an initial determination subject to subsequent modification. In such cases, goals for resolving probate cases within a given time frame may need to focus on specific events or procedures associated with these cases (*e.g.*, the issuing of the initial order on the need for a guardianship or conservatorship).

[33] Steelman & Davis, *supra,* note 4, at 14-15. *of Guardianship*

In contested cases, an initial conference should ordinarily be held between the judge and the attorneys to establish appropriate deadlines, such as for pre-trial discovery and to identify special or complex cases. For example, many courts have established rules with respect to pretrial conferences and discovery timetables that are strictly enforced. Adopting this approach in contested matters could greatly reduce the delays between the filing of a petition and the ultimate trial and disposition. This initial conference will help the court monitor the progress of each case and anticipate and respond to special difficulties the case may pose. If the case is especially complex, or if circumstances change, additional conferences may be necessary. If the parties are unable to agree upon appropriate deadlines, the court should impose a default schedule. Should a party fail to meet an established deadline, the court should issue sanctions, compel parties to appear, or dismiss the action.

PROMISING PRACTICES

The **Maricopa County, AZ, Superior Court** issued a list of 11 enhancements to the probate courts system. The first enhancement concerned differentiated case management and the need for separate tracks for cases with a high-conflict potential.[34]

STANDARD 2.2.2 TIME STANDARDS GOVERNING DISPOSITION

Probate courts in each state, in collaboration with the Administrative Office of the Courts and the bar, should establish overall time standards governing case disposition of each major kind of case and intermediate standards governing elapsed time between major case events.

COMMENTARY

An initial step in developing a functional caseflow management system is the creation of time standards governing case disposition. Ideally, these should be statewide standards applicable to all courts with probate jurisdiction in the state. The *Model Time Standards for State Trial Courts*,[35] adopted by the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association, and the National Association for Court Management, provide a basis for discussion with the Administrative Office of the Courts, the bar, and other stakeholders regarding the appropriate time standards in light of state procedures, statutory time periods, jurisdictional conditions, demographic and geographic factors, and resources.[36]

In addition to overall time standards, it is useful, for case management purposes, to include timelines governing each significant intermediate event from filing to disposition, including status conferences, arbitration hearings, or issue conferences. Intermediate timelines should be integrated with the overall standard for case disposition to create a consistent and functional organizational plan for caseflow management. Status reports should be periodically generated to maintain a record of what has occurred and to determine whether prescribed deadlines have been met. Each intermediate step should be monitored to assure compliance with the timelines, thereby ensuring orderly case development and prompt disposition.[37]

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[34] *Id.* at 9.

[35] Van Duizend, Steelman, & Suskin, *supra*, note 23, at 31 – 34 (NCSC, 2011).

[36] *Id.* at 2.

[37] *Id.* at 35-51.

STANDARD 2.2.3 SCHEDULING TRIAL AND HEARING DATES

The probate court should establish realistic trial and hearing dates based on the schedules established during the pretrial conferences.

COMMENTARY

The court should give careful attention to the scheduling of trials, hearings, conferences and all other appearances before the court. This will ensure the efficient use of judicial resources, and promote trial date certainty, one of the key factors in reducing delay.[38] To achieve accurate scheduling, among the factors the court should consider are:

- Any statutory requirements for hearings
- the likelihood that a case will proceed to trial
- the needs and disabilities of the parties[39]
- the anticipated length of the trial, including the number of court days that will be required
- the number of court days available for scheduling
- the expected judicial complement available (i.e., the number of judges assigned to the court minus anticipated and predicted judicial absences)
- the number of judge days available (i.e., the expected judicial complement multiplied by the number of court days in the period)
- the judicial capacity (i.e., the percentage of scheduled cases tried and settled with judicial participation within the court)
- fallout (i.e., the percentage of cases scheduled for trial that are continued, settled, or dismissed without judicial intervention)
- priorities or time limits imposed by statute.[40]

The likelihood and expected length of a trial or hearing should be determined by the court after consultation with the attorneys or *pro se* parties in the case. The other factors can be computed as needed by the court administrator. An additional factor that may be appropriate to take into consideration when scheduling trial and hearing dates is the court's case backlog and delays likely to result from this backlog.

Accurate scheduling requires the court to adopt firm policies on the issuance of trial and hearing dates and to restrict the availability of continuances.[41] Counsel should be expected to prepare for trial or hearing properly and adequately with the anticipation that the trial or hearing will be held as scheduled. Continuances should not be granted without a showing of good cause and never solely on the stipulation of the attorneys to a continuance.

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[38] CourTools, *supra, note 18, at* Measure 5, *available at* http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure5.pdf.

[39] Lori Stiegel, Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse, Recommendations 4 & 5 (American Bar Association (ABA), 1996).

[40] *See generally* Maureen Solomon & Douglas Somerlot, Caseflow Management in the Trial Court: Now and for the Future, 18 (ABA, (1987).

[41] Steelman, Goerdt, & McMillan, *supra*, note 31, at 9-10.

2.3 JUDICIAL LEADERSHIP

The standards in this category discuss the responsibility of probate courts to ensure that they, like any other organization, are managed in a responsible and appropriate manner. Probate judges should assume a leadership role in helping probate courts meet this responsibility.

STANDARD 2.3.1 HUMAN RESOURCES MANAGEMENT

Probate courts should be responsible for implementing an effective human resources management program.

COMMENTARY

Probate courts should be administered so that their employees are treated with dignity and respect. (See Principle 1.4) To meet this goal, probate courts should implement a human resources management program. A clear chain of command should exist to prevent confusion and ensure accountability. Court employees should have clear and accurate written job descriptions, adequate training and supervision,[42] regularly conducted performance evaluations, and written policies and guidelines to follow. [See Standard 2.3.4]

Probate courts should actively support and improve the quality of the work of their personnel. Surveys of court employees should be administered periodically to identify problems and assess the level of employee satisfaction.[43] Annual development of goals should be established for each supervisor and court unit, as well as for all staff members. Training programs should be used to maintain and improve the capabilities and skills of all staff members. An employee recognition program should acknowledge the strengths and achievements of the court employees.

An effective human resource plan cannot be implemented successfully without the leadership of the court. The judge and court administrator, if there is one, must demonstrate their complete support of and commitment to the plan through active involvement in court training programs and model behavior on and off the bench.

STANDARD 2.3.2 FINANCIAL MANAGEMENT

A. Probate courts should seek financial support sufficient to enable them to perform their responsibilities effectively.
B. Probate courts should inform state and local funding sources on a regular basis about the importance, breadth, and impact on the community and individuals of probate courts and their decisions, as well as about the demographic trends affecting probate court caseloads.
C. The court should institute standardized procedures for monitoring fiscal expenditures.

COMMENTARY

To carry out their duties adequately and effectively, probate courts must receive sufficient funding. Considerable variation in the sources of funding exists from jurisdiction to jurisdiction. In many jurisdictions, the state rather than local government has assumed financial responsibility for the probate courts, which may avoid fragmented and disparate levels

[42] The Probate Division of the District of Columbia Superior Court records, and has supervisors review, the responses that Division staff provide to telephonic information inquiries from the public in order to identify areas in which additional training may be needed and make certain that accurate information is provided in a timely and courteous manner.

[43] CourTools, *supra,* note 18, at: Measure 9, *available at* http://www.ncsconline.org/D_Research/CourTools/Images/courtools_measure9.pdf.

of financial support among courts. Whatever the source of funds, adequate funding is needed for probate courts to attract and retain competent judges and court personnel; to provide adequate supplies, equipment, and library materials; to purchase specialized services such as those provided by court visitors, physicians, psychologists, expert witnesses, examiners, interpreters, and consultants; and to obtain, renovate, and replace, when needed, capital items and physical facilities.

In generating a budget for a probate court, it is necessary that the court's special functions and responsibilities be taken into account. Imposition of a standardized court budget derived from other courts generally provides an inadequate representation of the budgetary needs of a probate court. Probate courts should have the opportunity to present their resource needs as part of the budget preparation process whether that takes place at the general jurisdiction court level, the administrative office of the court level, the county board level, or the state legislature level. In order to do so, it is helpful to be able to present statistical analyses of the number of cases of each type and the staff and judicial time required to dispose of each type of case. [See Standards 2.4.1 and 2.4.2] During the budget process and at other times of the year, probate judges also should take the opportunity to better inform their funding bodies about the nature of probate court work and how it affects individual litigants and the community as a whole. Information should also be presented on how demographic trends are and will affect probate caseloads.[44]

The overall level of financial support required by probate courts is likely to vary from year to year, as may the specific levels of support needed for the various activities of the courts. Probate courts should regularly review and evaluate their funding requirements and requests. Within the funds provided, probate courts should allocate expenditures according to the needs and priorities established by the courts themselves.

In addition to generating requests for financial resources for the upcoming fiscal year, the long-term needs of a probate court should be emphasized in each annual operating budget. This should include projections of court operations and corresponding financial requirements for future years. Procedures should be in place for the review and revision of these projections in light of later events. Special attention should be given to the projection of anticipated major capital expenditures. By developing projections of their future needs, probate courts will be able to better anticipate those needs and build them into their annual budgetary request. In addition, certain budgetary requests, such as major capital expenditures, may require a special request, more extensive justification, and lobbying with the funding source. Such requests may necessitate a long-term budgetary strategy. At the same time, unanticipated events may invalidate prior forecasts. Sufficient flexibility should be built into a court's budget to allow the court to respond appropriately to unanticipated events. The establishment of an advisory committee on court finance may provide helpful advice on the court's budget and on obtaining the support of the funding agency.

Because of their role as a guardian of the public trust, probate courts must carefully account for their resources. They should institute procedures that will ensure that their fiscal expenditures are adequately monitored.[45] Monthly reviews of expenditures should be conducted and probate courts should be subject to regular audits of its accounts following close of each fiscal year by an independent auditing agency. Use of generally accepted accounting principles and an independent auditing agency ensures the proper use of public funds and enhances public confidence in the probate court. In general, the fees charged in the court should be reasonably related to the time and work expended by the court. (See Principle 1.1.)

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[44] See Richard Van Duizend, *The Implications of an Aging Population for the State Courts*, *in* Future Trends in State Courts 2008 76 (NCSC, 2008).

[45] *See, e.g.,* American Bar Association Committee on Standards of Judicial Administration, Standards Relating to Court Organization §1.52 (ABA, 1990) (recommended procedures for fiscal administration "should include uniform systems for payroll accounting and disbursement; billing and presentation and pre-audit of vouchers for purchased equipment and services; receipt, deposit, and account for money paid into court; internal audits and regular, at least monthly, recapitulations of current financial operations").

STANDARD 2.3.3 PERFORMANCE GOALS AND STRATEGIC PLAN

Probates courts should:

A. Adopt quantifiable performance goals.
B. Establish multi-year strategic plans to meet its goals.
C. Continuously measure their progress in meeting those performance goals.
D. Disseminate information regarding their performance and progress.

COMMENTARY

Probate courts should adopt performance goals to fulfill their responsibilities and to achieve efficiency in their operations and in meeting these Standards. Over the past two decades, strategic planning—a systematic, interactive process for thinking through and creating an organization's best possible future"[46] —has become a fundamental management approach in individual courts and judicial systems throughout the United States and around the world. It is particularly helpful when the courts, like probate courts, are working closely with other governmental as well as community partners.

Adopting goals and establishing a plan in themselves are not sufficient. It is essential for probate courts to assess their performance by collecting and analyzing data to determine the extent to which they are achieving their goals, the progress in implementing the changes and strategies identified in the plan, the impact of those changes, and any unintended consequences.[47] There are many sets of performance measurement tools that courts can use, most notably *CourTools*, which provide a balanced approach to assessing performance and progress.[48] By simultaneously establishing a strategic plan and updating it in conjunction with periodic evaluations, probate courts can engage in a continuous cycle of improvement.

Probate courts should share their goals, plan, and reports on progress internally and with external stakeholders including the state administrative office of the courts, funding sources, the bar, and the public.

> Open communication about court performance—be it stellar, good, mediocre, or poor—builds public trust and confidence. This is particularly true if a report includes a court's strategy for improving performance.[49]

STANDARD 2.3.4 CONTINUING PROFESSIONAL EDUCATION

A. Probate courts should work with their state judicial branch education program and national providers of continuing education for judges and court staff to ensure that specialized continuing education programs are available on probate court procedures, improving probate court operations, and issues and developments in probate law.
B. Probate courts should encourage and facilitate participation of their judges, managers, and staff in relevant continuing professional education programs at least annually.

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[46] Brenda Wagenknecht-Ivey, An Approach to Long Range Strategic Planning for the Courts, 2-19 (Center for Public Policy Studies, 1992).

[47] International Consortium for Court Excellence, International Framework for Court Excellence (2009), *available at* http://www.ncsc.org/Resources/~/media/Microsites/Files/ICCE/IFCE-Framework-v12.ashx.

[48] CourTools, *supra,* note 18; for other sets of court measures, see International Consortium for Court Excellence, *supra,* note 47, at 18-22.

[49] International Consortium for Court Excellence, *supra,* note 47, at 35.

COMMENTARY

Probate law and procedures and probate court operations are distinct from those of other trial court jurisdictional areas. It is also one of the dynamic jurisdictional areas that must adjust to frequent changes in federal tax law and benefit programs, a swelling caseload due to demographic trends, and increased scrutiny of the probate court's responsibility to oversee the trans-generational transfer of property and the well-being and assets of disabled adults. Updates on legal changes and new approaches, as well as professional development on the skills required to operate a probate court effective are needed,[50] but in many states, are not readily available due to limited resources and the relatively small number of judges and staff engaged in probate work.

It is recommended that the staff training program should prepare all probate court employees for all elements of their work.[51] Training also should include components on aging and the causes and effects of dementia, the Americans with Disabilities Act; communication with disabled persons and elders, civil rights laws; employment policies including those pertaining to advancement, promotions, and grievances; courtesy and responsiveness to their fellow employees and the public; tolerance for different viewpoints; and ways to eliminate gender, racial, ethnic bias and sexual harassment.

In addition to the continuing education on probate matters offered by state judicial branch education programs and state probate judges associations, educational conferences, courses, and webinars relevant to probate court judges, registrars, clerks, and staff are offered by the National College of Probate Judges, the National Judicial College, the National Association for Court Management, and the Institute for Court Management among others.

Promising Practices

The **State Justice Institute** has for many years provided scholarships to judges, court managers, and court staff to assist them in attending continuing professional education programs—http://www.sji.gov/grant-esp.php.

2.4 INFORMATION AND TECHNOLOGY

The courts, like all of society, have undergone a technological revolution driven in part by the need to process and store increasing amounts of information, including the records associated with the greater number of cases over which they preside. At the same time, increased attention is being given to the importance of accountability and efficient caseflow within the courts. The standards in this category recognize the importance of the court with probate jurisdiction (hereinafter the court) remaining abreast of and joining in these developments.

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[50] Third National Guardianship Summit, *supra*, note 6, at Recommendation 2.1, 2012 Utah L. Rev., at 1200.

[51] *See* Core Curriculum, National Association for Court Management, http://www.nacmnet.org/CCCG/index.html (July 12, 2012).

STANDARD 2.4.1 MANAGEMENT INFORMATION SYSTEM

A. Probate courts should use a record system that is easily accessible and understandable for all persons who are entitled to the information within those records, and that effectively protects the confidentiality of sensitive information The records should be comprehensive, indexed, and cross-referenced.

B. Probate courts should regularly monitor and evaluate their management information system, and acquire and utilize new technologies and equipment when needed to assist the court in performing its work effectively, efficiently, and economically.

COMMENTARY

The records and files of probate courts should be accurate, reliable, and accessible to ensure efficient court operation. Access to these records and files is needed by a range of persons, including court personnel as they perform their duties, litigants as they develop and present their cases, and non-litigants as they conduct various research permitted under public records laws. (*But see*, Standard 2.4.3 regarding protection of sensitive personal information and information entitled to confidentiality under state law.) Probate court information systems should provide for integration of printed and digitized records and be updated regularly to allow complete and easy access to all needed information. The systems should be sufficiently flexible to permit probate courts to use new technology as it becomes available. Probate court information systems should be designed to produce all information and records in a timely manner and understandable formats, and to make them available for both case-processing and management purposes.

At least after the initial filing, probate courts should enable counsel and *pro se* litigants to file pleadings and supporting materials electronically except for those documents such as wills for which the original is required. The e-filing system should be tied directly into the probate court's case management system to permit case tracking and management without additional data entry.[52] Probate courts should ensure that digitized information is managed in a way that provides access to authorized persons, maintains the security of the data from inappropriate release and unauthorized alterations, and permits the use of improved versions of the operating software. Access to probate courts records should be user-friendly both through on-site public access terminals and through a probate court website. Websites should provide information on what case file information is available, what is confidential, how to access it along with general information on the court's jurisdiction, and how to file and respond to pleadings. Probate court staff and volunteers should be trained to explain information access and answer questions about it. Beyond this routine assistance, the Americans with Disabilities Act requires court personnel to provide additional assistance to individuals with a disability seeking access to court records.

Probate courts should periodically determine whether its management information system, including its system of filing and record keeping, is fulfilling the needs of the court. This should include an evaluation of the overall system and the system's individual components. The monitoring system should only be as complex as required to provide necessary and useful information. In addition to routine self-assessment, periodic review by a third party, who is not a member or a current employee of the court, may provide an objective and independent assessment of the court's performance.

The first and most important step in deciding whether to implement a technological innovation is to consider the needs of the probate court and its constituents, including an analysis of court operations and processes that might benefit from the introduction of new technology. The second step should be to assess the usefulness of the technological innovation with a cost-benefit analysis. Where appropriate, probate courts should rely on their own employees for the evaluation. If

[52] *See Court Specific Standards*, NCSC, http://www.ncsc.org/Services and Experts/Technology tools/Court specific standards.aspx (July 12, 2012).

necessary, outside consultants with technical expertise should be used. If the adoption of the technology is advantageous, a specific plan should be developed to implement the necessary changes. With the introduction of any new technology, probate courts, when necessary, may wish to maintain a dual recordkeeping system, simultaneously recording information via both the old and new systems, but only long enough to establish the reliability of the new system.

STANDARD 2.4.2 COLLECTION OF CASELOAD INFORMATION

Probate courts should collect and review meaningful caseload statistics including the volume, nature, and disposition of proceedings, the time to disposition including a comparison to the time standards adopted for probate courts, the certainty of hearing dates, and the number of guardianships and conservatorships being monitored.

COMMENTARY

The functioning of probate courts can be enhanced by accumulating basic information regarding their court's caseload and dispositions. These data can be useful to probate courts or the court administrator's office in managing probate court operations and measuring court performance as well as assessing job performance of court appointees and conducting needs assessments. "Excellent courts use a set of key-performance indicators to measure the quality, efficiency, and effectiveness of their services."[53] The measures suggested in the standard reflect the case management related performance measures contained in *CourTools 2-5*.[54] In addition, to helping gauge probate court performance, this information may assist in identifying trends in system use and allow the court to divert and apply its resources to meet these trends. The information may also bolster arguments for increased resources for the court. [See Standard 2.3.3]

While many courts collect and closely monitor caseload data, others do not, often because they lack the resources to do so. Such statistical data will inform the court about the number of proceedings it processes, how judicial and staff resources are allocated. Identification of statistical categories of court proceedings and activities should be consistent throughout the state. When a data collection system involving the probate court is designed, the unique nature of the court and its procedures should be taken into account, thereby ensuring that the data gathered will accurately reflect the operations and goals of the court and definitions adhering as closely as possible to those set forth in *The State Court Guide to Statistical Reporting*.[55]

At a national level, neither the justice system nor the social service system—both of which have long-standing programs for the development and reporting of "case" statistics—possess a meaningful statistical portrait of the volume and composition of probate court cases in the United States. Without such information, questions fundamental to reform and improvement of the state probate systems are difficult to answer.[56]

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[53] International Consortium for Court Excellence, *supra*, note 7, at 33.

[54] CourTools, *supra*, note 18.

[55] Court Statistics Project, State Court Guide to Statistical Reporting 10 (NCSC, 2009) *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP%20StatisticsGuide%20v1%203.ashx.

[56] *See* Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform*, *in* Future Trends in State Courts 2011 107 (NCSC, 2011); COSCA, *supra*, note 6; B. K. Uekert, Adult Guardianship Court Data and Issues: Results from an Online Survey, (NCSC, 2009), *available at* http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Special-Programs/4-3-Adult-Guardianships.aspx.

STANDARD 2.4.3 CONFIDENTIALITY OF SENSITIVE INFORMATION

Probate courts should establish procedures to maintain the confidentiality of sensitive personal information and information required to be kept confidential as a matter of law.

COMMENTARY

Probate courts should remain cognizant that sensitive and private matters may be contained both in automated case management systems and in physical case files. Probate courts should take special precautions, in accordance with state law, to ensure the confidentiality of Social Security and financial account numbers, medical, mental health, financial, and other personal information.[57]

2.5 ALTERNATIVE DISPUTE RESOLUTION

The use of alternative dispute resolution techniques to resolve disputes in probate matters is often preferable to litigation. Mediation, family group conferencing, and settlement conferences can better accommodate all interests and maintain long-term familial relations than litigation. The standard in this category recognizes the increased use and proposed use of ADR for probate matters.

STANDARD 2.5.1 REFERRAL TO ALTERNATIVE DISPUTE RESOLUTION

Probate courts should refer appropriate cases to appropriate alternative dispute resolution services including mediation, family group conferencing, settlement conferences and arbitration.

COMMENTARY

In many situations, mediation may be a highly desirable method of dispute resolution. In addition to providing relief from crowded court dockets and dispensing justice in a timely manner, participants may find the opportunity to discuss all issues fully and to craft their own solutions to be particularly satisfying. In addition, the cost of mediation may be much lower than trial, particularly when volunteer mediators are used.[58] Thus, at a minimum, probate judges should strongly encourage the parties and their families to participate in mediation, family group conferencing, or other alternative dispute resolution (ADR) processes, and consider ordering participation in appropriate cases. A number of states currently offer or require mediation in guardianship, conservatorship, and/or contested will cases (*e.g.*, CA, CT, DC, OH, OR, PA, SD, TX, WA). Others, such as AZ offer settlement conferences with trained volunteer attorneys. Family group conferencing, an ADR technique widely used in child protection cases,[59] may be useful as well in cases in which the welfare and protection of an older person or disabled person is at issue.[60]

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[57] *See* Martha W. Steketee & Alan Carlson, Developing CCJ/COSCA Guidelines for Public Access to Court Records (NCSC, 2002).

[58] *See* Susan J. Butterwick, Penelope A. Hommel, & Ingo Keilitz, Evaluating Mediation as a Means of Resolving Adult Guardianship Cases, (The Center for Social Gerontology, 2001); S.N. Gary, *Mediating Probate Disputes* 1 GP/Solo Law Trends and News, No. 3 (May 2005), *available at* http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0506_estate_probate.html.

[59] *See* Susan M. Chandler & Marilou Giovanucci, *Transforming Traditional Child Welfare Policy and Practice*, 42 Fam. Ct. Rev. 216 (2004).

[60] *See e.g.*, Julia Honds, Family Group Conferencing as a Means of Decision-Making in Matters of Adult Guardianship, (University of Wellington, 2006); Laura Mirsky, Family Group Conferencing Worldwide (International Institute for Restorative Practices, 2003).

The court should be open to ADR in all situations, but especially when the parties have requested outside help in settling their dispute. It may be beneficial for resolving disputes such as will contests and contested creditor claims. ADR may also often work well for disputes involving individual treatment or habilitation plans for respondents in guardianship or civil commitment proceedings and may be appropriate to determine the extent of the guardian's or conservator's powers in a limited guardianship or conservatorship or to determine which family member(s) will be given fiduciary responsibility. ADR, however, should not be used for the threshold determination of incapacity in guardianship/conservatorship proceedings. Similarly, it may not be a viable alternative when one of the parties is at a significant disadvantage. Examples include disputes involving persons with severe depression; who are on a medication that affects their reasoning; who have difficulty asserting themselves; who have been physically or emotionally abused by another party; or who perceive themselves as significantly less powerful than the opposing party. In any of these instances as well as in proceedings related to guardianships/conservatorships, the disadvantaged party should be represented and probate court judges should exercise special care before accepting any agreement reached.[61]

In addition, probate courts should ensure that the ADR professionals and volunteers in court-connected alternative dispute resolution have received training on the nature of and key issues in probate matters. This training should include methods for effectively communicating with elders and persons with mental health and developmental disabilities.

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[61] *See* Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 STETSON L. REV. 611 (2002).

SECTION 3: PROBATE PRACTICES AND PROCEEDINGS

Unlike the standards in the first two sections, the standards in this section focus on the practices and proceedings used by probate courts to resolve the issues placed before them. Because many of the issues faced by probate courts are relatively unique, specialized practices and proceedings have evolved. This section identifies and discusses these practices and proceedings.

The standards related to probate practices and proceedings are divided into four categories. **COMMON PRACTICES AND PROCEEDINGS** addresses procedural aspects that most probate matters have in common. The last three categories, **DECEDENTS' ESTATES**, **ADULT GUARDIANSHIPS AND CONSERVATORSHIPS**, and **GUARDIANSHIPS OF MINORS**, are areas of the law that almost all courts with probate jurisdiction must address. Each poses its own special issues.[62]

The standards in this category recognize the importance of probate courts adopting procedures that respond to the special needs of the parties appearing before them and the unique nature of the issues that probate courts are asked to resolve.

3.1 COMMON PRACTICES AND PROCEEDINGS

STANDARD 3.1.1 NOTICE

A. Probate courts should ensure that timely and reasonable notice is given to all persons interested in court proceedings. The elements of notice (content, delivery, timing, and recipients) should be tailored to the situation.

B. The initial notice should be non-digital and formally served. If permitted by statute or court rule, subsequent notices and pleadings may be served through electronic means to all parties, counsel, and interested persons who provide their e-mail addresses, and to the probate court if it has e-filing capabilities.

COMMENTARY

Notice and due process are important concepts in any area of the law, but particularly in probate. Persons whose interests may be affected may be unaware that an action has been filed. Although notice requirements vary from state to state, proper notice must be given, and certain levels of notice may even be constitutionally required.[63] When there is a failure to provide proper notice, any orders previously made can be vacated. Due process standards do not depend on whether an action is characterized as one *in rem* or *in personam*.[64]

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[62] Although not specifically listed, the Standards in this section also apply to the other types of cases within probate court jurisdiction including, but not limited to, testamentary and *inter vivos* trust cases.

[63] Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485 (1988) (notice by publication insufficient to bar reasonably ascertainable creditors of an estate).

[64] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

The need for notice varies in different contexts. Many states allow informal probate of wills without notice, but such probate can be superseded by a formal proceeding. To have *res judicata* effect, a decree in a formal proceeding must be preceded by notice. Where notice of a hearing is required, it should indicate the time, place, and purpose of the hearing in a manner likely to be understood by the recipient. Notice should be given in a language in addition to English if appropriate to the circumstances. It should be served a reasonable time before the hearing, by mail or personal delivery where possible. Notice by publication is acceptable only as to persons whose address or identity cannot be ascertained with reasonable diligence.[65]

The "interested persons" to whom notice should be given in the context of decedents' estates includes persons with a potential property interest in the estate. When a will is offered for probate, this includes trustees, charities, and/or the state Attorney General in some circumstances, as well as the testator's heirs who would take if no will existed. If the testator executed several wills, devisees under earlier wills filed with the court that are adversely affected by the later will also have an interest because they may take if the later will is found to be invalid. However, it is not reasonable to require notice to the devisees of every will ever executed by the testator, particularly those that have not been probated or offered for probate. But if notice, even though not required by statute, is not given to known devisees under the decedent's last prior will, the probate order may not be *res judicata* as to such devisees.

When interested persons are under a legal disability, they may be represented by another. For example, virtual representation may be applicable. [See Standard 3.1.4] Similarly, provided no conflict of interest exists, a trustee of a trust that is a beneficiary under a will may represent trust beneficiaries in connection with a personal representative's accounting. However, it may be appropriate to give notice in such cases also to the persons represented by others (*e.g.*, the trust beneficiaries) so they will be kept informed and be assured that their interests are being considered.

Notice is not limited to hearings before the court. In some instances, lack of court supervision of a decedent's estate is acceptable only where the affected persons receive notice that the court is not going to supervise the matter and that the affected persons will be responsible for protecting their own interests. [See Standard 3.2.1] For example, some states allow a will to be probated without a judicial hearing, but require the personal representative to notify the heirs and devisees promptly. The notice must inform them that the estate is being administered without court supervision but that they can petition the court on any matter relating to the estate.[66] Similarly, some states allow an estate to be closed without a court proceeding by operation of law or on the basis of a closing statement executed by the personal representative, which must be sent to the court and to distributees advising them that administration of the estate has been completed.[67]

The notice requirements in proceedings for guardianship and conservatorship raise some special problems. In such proceedings, "interested persons" is a flexible concept and its meaning may change depending on the circumstances. [See Standards 3.3.7 and 3.5.2]

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[65] *See id.* at 317.

[66] *See, e.g.,* Cal. Prob. Code § 10451 (West 1991); Unif. Prob. Code § 3-705 (2008).

[67] *See* DC Stat §20-1301(c) (2012); Unif. Prob. Code § 3-1003 (2008).

To ensure that all parties and interested persons have knowledge of a probate proceeding, the initial notice should be a formal written paper document served in the traditional manner. However, to expedite the process and reduce costs, subsequent notices and pleadings may be served electronically.[68] Parties and interested persons who provide their e-mail address should be deemed to have consented to electronic service. A number of states currently permit electronic notice, at least in some instances [*e.g.*, CA, OR, and PA]. Any process for providing notice electronically should require delivery of an electronic receipt to document that notice has been served.

STANDARD 3.1.2 FIDUCIARIES

A. Probate courts should appoint as fiduciaries only those persons who are:
(1) Competent to serve.
(2) Aware of and understand the duties of the office.
(3) Capable of performing effectively. A fiduciary nominated by a decedent should be appointed by the court absent disqualifying circumstances.

B. When issuing orders appointing or directing a fiduciary, probate courts should make those orders as clear and understandable as possible and should specify the fiduciary's duties and powers, the limits on those duties and powers, and the duration of the appointment.

C. Probate courts should require a surety bond or other asset protection arrangement of a fiduciary when (1) an interested person makes a meritorious demand, (2) there is an express requirement for a bond in the will or trust, or (3) the court determines that a bond is necessary. The court should ensure that the amount is reasonably related to the otherwise unprotected assets of the estate.

D. Probate courts are encouraged to develop and implement programs for the orientation and education of unrepresented fiduciaries, to enable them to understand their responsibilities, how to perform them effectively, and how to access resources in the community.

COMMENTARY

Probate courts should appoint qualified fiduciaries. A *fiduciary* is "one who must exercise a high standard of care in managing another's money or property."[69] The term generally includes personal representatives, guardians, conservators, and trustees. *Persons* as it is used here includes natural persons, corporations, and other entities authorized to serve as a fiduciary.

Because trust and confidence are needed between the fiduciary and the beneficiaries, probate courts should examine the credentials of potential fiduciaries with care. Experience, honesty, the absence of a conflict of interest, reputation and ability, and any prior service as a fiduciary are some of the factors that probate courts may consider in reviewing a person's ability to perform the duties of the office. Probate courts should determine if anything would disqualify the person being considered (*e.g.*, statutory disqualifications) or make the appointment unsuitable.[70] [See Standard 3.3.12.]

Issuing an order that is clear and understandable to a non-lawyer fiduciary is essential for ensuring that the terms of that order are properly carried out. Specifying the responsibilities and authority of a fiduciary provides a blueprint, not only for the fiduciary, but also for beneficiaries, their families, and third parties engaged in financial and other transactions with the estate or trust.

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[68] Original documents such as wills should be filed with the probate court.

[69] Black's Law Dictionary 625 (9th ed. 2009).

[70] Currently, 13 states require that guardians undergo independent criminal background checks before being appointed. U.S. Government Accountability Office, GAO-11-878, Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement, 7 (July 2011), http://www.gao.gov/new.items/d11678.pdf; *See, e.g.*, Tex. Prob. Code Ann. § 78 (Vernon 1995).

Another means of protecting the estate is requiring fiduciaries to post a surety bond in an amount not less than the estimated value of the personal property of the estate and the income expected from the real and personal property during the next year, less any amounts that can be otherwise protected.[71] [See Standards 3.3.15 and 3.4.8] When a testator or settlor of a trust has provided for appointment without bond, his or her wishes should be respected unless an interested person is able to show a necessity for imposing the bond. In such instances, there may be alternatives that protect assets without adding to the cost of administration of estates such as restricted bank accounts, safekeeping agreements, insurance,[72] and collateral for performance (*e.g.*, a mortgage of land).

Some states have enacted mandatory statutory preference lists, thereby limiting the discretion of probate courts in selecting the most qualified person. Other states have a statutory priority list but allow probate courts to disregard the list if in the best interest of the estate or respondent. If a statutory preference is granted to certain persons, probate courts should have authority to deny that appointment if the person is unsuitable under the evidence presented. In all situations, the court should limit appointments as required by statute, assuming the statute does not require unconstitutional distinctions.[73]

Inherent in the process of appointment is the probate court's responsibility to ensure that the fiduciary understands his or her duties under controlling state law. [See Standard 3.3.14] Probate courts should develop or use available materials and programs to assure that those appointed know what they must do to properly discharge their responsibilities. Several states offer an orientation or instructional materials to fiduciaries such as personal representatives and executors as well as to guardians and conservators [*e.g.*, AZ, DC, and VA].

PROMISING PRACTICES

District of Columbia *AFTER DEATH A GUIDE TO PROBATE IN THE DISTRICT OF COLUMBIA*[74]

Tarrant County, TX Probate Court No. 2 requires all decedents' administrators, guardians, and conservators to attend a mandatory training immediately after appointment conducted by the staff member who will be reviewing their documents and to sign an acknowledgment of understanding following the training.

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[71] *See* U.P.C. §3-604; regarding bonds for conservators *see* Third National Guardianship Summit, *supra*, note 6, at Standard 4.9, 2012 Utah L. Rev., at 1195; M.J. Quinn & H. Krooks, *The Relationship Between the Guardian and the Court*, 2012 Utah L. Rev. 1611 (2013).

[72] *See e.g.*, Wash. Ct. Gen. R. 23(d)(4) & (5).

[73] *See* Reed v. Reed, 404 U.S. 71, 74 (1971) (statute preferring males to females in selecting administrators).

[74] Probate Div. of the Superior Court of D.C., After Death – A Guide to Probate in the District of Columbia, (Jan. 2010), http://www.dccourts.gov/internet/documents/AfterDeathAGuideToProbateInTheDistrictOfColumbia.pdf.

STANDARD 3.1.3 REPRESENTATION BY A PERSON HAVING SUBSTANTIALLY IDENTICAL INTEREST

Probate courts should allow representation by a person having substantially identical interest, where appropriate.

COMMENTARY

Often, in probate proceedings, interested persons are minors or incapacitated adults, unborn, unascertained, or persons whose addresses are unknown. In order for probate courts to have jurisdiction to enter a fully binding order, their interests must be represented by others—for example, "a trust providing for distribution to the settlor's children as a class with an adult child being able to represent the interests of children who are either minors or unborn."[75] Both the Uniform Probate Code and the Uniform Trust Code embrace this concept of virtual representation[76] as well as in some state statutes,[77] but it has also been recognized without explicit statutory support.[78]

Before allowing someone to represent others in this manner, probate courts should conduct a careful examination to ensure that the interests are truly identical, and when the trustee of a testamentary trust and the personal representative are the same person, a potential conflict of interest exists, and the beneficiaries, if incapacitated, should be represented by an independent person. The question of virtual representation may also arise in connection when an earlier judgment is challenged by someone who was not formally represented. In the latter situation, the probate court may decide that the challenge is barred because the challenger was virtually represented by another at the time of the prior decree.

STANDARD 3.1.4 ATTORNEYS' AND FIDUCIARIES' COMPENSATION

A. Attorneys and fiduciaries should receive reasonable compensation for the services performed.

B. In order to enhance consistency in compensation and reduce the burden on probate courts of determining compensation in each case, probate courts or the state Administrative Office of the Courts should consider establishing fee guidelines or schedules.

C. When a dispute arises that cannot be settled by the parties directly or by means of alternative dispute resolution, probate courts should determine the reasonableness of fees.

COMMENTARY

Attorneys and fiduciaries are entitled to receive fair compensation for the time, effort and expertise they are providing.[79] However, defining what is reasonable compensations for the services rendered can be a complex, thorny determination. One way of limiting the need for probate courts to engage in the review of fees on a case-by-case basis is through the use of fee schedules or guidelines set either by statute or court rule. Ohio, for example, has established a fee schedule by statute.[80] Such schedules help to ensure fairness and consistency. In establishing a fee schedule or guideline, it is essential that the fees set are reasonable and reflect or relate to customary time involvement so as not to discourage well qualified individuals from serving as fiduciaries or counsel in probate matters.

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[75] UNIF. TR. CODE comment to §304 (2010).

[76] UNIF. TR. CODE §304 (2010); UNIF. PROB. CODE §1-403(2) (iii) (2008).

[77] *See, e.g.,* NY SURR. CT. PROC. ACT § 315 (McKinney 1981); UNIF. PROB. CODE § 1-403 (2008).

[78] *See* WILLIAM M. MCGOVERN *ET AL.*, *WILLS, TRUSTS AND ESTATES* 703 (1988).

[79] UNIF. PROB. CODE 3-179 (2008); UNIF. TR. CODE §708 (2010).

[80] Probate Court of Montgomery County, Ohio, *Computation of Fiduciary Fees in Estate Cases*, http://www.mcohio.org/government/probate/docs/estate/APPENDIX_D_Computation_of_Fiduciary_Fees.pdf (Jun. 25, 2012).

When there is no guideline, in reviewing a request for a fee in excess of the scheduled amount due to the provision of extraordinary services, or when a dispute arises that requires court intervention, the factors that a probate court may consider include:

- The usual and customary fees charged within that community
- Responsibilities and risks (including exposure to liability) associated with the services provided
- The size of the estate or the character of the services required including the complexity of the matters involved
- The amount of time required to perform the services provided
- The skill and expertise required to perform the services
- The exclusivity of the service provided
- The experience, reputation and ability of the person providing the services
- The benefit of the services provided.[81]

Time expended should not be the exclusive criterion for determining fees. Probate courts should consider approving fees in excess of time expended where the fee is justified by the responsibility undertaken, the results achieved, the difficulty of the task, and the size of the matter. Conversely, a mere record of time expended should not warrant an award of fees in excess of the worth of the services performed.

In many cases, it may be helpful for probate courts to require a fiduciary, at the time of appointment or first appearance in a matter, to disclose the basis for fees (*e.g.*, a rate schedule). Probate courts may also direct that a fiduciary submit a projection of the annual fees within 90 days of appointment, disclose changes in the fee schedule and estimate, seek authorization for fee-generating actions not included in the appointment order, and provide a detailed explanation for any fees claimed.[82]

The services should be rendered in the most efficient and cost-effective manner feasible. For example, the proper delegation of work to paralegals, acting under the supervision of an attorney, reduces the cost of services, and a requested allowance for such services should be approved.[83] Probate courts should not penalize firms that reduce expenses by prudently employing paralegals or using other appropriate methods by disallowing these expenses.

In most estates, the fiduciary will retain an attorney to perform necessary legal services. The dual appointment of one person as both fiduciary and attorney may result in significant savings for the estate and should not be discouraged by denial of compensation, though the fees requested as fiduciary and as attorney should be differentiated and must still be reasonable. In most estates, the fiduciary will retain an attorney to perform necessary legal services. The dual appointment of one person as both fiduciary and attorney may result in significant savings for the estate and should not be discouraged by denial of compensation, though the fees requested as fiduciary and as attorney should be differentiated and must still be reasonable. When a person acts both as fiduciary and attorney, probate courts should be alert for the possibility that there may be a conflict of interest and that having the fiduciary serve in a dual capacity will best meet the needs of the person, trust, or estate.[84]

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[81] *See generally* Model Code of Prof'l Conduct R. 1.5(a) (2007).

[82] Third National Guardianship Summit, *supra*, note 6, at Standard 3.1, 2012 Utah L.Rev., at 1193-1194.

[83] *See, e.g.*, Cal. Prob. Code § 10811(b) (West 1993).

[84] *See* National Guardianship Association, Standards Of Practice, Standard 16(2) (J). http://www.guardianship.org/guardianship_standards.htm

When requesting fees in excess of a schedule or guideline, the attorney or fiduciary has the burden of proving the reasonableness of the fees requested. Probate courts may consider factors that made the provision of services more complicated, including the threat or initiation of litigation; the operation of a business; or extensive reporting and monitoring requirements. Improper actions by a fiduciary or a lawyer may justify a reduction or denial of compensation.[85]

Generally, probate courts are not involved in reviewing fees in unsupervised estates unless the matter is appropriately brought before the court. In extreme cases, however, even though the administration is unsupervised, a probate court may review compensation on its own motion where the personal representative is the drafting attorney or the will contains an unusually generous fee provision. Similarly, probate courts may review fees if the court observes a pattern of fee abuse.

In supervised administration of estates, unless all affected parties consent, attorneys and fiduciaries seeking payment of fees from an estate should submit to the probate court sufficient evidence to allow it to make a determination concerning compensation. [See Standard 3.2.1 for a discussion of the distinction between these two types of estate administration.]

Fee disputes can be particularly acrimonious and can involve litigation costs eventually borne by the estate or the parties far in excess of the amount in controversy. Probate courts should identify, encourage and provide opportunities for early settlement or disposition of these disputes through settlement conferences and alternative dispute resolution procedures.

STANDARD 3.1.5 ACCOUNTINGS

A. As required, probate courts should direct fiduciaries to provide detailed accountings that are complete, accurate and understandable.
B. Probate courts should have the ability to review fiduciary accountings as required.

COMMENTARY

Unless specified by statute, the format for accountings should be established by statute, the probate court or the state Administrative Office of the Courts. An accounting should include all assets, the distribution of those assets, the payments of debts and taxes, and all transactions by the fiduciary during the administration of the estate. Categorical reporting of expenditures should not be permitted in order to lessen opportunities for theft or fraud. Receipts for all expenditures and documentation of all revenue should be provided upon request. While requiring detailed information, the schedules and text of the accountings (including the formats used) should be readily accessible and understandable to all interested persons, particularly those persons with limited experience with and knowledge of estates and trusts. Although the court reviews many accountings, others are prepared for beneficiary use and review in unsupervised estates and trusts. Several jurisdictions have developed forms for fiduciaries to use in providing accountings including DC, FL, ID, OH, and PA.[86]

Unless waived, the fiduciary should distribute copies of status reports and accountings to all persons interested in the estate. The accounting entity, not the probate court, should have the responsibility for distributing the accountings to interested persons, and should incur the cost as an expense of administration. Probate court staff should review accountings individually or through an automated review process if the accounting is submitted electronically. [See Standard 3.3.17]

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[85] *See* McGovern, *supra*, note 78, at 626-27.

[86] See *e.g.*, D.C. Courts, *Search Court Forms*, http://www.dccourts.gov/internet/formlocator.jsf (Jun. 25, 2012); Fla. Courts, *E-Filling Forms*, http://www.17th.flcourts.org/index.php/component/content/article/34-17th-fl-courts/166-e-filling-forms (Jun. 25, 2012); The Philadelphia. Courts, Forms Center, http://www.courts.phila.gov/forms (Jun. 25, 2012). *See also* Standard 3.3.16.

If all interested persons agree, the court may waive a review of accountings. Many estates have expenditures that are relatively straightforward, and court review of the accountings may unnecessarily deplete the estate's resources. A waiver of an accounting should be executed by all potential distributees and beneficiaries or their representatives.

STANDARD 3.1.6 SEALING COURT RECORDS

Probate courts should not order probate records, or any parts thereof, to be sealed without a full explanation of the reasons for doing so.

COMMENTARY

Public access to governmental records has been increasingly required as a matter of policy to promote transparency and accountability.[87] The general trend in the courts has been to allow public access to court records except under specifically delineated circumstances, and, accordingly, to restrict the sealing of court records.[88]

Probate courts should not seal a record without providing a reason for their action, unless the records associated with these proceedings are sealed routinely pursuant to statute or court rule.[89] For example, confidentiality and restricted access to records may ordinarily attach to adoption records, records associated with guardianship or conservatorship proceedings, and other records containing sensitive information. Except for these routine sealings, when the court seals the record in a given case without providing in its order a reason for the ruling, public confidence in and access to the court may be impaired. When a probate court concludes that sealing a record is appropriate, it should consider whether to limit the length of time that access to the record is restricted, where this is permitted by state law.

STANDARD 3.1.7 SETTLEMENT AGREEMENTS

When required, probate courts should carefully review settlement agreements before authorizing a personal representative or conservator to bind the estate.

In some jurisdictions, state law or practice requires a personal representative or conservator to obtain court authority to enter into an agreement to settle a lawsuit or claim. For example, probate courts may be called upon to allocate the proceeds of the settlement between pre-death pain and suffering and wrongful death. In reviewing such settlements, probate courts should be alert to potential conflicts of interest, premature settlements, improper attorneys' fee arrangements, or inappropriate allocation of the award between injured parties.[90] All interested parties should be provided notice and represented in the settlement discussions. The allocation of the settlement proceeds should be closely reviewed, and, if necessary, the court should appoint a guardian *ad litem* to represent minors or incapacitated parties.[91] [See Standard 3.1.3]

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[87] Steketee & Carlson, *supra*, note 57.

[88] *See, e.g.,* In re Estate of Hearst, 67 Cal.App. 3d 777, 782-83 (1977).

[89] *See e.g.,* NBC Subsidiary v. Superior Court, 20 Cal. 4th 1178, 980 P.2d 337, 86 Cal. Rptr. 2d 778 (1999) that holds that before a trial court seals a record it must hold a hearing and find expressly that there exists "an overriding interest supporting . . .sealing; . . .a substantial probability that the interest will be prejudiced absent closure or sealing; . . . [that] the proposed . . . sealing is narrowly tailored to serve the overriding interest; and . . . [that] there is no less restrictive means of achieving the overriding interest."

[90] *See* C. Jean Stewart, *Court Approval of the Settlement of Claims of Persons Under Disability,* 35 Colorado Lawyer no. 8, 97 (Aug. 2006).

[91] Unif. Prob. Code §1-403 (2008).

3.2 DECEDENT'S ESTATES

The standards in this category attempt to facilitate the ability of probate courts to process decedent's estates using simple, inexpensive methods. Much property already transfers without court supervision by mechanisms such as joint tenancy and funded living trusts. Without simplifying and reducing the expense of estate administration, the current trend to avoid probate to transfer property at death will accelerate. These standards generally apply equally whether the decedent died testate or intestate, although special recommendations for an intestate decedent are included.

STANDARD 3.2.1 UNSUPERVISED ADMINISTRATION

Absent a need for probate court supervision, the interested persons should be free to administer an estate without court intervention.

COMMENTARY

State law varies with respect to the requirements for continued court supervision of estate administration after a fiduciary has been appointed. For example, some states do not permit independent administration of an estate if the will prohibits it,[92] or if "it would not be in the best interest of the estate to do so."[93] Other states allow it if the will so directs, or if the distributees agree and the court, in its discretion, allows it.[94] The Uniform Probate Code permits both informal administration of estates and succession without administration.[95] Unless mandated by state law or the court finds there is good cause (*e.g.*, a significant conflict within the family or a delayed opening of the estate), probate courts should not require supervised estate administration. Even if the will calls for supervision of estate administration, probate courts should waive this provision if "circumstances bearing on the need for supervised administration have changed since the execution of the will."[96]

Unsupervised or independent administration means different things in different states. In some states an unsupervised estate may be finally distributed without any probate court review of an accounting,[97] whereas in other states, court review of the accounts is required even in an independent administration.[98] This standard adopts the general view that court approval of every step in estate administration is not cost-effective and should be abandoned.

Whenever administration of an estate is unsupervised, all interested persons should be advised that the probate court is available to hear and resolve complaints about the administration. Court intervention should be available at the request of any interested person, including the fiduciary. Probate courts, on their own motion, may intervene when the circumstances warrant. The need for probate court determination of a particular issue, however, does not require court supervision of the rest of the administration.

This standard differs from Standard 3.3.17, which calls for the court monitoring of conservatorships. Conservatorships involve persons who are unable to protect their own interests, whereas the beneficiaries of estates are often competent adults, or are represented by competent adults, and thus are able to assert their own interests.

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[92] *See, e.g.,* CAL. PROB. CODE § 10404 (West 1991).

[93] TEX. PROB. CODE ANN. § 145 (Vernon 1995). *See also* CAL. PROB. CODE § 10452 (West 1991) (no independent administration where objector shows good cause).

[94] *See, e.g.,* TEX. PROB. CODE ANN. § 145 (Vernon 1995).

[95] UNIF. PROB. CODE §§301-322 (2008).

[96] UNIF. PROB. CODE § 3-502 (amended 2008).

[97] *See, e.g.,* UNIF. PROB. CODE § 3-704 (2008).

[98] *See, e.g.,* CAL. PROB. CODE § 10501 (West 1992).

STANDARD 3.2.2 DETERMINATION OF HEIRSHIP

Probate courts should determine heirship only after proper notice has been given to all potential heirs and reliable evidence has been presented.

COMMENTARY

Although probate courts are most frequently called upon to determine heirship when the decedent died intestate, the issue can arise when there is a will as well. Probate courts should require the personal representative or applicant to provide personal notice to all heirs, including purported heirs and/or persons who may claim or hold a right of inheritance, whose addresses can be found after a good faith effort which may include electronic searches..[99] [See Standard 3.1.1] Notice by publication may be required for unlocated and unascertained beneficiaries as well as the appointment of a guardian *ad litem* to represent them. In determining heirship in an intestate estate, probate courts should require reliable evidence, including testimony by persons who do not inherit and documentary evidence, because the testimony of interested persons may be suspect.

STANDARD 3.2.3 TIMELY ADMINISTRATION

All estates should be administered in a timely fashion and closed at the earliest possible opportunity.

COMMENTARY

The *Model Time Standards for State Trial Courts* recommend that administration of 75 percent of all estates should be completed within 360 days, 90 percent within 540 days, and 98 percent within 720 days.[100] Twelve jurisdictions have time standards governing administration of estates, though they vary considerably.[101] In order to facilitate the timely administration of estates, probate courts should establish rules setting forth a schedule as to when certain filings and actions associated with supervised estates should occur. This schedule may set different time frames based on the size and complexity of an estate or whether or not the matter is contested. Probate courts should ensure that the filings are completed on a timely basis or require those responsible for the filings to show cause for their failure to be so filed. The court may consider providing 30 calendar days advance notice of all filing deadlines to encourage prompt filings. Failure without cause to comply with the filing rules should result in sanction, removal, or denial of fees.[102]

Although no set formula exists to determine when an estate should be closed, probate courts should establish a system to monitor the progress of estates in probate. In supervised estates, probate courts should require brief periodic reports on the progress that the personal representative has made, and should take action when there has been little or no progress. Once the final report is filed, probate courts should review it promptly and move to close the estate as soon as possible.

The court should be aware of tax responsibilities that may require the continued existence of an estate. For example, the forms for filing the decedent's final income tax return will not be available to the personal representative until early in the calendar year following death. A federal estate tax return is not due until nine months after the date of death, and another year may pass before the return is approved or even selected for audit. Nevertheless, the personal representative may still make interim partial distributions to facilitate the processing of the estate.

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[99] *See* UNIF. PROB. CODE §3-705 (2008).

[100] VAN DUIZEND, STEELMAN & SUSKIN, *supra*, note 23, at 31 (NCSC, 2011).

[101] *Id.*, at 31.

[102] *See, e.g.,* CAL. PROB. CODE §§ 12200-12205 (West 1991).

Unsupervised administration of an estate generally permits closing without a formal accounting to the probate court, but, a probate court should ensure that even unsupervised estates are closed in a timely manner in accordance with state law (*e.g.*, by the filing of an affidavit or a release and discharge).[103]

STANDARD 3.2.4 SMALL ESTATES

Probate courts should encourage the simplified administration of small estates.

COMMENTARY

Many states have provisions for the expedited processing of "small estates."[104] Generally, one of two approaches are used – either a summary administrative procedure in which court approval is require before the personal representative can gather and distribute assets, or an affidavit procedure through which an appropriate person can use an affidavit to directly collect and distribute the decedent's property. States are almost evenly divided on which approach they use.[105]

These approaches seek to eliminate or minimize the need for full probate proceedings when the size of the estate and type of assets fit within statutory guidelines. It is important that processes be available for persons expeditiously to collect the assets of small estates and to enable them to represent themselves. Such summary procedures may also include distributions of family allowances and exempt property to surviving spouses or unmarried minors, distribution to creditors, and distribution to heirs or devisees of decedent by affidavit. Sometimes cases are opened where, upon further examination of the matter before the court, a small estate proceeding might have been more appropriate for the disposition of the matter (*e.g.*, by the filing of an affidavit to close out the estate or by using a summary proceeding). In these cases, such alternative proceedings should remain available and be considered in lieu of more formal proceedings.

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[103] *See, e.g.,* NY. Surr. Ct. Proc. Act § 2203 (McKinney 1997); Unif. Prob. Code § 3-1003 (2008).

[104] The definition of a small estate is generally established as a matter of state law. *See, e.g.,* Cal. Prob. Code §13100 (West 1996) (estates may undergo summary administration where the gross value of the decedents' real and personal property in California, subject to certain statutory exceptions, does not exceed $150,000); Colo. Rev. Stat. § 15-12-1201 (2011) (no more than $60,000); Mich. Comp. Laws Ann. 700.3982 (West 2000) (Michigan has a small estate statute that deals with estates of $15,000 or less and also applies to estates where the size of the estate is not more than the sum equal to the statutory exemptions and allowances for a surviving spouse and minor children, if any).

[105] "A total of 27 states have an Affidavit Procedure allowing a person to directly deliver an affidavit to the holder of the property to collect that property, without a court order. These 27 states can be further divided, as follows: (1) Eight of these states ... allow a person to collect those assets and never come to court, i.e., they do not need to file for a summary proceeding to close the estate (IL, CA, LA, MS, SD., WA, WI, DE) (note, however, that California still requires a "probate referee" to perform an inventory and appraisal of assets); (2) The other 19 affidavit states allow collection by affidavit but still require summary court procedure to close the estate. This means that a person could create his own affidavit and collect property without court approval and later close the estate in court. (AK, AZ, CO, GA, HI, ID, KS, KY, ME, MN, MT, NE, NV, ND., NY., N.M., PA, UT, VA). . . . The other 23 states and the District of Columbia require a person to go to court for Summary Administration before receiving the assets in question . . . .[AL, AR, CT, FL, IN, IA, MA, MD, MI, MO, NH., NJ., NC., OH, OK, OR, RI., SC., TN, TX, VT, WV, WY & DC]." Small Estate Procedures in 50 States & Recommended Missouri Revisions, paper prepared by Joseph N. Blumberg, University of Missouri College of Law (2012).

3.3 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR ADULTS

The standards in this chapter address guardianships and conservatorships of incapacitated adults. They are intended to serve as a basis for review and amendment, where necessary, of state law and rules. Although the terminology varies considerably across the country, this report will use the definitions of **conservator** and **guardian** found in the Uniform Probate Code:

A **conservator** means a person appointed by a probate court to manage the estate of the respondent on a temporary and permanent basis.[106]

A **guardian** is a court-appointed person responsible for the care, custody, and control of the respondent on a temporary and permanent basis.

A **respondent** is the subject of a guardianship/conservatorship proceeding.[107]

The inclusion of guardianship and conservatorship into a single section is not meant to imply that guardianships and conservatorships should be filed together. Many times a joint petition seeking both a guardianship and a conservatorship and combining both matters into a single proceeding can bring about an effective and efficient result. Indeed, it may not be necessary to file separate petitions for the two. Furthermore, it may be more efficient and effective to appoint the same person to serve as both guardian and conservator. Regardless, guardianship and conservatorship are separate matters that must be considered individually.[108]

The standards in this category recognize the important liberty interests at stake in a guardianship/conservatorship proceeding and the due process protections appropriately afforded a respondent in conjunction with such a proceeding. These standards also recognize, however, that the great majority of these cases are not contested and that they are initiated by people of goodwill who are in good faith seeking to assist and protect the respondent. Indeed, the initiating petition may have been filed at the behest of or even by the respondent. Furthermore, in the great majority of guardianship/conservatorship proceedings, the outcome serves the best interests of the respondent and an appointed guardian/conservator acts in the respondent's best interests.[109] Nevertheless, the procedural protections described here and generally in place in the various states are needed to protect the significant liberty interests at stake in these proceedings, and attempt to minimize, to the greatest extent possible, the potential for error and to maximize the completeness and accuracy of the information provided to probate courts.

Because it is the respondent's property rather than the respondent's personal liberty that is the subject of a conservatorship proceeding, the importance of this proceeding to the respondent is sometimes overlooked. Nevertheless, because diminished access to his or her property may dramatically affect the way in which the respondent lives, a conservatorship proceeding may have critical implications for the respondent. The standards in this category are intended to ensure that the respondent's interests receive appropriate protection from probate courts while responding appropriately to the needs of the parties appearing before the court.

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[106] Unif. Prob. Code § 5-102(1) (2008). UGPPA §102(2) (1997).

[107] The term respondent is used rather than ward or interdict, protected person, etc., because it is not indicative of the final outcome of the proceeding.

[108] For example, §409(d) of the Uniform Guardianship and Protective Proceedings Act (UGPPA) (1997) specifies that appointment of a conservator "is not a determination of incapacity of the protected person." [*emphasis added*]

[109] *But see*, Winsor C. Schmidt, *Medicalization of Aging: The Upside and the Downside*, 13(1) Marquette Elder's Advisor 55, 75-77 (Fall 2011).

STANDARD 3.3.1 PETITION

A. Probate courts should adopt a clear, easy to complete petition form written in plain language for initiating guardianship/conservatorship proceedings.

B. The petition form together with instructions, an explanation of guardianship and conservatorship, and the process for obtaining one should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

(1) The name, age, address, and nationality of the respondent.

(2) The address of the respondent's spouse, children, parents, siblings, or other close kin, if any, or an adult with whom the respondent has resided for at least the six months prior to the filing of the petition.

(3) The name and address of any person responsible for the care or custody of the respondent.

(4) The name and address of any legal representative of or representative payee for the respondent.

(5) The name and address of the person(s) designated under any powers of attorney or health care directives executed by the respondent.

(6) The name, address, and interest of the petitioner.

(7) The reasons why a guardianship and/or conservatorship is being sought.

(8) A description of the nature and extent of the limitations in the respondent's ability to care for herself/himself or to manage her or his financial affairs.

(9) Representations that less intrusive alternatives to guardianship or conservatorship have been examined.

(10) The guardianship/conservatorship powers being requested and the limits and duration of those powers.

(11) In conservatorship cases, the nature and estimated value of assets, the real and personal property included in the estate, and the estimated annual income.

D. The petition should be accompanied by a written statement from a physician or licensed mental health services provider regarding the respondent's physical, mental, and/or emotional conditions that limit the respondent's ability to care for herself/himself or to manage her or his financial affairs.

E. The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship/conservatorship proceeding is complete.

COMMENTARY

The standard lists the minimum information that probate courts and all parties to a guardianship or conservatorship proceeding need in order to proceed. It attempts to strike a balance between making guardianship/conservator proceedings available to a person concerned about the well-being of another, and protecting against frivolous or harassing filings. On the one hand it urges courts to use forms that minimize "legalese" and are as easy to complete as possible. On the other, it requires that petitioners verify the statements made and include a written statement from an appropriate medical or mental health professional regarding the conditions that are affecting the respondent's capacity to care for herself/himself or manage her/his financial affairs.[110] The standard calls for specifying the respondent's nationality because of the provision in the Vienna Convention on Consular Relations that requires notification of the local consulate whenever a guardian may be appointed for a foreign national.[111]

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[110] *See, e.g.*, Probate Court of Tarrant County, TX, *Physician's Certificate of Medical Exam,* http://www.tarrantcounty.com/eprobatecourts/lib/eprobatecourts/PhysiciansCertificateofMedicalExam.pdf (July 6, 2012); Jennifer Moye *et al., A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship,* 47 GERONTOLOGIST 591 (2007); *but see* Jennifer Moye, *Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study,* 47 GERONTOLOGIST 604, 608, 610 (2007).

[111] Vienna Convention on Consular Relations, Art. 37 21 U.S.T. 77 (1963) http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf

While the standard sets forth the minimum information that should be required, good practice suggests that the following information will often be needed and should be included as part of the petition itself or as attachments to it, including:

- Whether other related proceedings are pending in this or other jurisdictions.
- Specific examples of behavior that demonstrate the need for the appointment of a guardian or conservator.
- Known nominations by the respondent of persons to be appointed if a guardian/conservator is needed.
- The proposed guardian's/conservator's qualifications.
- The relationship between the proposed guardian/ conservator and the respondent. known and potential conflicts of interest.
- The name, address, and relationship of those persons required to be given notice and those persons closely related to the respondent.[112]

A petition for conservatorship should also include information on the respondent's assets, property, and income.

Probate courts should develop and distribute forms that will assist the petitioner to meet these requirements. Whenever possible, petitions, instructions, and explanations of guardianship, conservatorship, and the process for seeking them should be available on the court website as well as at libraries, and providers of services to disabled persons and elderly persons. Probate courts should be able to provide sources of free or low-cost legal services, such as bar referral services, legal aid offices, and law school clinics. To the extent possible, petitioners should be able to complete and submit petitions electronically. Informational brochures should be available on the court website and distributed to all persons upon request or to those who file guardianship/conservatorship petitions.

When a petitioner seeks a guardianship or conservatorship for two or more respondents, separate petitions should be filed for each respondent.

Promising Practices

Several court systems and individual courts provide information regarding guardianship/conservatorship proceedings on their websites including the forms necessary to initiate a conservatorship or guardianship. For example:

California Judicial Branch http://www.courts.ca.gov/forms.htm?filter=GC
Colorado State Judicial Branch http://www.courts.state.co.us/Forms/Index.cfm
The Georgia Council of Probate Judges http://www.gaprobate.org/
District of Columbia Superior Court http://www.dccourts.gov/internet/formlocator.jsf
Maricopa County, AZ Superior Court
http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/ProbateCases/prob_group_1.asp
Philadelphia County, PA Court of Common Pleas http://www.courts.phila.gov/forms/
Tarrant County, TX http://www.tarrantcounty.com/eprobatecourts/cwp/view.asp?A=766&Q=430951

[112] See UGPPA § 304 (1997).

STANDARD 3.3.2 INITIAL SCREENING

Probate courts should encourage the appropriate use of less intrusive alternatives to formal guardianship and conservatorship proceedings.

COMMENTARY

Guardianship/conservatorship is often used to address problems that could be solved by less intrusive means. Concerned individuals may seek guardianships to provide respondents with a wide variety of needed services. However, a screening process may identify and can encourage other ways to address the respondent's needs that are less intrusive, expensive, and burdensome.

- Possible alternatives to a full **guardianship** include, but are not limited to: advance health care directives including living wills; voluntary or limited guardianships; health care consent statutes; instructional health care powers of attorney; designation of a representative payee; and intervention techniques including adult protective services, respite support services, counseling, and mediation.
- Possible alternatives to a full **conservatorship** include, but are not limited to: establishment of trusts; voluntary or limited conservatorships; representative payees; revocable living trusts; durable powers of attorney; and custodial trust arrangements.

In addition to protecting the interests of the respondent, such alternative arrangements avoid court action, delay, and expense. Additionally, petitioners may be able to use social service agencies and volunteer organizations to help persons requiring assistance, or the court may ratify individual transactions rather than impose a conservatorship.

Probate courts should consider establishing a procedure for screening potential guardianship/conservatorship cases if consistent with state law and court rules. Screening may occur at various points, but at least some initial screening should occur as early as possible in the process. The screening procedure may be no more complex than instructing the court official who routinely receives petitions to initiate a guardianship/conservatorship to discuss possible alternatives with the petitioner. Where resources permit, a more formal, separate screening unit may be appropriate. In either instance, the probate court should provide training for those members of its staff who initially review petitions for guardianships and conservatorships so that they can properly screen and divert inappropriate petitions, when consistent with state law and court rule.

By providing an early screening of petitions, probate courts can minimize the expense, inconvenience, and possible indignity incurred by respondents for whom a guardianship/conservatorship is inappropriate, or for whom less intrusive alternatives exist, and conserve court resources. In addition, in most jurisdictions many petitions for a guardianship or conservatorship are filed by persons who are not represented by attorneys and who will need instruction regarding the responsibilities of a guardian or conservator, when a guardianship/conservatorship is appropriate and assistance in meeting the initial requirements for filing a petition. Such screening may be provided in several ways: by probate court staff when appropriate, by use of volunteers, or by providing access to *pro bono* legal advice.

As part of this screening, the petition should initially be reviewed for compliance with filing requirements, the completeness of the information supplied, and consideration of less intrusive alternatives. Screening also should be used to identify available services in the community that may adequately assist and protect the respondent, divert inappropriate cases, and promote consideration of less intrusive legal alternatives.[113] In addition, screening should be used to determine

[113] In conducting this screening, non-lawyer court staff should remain mindful of the distinction between providing legal information and offering legal advice. *See* John M. Greacen, *Legal Information vs. Legal Advice—Developments During the Last Five Years*, 84 JUDICATURE 198 (January-February 2001), www.ajs.org/prose/pro_greacen.asp; IOWA JUDICIAL BRANCH CUSTOMER SERVICE ADVISORY COMMITTEE, GUIDELINES AND INSTRUCTIONS FOR CLERKS WHO ASSIST *PRO SE* LITIGANTS IN IOWA'S COURTS (2000); *but see*. Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999) – the practice of law includes selection and completion of forms

whether undue influence was used to gain the respondent's participation in the process.[114] In establishing the screening process and criteria, care should be taken to ensure that they do not result in an insurmountable barrier-to-entry that leaves vulnerable persons unprotected.

Preferably this initial screening will be renewed after the court visitor has had an opportunity to make an investigation and report. [See Standard 3.3.4, Court Visitor]

Promising Practices

In **Colorado**, a *pro se* facilitator interviews unrepresented persons seeking to file a guardianship or conservatorship petition to help them understand the process and ascertain whether other services or resources may suffice.

The Probate Division of the **District of Columbia** Superior Court houses a Public Resources Center staffed by volunteer attorneys who offer information and brief legal services to unrepresented parties or potential parties. http://www.dccourts.gov/internet/documents/Public_Resources_for_Probate.pdf

In at least one **Pennsylvania county**, all petitions are first reviewed by guardianship staff who make a report and recommendation to the court. The petition is then reviewed by the judge's law clerk.

In **South Dakota**, *pro se* parties are interviewed prior to filing the petition.

STANDARD 3.3.3 EARLY CONTROL AND EXPEDITIOUS PROCESSING

The probate court should establish and adhere to procedures designed to:

A. Identify guardianship and conservatorship cases immediately upon their filing with the court.
B. Supervise and control the flow of guardianship and conservatorship cases on the docket from filing through final disposition.
C. When appropriate, make available pre-hearing procedures to narrow the issues and facilitate their prompt and fair resolution.

COMMENTARY

Unnecessary delay engenders injustice and hardship and may injure the reputation of the court in the community it serves. Probate courts should meet their responsibilities to everyone affected by its activities in a timely and expeditious manner.[115] [See Standards 2.2.1 – 2.2.3] Delay in court action may be devastating, for example, to a respondent who is experiencing considerable pain and suffering and needs authorization for a medical procedure. Once a guardianship or conservatorship case is presented, probate courts should be prepared to respond quickly by having procedures in place that allow for an expedited resolution of the case.

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[114] COSCA, *supra,* note 6, at 8.

[115] Van Duizend, Steelman & Suskin, *supra,* note 23, at 32 (NCSC, 2011); *See also* Court-Related Needs of the Elderly and Persons with Disabilities: A Blueprint for the Future (ABA 1991) http://www.americanbar.org/content/dam/aba/migrated/aging/docs/aug_1991.authcheckdam.pdf.

Guardianship/conservatorship proceedings should receive special treatment and priority as part of the court's docket, ensuring that a prompt hearing is provided where appropriate. Probate courts, not the attorneys, should control the case from the filing of the petition to final disposition.[116] Probate courts should always ensure that necessary parties are given an opportunity to be heard and that their decisions are based on careful consideration of all matters before them.

Expeditious processing must be balanced with the need for a thorough investigation and consideration of the issues. Procedures should result in the identification of petitions that need more or less attention.[117] Differentiated case management, in which some cases receive additional investigation based on information in the petition, should be considered. As part of their pre-hearing procedures, probate courts should consider establishing investigatory services to facilitate expeditious, efficient, and effective performance of their adjudicative, supervisory, and administrative duties in guardianship/conservatorship cases. Where such services are unavailable, probate courts should attempt to obtain such services by contract, recruitment, and training of volunteers, or similar options. [See Standards 3.3.4 and 3.3.17] The results of these services should be presented promptly to the court and made available to all parties. In particularly difficult or contentious cases, probate courts may schedule a hearing or status conference in advance of the hearing on the petition to resolve issues disclosed during the investigation.

Promising Practices

The Probate and Mental Health Department of the **Maricopa County, AZ** Superior Court has established a comprehensive caseflow management protocol. At the time when guardianship and conservatorship cases are filed, Court staff triage and establish separate tracks for high-conflict cases involving large dollar estates, multiple issues in controversy and those that may be susceptible to protracted litigation. Additional judicial and support resources are directed to these matters to ensure fair and timely consideration and disposition. The Court has established Probate Alternative Dispute Resolution, conducting early settlement conferences to resolve disagreements and abbreviate litigation. The Court also may set a telephonic comprehensive pre-hearing conference ("CPTC") to identify issues that have been settled, issues that still need to be resolved and a trial date.[118]

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[116] Steelman, Goerdt, & McMillan, *supra* note 31, at 55.

[117] Principles 8 and 9 of the *Principles for Judicial Administration* provide that while "Judicial officers should give individual attention to each case that comes before them[,] the attention judicial officers give to each case should be appropriate to the needs of that case." NCSC, Principles for Judicial Administration: The Lens of Change 153 (NCSC, Jan., 2011).

[118] Steelman & Davis, NCSC, *supra*, note 4, at 17-18.

STANDARD 3.3.4 COURT VISITOR

A. Probate courts should require a court appointee to visit with the respondent upon the filing of a petition to initiate a guardianship/conservatorship proceeding to:
(1) Explain the rights of the respondent and the procedures and potential consequences of a guardianship/conservatorship proceeding.
(2) Investigate the facts of the petition.
(3) Determine whether there may be a need for appointment of counsel for the respondent and additional court appointments.
B. The visitor should file a written report with the court promptly after the visit.

COMMENTARY

Persons placed under a guardianship or conservatorship may incur a significant reduction in their personal activities and liberties. When a guardianship/conservatorship is proposed, probate courts should ensure that respondents are provided with information on the procedures that will follow. Respondents also need to be informed of the possible consequences of the probate court's action.

Probate courts should appoint a person to provide the respondent with this information when counsel has not been retained or appointed to represent the respondent. Several different designations have been used to identify this appointee, including court visitor,[119] court investigator,[120] court evaluator,[121] and guardian *ad litem*[122] (collectively referred to as a court visitor in these standards).

The visitor's role is generally addressed by this standard, although their duties will also be typically established by statute.[123] In general, their role stands in contrast to that of court-appointed counsel [see Standard 3.3.5], although in some states, counsel (or guardian *ad litem*) may be assigned some of the duties delineated here. A court visitor may be better equipped to address the psychological, social, medical, and financial problems raised in guardianship and conservatorship proceedings than court-appointed counsel. Although a visitor may be a lawyer by training, it is not necessary that the visitor be a lawyer. Indeed, in many instances, other professional training such as medicine, psychology, nursing, social work, or counseling may be more appropriate. Regardless of their professional background, court visitors should have the requisite language and communication skills to adequately provide necessary information to the respondent.

Court visitors serve as the eyes and ears of probate courts, making an independent assessment of the need for a guardianship/conservatorship. Under the standard, they have additional specific responsibilities. The first is to inform the respondent about the proceedings being conducted in the manner in which the respondent is most likely to understand. Even though the respondent may not fully understand the proceedings because of a lack of capacity, this information

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[119] *See* UNIF. PROB. CODE § 5-305 (2008) cmt. ("The visitor can be a physician, psychologist, or other individual qualified to evaluate the alleged impairment, such as a nurse, social worker, or individual with pertinent expertise.").

[120] *See, e.g.,* CAL. PROB. CODE §§ 1454, 1513.

[121] *See, e.g.,* NY MENTAL HYG. LAW § 81.09 (McKinney through 2011 legislation).

[122] *See, e.g.,* MISS. CODE ANN. § 93-15-107 (West).

[123] *See, e.g.,* NY MENTAL HYG. LAW & UNIF. PROB. CODE § 5-305 (2008). In some jurisdictions, the assigned duties of a guardian *ad litem* (GAL) may be slightly different from those of a court visitor or court investigator. They may be given the additional responsibility of representing or speaking on behalf of the respondent during a guardianship proceeding. This role may overlap with that of court-appointed counsel. More typically, however, the GAL's duties are limited to those described here and, as a result, the designation court visitor is used here to subsume that of GAL.

should still be provided. When talking with a respondent, a visitor should also seek to ascertain the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the guardianship/conservatorship; inform the respondent of the right to consult with an attorney at the respondent's expense or request court-appointed counsel; advise the respondent of the likely costs and expenses of the proceeding and that they will be paid from the respondent's resources;[124] as well as determining whether the respondent desires and is able to attend the hearing. Visitors should also interview the petitioner and the proposed guardian/conservator; visit the current or proposed residence/placement of the respondent; and consult, where appropriate, with professionals who have treated, advised, or prepared an evaluation of the respondent.

The visitor's report should state the respondent's views; provide an assessment of the capacity of the respondent; evaluate the fitness of the proposed guardian/conservator; contain recommendations regarding (a) whether counsel should be appointed to represent the respondent if one has not already been retained or appointed, (b) the appropriateness of a guardianship/conservatorship, including whether less intrusive alternatives are available; and (c) the need for the specific powers requested in the petition.[125] The report should be provided promptly to the petitioner and the respondent so that they can review its contents in advance of the hearing.

The court visitor may be a part of the initial screening process or independent of it. [See Standard 3.3.2] The expenses incurred by probate courts visitors should be charged to the respondent's estate where such funds are available.

Jurisdictions have adopted various approaches to performing the visitor function. Some states utilize court staff to conduct the visits (*e.g.*, Maricopa County, AZ, CA, OH, TX). Others appoint professionals in the community (*e.g.*, CO, ID, SD). Individual jurisdictions rely on community volunteers (*e.g.*, Rockingham County, NH). At least two states, (FL, KY), appoint a multi-disciplinary team to assess the respondent and perform other visitor functions.[126] Regardless of the source, visitors should be required to adhere to strict standards of confidentiality.

Promising Practices

In **Maricopa County, AZ, Los Angeles County, CA, and Harris County, TX**, court investigators are responsible for visiting respondents and reporting to the court on their findings.

STANDARD 3.3.5 APPOINTMENT OF COUNSEL

A. Probate courts should appoint a lawyer to represent the respondent in a guardianship/conservatorship proceeding if:
   (1) Requested by the respondent; or
   (2) Recommended by the visitor; or
   (3) The court determines that the respondent needs representation; or
   (4) Otherwise required by law.

B. The role of counsel should be that of an advocate for the respondent.

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[124] UGGPA, §305(c).

[125] *See* CAL. PROB. CODE §1513; THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra*, note 6, at Recommendation 2.2, 2012 UTAH L. REV., at 1200.

[126] FL. STAT. ANN. §744.331(3) (2011); KY. REV. STAT. §387.540 (2011).

COMMENTARY

This standard follows the first alternative offered by the Uniform Guardianship and Protective Proceedings Act.[127] Respondents in guardianship and conservatorship proceedings are often vulnerable. They may have an incomplete or inadequate understanding of proceedings that may have a significant effect upon their lives and fundamental. The assistance of counsel provides a valuable safeguard of their rights and interests. Although there may be occasions when respondents can speak on their own behalf or where family and friends of respondents can be relied upon to fill this role, counsel is typically better equipped to provide this function.[128] Over 25 states require appointment of an attorney. When there are sufficient assets in the respondent's estate, the cost of appointed counsel may be charged to the estate. When the respondent is unable to the cost of an attorney, the appointment should be at state expense.[129]

Respondents should have the right to secure their own counsel in these proceedings. Because of a respondent's prior experience with a given attorney, the respondent may prefer to obtain the attorney's continued services in these proceedings. In such cases, it is unnecessary for the court to appoint additional counsel to represent the respondent. Respondents may also seek to waive their right to counsel, but this raises the question of whether an allegedly incompetent individual has the capacity or should be allowed to exercise this waiver. Such waivers should not be impermissible *per se*, but probate courts should have independent information confirming the competency of the respondent to make such a waiver (*e.g.*, a report from the court visitor). A visitor may also notify the court, when appropriate, that there is a need for court-appointed counsel. [See Standard 3.3.4]

In general, the role of counsel should be that of an advocate for the respondent.[130] In cases where the respondent is unable to assist counsel (*e.g.*, where the respondent is comatose or otherwise unable to communicate or indicate her/his preferences), counsel should consider the respondent's prior directions, expressed desires, and opinions, or, if unknown, consider the respondent's prior general statements, actions, values and preferences to the extent ascertainable.[131] Where the position of the respondent is not known or ascertainable, counsel should request the probate court to consider appointment of a guardian *ad litem* to represent the respondent's best interest.

Appointment of counsel will incur additional expense, but because of the valuable services provided, it is typically a necessary expense.[132] If the petition was not brought in good faith, these fees may be charged to the petitioner.[133] Good faith should be determined based on the circumstances prevailing at the time the petition was filed.

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[127] UGPPA §305, Alt. 1 (1997). (UGGPA Alternative 2 provides that the court shall appoint a lawyer unless the respondent is represented by counsel.)

[128] Wingspan – The Second National Guardianship Conference, *Wingspan – The Second National Guardianship Conference, Recommendations*, 31 STETSON LAW REVIEW 595, 601 (2002); *see also* UGPPA §305(b), Alt. 2 (1997); Application of Rodriquez, 169 Misc. 2d 929, 607 N.Y.S.2d 567 (Sup. Ct. 1992).

[129] TEASTER, SCHMIDT, WOOD, LAWRENCE, & MENDIONDO, *supra*, note 5, at 20.

[130] *Id., See e.g.,* Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person,* 31 STETSON LAW REVIEW 686-734 (2002); Winsor C. Schmidt, *Accountability of Lawyers in Serving Vulnerable Elderly Clients,* 5 JOURNAL OF ELDER ABUSE AND NEGLECT 39-50 (1003).

[131] *Cf.* THIRD NATIONAL GUARDIANSHIP SUMMIT, *supra,* note 6, at Standard 5.3 (regarding responsibilities of guardians), 2012 UTAH L.REV., at 1196.

[132] COSCA, *supra,* note 6, at 9.

[133] *See, e.g.,* NY. MENTAL HYG. LAW § 81.10(f) ("If the petition is dismissed, the court may in its discretion direct that petitioner pay such compensation for the person alleged to be incapacitated.").

STANDARD 3.3.6 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR

A. When permitted, probate courts should only appoint a temporary guardian or conservator *ex parte*:
- **(1) Upon the showing of an emergency.**
- **(2) In connection with the filing of a petition for a permanent guardianship or conservatorship.**
- **(3) Where the petition is set for hearing on the proposed permanent guardianship or conservatorship on an expedited basis.**
- **(4) When notice of the temporary appointment is promptly provided to the respondent.**

B. The respondent should be entitled to an expeditious hearing upon a motion by the respondent seeking to revoke the temporary guardianship or conservatorship.

C. Where appropriate, probate court should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian or conservator.

D. The powers of a temporary guardian or conservator should be carefully limited and delineated in the order of appointment.

E. Appointments of temporary guardians or conservators should be of limited and finite duration.

COMMENTARY

Emergency petitions seeking a temporary guardianship/conservatorship require the court's immediate attention. Such appointments have the virtue of addressing an urgent need either to provide needed assistance to a respondent that cannot wait until the hearing on appointment of a permanent guardian/conservator or to supplant a previously appointed guardian or conservator who is no longer able to fulfill the duties of office. However, where abused, they have the potential to produce significant or irreparable harm to the interests of the respondent. When continued indefinitely, they bypass procedural protections to which the respondent would be otherwise entitled. Because probate courts must always protect the respondent's due process rights, emergencies, and the expedited procedures they may invoke, require probate courts to remain closely vigilant for any potential due process violation. In such cases, while providing for an immediate hearing, probate courts should also require immediate service of written notice on the respondent, appoint counsel for the respondent, and allow the respondent an appropriate opportunity to be heard.[134] Because other individuals including family, friends, and caregivers may also have an interest in the proceedings, probate courts, when appropriate, may require that they be served notice and allow them an opportunity to be heard as well.

Emergency appointment of a guardian/conservator should be the exception, not the rule. Before making an emergency appointment prior to a full guardianship/ conservatorship hearing, probate courts should require a showing of actual risk to the respondent of an immediate and substantial risk of death or serious physical injury, illness, or disease, or an immediate and substantial risk of irreparable waste or dissipation of property. Following appointment of a guardian or conservator, an emergency appointment may be required if the guardian or conservator dies, becomes incapacitated, resigns, or is removed.

By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship/ conservatorship, probate courts will confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely. When the temporary guardianship or conservatorship is established, the date for the hearing on the proposed permanent guardianship/conservatorship should be scheduled. The order establishing the temporary guardianship/conservatorship should limit the powers of the temporary guardian or conservatorship to only

[134] *See* UGGPA §312(a).

those required by the emergency at hand and provide that it will lapse automatically upon that hearing date. Full bonding of liquid assets should be required in temporary conservatorship cases. Temporary guardianships/ conservatorships should not extend for more than 30 days.[135]

Because the imposition of a temporary guardianship/conservatorship has the potential to infringe significantly upon the interests of the respondent with minimal due process protections, probate courts should also consider whether issuing a protective order might adequately meet the needs of the situation. [See Standard 3.3.2] For example, in a guardianship case the court might issue a protective order that allows for a surgical procedure, but that defers a decision on the appointment of a temporary or permanent guardian pending further proceedings. In a conservatorship case, the court might issue a protective order that allows for the payment of medical bills, but defers a decision on the appointment of a temporary or permanent conservator pending further proceedings. The use of a protective order may be particularly appropriate in the case of a respondent who has suffered a physical injury that leaves him or her unable to make decisions for a short period of time, but who is expected to soon regain full decision-making capacity.

In some jurisdictions, *ex parte* temporary guardianships have been used to bypass the normal procedural requirements for involuntary civil commitment to a psychiatric facility. Temporary guardians may have the authority under state law to "voluntarily" admit the respondent for psychiatric care even though the respondent objects to this admission. Alternatively, a temporary guardianship may be used to supplement adult or children's protective services, again bypassing usual procedural protections. A although a temporary guardian should not be prevented from making necessary health care and placement decisions, the court should ensure that the temporary guardianship is not used for improper purposes or to bypass the normal procedural protections.

When establishing the powers of the temporary guardian or conservator, the court should be cognizant of the fact that certain decisions by a temporary guardian or conservator may be irreversible or result in irreparable damage or harm (*e.g.*, the liquidation of the respondent's estate). Therefore, it may be appropriate for the court to limit the ability of the temporary guardian or conservator to make certain decisions without prior court approval (*e.g.*, sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, withdrawal of life-sustaining medical treatment, termination of parental rights).

While the appointment of a temporary guardian or conservator provides a useful mechanism for making needed decisions for a respondent during an emergency, it also can offer an option to a probate court that receives information that a currently appointed guardian or conservator is not effectively performing his or her duties and the welfare of the respondent requires that a substitute decision maker be immediately appointed. Under such circumstances, the authority of the permanent guardian or conservator can be suspended and a temporary guardian appointed for the respondent with the powers of the permanent guardian or conservator. The court should, however, ensure that this temporary guardianship/conservatorship also does not extend indefinitely by including a maximum duration for it in its order.

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[135] *Cf.* UGPPA § 313(a) (1997) (suggesting that a temporary guardianship should not exceed six months). *See* Grant v. Johnson, 757 F. Supp. 1127 (D. Or. 1991) (Oregon temporary guardianship provisions unconstitutional for lack of minimum due process protections). In addition, UGPPA §316 (d) imposes limits on the authority of a temporary guardian, such as a prohibition against initiating civil commitment proceedings.

STANDARD 3.3.7 NOTICE

A. The respondent should receive timely written notice of the guardianship or conservatorship proceedings before a scheduled hearing. Any written notice should be in plain language and in easily readable type. At the minimum, it should indicate the time and place of judicial hearings, the nature and possible consequences of the proceedings, and set forth the respondent's rights. A copy of the petition should be attached to the written notice.

B. Notice of guardianship and conservatorship proceedings also should be given to family members, individuals having care and custody of the respondent, agents under financial and health care powers of attorney, representative payees if known, and others entitled to notice regarding the proceedings. However, notice may be waived, as appropriate, when there are allegations of abuse.

C. Probate courts should implement a procedure whereby any interested person can file a request for notice.

COMMENTARY

Almost all states have a specific statutory notice requirement that the respondent in a guardianship/conservatorship proceeding receive notice within a stated number of days before a hearing (*e.g.*, 14 days).[136] This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship and conservatorship proceedings to the respondent and others entitled to notice.[137] The notice should be written and personally delivered. When the officers serving the notice are under court control, it may be appropriate to provide them with special training to facilitate interactions with persons who may have diminished capacity and/or have hearing, sight, or other physical disabilities that may impede communications. The notice and petition should be subsequently explained to the respondent by a court visitor. Care should be taken to ensure that the visitor has the requisite language and communication skills to adequately provide this explanation to the respondent. [See Standard 3.1.1]

If the respondent is unable to understand or receive notice, provision may be made for substitute or supplemental service. The respondent may still benefit, however, from receiving notice even though he or she may not fully understand it. The use of substitute or supplemental service should not relieve the court visitor or counsel of the responsibility to communicate to the respondent the nature of the proceedings in the manner most likely to be understood by the respondent.

Failure to serve requisite notice upon the respondent will ordinarily establish a right in the respondent for *de novo* consideration of the matter and independent grounds for setting aside a prior order establishing a guardianship or conservatorship.

In addition to providing notice to the respondent, notice should ordinarily also be given to the respondent's spouse, or if none, to the respondent's adult children, or if none, to the respondent's parents, or if none, to at least one of the respondent's nearest adult relatives if any can be found.[138] In guardianship cases, notice should also be given to any persons having responsibility for the management of the estate of the respondent, including any previously appointed conservator. In conservatorship cases, notice should also be given to any individuals having care and custody of the respondent, including any previously appointed guardian. It may also be appropriate to provide notice to an individual

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[136] American Bar Association Commission on Law and Aging/Sally Hurme, Table on Notice in Guardianship Proceedings (2011), www.americanbar.org/content/dam/aba/uncategorized/2012_aging_gship_chrt_notice_06_12.authcheckdam.pdf

[137] *See, e.g.,* NY Mental Hyg. Law § 81.07(d) (Consol. Supp. 1992); Unif. Prob. Code §§ 1-401, 5-304 (2008).

[138] *See e.g.,* NY Mental Hyg. Law § 81.07(e); Unif. Prob. Code §§ 1-401, 5-309 (2008).

nominated by the respondent to serve as his or her guardian, agents appointed by the respondent under a durable health care power of attorney, a close friend providing routine care to the respondent, and the administrator of a facility where the respondent currently resides. Whenever possible, notice should be provided to at least two persons in addition to the respondent or to adult protective services if there are not contact persons.

Probate courts should establish a procedure permitting interested persons who desire notification before an order is made in a guardianship/conservatorship proceeding to file a request for notice with the court.[139] This procedure allows persons interested in the establishment or monitoring of a guardianship or conservatorship to remain abreast of developments and to bring relevant information to the court's attention. The request for notice should contain a statement showing the interest of the person making the request. Intervention in the proceedings by an interested party, including the nomination of someone else as guardian or conservator, should be permitted. A fee may be attached to the filing of the request and a copy of the request should be provided to the respondent's guardian/conservator (if any). Unless the probate court makes a contrary finding, notice should be provided to any person who has properly filed this request.[140]

STANDARD 3.3.8 HEARING

A. Probate courts should promptly set a hearing for the earliest date possible.
B. Respondents should be present at the hearing and all other stages of the proceeding unless waived.
C. Probate courts should make reasonable accommodations to enable the respondent's attendance and participation at the hearing and all other stages of the proceeding.
D. A waiver of a respondent's right to be present should be accepted only upon a showing of good cause.
E. The hearing should be conducted in a manner that respects and preserves all of the respondent's rights.
F. Probate courts may require the court visitor who prepared a report regarding the respondent to attend the hearing.
G. Probate courts should require the proposed guardian or conservator to attend the hearing.
H. Probate courts should make a complete record of the hearing.

COMMENTARY

It is critical that probate courts promptly hear a petition for guardianship or conservatorship. After the filing of the petition, probate courts should promptly set a hearing date and ensure that the hearing is held expeditiously. This permits either a prompt dismissal of the petition where warranted or a timely decision ordering the establishment of a guardianship/conservatorship or the imposition of a less intrusive alternative. With a prompt dismissal, the respondent will not have to endure unnecessary emotional stress. With a prompt order establishing a guardianship/conservatorship or a less intrusive alternative, the respondent will receive needed supervision or services in a timely fashion.

A guardianship or conservatorship hearing can have significant consequences for the respondent, and the rights and privileges of the respondent should, accordingly, be respected and preserved. The respondent should be given time and opportunity to prepare for the hearing, with the assistance of counsel. The respondent's presence at the hearing and at all other stages of the proceeding should be waived only for good cause. The standard urges probate courts to make reasonable accommodations to enable the respondent's attendance and participation (*e.g.*, mobility accommodations,

[139] *See e.g.*, NY MENTAL HYG. LAW § 8 1.07(g)(ii); UNIF. PROB. CODE §§ 5-304(a), 5-309(b) (2008).
[140] *See e.g.*, UGPPA § 116 (1997); UNIF. PROB. CODE § 5-116 (2008).

hearing devices, medical appliances, setting the hearing at a time at which the respondent is generally the most alert, frequent breaks, telephonic or video conferencing).[141] This may necessitate the moving of the hearing to a location readily accessible to the respondent (*e.g.*, a hospital conference room).

The Standard, following the practice in most states, does not recommend that the person appointed to perform the responsibilities of a court visitor [see Standard 3.3.4] be present at the hearing in each case to provide testimony based on her or his report and respond to questions from the parties. The parties should advise the probate court if they wish the visitor to testify.

The proposed guardian or conservator should attend the hearing in order to become more fully acquainted with the respondent, the respondent's identified needs and wishes, and the intended purposes of the guardianship/conservatorship. The proposed guardian/conservator should also be available at the hearing to answer relevant questions posed by the respondent, other interested parties, or the court.

The hearing should ordinarily be open to the public unless the respondent or counsel for the respondent requests otherwise. In general, any person who so desires should be able to attend these proceedings. With the court's permission, any interested person should be able to participate in these proceedings provided that the best interests of the respondent will be served thereby.[142] A stenographic, audio, or video recording should be made of the hearing and maintained for a reasonable period of time.

The respondent's due process rights should be afforded full recognition in the course of the hearing. For example, a complete record will protect the respondent should an appeal be necessary. Similarly, the respondent should be able to obtain an independent evaluation prior to the hearing, present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor, and have the right to be represented by counsel.[143] [See Standard 3.3.5] In at least 24 states the respondent is entitled to or may request a jury trial.[144]

STANDARD 3.3.9 DETERMINATION OF INCAPACITY

A. The imposition of a guardianship or conservatorship by the probate court should be based on clear and convincing evidence of the incapacity of the respondent and that a guardianship or conservatorship is necessary to protect the respondent's well-being or property.

B. The court may require evidence from professionals or experts whose training and expertise may assist in the assessment of the physical and mental condition of the respondent.

COMMENTARY

The appointment of a guardian or conservator should be based on clear and convincing evidence. This is the standard of proof prescribed in at least three-quarters of the states.[145] Evidentiary rules and requirements are needed to ensure that due process is afforded and that competent evidence is used to determine incapacity. To obtain competent evidence, probate courts should allow evidence from professionals and experts whose training qualifies them to assess the physical and mental condition of the respondent.

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[141] *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. 1993); Civil Rights Act of 1991, 42 U.S.C. §§ 1981-2000 (Supp. 1993).

[142] *See* UGPPA § 308(b) (1997).

[143] *Id.*, at §§ 305 & 308.

[144] American Bar Association Commission on Law and Aging/Sally Hurme, Table on Conduct and Findings of Guardianship Proceedings, (2011) http://www.americanbar.org/content/dam/aba/uncategorized/2012_aging_gship_chrt_conduct_06_12.authcheckdam.pdf .

[145] American Bar Association Commission on Law and Aging/Sally Hurme, Adult Guardianship Legislative Charts (2011) http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html/

Although it may not be necessary to receive evidence from a professional or expert in every case (*e.g.*, where the evidence regarding incapacity is relatively clear), probate courts should seek the assistance of professionals and experts when their knowledge will assist the court in making a decision on whether a plenary guardianship/conservatorship is necessary or whether a less intrusive alternative may adequately protect and assist the respondent. [See Standard 3.3.10] These professionals and experts include, but are not limited to, physicians, psychiatrists, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, and community mental health workers with skill and experience in capacity assessments. The determination of the need for the appointment of a guardian or conservator is frequently made by a physician after conducting an examination of the respondent.[146] Although a physician may provide valuable information regarding the capacity of the respondent, incapacity is a multifaceted issue and the court may consider using other professionals whose expertise and training may give them greater insight into representations of incapacity.

> Even medical diagnoses of common mental illnesses do not dictate whether an individual has legal capacity. ... "Establishing that a patient lacks decisional capacity requires more than making a psychiatric diagnosis; it also requires demonstrating that the specific symptoms of that disorder interfere with making or communicating responsible decisions about the matter at hand."[147]

The use of other professionals and experts may ensure that when a physician is appointed, his or her skills are fully utilized and, in turn, ensure that the physician is a willing and responsive participant in the proceeding. Evaluation by an interdisciplinary team can provide probate courts with a fuller and more accurate understanding of the alleged incapacity of the respondent that includes cognition, everyday functioning, values and preferences, risk and level of supervision, and the means to enhance capacity as well as the respondent's medical condition.[148] In at least some jurisdictions, however, the cost of using an interdisciplinary team may preclude its use in every case.

The written reports of professionals should be presented promptly and should be made available to all interested persons. Probate courts need not base their findings and order on the oral testimony of such professionals and experts in every case. However, where a party objects to submitted documents that contain the opinion of a professional or expert (*e.g.*, the written medical report of an examining physician), that professional or expert should appear and be available for cross-examination. Where the professional or expert is unavailable for cross-examination, the traditional rules of evidence may limit the ability of the judge to rely on the written report. Probate courts should be able to obtain as much helpful information as they need and can properly acquire.

The prescribed content of the written report should be in the discretion of the court. In general, most of the developing law in this area indicates that an evaluation of incapacity should be based upon an appraisal of the functional limitations of the respondent.[149] Among the factors to be addressed in the report are: the respondent's diagnosis; the respondent's

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[146] *See* Unif. Prob. Code § 5-306 (2008) ("[T]he respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment.").

[147] Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 Fordham L. Rev. 1177, 1187 (1994); *see also* Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 Stetson L. Rev. 611, 628 n.85 (2002).

[148] American Bar Association Commission on Law and Aging, American Psychological Association, National College of Probate Judges, Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges (2006) http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_bk_judges_capacity.authcheckdam.pdf; *See* FL. Stat. Ann. § 744.331(3) (2011); Thomas L. Hafemeister & Bruce D. Sales, *Interdisciplinary Evaluations for Guardianships and Conservatorships*, 8 Law & Human Behav. 335 (1985); *see also,* Moye, *supra,* note 110.

[149] COSCA, *supra,* note 6, at 8.

limitations and prognoses, current condition, and level of functioning; recommendations regarding the degree of personal care the respondent can manage alone or manage alone with some assistance and decisions requiring supervision of a guardian or conservator; the respondent's current incapacity and how it affects his or her ability to provide for personal needs; and whether current medication affects the respondent's demeanor or ability to participate in proceedings. Prescribing such content avoids the unfortunate practice of professionals and expert examiners providing cursory, conclusory evaluations to the court.

Oral testimony from family and friends of the respondent is often helpful to round out the picture presented by the written reports and oral testimony of professionals. These lay witnesses may be more familiar with the functional adaptations not evident in clinical environments that enable respondents to meet their needs at home.

The Uniform Guardianship and Protective Proceedings Act specifies that appointment of a conservator is not a determination of the respondent's incapacity for other purposes.[150] However, the basis for initiating a conservatorship proceeding under UGPPA is that "the individual is unable to manage property and business affairs because of an impairment in the ability to receive and evaluate information or make decisions, even with appropriate technological assistance ... and the property will be wasted or dissipated unless management is provided ...."[151] The Standards take the position that the distinction between incapacity and impairment can more clearly be made by clear definition of the powers of a conservator in the order. [See Standard 3.3.12]

STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES

A. Probate courts should find that no less intrusive appropriate alternatives exist before the appointment of a guardian or conservator.

B. Probate courts should always consider, and utilize, where appropriate, limited guardianships and conservatorships, or protective orders.

C. In the absence of governing statutes, probate courts, taking into account the wishes of the respondent, should use their inherent or equity powers to limit the scope of and tailor the guardianship or conservatorship order to the particular needs, functional capabilities, and limitations of the respondent.

COMMENTARY

Scientific studies show that the loss—or perceived loss—of a person's ability to control events can lead to physical or emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate any existing disability.[152] Allowing persons potentially subject to guardianships or conservatorships to retain as much autonomy as possible may be vital for their mental health. Therefore, probate courts should encourage the exploration and appropriate use of suitable alternatives to guardianship/conservatorship. [See Standard 3.3.2] Such alternatives may avoid unwanted intrusion, divisiveness, and expense, while meeting the needs of the respondent before establishing a guardianship/conservatorship.[153] Alternatives include but are not limited to:

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[150] UGPPA §409(d) (1997). *See also,* Unif. Prob. Code §4-409(d) (2008).

[151] UGPPA §401(2) (1997); Unif. Prob. Code § 5-401(2) (2008).

[152] American Bar Association Commission on the Mentally Disabled & American Bar Association Commission on Legal Problems of the Elderly, Guardianship: An Agenda For Reform, 20 (American Bar Association, 1989).

[153] Wingspread Conference, *Recommendations III-D & IV-B*, 13 Mental & Physical Disability L. Rep. 271, 290 & 292 (1989); Wingspan Conference, *Recommendations 38 and 39*, 31 Stetson L. Rev. 595, 602-603. (2002); Third National Guardianship Summit, *supra,* note 6, Recommendation 2.2, 2012 Utah L.Rev., at 1200; American Bar Association Commission on Law and Aging & American Psychological Association, Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, 2 (American Bar Association, 2006); Utah *Ad hoc* Committee on Probate Law and Procedure, *supra*, note 5.

Alternatives for financial decision-making

- Use of a representative payee appointed by the Social Security Administration or other federal agency or a fiduciary appointed by the Department of Veterans Affairs to handle government benefits
- Use of a single transaction protective order[154]
- Use of a properly drawn trust
- Use of a properly drawn durable power of attorney
- Establishment of a joint bank account with a trusted person
- Electronic bill-paying and deposits

Alternatives for health care decision-making

- Use of properly drawn advance health care directives
- Use of a properly drawn power of attorney for medical decisions

Alternatives for crisis intervention and daily needs

- Use of mediation, counseling, and respite support services
- Engagement of community-based services[155]

When attempting to determine what constitutes a less intrusive appropriate alternative, probate courts should defer to any alternatives previously established or proposed by the respondent (*e.g.*, a durable power of attorney). In general, probate courts should be guided by the express wishes of the respondent where available, and, where not available, by past practices, reliable evidence of likely choices, and best interests of the person.[156] Even if a respondent lacks current capacity to make decisions regarding his or her personal care, probate courts should solicit the respondent's opinions and preferences and obtain information about the respondent's needs and available services and alternatives. The use of an initial screening process can facilitate the consideration of less intrusive alternatives. [See Standard 3.3.2]

On the other hand, probate courts should also be mindful that there may be downsides to less intrusive alternatives as well, especially because of the absence of judicial oversight, bonding, and other safeguards.

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[154] UGPPA § 412 (1997).

[155] Utah *Ad hoc* Committee on Probate Law and Procedure, *supra* note 5, at 24-25

[156] Third National Guardianship Summit, *supra*, note 6, at Standard 4.2, 2012 Utah L.Rev., at 1194; see also Linda S Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians—Theory and Reality*, 2012 Utah L. Rev., at 1491 (2013).

> Although, principals may revoke ... [a durable power of attorney (DPA)] as long as they have capacity, the lack of formality and oversight means there is no standard method for ascertaining if and when a DPA has been revoked.... Because the DPA remains in force if the principal becomes incapacitated, a lawsuit may only be filed if someone else notices a misuse of the fiduciary duty (Rhein 2009). Often it is too late to recover lost assets at this point . . . . Similarly, because they are an owner, a joint account holder cannot usually be charged with stealing funds unless there was some kind of deception or the elder was mentally incapacitated at the time the joint tenant was added. (Bailly 2007 POA Abuse pp. 7-5 - 7-19). . . . Living trusts, while avoiding probate, are vulnerable to the same abuses as other guardianship alternatives due to a lack of supervision or oversight of the trustee.[157]

If probate courts determine that a guardianship or conservatorship is necessary, the respondent's self-reliance, autonomy, and independence should be promoted by restricting the authority of the guardian or conservator to the minimum required for the situation, rather than routinely granting full powers of guardianship/conservatorship in every case. For example, where a respondent has only a limited disability, the court should grant only those powers needed to protect the respondent's health or safety. Probate courts also should require the guardian or conservator to attempt to maximize the respondent's self-reliance and independence (*e.g.*, by including the respondent in decisions to the fullest extent possible) and to report periodically on these efforts to the court.

Although many states do not have statutory provisions for limited guardianship or conservatorship, probate courts, in at least some states, have the power to create such limited guardianships/conservatorships because of their equitable nature. Similarly they can invoke (either with or without further court supervision) other less intrusive alternatives.[158] [See Standard 3.3.2]

STANDARD 3.3.11 QUALIFICATIONS AND APPOINTMENTS OF GUARDIANS AND CONSERVATORS

Probate courts should appoint a guardian or conservator suitable and willing to serve as a guardian/conservator. Where appropriate, probate courts should appoint a person requested by the respondent or related to or known by the respondent.

COMMENTARY

Different degrees of expertise will be required in guardianships and conservatorships. Probate courts should consider the training, education, and experience of a potential guardian or conservator to determine if that person can perform the necessary tasks on behalf of the respondent competently. If the court anticipates that the scope of the guardianship/conservatorship may later increase, the person appointed should be competent to handle these possible future responsibilities as well. In determining the competence of a potential guardian, probate courts should consider such factors as familiarity with health care decision making, residential placements, and social service benefits. In determining the competence of a potential conservator, probate courts should consider such factors as the size of the estate, the complexity of the estate, and the availability of financial planning experts who can give the conservator advice. Further, the guardian or conservator should act only within the bounds of the court order and should not expand the scope of the guardianship/conservatorship, except when authorized to do so by the court.

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[157] D. Saunders, Issue Paper on Abuses to Alternatives to Guardianship,1-2, (NCSC, 2011); Jennifer L. Rhein, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 University of Illinois Elder Law Journal 165 (2009); Lori Stiegel & Ellen M. Klem, Power Of Attorney Abuse: What States Can Do About It (AARP Public Policy Institute, 2008); Rose Mary Bailly et al., Financial Exploitation of the Elderly, (Civic Research Institute, 2007).

[158] UGPPA and the Uniform Probate Code require that the court find that a "respondent's needs cannot be met by less restrictive means." UGPPA §311(a)(1)(B) (1997); Unif. Prob. Code § 5-311(a)(1)(B) (2008).

Probate courts should attempt, when appropriate, to appoint as guardian or conservator a person who has been designated for this role by the respondent, or who is related to or known by the respondent. This enhances the likelihood that the guardian/conservator will obtain the trust and cooperation of the respondent and be familiar with the respondent's values and preferences. When considering appointing a person known to the respondent, probate court judges should enquire about the length, depth and nature of the relationship in order to guard against empowering individuals who may be seeking to take advantage of the respondent.

It may also be appropriate to appoint as guardian or conservator a public administrator, a public guardian, a professional guardianship/conservatorship firm, a person or corporation having special qualifications, certification, or expertise that will be beneficial to the respondent, an attorney or other professional. Eleven states require a level of certification for some non-family guardians/conservators either through the Center for Guardianship Certification,[159] or a state run program.[160] Although probate courts should not appoint any agency, public or private, that financially benefits from directly providing housing, medical, or social services as a guardian, they should use the services of such organizations, where appropriate.

Probate courts also should consider the geographical proximity of any prospective nominee and the nominee's ability to respond in a timely and appropriate fashion to the needs of the respondent. Particular care may be required in making a reappointment where a guardian or conservator has left the jurisdiction where the original order of guardianship/conservatorship was issued. If the guardian or conservator has failed to carry out the original order and is subject to a contempt charge, that person should not be reappointed as a guardian/conservator for the original respondent or appointed as a guardian/conservator for any other respondent.

In selecting the guardian or conservator, preference should be given to any written designation of a prospective guardian/conservator made by the respondent while competent (*e.g.*, as provided in a durable power of attorney) unless there are compelling reasons to appoint another.[161] In many situations, the respondent has had ample opportunity to anticipate the need for a guardian or conservator and to identify a nominee with whom he or she is comfortable. In such cases, probate courts should give great weight to the expressed desires of the respondent (although care should be taken to ensure that the respondent has not changed his or her mind about the nominee since the nomination was made, particularly when a considerable period of time has passed since the nomination). Alternatively, the respondent may have indicated in a non-guardianship or non-conservatorship context a preference for a given person in an advance written directive executed while the respondent was competent (*e.g.*, the executor in a will). Ordinarily, such preferences should also be respected. If a preference for a guardian/conservator is not stipulated, or a person designated is not suitable or willing to serve, probate courts should appoint a guardian or conservator who is capable and willing to develop a rapport with the respondent.

Generally, state law will provide a list of categories of persons who must be considered, although ultimate discretion in making this appointment remains with the court.[162] In general, probate courts should seek a guardian or conservator with the least potential for a conflict of interest with the respondent. In many cases this may disqualify individuals such as the

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[159] AK, CA, FL, IL, NV, NH, OR, WA.

[160] By the Supreme Court in AZ, and TX, or the state guardianship association in NC.

[161] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.17 & 81.19(b) (McKinney through 2011 legislation); UNIF. PROB. CODE § 5-310 (2008).

[162] *See, e.g.,* NY MENTAL HYG. LAW § 81.19 ; UNIF. PROB. CODE § 5-310(a) (2008).

respondent's physician, attorney, landlord, current caregiver (particularly where there is a pecuniary interest), or creditor from serving as the respondent's guardian or conservator. Probate courts should not decline to appoint the respondent's parent, spouse, or child, however, when the appointment would be the most beneficial to the respondent. As noted above, such persons are likely to be familiar with the respondent's values and residential, health care, and other preferences. [See Standard 3.3.14 Training and Orientation]

Similarly, state law may provide a list of categories of potential nominees who are qualified for or disqualified from serving as a conservator (*e.g.*, a convicted felon may not be eligible to act as a conservator).[163] To the extent permitted, probate courts should supplement this list by making their own determination regarding the qualifications of individuals being considered for appointment as a conservator. For example, a nonfamily care provider or any person associated with a facility where the respondent is a resident should not be appointed in most instances, nor should persons of questionable honesty or integrity or any person who may have a material conflict of interest in handling the respondent's estate.

A relationship to the respondent does not, in and of itself, constitute a potential conflict of interest, and should not preclude appointment. The adult child of the respondent may stand to inherit from the respondent's estate and may technically be subject to a potential conflict of interest, yet he or she will often be particularly well suited to serve as the respondent's conservator because of the close emotional bond between the offspring and the respondent.

Probate courts should require attorneys who file guardianship/conservatorship proceedings to exercise due diligence by informing proposed guardians or conservators of the qualifications for appointment and the obligations if appointed, and inquiring whether they are willing to serve, are eligible for an appropriate surety bond and to open a bank account,, have not been convicted of a potentially disqualifying offense [see Standard 3.3.12], and do not have a bankruptcy history.

STANDARD 3.3.12 BACKGROUND CHECKS

A. Probate courts should request a national background check on all prospective guardians and conservators, other than those specified in paragraph (b), before an appointment is made, to determine whether the individual has been convicted of a relevant crime; determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, spouse, or other adult; has been suspended or disbarred from law, accounting, or other professional licensing for misconduct involving financial or other fiduciary matters; or has a poor credit history.

B. Background checks should not be conducted for prospective guardians and conservators who have been the subject of such a check as part of a certification or licensing procedure, or banks, trust companies, credit unions, savings and loan associations, or other financial institution duly licensed or authorized to conduct business under applicable state or federal laws.

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[163] *See, e.g.,* NY MENTAL HYG. LAW §§ 81.20, 81.22, 81.29(a); UNIF. PROB. CODE § 5- 206(b) (2008), cmt. background.

COMMENTARY

Currently, criminal conduct disqualifies or may disqualify a person from serving as a guardian or conservator in half the states. Only 13 states require that guardians undergo independent criminal background checks before being appointed.[164] There is little empirical data demonstrating the effectiveness of background checks in reducing instances of abuse and exploitation.[165] However, given the authority of guardians and conservators, the opportunities for misuse of that authority, and the occurrence of abuse and exploitation of vulnerable adults around the country, requiring prospective guardians and conservators to undergo a thorough criminal history and credit check is an appropriate safeguard. The background information is intended to provide probate courts with information on which to base a decision whether the nominee should be appointed. Upon receiving such potentially disqualifying information, probate courts should weigh the seriousness of the offense or misconduct, its relevance to the responsibilities of a guardian or conservator, how recently the offense or misconduct occurred, the nominee's record since the offense or misconduct occurred, and the vulnerability of the respondent. If there is some concern but not enough to disqualify a potential guardian or conservator, probate courts may require periodic post-appointment criminal history and/or credit checks of a guardian or conservator.[166]

STANDARD 3.3.13 ORDER

A. Probate courts should tailor the order appointing a guardian or conservator to the facts and circumstances of the specific case. Each order should specify the duties and powers of the guardian or conservator, including limitations to the duties and powers, the rights retained by the respondent, and if the order is for a temporary or limited guardianship or conservatorship, the duration of the order.

B. Probate courts should inform newly appointed guardians regarding their responsibilities to the respondent, the requirements to be applied in making decisions and caring for the respondent, and their responsibilities to the court including the filing of plans and reports.

C. Probate courts should inform newly appointed conservators regarding their responsibilities to the respondent, the requirements to be applied in managing the respondent's estate, and their responsibilities to the court including the filing of inventories and accountings.

D. Following appointment, probate courts should require a guardian or conservator to:

(1) Provide a copy of and explain to the respondent the terms of the order of appointment including the rights retained.

(2) Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding, and file proof of service with the court.

(3) Record the order.

(4) Establish such restricted accounts as may be necessary to protect the respondent's estate.

E. Probate courts should set the due date for the initial report or accounting and periodically consider the necessity for continuing a guardianship or conservatorship.

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[164] U.S. Gov't Accountability Office, GAO-11-678, Incapacitated Adults: Oversight of Federal Fiduciaries and Court- Appointed Guardians Needs Improvement, 7 (July 2011), *available at* http://www.gao.gov/new.items/d11678.pdf; *see also* National Guardianship Association, Standards of Practice, (3d ed. 2007), *available at* http://guardianship.org/documents/Standards_of_Practice.pdf.

[165] Sara Galantowicz Et Al., Safe at Home? Developing Effective Criminal Background Checks and Other Screening Policies for Home Care Workers, 25 (AARP Policy Institute, 2010).

[166] In light of the abuses that have occurred, some probate courts may wish to require periodic updates of background checks in all cases in order to ensure that the person appointed continues to be fit to serve.

COMMENTARY

Most individuals appointed as a guardian or conservator know little about what is expected of them and the scope of their responsibilities and authority. Thus, including a clear, complete statement of duties and powers in the appointment order is an important first step in ensuring that the respondent will receive the protection and services needed and that the respondent's rights and autonomy will be respected.[167] Specifically enumerated duties and powers serve as a guide for the appointing court and other interested parties in evaluating and monitoring the guardian or conservator. Because the preferred practice is to limit the powers and duties of the guardian/conservator to those necessary to meet the needs of the respondent [see Standard 3.3.10], a probate court should specifically enumerate in its order the assigned duties and powers of the guardian/conservator, as well as limitations on them, with all other rights reserved to the respondent.[168] By listing the powers and duties of the guardian/conservator, the court's order can serve as an educational roadmap to which the guardian/conservator can refer to help answer questions about what the guardian/conservator can or cannot do in carrying out the assigned responsibilities. [See Standards 3.3.16 and 3.3.17]

When a guardianship/conservatorship is for a limited period of time (*e.g.*, when the respondent has suffered a traumatic brain injury and may recover some or all of his/her faculties), specifying the duration of a guardianship/conservatorship is particularly important so as not to unnecessarily impede the respondent's ability to return to normalcy.

When establishing the powers of the guardian/conservator, probate courts should be aware that certain decisions by a guardian or conservator may be irreversible or result in irreparable damage or harm. As a result, unless otherwise provided by statute, probate courts may specifically limit the ability of the guardian/conservator to make certain decisions without prior court approval (*e.g.*, sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, termination of parental rights, change of residence, sale of residence or other major assets, or limits on visitation and contact). The ability of the guardian to make routine medical decisions should not ordinarily be curtailed, but where extraordinary decisions of an irreversible or irreparable nature are involved, authorization for those decisions should be included in the initial court order or the guardian should be required to return to the court for specific authorization before proceeding.

Generally, guardians should also be required to obtain prior court approval before a respondent is permanently removed from the court's jurisdiction. Prior court approval, however, should not be required where the removal is temporary in nature (*e.g.*, when the respondent is being taken on a vacation).

In general, the court's order should only be as intrusive of the respondent's liberties as necessary. [See Standard 3.3.10] The court's order should also include a statement of the need for the guardian/conservator to involve the respondent to the maximum extent possible in all decisions affecting the respondent. The guardian should consider the preference and values of the respondent in making decisions and attempt to help the respondent regain legal capacity.[169]

Requiring the guardian/conservator to serve a copy of the order of appointment to those persons who received notice of the petition for guardianship or conservatorship will promote their continued involvement in monitoring the respondent's situation. Explaining the order of appointment to the respondent demonstrates respect for the person, facilitates the respondent's awareness of the implementation of the guardianship/conservatorship, encourages communication between

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[167] M.J. Quinn & H. Krooks, *supra,* note 71, at 1635; *see also* Third National Guardianship Summit, *supra,* note 6, at Recommendation 1.3, 2012 Utah L. Rev., at 1199.

[168] *See, e.g.,* NY Mental Hyg. Law §§ 81.20, 81.22, 81.29(a); UNIF. PROB. CODE § 5- 206(b) (2008), cmt. Background assigned responsibilities. *See also,* Standard 3.3.14, Reports by the Guardian; Standard 3.3.15, Monitoring of the Guardian.

[169] *See* Third National Guardianship Summit, *supra,* note 6, at Standards 4.1 – 6.11, 2012 Utah L. Rev., at 1194-1198.

the respondent and the guardian/conservator, and provides an initial opportunity to involve the respondent in decision-making as much as is appropriate. Recording a guardianship/conservatorship order provides notice to others regarding who has the authority to engage in significant financial transactions including the sale of real property.

The guardian or conservator, when accepting appointment, should acknowledge that he or she consents to the court's jurisdiction in any subsequent proceedings concerning the respondent.[170]

In order to facilitate greater use of limited guardianships and other less intrusive alternatives [see Standard 3.3.10], it is critical that probate courts implement procedures for conducting periodic reviews of the guardianship or conservatorship. The initial review should ordinarily take place no more than one year after appointment. These periodic reviews should examine compliance with the order and the well-being of the respondent and the estate, and determine whether the conditions still exist that underlay the original appointment of a guardian or conservator, whether the duties and authority of the guardian or conservator should be expanded or reduced, or particularly in instances in which the injury, illness, or condition that resulted in the guardianship may be temporary, whether the guardianship or conservatorship can be abolished.

The reviews may be triggered by a review date set as part of the terms of the original guardianship order, the review of the guardian's/conservator's/court visitor's report (see Standard 3.3.17), the request of the respondent or the guardian/conservator, or at the urging of a family member or other concerned person.[171] Probate courts should establish flexible written guidelines for the submission of a *pro se* petition or other request for review of the continuing need for a guardianship or conservatorship. So as not to dissipate the court's time and resources with frequent, unnecessary reviews, however, probate courts may wish to set a limit on the frequency with which the need for a guardianship or conservatorship may be re-adjudicated, absent special circumstances.

There is a divergence of views as to whether, in connection with a petition or request for reevaluation, the burden of proof should be on the respondent to reverse or modify the court's prior order or on the guardian/conservator to reestablish the basic grounds for the guardianship/conservatorship. There are also different opinions as to whether a trial *de novo* is required or whether the court may consider evidence received in prior hearings.

Promising Practices

The **District of Columbia Superior Court** provides newly-appointed guardians and conservators with a list of mandatory filing deadlines in addition to the order itself.

[170] *See* UNIF. PROB. CODE § 3-602 (2008).

[171] *Cf*. UGPPA §§ 318(b) & 421(b) (1997).

STANDARD 3.3.14 ORIENTATION, EDUCATION, AND ASSISTANCE

Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators.

A key recommendation of the Third National Guardianship Summit is that "the court or responsible entity shall ensure that guardians [and conservators] . . . receive sufficient ongoing, multi-faceted education to achieve the highest quality of guardianship possible."[172] As noted previously, most newly appointed guardians and conservators are not fully aware of their responsibilities and how to meet them. While only eight states statutorily require that all guardians and conservators receive training,[173] courts throughout the country are addressing the need to inform and assist lay guardians and conservators in a variety of ways including printed manuals and information materials (*e.g.*, AK, CA, NJ, OH); videos (AK, DC, MI, TX); on-line training and information (*e.g.*, ID, NC, OH, PA, UT, WI); and in-person briefings and educational sessions by court staff (*e.g.*, DC, FL, NY, TX) or professional or public guardians (*e.g.*, CA).[174] Where appropriate, the materials should be in a language other than English to supplement the English version (*e.g.*, AZ).

Even when the appointment order clearly sets forth the duties and authority of a guardian and conservator and effective initial orientation and education has been provided, there will be instances in which guardians or conservators will be uncertain about how best to meet their responsibilities or whether they have the authority to take the actions necessary.[175] Again, there are a variety of approaches to addressing this need short of formally petitioning the court for guidance. Some probate courts have authorized staff to provide guidance short of legal advice to guardians and conservators on an on-going basis (*e.g.*, San Francisco, CA, Houston, TX, and UT).[176] In Florida, lay guardians are required to be represented by an attorney following appointment.[177] The District of Columbia offers annual conferences for guardians and conservators. Probate courts in Colorado employ facilitators whose duties include assisting guardians/conservators. The court in Suffolk County, NY employs a resource coordinator to assist in linking guardians to community resources, and the courts in Maricopa County, AZ and elsewhere utilize volunteer visitors whose duties include providing assistance to guardians and conservators as well as ensuring the well-being of the protected person. Maricopa County also has training programs on its website such as on basic accounting for non-professional conservators.[178]

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[172] Third National Guardianship Summit, *supra, note* 6, at Recommendation 2.4, 2012 Utah L. Rev., at 1200; Quinn & Krooks, *supra,* note 71, at 1659-1661; *See also* National Conference of the Judiciary on Guardianship Proceedings for the Elderly, Recommended *Judicial Practices*, recommendation IV(b) (Jun. 1986) (endorsed by the American Bar Association, House of Delegates, Aug. 1987).

[173] Quinn & Krooks, *supra,* note 71, at 1659; In addition, the 11 states that require a level of certification for some non-family guardians/conservators require initial training sufficient to enable the individual to pass a certification examination, in most instances, continuing professional education.

[174] *Id.*; Karp and Wood, *supra,* note 4, at 61-62 (AARP, 2007). For a list of video and on-line informational resources for guardians and conservators, *see* Guardianship Video Resources, American Bar Association Commission on Law and Aging http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_video_resourc_8_10.authcheckdam.pdf; American Bar Association, Adult Guardianship Handbooks by State, http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_gship_st_hbks_2011.authcheckdam.pdf. Initial and continuing education requirements for professional guardians and conservators are set forth in licensing and certification requirements. *See, e.g.,* FL .Stat. ANN. §744.1085(3) (2006); National Guardianship Association, Standards of Practice, 23-24 (3d ed. 2007).

[175] Quinn & Krooks, *supra,* note 71, at 1637-1640.

[176] For a definition of the distinction between legal information and legal advice, *see* Iowa Judicial Branch Customer Service Advisory Committee, Guidelines and Instructions for Clerks Who Assist *Pro se* Litigants in Iowa's Courts 7 (July 2000), *available at* http://www.ajs.org/prose/pdfs/Iowa_Guidelines.pdf; *but see* Wash. St. Bar Assoc. v. Great Western Federal Savings & Loan Ass'n., 91 Wash. 2d. 49, 54-55 586 P.2d 870 (1999).

[177] FL. Prob. R. 5.030(a) (West 2012) (except when the personal representative remains the sole interested person).

[178] Establishing a mentoring program through which experienced guardians and conservators can serve as mentors of less experienced guardians and conservators is yet another approach.

Promising Practices

The **District of Columbia Superior Court** offers annual conferences for guardians and for fiduciaries managing funds such as conservators, personal representatives and trustees. It also sets training requirements for attorneys who wish to be eligible for appointment to represent respondents.

Florida requires that every guardian complete an educational course within four months of appointment. The course covers reporting requirements, duties, and responsibilities. Professional guardians are required to complete a 40-hour course.

Idaho and **Ohio** require guardians and conservators to complete an on-line training course before a court can hold any final hearing or issue a final order.

The **San Francisco CA Superior Court** requires all lay appointees to purchase a handbook published by the Administrative Office of the Courts and offers an orientation program.

Tarrant County, TX Probate Court No. 2 requires all decedents' administrators, guardians, and conservators to attend a mandatory training immediately after appointment conducted by the staff member who will be reviewing their documents and to sign an acknowledgment of understanding following the training.

STANDARD 3.3.15 BONDS FOR CONSERVATORS

Except in unusual circumstances, probate courts should require for all conservators to post a surety bond in an amount equal to the liquid assets and annual income of the estate.

COMMENTARY

Among the measures probate courts may use to protect respondents is to require newly appointed conservators to furnish a surety bond[179] conditioned upon the faithful discharge by the conservator of all assigned duties.[180] The requirement of bond should not be considered as an unnecessary expense or as punitive. It is insurance against any loss being suffered by the minor. Bonding or some equally protective alternative (*e.g.*, accounts that require a court order for all withdrawals, court-maintained accounts, etc.) protect the court from public criticism for having failed in its duty and responsibility to protect the respondent's estate from loss, misappropriation, or malfeasance on the part of the conservator.

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[179] This standard addresses surety bonds, that is, bonds with corporate surety or otherwise secured by the individual assets of the personal representative.

[180] *See* UNIF. PROB. CODE § 5-415 (2008) (unless otherwise directed, the size of the bond should equal the aggregate capital value of the estate under the conservator's control, plus one year's estimated income, minus the value of securities and land requiring a court order for their removal, sale, or conveyance); *see also* THIRD NATIONAL GUARDIANSHIP, *supra*, note 6, at Standard 4.9, 2012 UTAH L. REV., at 1195; M.J. Quinn & H. Krooks, *supra*, note 71, at 1649-1653.

In determining the amount of the bond, or whether the case is the unusual situation in which an alternative measure will provide sufficient protection, probate courts should consider such factors as:

- The value of the estate and annual gross income and other receipts.
- The extent to which the estate has been deposited under an effective arrangement requiring a court order for its removal.
- Whether a court order is required for the sale of real estate.
- Whether a restricted account has been established and proof provided to the court that the restrictions will be enforced by the bank.
- The frequency of the conservator's required reporting.
- The extent to which the income or receipts are payable to a facility responsible for the ward's care and custody.
- Whether the conservator was appointed pursuant to a nomination that requested that bond be waived.
- The information received through the background check.
- The financial responsibility of the proposed guardian/conservator.

STANDARD 3.3.16 REPORTS

A. Probate courts should require guardians to file at the hearing or within 60 days:
(1) A guardianship plan and a report on the respondent's condition, with annual updates thereafter.
(2) Advance notice of any intended absence of the respondent from the court's jurisdiction in excess of 30 calendar days.
(3) Advance notice of any major anticipated change in the respondent's physical location (*e.g.*, a change of abode).

B. Probate courts should require conservators to file within 60 days, an inventory and appraisal of the respondent's assets and an asset management plan to meet the respondent's needs and allocate resources for those needs, with annual accountings and updates thereafter. Probate courts should require conservators to submit, for approval, an amended asset management plan whenever there is any significant deviation from the approved plan or a significant change from the approved plan is anticipated.

COMMENTARY

The standard urges that guardians be required to provide a report to the court at the hearing or within two months of appointment.[181] Similarly, conservators must immediately commence making an inventory of the respondent's assets and submit the inventory and a plan within a two-month period.

- The guardian's report should contain descriptive information on the respondent's condition, the services and care being provided to the respondent, significant actions taken by the guardian, and the expenses incurred by the guardian.
- The conservator's report should include a statement of all available assets, the anticipated financial needs and expenses of the respondent, and the investment strategy and asset allocation to be pursued (if applicable). As part of this process, the conservator should consider the purposes for which these funds are to be managed, specify the services and care provided to the respondent and their costs, describe significant actions taken, and the expenses to date.

[181] Each state's respective statutory provisions may establish somewhat different time frames. *See, e.g.,* REV. CODE WASH. ANN. § 11.92.043(1) (West, Westlaw through 2011 legislation) ("It shall be the duty of the guardian . . . to file within three months after appointment a personal care plan for the incapacitated person."); WYO. STAT. § 3-2-109 (West, Westlaw through 2012 Budget Session) ("The guardian shall present to the court and file in the guardianship proceedings a signed, written, report on the physical condition, including level of disability or functional incapacity, principal residence, treatment, care and activities of the ward, as well as providing a description of those actions the guardian has taken on behalf of the ward."); OR. REV. STAT. § 125.470 (West 2012) (inventory of the estate must be filed within 90 days of conservator's appointment); S.C. CODE ANN. § 62-5-418 (West 2012) (inventory of the estate must be filed within 30 days of conservator's appointment); W. VA. CODE § 44-4-2 (2010) (inventory of the estate must be filed within 1 year of conservator's appointment).

These reporting requirements ensure that probate courts quickly receive information to enable them to better determine the condition of the respondent, the amount of assets and income available, and the initial performance of the guardian or conservator. Probate courts should also consider requiring additional information to assist in monitoring the guardianship or conservatorship such as an estimate of the fees that the guardian/conservator will charge and the basis for those charges.[182] [See Standard 3.1.4]

Probate courts should provide explicit instructions regarding the information to be contained in initial and subsequent reports. This can be accomplished either through clear forms with detailed instructions,[183] or through an on-line program such as that developed by Minnesota that poses a series of questions for the guardian or conservator to respond to and calculates totals automatically.[184] Where there is considerable overlap or interdependence, probate courts may authorize the joint preparation and filing of the plans and reports of the guardian and conservator.

In addition, the standard calls for submission of an initial plan that will help guardians and conservators perform their duties more effectively. The plans should specify goals over the next 12-24 months and how the guardian or conservator will meet those goals.[185] Development of a care or financial management plan not only offers a guide to the guardian and conservator, but also provides probate courts with a benchmark for measuring performance and assessing the appropriateness of the decisions and actions by the guardian/conservator.

The plans should be neither rote nor immutable. They should reflect the condition and situation of each individual respondent rather than provide general statements applicable to anyone. For example, the investment strategy and management objectives may be different for a relatively young respondent than for one who is older, may vary depending on the source or purpose of the assets,[186] or may be different where there is a greater need to replenish the funds for long-term support.[187] Minor changes to a guardianship plan (*e.g.*, changing doctors, replacing one social activity with another, etc.) and prudent changes in a conservatorship's investments may be implemented without consulting the court. However, probate courts should advise guardians and conservators that except in emergencies, there should be no substantial deviation from the court-approved plan without prior approval. For example, any absence of the guardian or respondent from the jurisdiction of the court that will exceed 30 calendar days should be reported as should any anticipated move of the respondent within or outside the jurisdiction so that the court can readily locate the respondent at all times.

The standard provides for annual updates of the initial guardianship and conservatorship reports and plans to enable probate courts to ensure that the guardian is providing the respondent with proper care and services and respecting the respondent's autonomy, and that the estate is being managed with the proper balance of prudence and attention to the current needs and preferences of the respondent. The Uniform Guardianship and Protective Proceedings Act, and all but

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[182] Third National Guardianship Summit, *supra*, note 6, at Standard 3.1, Utah L. Rev., at 1193-1194.

[183] *See, e.g.*, Alaska Courts, *Guardianship and Conservatorship Forms, Instructions & Publications*, www.courts.alaska.gov/forms-subj.htm#guardian (last updated May 8, 2012); California Courts, *Probate Forms*, www.courts.ca.gov/forms.htm?filter=GC (July 9, 2012); D.C. Courts, *Form Locator*, http://www.dccourts.gov/internet/formlocator.jsf (July 9, 2012); 17th Judicial Circuit Court of Florida, *Probate and Guardianship Smart Forms*, http://www.17th.flcourts.org/index.php/judges/probate/probate-and-guardianship-smart-forms (July 9, 2012); Karp & Wood, *supra*, note 4, at 37-41 & Appendix B.

[184] Minnesota Judicial Branch, *Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)*, www.mncourts.gov/conservators (July 9, 2012).

[185] *See e.g.*, National Guardianship Association, Standards of Practice, Standards 13 and 18 (3d ed. 2007); For a model plan *see* Karp & Wood, *supra*, note 4, at 87-88.

[186] For example, the management objectives may be different where funds come from a wrongful death settlement designed to replace the support capacity of a deceased parent as opposed to funds that come from a personal injury settlement designed to provide medical support for the respondent.

[187] *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 Real Prop., Prob. & Trust J. 407 (1992) (discussing the background and applications of principles of fiduciary prudence as formulated in the Third Restatement of the Law of Trusts).

one state statutorily require reports of some type.[188] Along with the periodic reporting on what has been done during the reporting period including information on expenditures and projected future expenditures, guardians or conservators should notify the probate court about significant changes in the respondent's condition, either for the better or for the worse, and suggest what changes may be needed in the scope of the guardianship order.[189]

Additionally, guardians/conservators should immediately report if the respondent has been abused (*e.g.*, by staff at their place of residence).[190] Upon receiving a report of abuse, probate courts may take any of a number of appropriate actions including ordering an investigating by court staff, notifying the appropriate law enforcement or adult protective services agency, setting a hearing, or ordering an immediate change in placement.[191]

Promising Practices

In **Minnesota**, after inserting a user name and password, conservators can log into a special webpage on the Judicial Branch website to complete annual financial reports by inserting requested information in response to prompts. The program automatically ensures that the report balances. It will also interface with common non-technical accounting programs to permit data to be uploaded. Supporting information can be attached such as bank statements and cancelled checks.[192]

STANDARD 3.3.17 MONITORING

Probate courts should monitor the well-being of the respondent and the status of the estate on an on-going basis, including, but not limited to:

- Determining whether a less intrusive alternative may suffice.
- Ensuring that plans, reports, inventories, and accountings are filed on time.
- Reviewing promptly the contents of all plans, reports, inventories, and accountings.
- Independently investigating the well-being of the respondent and the status of the estate, as needed.
- Assuring the well-being of the respondent and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.

Investigations by the Government Accountability Office (GAO) and articles in newspapers around the country have documented failures by some probate courts to properly monitor guardianships and conservatorships they have established, resulting in harm to respondents and dissipation of their estates.[193] This standard adopts the recommendation

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[188] UGPPA §§ 317 & 420 (1997).

[189] *See* Third National Guardianship Summit, *supra*, note 6, at Standard 1.4, Utah L. Rev., at 1193.

[190] *Id.* at Standard 1.5. In some jurisdictions, guardians and conservators are mandatory reporters.

[191] *See* Quinn and Krooks, *supra*, note 71, at 1658-1659 for additional examples of actions probate courts might take.

[192] Minnesota Judicial Branch, *Conservator Account Monitoring Preparation and Electronic Reporting (CAMPER)*, www.mncourts.gov/conservators (July 9, 2012); *see also* Third National Guardianship Summit, *supra*, note 6, at Standard 2.4 Utah L. Rev., at 1194.

[193] *See e.g.*, U.S. Gov't Accountability Office, GAO-04-655, Collaboration Needed to Protect Incapacitated Elderly People, (July 13, 2004); U.S. Gov't Accountability Office, GAO-06-1086T, Little Progress in Ensuring Protection for Incapacitated Elderly People, (Sept. 7, 2006); U.S. Gov't Accountability Office, GAO-10-1046, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors, (Sept., 2010); Associated Press, *Guardians of the Elderly: An Ailing System*, Sept., 1987; Carol D. Leonnig et al., *Misplaced Trust/Guardians in the District: Under Court, Vulnerable Become Victims*, The Washington Post, June 15-16, 2003; S. Cohen et al., *Misplaced Trust: Guardians in Control*, The Washington Post, June 16, 2003; L. Hancock & K. Horner, The Dallas Morning News, Dec. 19-21, 2004; S.F. Kovalski, *Mrs. Astor's Son to Give Up Control of Her Estate*, The New York Times, Oct.14, 2006; Robin Fields, Evelyn Larrubia, Jack Leonard, *"Justice Sleeps While Seniors Suffer,"* Los Angeles Times (November 14, 2005); Kristin Stewart, *Some Adults' 'Guardians' Are No Angels*, The Salt Lake Tribune, (May 14, 2006); Cheryl Phillips, Maureen O'Hagan and Justin Mayo, *Secrecy Hides Cozy Ties in Guardianship Cases*, Seattle Times (December 4, 2006); Todd Cooper, *Ward's Assets Vulnerable*, Omaha World Herald (August 16, 2010).

of the Third National Guardianship Summit.[194] Following appointment of a guardian or conservator, probate courts have an on-going responsibility to make certain that the respondent is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the respondent's needs and condition. The review, evaluation, and auditing of the initial plans, inventories, and report and the annual reports and accountings filed by a guardian or conservator is the initial step in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. An automated case management system that tracks when reports and accounting are due and sends out reminders in advance and notices when required material is overdue can be helpful in fulfilling this responsibility. [See Standard 2.4.2] Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.

A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, and should require that all vouchers, invoices, receipts, and statements be attached to the accounting to enable comparison. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has violated a provision of the original order.
Various approaches have been developed to facilitate monitoring of guardianships and conservatorships. Some jurisdictions such as Spokane County, WA and 11th Judicial Circuit of FL (Miami-Dade) employ court staff to review reports and accountings and visit respondents. Others such as Tarrant County, TX and Trumbull County, OH rely on volunteers such as nursing or social work students. Maricopa County, AZ and Ada County, ID use a mix of staff and volunteers. Maricopa County has also implemented a "compliance calendar" process to enforce guardianship/conservatorship orders. The 17th Judicial Circuit of Florida (Broward County) has developed electronic systems to analyze expenditures and flag anomalies and possible problems. These systems also notify guardians and conservators of upcoming due dates and alert the court when reports are submitted or overdue.[195]

Some jurisdictions also require guardians and/or conservators to distribute reports and accountings to family members and other interested persons. This provides probate courts with additional informed reviews. On the other hand, given the personal information contained in reports and the financial disclosures in accountings, it may also compromise a respondent's privacy or generate family disagreements regarding the allocation of assets that have little to do with the performance of the conservator.

A number of probate courts have identified lists of actions or factors that may warrant provision of additional services or training for the guardian or conservator or further examination of a particular guardianship or conservatorship through a visitor, guardian *ad litem*, adult protective services, or more frequent reviews and hearings. These include:

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[194] Third National Guardianship Summit, *supra*, note 6, at Recommendation 2.3, 2012 Utah L. Rev., at 1200; Washington State Bar Association Elder Law Section Guardianship Task Force, Report to the WSBA Elder Law Section Executive Committee, 9 (August 2009) www.wsba.org/Legal-Community/Sections/Elder-Law-Section/Guardianship-Committee.

[195] Third National Guardianship Summit, *supra*, note 6, at Recommendation 2.5, Utah L. Rev., at 1201.

Concerns

- The person under guardianship/conservatorship has no relatives or active friendships. There is no one to ask questions or provide oversight.
- The guardian/conservator talks about being exhausted and overwhelmed.
- The estate is large and complicated with significant amounts of cash and securities.
- The guardian/conservator keeps changing attorneys or attorneys try to withdraw from representing the guardian/conservator.
- The guardian/conservator has little knowledge about caring for dependent adults or has minimal experience with financial matters.
- The guardian/conservator excessively controls all access to the person in guardianship/conservatorship and insists on being the sole provider of information to friends and family.
- The guardian/conservator does not permit the person in guardianship/conservatorship to be interviewed alone.
- The guardian/conservator wants to resign.
- The guardian/conservator changes the person's providers such as physicians, dentist, accountants and bankers to his own personal providers.
- The guardian/conservator has financial problems such as tax problems, bankruptcy, or personal problems such as illness, divorce, a family member who has a disabling accident or illness.

Possible Red Flags

- The bills are not being paid or are being paid late or irregularly.
- The person in guardianship/conservatorship lives in a nursing home or assisted living and the guardian/conservator does not furnish/pay for clothing.
- The guardian/conservator does not arrange for application for Medicaid when needed for skilled nursing home payment.
- The guardian/conservator does not cooperate with health or social service providers and is reluctant to spend money on the person in guardianship.
- The guardian/conservator is not forthcoming about the services the person in guardianship/conservator can afford or says the person cannot afford services when that is not true.
- The court has been alerted that the guardian's/conservator's lifestyle seems more affluent than before the guardianship/conservatorship.
- Court documents, including accountings are not filed on time.
- Accountings have questionable entries such as:
  - There are charges for utilities when the person is not living in the home or the home is standing empty.
  - Television sets or other items appear in the accounting but the person does not have them.
  - Numerous checks are written for cash.
  - The guardian reimburses herself repeatedly without explanation as to why.
  - An automobile is purchased but the person in guardianship cannot drive or use the car.
  - Use of an ATM without court authorization.
  - Gaps and missing entries for expected income such as pensions, Social Security, rental income.
  - No entries for expected expenses such as insurance for health or real property.
- There are concerns about the quality of care the person is receiving.
- There are repeated complaints from family members, neighbors, friends, or the person in guardianship.
- A different living situation is needed, either more protected or less protected.
- Revocation or failure to renew fiduciary bonds.

- Large expenditures in the accounting not appropriate to the person's lifestyle or setting.
- The guardian is not visiting or actively overseeing the care the person in guardianship is receiving or not receiving.[196]

Promising Practices

The Probate Division of **Florida's 17th Judicial Circuit** (Broward County) uses electronic filing and XML-based forms to create a database that enables the court to run a variety of reports such as a list of the guardianships in which expenses increased by more than specified percentage; the respondents for whom a particular guardian or conservator has been appointed; and the fees above a particular level.[197]

Maricopa County, AZ is developing a risk assessment tool to enable court staff to calibrate the level of oversight required, whether monitoring should be conducted by volunteers or full-time employees, and the frequency of reviews.[198]

Tarrant County, TX Probate Court #2 has established a program under which MSW under the supervision of a staff social worker visit respondents on behalf of the Court and report on the condition of the respondent, and the needs of the respondent and the guardian.[199]

American Bar Association Commission on Law and Aging, Volunteer Guardianship Monitoring and Assistance: Serving the Court and the Community includes handbooks for program coordinators and volunteers and a trainer's manual to help courts establish volunteer programs. It is based on the extensive experience of AARP, as well as existing court volunteer guardianship review programs.[200]

STANDARD 3.3.18 COMPLAINT PROCESS

Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships and the performance of guardians/conservators. The process should outline circumstances under which a court can receive *ex parte* communications. Following the appointment of a guardian or conservator, probate courts should provide a description of the process to the respondent, the guardian/conservator, and to all persons notified of the original petition.

COMMENTARY

The standard urges probate courts to establish a process for respondents, members of the respondent's family, or other interested persons to question whether the respondent is receiving appropriate care and services, the respondent's estate is being managed prudently for the benefit of the respondent, or whether the guardianship/conservatorship should be modified

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[196] Quinn & Krooks, *supra, note* 71, at 1663-1666 (citing Tarrant County Probate Court Number Two *A Systems Approach to Guardianship Management* (2002) (paper presented at the National College of Probate Judges Fall Conference, Tucson, AZ)); R. T. Vanderheiden, *How to Spot a Guardianship or Conservatorship Going Bad: Effective Damage Control and Useful Remedies* (2002) (Paper presented at the National College of Probate Judges Fall Conference, Tucson, AZ); Mary Joy Quinn, Guardianships of Adults: Achieving Justice, Autonomy, and Safety, 213 (Springer Publ'g Co., 2005).

[197] Karp & Wood, *supra,* note 4, at 55.

[198] Steelman & Davis, *supra, note 4.*

[199] Karp & Wood, *supra,* note 4, at 51.

[200] http://www.americanbar.org/content/dam/aba/uncategorized/2011/vol_gship_intro_1026.authcheckdam.pdf

or terminated.[201] In designing the process, care should be taken to ensure that that an unrepresented person is able to use it, that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances. The process could include designation of a specific member of the staff to receive and review complaints, a designated e-mail address, and/or an on-line form. Requiring that the request be written (whether electronically or on paper) can discourage frivolous or repetitious requests that can drain the estate as well as waste the court's time.[202]

When a complaint is received, it should be reviewed to determine how it should be addressed. Approaches include a referral to services, sending a court visitor to investigate; requesting the guardian or conservator to address the issue(s) raised; referring the matter for mediation, particularly when the complaint appears to be the result of a family dispute; conducting an evaluation of the person under guardianship or conservatorship; or setting a hearing on the matter.

STANDARD 3.3.19 ENFORCEMENT OF ORDERS; REMOVAL OF GUARDIANS AND CONSERVATORS

A. Probate courts should enforce their orders by appropriate means, including the imposition of sanctions. These may include suspension, contempt, removal, and appointment of a successor.

B. When probate courts learn of a missing, neglected, or abused respondent or that a respondent's assets are endangered, they should take timely action to ensure the safety and welfare of that respondent and/or the respondent's assets.

C. When a guardian or conservator is unable or fails to perform duties set forth in the appointment order, and the safety and welfare of that respondent and/or the respondent's assets are endangered, probate courts should remove the guardian or conservator and appoint a successor as required.

COMMENTARY

Although probate courts cannot be expected to provide daily supervision of the guardian's or conservator's actions, they should not assume a passive role, responding only upon the filing of a complaint. The safety and well-being of the respondent and the respondent's estate remain the responsibility of the court following appointment. When a guardian or conservator abandons the respondent, or fails to submit a complete and accurate report or accounting in a timely manner, or based on a review of such reports or accountings, the report of a visitor, or complaints received there is reason to believe that a respondent and/or the respondent's assets are endangered, probate courts should conduct a prompt hearing and take necessary actions. [See Standards 3.3.15 – 3.3.19]

For example, orders to show cause or contempt citations may be issued against guardians and conservators who fail to file required reports on time after receiving notice and appropriate training and assistance. [See Standard 3.3.14] If there is a question of theft or mismanagement of assets, the court may enter an order freezing the assets and suspending the powers of the conservator. If the guardian or conservator has left the court's jurisdiction, notice of a show cause hearing should be sent to the probate court in the new jurisdiction. [See Standard 3.4.1] If the guardian or conservator is an attorney, probate courts should advise the appropriate disciplinary authority that the attorney may have violated his or her fiduciary duties to the respondent. Probate courts may consider suspending the guardian or conservator and appointing a temporary guardian/conservator to immediately take responsibility for the welfare and care of the respondent. (See Standard 3.3.6, Emergency Appointment of a Temporary Guardian or Conservator.)

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[201] Quinn & Krooks, *supra,* note 71, at 1658-1659.

[202] Arizona has adopted a rule providing probate courts with remedies to limit "vexatious conduct" such as frivolous filings. Ariz. Rules of Prob. Proc. 10(G) (2012).

If a guardian or conservator becomes unable to fulfill his/her responsibilities or abandons a respondent, probate courts should make an emergency appointment of a temporary guardian/conservator and remove the original guardian/conservator. The emphasis should be on protecting the respondent's safety, welfare, and assets. After assigning a temporary guardian or conservator, probate courts should order an investigation to locate the guardian/conservator and to examine the conduct of the guardian/conservator. Probate courts should impose appropriate sanctions against a guardian or conservator who failed to fulfill his or her duties, and when the whereabouts of a guardian or conservator are unknown, check the records of state and local agencies when sharing of information is authorized by state law.

When the whereabouts of a respondent are unknown to the probate court or the guardian/conservator, an immediate investigation should be ordered to locate the respondent including checking the records of state and local agencies when state law permits the sharing of information. If the guardian or conservator has been diligent in his or her duties, and the absence of the respondent is not the fault of the guardian/conservator, the guardian/conservator should retain the appointment. If the guardian or conservator has not been diligent in his or her duties, the probate court may remove the guardian/conservator and make an emergency appointment of a temporary guardian/conservator.

In imposing sanctions such as contempt upon a guardian or conservator, the due process rights of the guardian/conservator should be protected. At a minimum, the guardian/conservator should be entitled to notice and a hearing prior to the imposition of sanctions. However, these proceedings should not preclude probate courts from taking interim steps to protect the interests of the respondent and the estate. In addition, where needed, probate courts should be able unilaterally to suspend or remove the guardian/conservator and appoint a temporary successor to provide for the welfare of the respondent with the guardian/conservator entitled to object to the action at a later date. [See Standard 3.3.6]

STANDARD 3.3.20 FINAL REPORT, ACCOUNTING, AND DISCHARGE

A. Probate courts should require guardians to file a final report regarding the respondent's status and conservators to file a final accounting of the respondent's assets.

B. Probate courts should review and approve final reports and accountings before discharging the guardian or conservator unless the filing of a final report or accounting has been waived for cause.

COMMENTARY

The authority and responsibility of a guardian or conservator terminates upon the death, resignation, or removal of the guardian/conservator, or upon the respondent's death or restoration of competency.[203] The respondent, guardian, conservator, or any interested person may petition the court for a termination of the guardianship or conservatorship. A respondent seeking termination should be afforded the same rights and procedures as in the original proceeding establishing the guardianship/conservatorship. [See Standards 3.3.8 and 3.3.16] Where the guardian or conservator stands to benefit financially from the termination of the conservatorship, the court should carefully scrutinize this proposal.

When the request for termination of the guardianship or conservatorship is contested, probate courts should direct that notice be provided to all interested persons, conduct a hearing, and issue a determination regarding the need for

[203] *See* UGPPA §§ 318 & 431 (1997).

continuation of the guardianship or conservatorship. [See Standards 3.1.1 and 3.3.8] Before terminating a guardianship or conservatorship, probate courts should require submission of a final report regarding the respondent's status and actions taken on behalf of the respondent and or a final accounting of the estate access, review these submissions, and if all is in order, approve them. Following approval the court order should provide for the guardian's/conservator's reasonable expenses associated with the termination and cancel any applicable bond.

Circumstances may exist, however, where a formal closing of the guardianship or conservatorship, including notice, hearing, a final report, or accounting, may be waived. For example, where the status of a now-deceased respondent is virtually unchanged except for the fact of death since the previous status report (*e.g.*, the respondent suffered from a long-term disabling illness), the guardianship may be closed, the guardian discharged, and a final report forgone, if the guardian shows a waiver and consent by the respondent's successors or other interested parties. Similarly, where a relatively small amount of funds remains in the respondent's account at the time of the respondent's death, the conservator may be directed to apply those funds to the respondent's funeral and burial expenses. If the conservator shows a waiver and consent by the respondent's successors, as well as a receipt from the funeral home for expenses depleting the balance of the respondent's assets, the conservatorship should be closed without a final accounting and full hearing.[204] If the respondent approves of the actions taken previously on his or her behalf by the conservator, the balance of funds on hand may be restored or delivered to the respondent without a final accounting and discharge.

3.4 INTERSTATE GUARDIANSHIPS AND CONSERVATORSHIPS

Properly administering a guardianship/conservatorship system is difficult enough when the parties— the respondent, the guardian, the family and friends—stay in one place. Today, a respondent (or alleged incapacitated person) often has ties to more than one state. Numerous factors contribute to the increase of such interstate guardianships/conservatorships.[205] The respondent, his or her guardian, family or assets may be located outside of the jurisdiction of the court that originally established the guardianship. Some incapacitated adults desire to be closer to family or may need to be placed in a different, more suitable health care or living arrangements. Family caregivers that relocate for employment reasons reasonably may wish to bring the respondent with them. The respondent's real or personal property may remain in the existing jurisdiction, however, even after the respondent has moved. interfamily conflict or attempts simply to thwart jurisdiction may occur less frequently, but still cause significant problems for probate courts. Guardians and family members, for example, may engage in forum shopping for Medicaid purposes or for state laws governing death and dying that are compatible with their views or the views of the respondent.

The frustration of courts in their attempts to monitor and enforce guardianship orders outside their jurisdiction led the Uniform Law Commission to draft the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UGAPPJA) now enacted in 31 states.[206] UGAPPJA defines what state has primary jurisdiction to determine the need for and scope of a guardianship or conservatorship and lessens the legal impediments to transferring guardianships from one state to another.

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[204] The procedure of *waiver and consent* is alternatively known as *release and discharge* or *release and approval* in various other jurisdictions.

[205] *See generally* A. Frank Johns et al., *Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act*, 26 Clearinghouse Rev. 647 (1992).

[206] Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), (2007). Some states that have not adopted the uniform act provide probate courts with the authority to transfer guardianships and conservatorships. *See e.g.*, O.C.G.A. §29-2-73 (2010); Tex. Prob. Code §891 (2007).

The five standards in this section make provisions for guardianships that cross state lines. Central to the provisions is the concept of "portability" – that is, that a guardianship established in one state should be able to be "exported" or "imported" from one state to another absent a showing of abuse of the guardianship. The intent of the provisions, consistent with the concept of portability, is to facilitate, and not to impede unnecessarily, the movement of a guardianship across state lines, and to speed decisions and case processing by the court while protecting, even furthering, the interests of the respondent and other interested persons.

The standards in this section are extensions to interstate guardianships of the provisions in Principle 1.1 and Standard 3.3.10. They require probate courts to be accommodating and responsive to the wishes of the respondent as well as convenient and accessible. A guardianship is not intended to restrict freedom unreasonably or to limit the flexibility, choices and convenience available to the respondent. It should not unnecessarily limit choices and preferences. Standards of access to justice and the principle of comity require courts to remove those barriers that impede litigants' participation in the legal system even when that participation requires the engagement

STANDARD 3.4.1 COMMUNICATION AND COOPERATION BETWEEN COURTS

Probate courts in different jurisdictions and states should communicate and cooperate to resolve guardianship and conservatorship disputes and related matters.

COMMENTARY

This standard extends the requirement of independence and comity in Principle 1.1 to a probate court's relationship with courts in other jurisdictions and recognizes that the ends of justice are more likely to be met when courts communicate and cooperate to resolve guardianship matters that cross state lines.[207] In matters pertaining to specific guardianship or conservatorship cases in which two or more probate courts have jurisdiction, the courts should communicate among themselves to resolve any problems or disputes.

When an alleged incapacitated person temporarily resides or is located in another state, for example, the court in which the petition is filed should notify the foreign jurisdiction of the respondent's presence and the relevant allegations in the petition. This notification is intended to trigger proper actions in that jurisdiction including "courtesy checks" and other investigations of the proposed respondent, and, if necessary, protective or other services.

STANDARD 3.4.2 SCREENING, REVIEW, AND EXERCISE OF JURISDICTION

A. As part of its review and screening of a petition for guardianship or conservatorship, probate courts should determine that the proposed guardianship or conservatorship is not a collateral attack on an existing or proposed guardianship in another jurisdiction or state.

B. When multiple states may have jurisdiction, a probate court should determine:

(1) The respondent's home state.

(2) If the respondent does not have a home state or if the respondent's home state has declined jurisdiction, whether the respondent has a significant connection to the state in which the probate court is located and whether it is an appropriate jurisdiction.

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[207] *See* UAGPPJA, §§ 104 & 105 (2007).

C. In determining whether it is an appropriate jurisdiction, a probate court should consider such factors as:
(1) The expressed preference of the respondent.
(2) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent.
(3) The length of time the respondent was physically present in or was a legal resident of the probate court's state or another state.
(4) The distance of the respondent from the court in each state.
(5) The financial circumstances of the respondent's estate.
(6) The nature and location of the evidence.
(7) The ability of the probate court of each state to decide the issue expeditiously and the procedures necessary to present evidence.
(8) The familiarity of the court of each state with the facts and issues in the proceeding.
(9) If an appointment were made, the probate court's ability to monitor the conduct of the guardian or conservator.
D. In an emergency, a probate court that is not in the respondent's home state or a state with which the respondent has a significant connection may appoint a temporary guardian or conservator or issue a protective order unless requested to dismiss the proceeding by the probate court of the respondent's home state.

COMMENTARY

This standard is based on Sections 201-209 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Its intent is to stop the "race to the courthouse" as determinative of jurisdiction and venue and to promote communication and cooperation between probate courts. Paragraphs (a) – (c) set out three tiers of review. Paragraph (d) addresses the authority of probate courts in an emergency situation. When there is any question regarding the appropriate venue for submission of a guardianship/conservatorship petition, probate courts should require the parties to submit information bearing on the factors listed in paragraph (c) in order to determine which state is the appropriate jurisdiction to hear the matter. In addition, when the petition is not brought in a respondent's home state, probate courts should order the petitioner to provide notice to those persons who would be entitled to notice of the petition if the proceeding had been brought in the respondent's home state.[208]

STANDARD 3.4.3 TRANSFER OF GUARDIANSHIP OR CONSERVATORSHIP

A. Probate courts may grant a petition to transfer a guardianship or conservatorship when:
(1) The respondent is physically present or is reasonably expected to move permanently to the other state or has a significant connection to the other state.
(2) An objection to the transfer has not been made or has been denied.
(3) Plans for the care of and services for the respondent and/or management of the respondent's property in the other state are reasonable and sufficient.
(4) The probate is satisfied that the guardianship/conservatorship will be accepted by the probate court in the other state.
B. The respondent and all interested persons should receive proper notice of the intended transfer and be informed of their right to file objections and to request a hearing on the petition.

[208] UAGPPJA § 208 (2007).

COMMENTARY

This standard is consistent with Section 301 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Its intent is to facilitate the transfer of a guardianship and/or conservatorship to another state in cases in which the probate court is satisfied that the guardianship/conservatorship is valid and that the guardian/conservator has performed his or her duties properly in the interests of the respondent for the duration of his or her appointment. It is based on the assumption that most guardians/conservators are acting in the interest of the respondent and that the notice and reporting requirements, and the opportunity to bring objections to the transfer to the attention of the court, are sufficient checks on the appropriateness of the transfer of the guardianship.

A guardian or conservator should always provide the court, the respondent, and all interested persons advance notice of an intended transfer of the guardianship/conservatorship or movement of the respondent or property from the court's jurisdiction. The guardian/conservator should be familiar with the laws and requirements of the new jurisdiction.

Any bond or other security requirements imposed by the exporting court should be discharged only after a new bond, if required, has been imposed by the receiving court. Debtor issues may need to be dealt with in accordance with existing state laws.

STANDARD 3.4.4 RECEIPT AND ACCEPTANCE OF A TRANSFERRED GUARDIANSHIP

Probate courts should accept a guardianship or conservatorship transferred in accordance with Standard 3.4.3 unless an objection establishes that the transfer would be contrary to the interests of the respondent or the guardian/conservator is ineligible for appointment in the receiving state. Acceptance of the transferred guardianship/conservatorship can be made without a formal hearing unless one is requested by the court *sua sponte* or by motion of the respondent or by any interested person named in the transfer documents. Upon accepting a transferred guardianship/conservatorship, probate courts should notify the transferring probate court.

COMMENTARY

This standard is consistent with Section 302 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Probate courts should recognize and accept the terms of a foreign guardianship or conservatorship that has been transferred with the approval of the transferring court. The receiving court should notify the transferring court and acknowledge that it has formally accepted the guardianship. Receipt of this notice can serve as the basis for the original court's termination of its guardianship.

Consistent with Standard 3.4.1, probate courts should cooperate with the foreign court to facilitate the orderly transfer of the guardianship. To coordinate the transfer, it may delay the effective date of its acceptance of the transfer, make its acceptance contingent upon the discharge of the guardian/conservator by the transferring court, recognize concurrent jurisdiction over the guardianship/conservatorship, or make other arrangements in the interests of the parties and the ends of justice.

STANDARD 3.4.5 INITIAL HEARING IN THE COURT ACCEPTING THE TRANSFERRED GUARDIANSHIP

A. No later than ninety (90) days after accepting a transfer of guardianship/conservatorship, probate courts should conduct a review hearing during which they may modify the administrative procedures or requirements of the guardianship/conservatorship in accordance with state law and procedure.

B. Probate courts should:

(1) Give effect to the determination of incapacity unless a change in the respondent's circumstances warrants otherwise.

(2) Recognize the appointment of the guardian/conservator unless the person or entity appointed does not meet the qualifications set by state law.

(3) Ratify the powers and responsibilities specified in the transferred guardianship/conservatorship except where inconsistent with state law or required by changed circumstances

COMMENTARY

Probate courts should schedule a review hearing within 90 days of receipt of a foreign guardianship. The review hearing permits the court to inform the respondent and guardian/conservator of any administrative changes in the guardianship/conservatorship (*e.g.*, bond requirements or reporting procedures) that are necessary to bring the transferred guardianship/conservatorship into compliance with state law. Unless specifically requested to do otherwise by the respondent, the guardian/conservator, or an interested person because of a change of circumstances, probate courts should give full faith and credit to the terms of the existing guardianship/conservatorship concerning the rights, powers and responsibilities of the guardian/conservator except when they are inconsistent with statutes governing guardianship and/or conservatorship in the receiving state.

3.5 PROCEEDINGS REGARDING GUARDIANSHIP AND CONSERVATORSHIP FOR MINORS

The standards in this section address non-testamentary guardianships and conservatorships of minors, i.e. persons under age 18.[209] They set forth the practices that probate courts should follow when adjudicating these cases but do not cover the complex interpretational issues that can arise, for example, in interstate cases where the Uniform Child Custody Jurisdiction Act[210] and the federal Parental Kidnapping Prevention Act[211] may apply, or when determining when the conditions have occurred to trigger a standby guardianship or terminate a temporary guardianship. The standards cover both guardianships of a minor's person and conservatorships of a minor's estate. In some states, both types of proceedings are within the jurisdiction of probate courts. In many other states, probate court jurisdiction is limited to protecting the property and financial interests of a minor with jurisdiction over custody matters vested in the family or juvenile court. Standard 3.5.12 specifically addresses the latter situation, urging that the courts communicate and coordinate with each other to ensure that the best interests of the minor are served. In most instances, the standards in this section urge probate courts to follow practices similar to those recommended in Section 3.3 for guardianships/conservatorships of adults.

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[209] Testamentary appointment of a guardian or conservatorship for a minor is effective automatically subject to later challenge; non-testamentary appointments require court approval. *See* Unif. Prob. Code 5-201, 5-202 (2008); UGPPA §§ 201 and 202 (1997).

[210] Uniform Child Custody Jurisdiction and Enforcement Act (1997) http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm

[211] 28 U.S.C. §1738A.

STANDARD 3.5.1 PETITION

A. Probate courts should adopt a clear, easy to complete form petition written in plain language for initiating proceedings regarding the non-testamentary appointment of a guardian/conservator for a minor.

B. The petition form, together with instructions, a description of the jurisdiction of the probate court and, if applicable, the jurisdiction of the juvenile or family court regarding guardianships/conservatorships of minors, and an explanation of guardianship and conservatorship and the process for obtaining one, should be readily available at the court, in the community, and on-line.

C. A petition to establish a guardianship or conservatorship should be verified and require at least the following information:

(1) The full name, physical and mailing address of the petitioner(s)

(2) The relationship, if any, between the petitioner(s) and the minor

(3) The full name, age, and physical address or location of the minor

(4) Whether the minor may be a member of a federally recognized tribe or a citizen of another country

(5) If the petitioner(s) is/are not the parent(s) or sole legal guardian(s) of the minor, the full name, physical and mailing address of each parent of the child whose parental rights have not been legally terminated by a court of proper jurisdiction

(6) The reasons why a guardianship and/or conservatorship is being sought

(7) The guardianship/conservatorship powers being requested and the duration of those powers

(8) Whether other related proceedings are pending

(9) In conservatorship cases:

(a) The nature and estimated value of assets

(b) The real and personal property included in the estate

(c) The estimated annual income and annual estimated living expenses for the minor during the ensuing twelve (12) months

(d) That the petitioner(s) is/are qualified for and capable of posting a surety bond in the total of the present value of all real property assets included in the estate plus the annual income expected during the ensuing twelve (12) months

D. If the petition is for appointment of a standby guardian or conservator it should be accompanied by documentation of the parent's debilitating illness or lack of capacity.[212]

E. The petition should be reviewed by the probate court or its designee to ensure that all of the information required to initiate the guardianship/conservatorship proceeding is complete.

COMMENTARY

The standard lists the minimum information that probate courts and all parties to a guardianship or conservatorship proceeding for a minor need in order to proceed. It attempts to strike a balance between making guardianship/conservator proceedings available to parents or others concerned about the well-being of a child, while providing the court with the fundamental information necessary to proceed. Paragraph C(4) of the standard is included to enable probate courts to comply more easily with the requirements of the Indian Child Welfare Act[213] and the Vienna Convention on Consular Relations.[214] The

[212] At least 24 states and the District of Columbia permit parents with a degenerative, incurable disease to seek appointment of a person who will serve as guardian/conservator of their children upon their death or incapacity. *See* J.S. Rubenstein, *Standby Guardianship Legislation: At the Midway Point*, 2 ACTEC Journal 33 (2007); UGPPA §202 (1997).

[213] 25 USC §§1901 *et seq.*

[214] Vienna Convention on Consular Relations, Art. 37 21 U.S.T. 77 (1963) http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf, which requires notification of the local consulate whenever a guardian may be appointed for a foreign national.

standard urges courts to use forms that minimize "legalese" and are as easy to complete as possible but requires that petitioners verify the statements made in order to protect against frivolous filings.

While the standard sets forth the minimum information that should be required, good practice suggests that the following information will often be needed and should be included as part of the petition itself or as attachments to it, including:

- **The name and address of any person responsible for the care or custody of the minor including an existing guardian/conservator.**
- **The name and address of any current guardian, conservator, legal representative or representative payee for the minor.**
- **Existing powers of attorney applicable to the minor.**
- **The name, address, and interest of the petitioner.**[215]

In addition, if the petition is for appointment of a stand-by guardian or conservator, a doctor's certificate or other documentation that the parent is suffering from a progressively chronic or irreversible illness that is fatal or will result in the parent's inability to protect the well-being and property of the minor.

Probate courts should develop and distribute forms that will assist the petitioner to meet these requirements. Whenever possible, petitions, instructions, and explanations of guardianship/conservatorship for minors, and the process for seeking them should be available on the court website as well as at libraries. Probate courts should be able to provide a list of community resources for free or low-cost legal services, such as bar referral services, legal aid offices, and law school clinics. To the extent permissible under state law and court rules, petitioners should be able to complete and submit petitions electronically. Informational brochures should be available on the court website and distributed to all persons upon request or to those who file guardianship/conservatorship petitions.

Promising Practices

Several court systems and individual courts provide information regarding guardianship/conservatorship for minors proceedings on their websites including the forms necessary to initiate a conservatorship or guardianship. For example:

California Judicial Branch
http://www.courts.ca.gov/documents/gc210.pdf

District of Columbia Superior Court
http://www.dccourts.gov/internet/legal/aud_probate/gdnlegal.jsf

Maricopa County, AZ Superior Court
http://www.superiorcourt.maricopa.gov/SuperiorCourt/Self-ServiceCenter/Forms/ProbateCases/prob_group_4.asp

Philadelphia County, PA Court of Common Pleas
http://www.pacourts.us/NR/rdonlyres/11E9588C-4158-4962-8ACA-BC95A7EA1B1E/0/OCRFormOC04.%20target=

In addition, the Denver, CO Probate Court employs *pro se* facilitators to assist persons seeking to file a petition for guardianship. http://www.denverprobatecourt.org/

[215] *See Model Statute on Guardianship and Conservatorship*, §19(b) in Bruce D. Sales, D. Matthew Powell, & Richard Van Duizend, Disabled Persons and the Law, 573-574 (Plenum Press, 1982).

STANDARD 3.5.2 NOTICE

A. Probate courts should ensure that timely notice of the guardianship/conservator proceedings is provided to:
(1) The minor if the minor has attained a sufficient age to understand the nature of the proceeding.
(2) Any person who has had primary care and custody of the minor during the 60 days prior to the filing of the petition.
(3) The minor's parents, step-parents, siblings, and other close kin.
(4) Any person nominated as guardian/conservator.
(5) Any current guardian, conservator, legal representative or representative payee for the minor.
(6) Notice to a representative of the minor's tribe if the minor is Native American.

B. Any written notice should be in plain language and in easily readable type. At the minimum, it should set forth the time and place of judicial hearings, the nature and possible consequences of the proceedings, and the rights of the minors and of persons entitled to object to the appointment of a guardian/conservator of the minor. A copy of the petition should be attached to the written notice.

C. Probate courts should implement a procedure whereby any interested person can file a request for notice and/or a request to intervene in the proceedings.

D. Probate courts should require that proof that all required notices be filed.

COMMENTARY

This standard underscores the general notice requirements of Standard 3.1.1 (Notice) by requiring specific timely notice of guardianship and conservatorship proceedings to the minor and others entitled to notice. It generally follows the notice provision in the Uniform Guardianship and Protective Proceedings Act.[216] Consistent with the trend in other types of proceedings involving minors, it does not specify a minimum age at which the minor is entitled to receive notice and participate in the hearing.[217] The notice should be written and personally delivered. When the officers serving the notice are under court control, it may be appropriate to provide them with special training to facilitate interactions with minors. In addition to providing notice to the minor, notice should ordinarily also be given to those who are most likely to have interest in the minor's well-being and safety, as well as the proposed guardian/conservator and any previously appointed legal representatives. This may include a tribal representative if the minor may be a member of a recognized Indian tribe.[218]

Probate courts should establish a procedure permitting interested persons who desire notification before a final decision is made in a guardianship/conservatorship proceeding to file a request with the court for notice or to intervene in the proceedings.[219] This procedure allows persons interested in the establishment or monitoring of a guardianship or conservatorship to remain abreast of developments and to bring relevant information to the court's attention. The request for notice should contain a statement showing the interest of the person making the request. Intervention in the proceedings by an interested party, including the nomination of someone else as guardian or conservator, should be permitted. A fee may be attached to the filing of the request and a copy of the request should be provided to the minor's guardian/conservator (if any). Unless the probate court makes a contrary finding, notice should be provided to any person who has properly filed this request.

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[216] UGPPA §205(a) (1997).

[217] *See e.g.,* AZ Juv. Ct. R. Pro., Rule 41 (2010); 42 U.S.C.A. § 675(5)(c) (2010).

[218] Indian Child Welfare Act, 25 USC §§1901 *et seq.*

[219] *See, e.g.,* UGPPA § 116 (1997); Unif. Pprob. Code § 5-116 (2008).

STANDARD 3.5.3 EMERGENCY APPOINTMENT OF A TEMPORARY GUARDIAN/CONSERVATOR FOR A MINOR

A. When permitted, probate courts should only appoint a temporary guardian or conservator for a minor *ex parte*:
(1) Upon the showing that unless granted temporary appointment is made, the minor will suffer immediate or irreparable harm and there is no one with authority or who is willing to act.
(2) In connection with the filing of a petition for a permanent guardianship or conservatorship for the minor.
(3) Where the petition is set for hearing on the proposed permanent guardianship or conservatorship on an expedited basis.
(4) When notice of the temporary appointment is promptly provided in accordance with Standard 3.5.2.
B. The minor or the person with custody of the minor should be entitled to an expeditious hearing upon a motion seeking to revoke the temporary guardianship or conservatorship.
C. Where appropriate, probate courts should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian or conservator for a minor.
D. The powers of a temporary guardian or conservator should be carefully limited and delineated in the order of appointment.
E. Appointments of temporary guardians or conservators should be of limited and finite duration.

COMMENTARY

Emergency petitions seeking a temporary guardianship/conservatorship for a minor require the court's immediate attention. Ordinarily such petitions would arise when both parents are deceased, or when there is written consent from the custodial parent, but there is not time to serve the non-custodial parent before significant decisions must be made for the minor such as enrollment in school or medical treatment), or when for some other reason the safety of the minor is threatened and there is no one including the relevant child protection agency willing or authorized to act.

Because not only the minor's safety but also parental and other important rights are involved, emergencies, and the expedited procedures they may invoke require probate courts to remain closely vigilant for any potential due process violation and any attempt to use the emergency proceedings to interfere with an investigation or proceeding initiated by the relevant child protection agency. Thus, the standard calls for the request for an emergency petition to submitted in conjunction with a petition for appointment of a permanent guardian/conservator for the minor [See Standard 3.5.1], notice to all parties or potential parties listed in Standard 3.5.2, an expedited hearing,[220] and use of protective orders as a substitute for appointment of a guardian or conservator when appropriate. By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship/conservatorship for the minor, probate courts will confirm the necessity for the temporary guardianship/conservatorship and ensure that it will not extend indefinitely. When the temporary guardianship or conservatorship is established for the minor, the date for the hearing on the proposed permanent guardianship/conservatorship should be scheduled. The order establishing the temporary guardianship/conservatorship should limit the powers of the temporary guardian or conservatorship to only those required by the emergency at hand and provide that it will lapse automatically upon that hearing date. The temporary guardianship/conservatorship order may be accompanied by

[220] *See e.g.*, NH REV. STAT. ANN. §463:7 (2011); UGGPA §204(e).

support, visitation, restraining, or other relevant orders when appropriate.[221] Full bonding of liquid assets should be required in temporary conservatorship cases. The length of temporary guardianships/conservatorships for minors should be in accord with state law, but should not extend for more than 30 days.[222]

When establishing the powers of the temporary guardian or conservator, the court should be cognizant of the fact that certain decisions by a temporary guardian or conservator may be irreversible or result in irreparable damage or harm (*e.g.*, the liquidation of the respondent's estate). Therefore, it may be appropriate for the court to limit the ability of the temporary guardian or conservator or a minor to make certain decisions without prior court approval (*e.g.*, sensitive personal or medical decisions such as abortion, organ donation, sterilization, civil commitment, withdrawal of life-sustaining medical treatment, termination of parental rights).

While the appointment of a temporary guardian or conservator for a minor provides a useful mechanism for making needed decisions during an emergency, it also can offer an option to a probate court that receives information that a currently appointed guardian or conservator is not effectively performing his or her duties and the welfare of the minor requires that a substitute decision maker be immediately appointed. Under such circumstances, the authority of the permanent guardian or conservator can be suspended and a temporary guardian appointed for the minor with the powers of the permanent guardian or conservator. The probate court should, however, ensure that this temporary guardianship/conservatorship also does not extend indefinitely by including a maximum duration for it in its order.

STANDARD 3.5.4 REPRESENTATION FOR THE MINOR

A. Probate courts should appoint a guardian *ad litem* for the minor if the guardianship results from a child neglect or abuse proceeding, there are grounds to believe that a conflict of interest may exist between the petitioner or proposed guardian and the minor, or if the minor is not able to comprehend the nature of the proceedings.

B. Probate courts should appoint an attorney to represent a minor if the court determines legal representation is needed or if otherwise required by law.

COMMENTARY

Most proceedings for appointment of a guardian/conservator for a minor are uncontested and the best interests of the minor will be served by the appointment of the proposed guardian/conservator. However, with greater use of other kinship guardianship as a means for providing a permanent placement for children who have been abused or neglected,[223] there will be greater need for probate courts to obtain more in-depth information regarding a minor's best interests when making determinations whether to appoint a guardian or conservator for a minor and whom to appoint.[224]

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[221] NH Rev. Stat. Ann. §463:7 (II) (2011).

[222] NH Rev. Stat. Ann. §463:7 (2011); UGGPA §204(e).

[223] Fostering Connections To Success And Increasing Adoptions Act, 42 U.S.C. 671(a) (2008).

[224] The Pew Commission on Children in Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care, 43 (2004), http://pewfostercare.org/research/docs/FinalReport.pdf.

Guardians *ad litem* are persons appointed to represent the best interests of a minor. They are responsible for conducting an independent investigation in order to provide the court with information and recommendations regarding what outcome will best serve the child's needs.[225] Some courts use CASAs (Court Appointed Special Advocates) who are specially screened and trained volunteer(s) to serve in this role in cases involving child abuse and neglect.[226] Both guardians *ad litem* and CASAs take the views and wishes of the minor into account but make their own determination of what are the child's or youth's best interests. Attorneys appointed to serve as legal counsel, on the other hand, must advocate for the outcome sought by their client. When appointing a guardian *ad litem*, CASA, or attorney for a minor, it is good practice for probate court judges to state their duties on the record and the reasons for the appointment.[227] Especially in jurisdictions with a significant Native American population, guardians *ad litem*, CASAs, and attorneys appointed for a minor should be familiar with the requirements of and reasons underlying ICWA.

STANDARD 3.5.5 PARTICIPATION OF THE MINOR IN THE PROCEEDINGS

Probate courts should encourage participation of minors who have sufficient capacity to understand and express a reasoned preference in guardianship/conservatorship proceedings and to consider their views in determining whether to appoint a guardian/conservator and whom to appoint.

COMMENTARY

From the time of the Romans, children age 14 or older had a voice in selecting a guardian.[228] This legal tradition is reflected in the Uniform Guardianship and Protective Proceedings Act and many state statutes.[229] There is growing recognition that presence and participation of a child in a proceeding determining residence and custody is important for both the child and the court both in the literature regarding dependency proceedings and in both family court and probate court statutes.[230] This has led some states to provide that minors of any age may not just formally object to a guardian but may also nominate a guardian if they are "of sufficient maturity to form an intelligent preference."[231] While a judge is not required to follow the preferences of a minor regarding the appointment of a guardian or conservator, it is good practice to at least ask the children or youth for their views.

Promising Practices

Resources to assist judges in meaningfully and appropriately involving minors in court proceedings are available from the American Bar Association Center on Children and the Law.
http://www.americanbar.org/groups/child_law/what_we_do/projects/empowerment/youthincourt.html

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[225] *See* National Council of Juvenile and Family Court Judges (NCJFCJ), Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, 83-84 (NCJFCJ, 2000).

[226] *See* www.casaforchildren.org

[227] UGGPA, §115 (2007).

[228] David M. English, *Minor's Guardianship in an Age of Multiple Marriage*, 1995 Institute on Estate Planning, 5-15 (1995).

[229] *Id.* at 5-16 – 5-18; UGPPA §203 (1997).

[230] NCJFCJ, *supra*, note 225, at 20; Andrea. Khoury, *With Me, Not Without Me: How to Involve Children in Court*, 26 Child L. Prac. 129 (2007); Miriam A. Krinsky, *The Effect of Youth Presence in Dependency Court Proceedings*, Juv. & Fam. Just. Today, Fall 2006, at 16; Pew Commission, *supra*, note 224, at 41; FL. Stat. Ann. §39.701(6)(a) (2012); NH Rev. Stat. Ann. §463-8 (II) (2012).

[231] *E.g.*, Cal. Prob. Code §1514(e)(2) (2012); Conn. Gen. Stat. Ann. §45a-617 (2012); NH Rev. Stat. Ann. §463.8 (IV) (2012).

STANDARD 3.5.6 BACKGROUND CHECKS

A. Probate courts should request a national background check on all prospective guardians and conservators of minors, other than those specified in paragraph B., before an appointment is made to determine whether the individual has been: convicted of a relevant crime; determined to have committed abuse, abandonment, neglect, or financial or sexual exploitation of a child, or a spouse or other adult; has been suspended or disbarred from law, accounting, or other professional license for misconduct involving financial or other fiduciary matters; or has a poor credit history.

B. Background checks should not be conducted for prospective guardians and conservators who have been the subject of such a check as part of a certification or licensing procedure, or banks, trust companies, credit unions, savings and loan associations, or other financial institutions duly licensed or authorized to conduct business under applicable state or federal laws.

COMMENTARY

Given the vulnerability of children who have lost their parents through death, illness, or through action of a court, the authority of guardians and conservators, the opportunities for misuse of that authority, and the incidence of abuse and exploitation around the country, requiring prospective guardians and conservators to undergo a thorough criminal history and credit check is an appropriate safeguard. Currently the federal Fostering Connections to Success and Increasing Adoption Act requires at least a criminal records check,[232] and many states require both a criminal records check and a check of child abuse registries.[233]

The background information is intended to provide probate courts with information on which to base a decision whether the nominee should be appointed. Upon receiving such potentially disqualifying information, probate courts should weigh the seriousness of the offense or misconduct, its relevance to the responsibilities of a guardian or conservator, how recently the offense or misconduct occurred, the nominee's record since the offense or misconduct occurred, and the vulnerability of the minor. If there is some concern but not enough to disqualify a potential guardian or conservator, probate courts may require periodic post-appointment criminal history and/or credit checks of a guardian or conservator, a larger bond, more frequent reports or accountings, and/or more intensive monitoring.[234] [See Standards 3.5.9 through 3.5.11].

STANDARD 3.5.7 ORDER

A. Probate courts should tailor the order appointing a guardian or conservator for a minor to the facts and circumstances of the specific case.

B. In an order appointing a conservator or limited guardian for a minor, probate courts should specify the duties and powers of the conservator or limited guardian, including limitations to the duties and powers, requirements to establish restrictive accounts or follow other protective measures, and any rights retained by the minor.

C. If the order is for a temporary, limited, or emergency guardianship or conservatorship for a minor, probate courts should specify the duration of the order.

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[232] 42 U.S.C. §471(a)(2)(D); *see e.g.*, NH Rev. Stat. Ann. §463.5(V).

[233] *See e.g.*, NH Rev. Stat. Ann. §463.5(V).

[234] In light of the abuses that have occurred, some probate courts may wish to require periodic updates of background checks in all cases in order to ensure that the person appointed continues to be fit to serve.

D. Probate courts should inform newly appointed guardians about their responsibilities to the minor, the requirements to be applied in making decisions and caring for the minor, and their responsibilities to the court including the filing of plans and reports.

E. Probate courts should inform newly appointed conservators of minors about their responsibilities to the minor, the requirements to be applied in managing the minor's estate, and their responsibilities to the court including the filing of inventories, asset management plans, and accountings.

F. Following appointment, probate courts should require a guardian, or conservator for a minor to:

(1) Provide a copy of and explain to the minor the terms of the order of appointment including the rights retained

(2) Serve a copy of the order to the persons who received notice of the petition initiating the guardianship/conservatorship proceeding and those persons whose request for notice and/or to intervene has been granted by the court and file proof of service with the court

(3) Record the order in the appropriate property record if the minor's estate includes real estate

COMMENTARY

Most individuals appointed as a guardian or conservator know little about what is expected of them and the scope of their responsibilities and authority. Thus, including a clear, complete statement of duties and powers in the appointment order (and/or the letters of authority) is an important first step in ensuring that minors will receive the protection and services needed. Generally, a guardian of a minor has the powers and responsibilities of a parent regarding the minor's well-being, care, education, and support.[235] Conservators of minors should have duties and authorities similar to those of a conservator of an incapacitated adult. By listing the powers and duties of the guardian/conservator, the probate court's order can serve as an educational roadmap to which the guardian/conservator can refer to help answer questions about what the guardian/conservator can or cannot do in carrying out the assigned responsibilities. This will also as serve as notice to third parties with whom the guardian/conservator may have dealings regarding the limitations on the powers and authority.

The Uniform Guardianship and Protective Proceedings Act provides that a probate court may establish a temporary, emergency, or limited guardianship for a minor in certain circumstances.[236] [See Standard 3.5.3] When such a guardianship or conservatorship is established, it is all the more important for probate courts to specify the guardian's/conservator's duties and authority, limitations on that authority, the responsibilities and rights retained by the minor or the minor's parents, and the duration of the appointment, in order to limit uncertainty within the family and by health providers, school officials, and creditors. Probate courts may also require use of protective measures such as establishment of restricted accounts, deposit of funds with the court, or transfers of property pursuant to the Uniform Transfer to Minors Act if applicable.[237]

Guardians of minors should also be required to obtain prior court approval before a minor is permanently removed from the court's jurisdiction. Prior court approval, however, should not be required where the removal is temporary in nature (*e.g.*, when the minor is being taken on a vacation or is sent to a school out of state).

Requiring the guardian/conservator to serve a copy of the order of appointment to those persons who received notice of the petition for guardianship or conservatorship and those persons whose request for notice and/or to intervene have been granted by the court will promote their continued involvement in monitoring the minor's situation. Explaining the

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[235] UGPPA, §§207 – 208 (1997).

[236] UGPPA, §§204(d) & (e), and 206(b) (1997).

[237] Uniform Transfers to Minors Act (1986), http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utma86.htm.

order of appointment to minors in terms they can understand facilitates the minor's awareness of what is happening and encourages communication between the minor and the guardian/conservator. Recording a guardianship/conservatorship order provides notice to others regarding who has the authority to engage in significant financial transactions including the sale of real property.

STANDARD 3.5.8 ORIENTATION, EDUCATION, AND ASSISTANCE

Probate courts should develop and implement programs for the orientation, education, and assistance of guardians and conservators for minors.

As noted previously, most newly appointed guardians and conservators are not fully aware of their responsibilities and how to meet them. A number of states currently provide at least some materials that explain the duties of guardians and conservators for minors (*e.g.*, printed guidelines CT; a video, GA; on-line instructions, AZ).[238] Where appropriate, the materials should be in a language other than English to supplement the English version (*e.g.*, GA). In addition, as with guardians and conservators for disabled adults, probate courts should have some program or process for assisting guardians or conservators for minors who are uncertain about how best to meet their responsibilities or whether they have the authority to take the actions necessary. [See Standard 3.3.14]

STANDARD 3.5.9 BONDS FOR CONSERVATORS OF MINORS

Except in unusual circumstances, probate courts should require all conservators to post a surety bond in an amount equal to the value of the liquid assets and annual income of the estate.

COMMENTARY

Among the measures probate courts may use to protect minors is to require newly appointed conservators to furnish a surety bond[239] conditioned upon the faithful discharge by the conservator of all assigned duties.[240] The requirement of bond should not be considered as an unnecessary expense or as punitive. It is insurance against any loss being suffered by the minor. Bonding or some equally protective alternative (*e.g.*, accounts that require a court order for all withdrawals, court-maintained accounts, etc.) protect the court from public criticism for having failed in its duty and responsibility to protect the minor's estate from loss, misappropriation, or malfeasance on the part of the conservator.

In determining the amount of the bond, or whether the case is one in which an alternative measure will provide sufficient protection, probate court should consider such factors as:

- The value of the estate and annual gross income and other receipts.
- The extent to which the estate has been deposited under an effective arrangement requiring a court order for its removal.
- Whether a court order is required for the sale of real estate.
- Whether a restricted account has been establish and proof provided to the court that the restrictions will be enforced by the bank.
- The frequency of the conservator's required reporting.

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[238] http://www.jud.state.ct.us/probate/Guardian-KID.pdf; http://www.gaprobate.org/guardianship.php; https://www.azcourts.gov/Portals/34/Forms/Probate/gardinst.pdf.

[239] As noted in Standard 3.1.2 (Fiduciaries), a personal bond adds little to a personal representative's oath or acceptance of appointment. This standard addresses surety bonds, that is, bonds with corporate surety or otherwise secured by the individual assets of the personal representative.

[240] *See* UNIF. PROB. CODE § 5-415 (2008) (unless otherwise directed, the size of the bond should equal the aggregate capital value of the estate under the conservator's control, plus one year's estimated income, minus the value of securities and land requiring a court order for their removal, sale, or conveyance).

- The extent to which the income or receipts are payable to a facility responsible for the minor's care and custody.
- Whether the conservator was appointed pursuant to a nomination that requested that bond be waived.
- The information received through the background check.
- The financial responsibility of the proposed conservator.

STANDARD 3.5.10 REPORTS

A. Probate courts should require guardians of minors to file at the hearing or within 60 days:
(1) A guardianship plan, with annual updates thereafter.
(2) Advance notice of any intended absence of the minor from the court's jurisdiction in excess of 30 calendar days.
(3) Advance notice of any major anticipated change in the minor's physical location (*e.g.*, a change of abode).

B. Probate courts should require conservators for minors to file within 60 days, an inventory of the minor's assets and an asset management plan to meet the minor's needs and allocate resources for those needs, with annual accountings and updates thereafter. Probate courts should require conservators to submit, for approval, an amended asset management plan whenever there is any significant deviation from the approved plan or a significant change from the approved plan is anticipated.

COMMENTARY

The standard urges that guardians for minors be required to provide a report to the probate court at the hearing or within 60 days of appointment and annually thereafter until discharged. Similarly, conservators for minors must immediately commence making an inventory of the minor's assets and submit the inventory and an asset management plan for the first twelve (12) months within 60 days of appointment.

- The guardian's report should contain descriptive information on the services and care being provided to the minor, significant actions taken by the guardian, and the expenses incurred by the guardian.
- The conservator's report should include a statement of all available assets, the anticipated income for the ensuing twelve (12) months, the anticipated financial needs and expenses of the minor, and the investment strategy and asset allocation to be pursued (if applicable). As part of this process, the conservator should consider the purposes for which these funds are to be managed, specify the services and care to be provided to the minor and their costs, describe significant actions taken, and the expenses to date.

These reporting requirements ensure that probate courts quickly receive information to enable them to better determine the condition of the minor, the amount of assets and income available, and the initial performance of the guardian or conservator. The Uniform Guardianship and Protective Proceedings Act authorizes courts to require guardians and conservators of minors to "report on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control" as required by rule or at the request of an interested person.[241] Several states require guardians and conservators of minors to file reports periodically as well.[242]

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[241] UGPPA, §207(b)(5) (1997).

[242] *See e.g.*, FL. STAT. ANN. §744.367 (2012); N.H. STAT. REV. §463.17 (2012).

Probate courts should provide explicit instructions regarding the information to be contained in initial and subsequent reports. This can be accomplished either through clear forms with detailed instructions or through an on-line program such as that developed by Minnesota for conservators of incapacitated adults.[243] Where there is considerable overlap or interdependence, probate courts may authorize the joint preparation and filing of the plans and reports of the guardian and conservator.

The plans should be neither rote nor immutable. They should reflect the condition and situation of each individual minor rather than provide general statements applicable to anyone. For example, the investment strategy and management objectives may be different for a relatively young minor than for one who is older, may vary depending on the source or purpose of the assets, or may be different where there is a greater need to replenish the funds for long-term support.[244] Minor changes to a guardianship plan (*e.g.*, changing doctors, replacing one social activity with another, etc.) and prudent changes in a conservatorship's investments may be implemented without consulting the court. However, probate courts should advise guardians and conservators that except in emergencies, there should be no substantial deviation from the court-approved plan without prior approval. For example, any absence of the guardian or minor from the jurisdiction of the court that will exceed 30 calendar days should be reported as should any anticipated move of the minor within or outside the jurisdiction so that the court can readily locate the minor at all times. In addition, if at any time there is any change in circumstances that might give rise to a conflict of interest or the appearance of such a conflict, it should be reported to the probate court as quickly as possible.

Finally, the standard provides for annual updates of the initial guardianship plan and conservatorship asset management plan to enable probate courts to ensure that the guardian is providing the minor with proper care and services and respecting the minor's autonomy, and that the estate is being managed with the proper balance of prudence and attention to the current needs and preferences of the minor. Along with reporting on what has been done during the reporting period, it is essential that the guardian inform the court about changes in the minor's condition, either for the better or for the worse, and suggest what changes may be needed in the scope of the guardianship order. [See Standard 3.3.16]

STANDARD 3.5.11 MONITORING, MODIFYING, TERMINATING A GUARDIANSHIP OR CONSERVATORSHIP OF A MINOR

A. Probate courts should monitor the well-being of the minor and the status of the minor's estate on an on-going basis, including, but not limited to:
- **(1) Ensuring that plans, reports, inventories, and accountings are filed on time.**
- **(2) Reviewing promptly the contents of all plans, reports, inventories, and accountings.**
- **(3) Ascertaining the well-being of the minor and the status of the estate, as needed.**
- **(4) Assuring the well-being of the minor and the proper management of the estate, improving the performance of the guardian/conservator, and enforcing the terms of the guardianship/conservatorship order.**

B. When required for the well-being of the minor or the minor's estate, probate courts should modify the guardianship/conservatorship order, impose appropriate sanctions, or remove and replace the guardian/conservator, or take other actions that are necessary and appropriate.

C. Before terminating a guardianship or conservatorship of a minor, probate courts should require that notice of the proposed termination be provided to all interested parties.

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[243] www.mncourts.gov/conservators.

[244] *See generally* Edward C. Halbach Jr., *Trust Investment Law in the Third Restatement*, 27 Real Prop., Prob. & Trust J. 407 (1992) (discussing the background and applications of principles of fiduciary prudence as formulated in the Third Restatement of the Law of Trusts).

COMMENTARY

This standard parallels that regarding monitoring of guardianships and conservatorships for incapacitated adults. [See Standard 3.3.17] As in the case of minors found to have been neglected or abused, probate courts have an on-going responsibility to make certain that the minor for whom they have appointed a guardian or conservator is receiving the services and care required, the estate is being managed appropriately, and the terms of the order remain consistent with the minor's needs and condition. The review, evaluation, and auditing of the initial and annual plans, inventories, and reports and accountings by a guardian or conservator are essential steps in fulfilling this duty. Making certain that those documents are filed is a necessary precondition. Probate courts should also have the capacity to investigate those situations in which guardian/conservators may be failing to meet their responsibilities under the order or exceeding the scope of their authority.

A principal component of the review is to ensure that the guardian/conservator included all of the information required by the court in these reports. Probate courts should not permit conservators to file accountings that group expenses into broad categories, absent inclusion of all vouchers, invoices, receipts, and statements to permit comparison against the returns. Prompt review of the guardian's or conservator's reports enables probate courts to take early action to correct abuses and issue a show cause order if the guardian/conservator has or appears to have violated a provision of the original order. Many of the red flags and concerns listed in the commentary to Standard 3.3.17 apply to guardianships/conservatorships of minors as well as those for incapacitated adults.

Some jurisdictions also require guardians and/or conservators to distribute reports and accountings to family members and other interested persons. This provides probate courts with additional opportunities for independent reviews by others having an interest in the welfare of the minor. On the other hand, given the personal information contained in reports and the financial disclosures in accountings, it may also compromise a minor's privacy or generate family disagreements regarding the allocation of assets that have little to do with the performance of the conservator.

If a probate court finds that a guardian/conservator for a minor is not performing the required duties or is performing them so inadequately that the well-being of the minor and/or the minor's is being threatened, it should take all necessary remedial actions including removing and the guardian/conservator and appointing a temporary or full replacement. If the minor has been abused or neglected or possible criminal conduct has occurred regarding the minor or the minor's state, the probate court should report the matter to local child protection or law enforcement agency.

A guardianship of a minor generally may be terminated upon the minor's adoption, attainment of majority, emancipation, or death, or upon a determination that termination will be in the best interest of the minor (*e.g.*, at the request of a parent who has recovered from a debilitating illness or addiction).[245] Some states, reflecting the provisions of the federal Fostering Connections to Success and Increasing Adoption Act,[246] permit courts to delay termination until age 21 in certain circumstances.[247] Because family members, care givers, educational institutions, and creditors may have an interest in the termination, notice of the proposed termination and an opportunity to be heard should be provided before issuance of the termination order.

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[245] *See e.g.*, UGPPA §210(b).

[246] 42 USC §§ 673(a)(4)(A)(i) & 675 (8)(B)(iii).

[247] *See e.g.*, NH Rev. Stat. Ann. §463:15 (II) (2011).

STANDARD 3.5.12 COMPLAINT PROCESS

Probate courts should establish a clear and easy-to-use process for communicating concerns about guardianships and conservatorships for minors and the performance of guardians/conservators. The process should outline circumstances under which a court can receive *ex parte* communications. Following the appointment of a guardian or conservator, probate courts should provide a description of the process to the minor, the guardian/conservator, and to all persons notified of the original petition.

COMMENTARY

The standard urges probate courts to establish a process for minors, members of the minor's family, or other interested persons to question whether the minor is receiving appropriate care and services, the minor's estate is being managed prudently for the benefit of the minor, or whether the guardianship/conservatorship should be modified or terminated. In designing the process, care should be taken to ensure that that an unrepresented person is able to use it, that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances. The process could include designation of a specific member of the staff to receive and review complaints, a designated e-mail address, and/or an on-line form. Requiring that the request be written (whether electronically or on paper) can discourage frivolous or repetitious requests.

When a complaint is received, it should be reviewed to determine how it should be addressed. Approaches include a referral to services, sending a court visitor to investigate, requesting the guardian or conservator to address the issue(s) raised, conducting an evaluation of the minor under guardianship or conservatorship, or setting a hearing on the matter.

STANDARD 3.5.13 COORDINATION WITH OTHER COURTS

When there is concurrent or divided jurisdiction over a minor or a minor's estate, probate courts should communicate and coordinate with the other court or courts having jurisdiction to ensure that the best interests of the minor are served and that orders are as consistent as possible.

COMMENTARY

In many states, guardianships of minors are matters within the jurisdiction of the juvenile or family court, and conservatorships of the estate of a minor are within the jurisdiction of the probate court.

> Guardianship of the person and the awarding of custody are essentially equivalent. . . . Family courts have the authority to decide custody between competing parents, but they may also have the authority to award custody to third persons. Family courts also frequently appoint guardians as a prelude to adoption. Finally, guardians may be appointed by the juvenile courts for children who have been abused, neglected, or adjudicated delinquent. . . . Unless otherwise ordered by the court, a guardian of a minor's person has custody of the child and the authority of a parent, *but without the financial responsibility*.[248] [emphasis added]

Protection of the minor's best interests and well-being are best served when the judges of the respective courts talk and cooperate with each other in making appointments, fashioning orders, and mitigating attempts to use the procedures of one court to undercut the process in another.[249]

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[248] English, *supra*, note 228, at 5-4.

[249] *Id.* at 5-5.

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Williamsburg, VA 23185-4147
Phone (800) 616-6164

DENVER, CO
707 17th St., Ste. 2900
Denver, CO 80202-3429

ARLINGTON, VA
2425 Wilson Blvd., Ste. 350
Arlington, VA 22201-3320

WASHINGTON, DC
111 Second St., NE
Washington, DC 20002-7303

TAB 9

Judiciary Determinations of Capacity

JUDICIAL DETERMINATION OF CAPACITY

Tamara C. Curry
Associate Judge of Probate
Charleston County, South Carolina
January 2014

INCREASING GUARDIANSHIPS

- Capacity cannot be determined in a cookie cutter formula.
- Facts of each case is different.
- Physical and medical factors may change results.
- Complex impairments can make case difficult.
- Must look at least restrictive alternative.

ROLE OF JUDGES IN CAPACITY DETERMINATIONS

- Decide capacity in a manner that balances well-being and rights.
- Promote self-determination.
- Identify less restrictive alternatives to guardianship.
- Provide guidance to guardians.
- Make determinations of restoration.
- Craft limited guardianship when appropriate.

LIMITED GUARDIANSHIP

- A **limited guardianship** is a relationship in which the guardian "is assigned only those duties and powers that the individual is incapable of exercising."
- The concept of limited guardianship is promoted in the UGPPA and the *National Probate Court Standards,* which directs probate judges to "detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the individual." 5

EXAMPLES OF LIMITATIONS TO GUARDIANSHIP

Include rights retained by an individual to:

- Determine living arrangements.
- Spend small amounts of money.
- Make and communicate choices about roommates.
- Initiate and follow a schedule of daily and leisure activities.
- Establish and maintain personal relationships with friends and relatives.
- Determine degree of participation in religious activities.

BENEFITS OF LIMITED GUARDIANSHIP

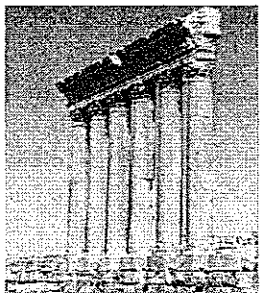
- Maximizes the autonomy of the person with diminished capacity.
- Is directly responsive to the concept of the least restrictive alternative.
- Supports an individual's mental health.
- Encourages the guardian to take into account the wishes of the individual, moving the relationship more toward collaboration and compromise.

RISKS OF LIMITED GUARDIANSHIP

In some cases, the elder is at risk for or has been subject to abuse, and the use of limited guardianship could keep the elder at some degree of continuing risk. In these cases, plenary guardianship may be the appropriate protective mechanism.

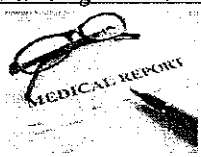
6 PILLARS OF CAPACITY

1. MEDICAL CONDITION
2. COGNITION
3. EVERYDAY FUNCTIONING
4. VALUES AND PREFERENCES
5. RISK AND LEVEL OF SUPERVISION
6. MEANS TO ENHANCE CAPACITY



PILLAR 1: MEDICAL CONDITION PRODUCING FUNCTIONAL DISABILITY

- Historically, many state statutes included **"physical illness"** or **"physical disability"** as sufficient disabling condition.
- Today, judges require <u>information on the specific disorder causing diminished capacity.</u>



PILLAR 2: COGNITIVE FUNCTIONING COMPONENT

- The 1997 UGPPA defines an incapacitated person as an individual who … is **unable to receive and evaluate information or make or communicate decisions to such an extent** that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.
- Includes alertness or arousal, as well as memory, reasoning, language, visual-spatial ability, and insight.

PILLAR 3: EVERYDAY FUNCTIONING COMPONENT

- Based upon the court's opinion of the reasonableness of one's behavior—essentially, a subjective test.
- Many states now set a higher and more objective bar for weighing functional behavior by focusing only on one's ability to provide for one's "essential needs," such as "inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety."
- **"Activities of Daily Living" or "ADLs"** (grooming, toileting, eating, transferring, dressing)
- **"Instrumental Activities of Daily Living" or "IADLs"**—abilities to manage finances, health, and functioning in the home and community.

PILLAR 4: CONSISTENCY OF CHOICES WITH VALUES, PREFERENCES, AND PATTERNS

- Capacity reflects consistency of choices with the individual's life patterns, expressed values, and preferences.
- Guardian must "consider the expressed desires and personal values of the [individual] to the extent known to the guardian."
- Core values may affect the individual's preference for who is named guardian.

PILLAR 5: RISK OF HARM AND LEVEL OF SUPERVISION NEEDED

- Provide for the essential needs of the individual.
- Lack of support may increase risk.
- Must match the risk of harm to the individual and the corresponding level of supervision required to mitigate that risk.
- Some cases, risk is low and the need can be addressed through a less restrictive alternative.

PILLAR 6: MEANS TO ENHANCE CAPACITY

- Practical accommodations.
- Mere existence of a physical disability should not be a ground for a guardianship.
- Information about enhancing capacity informs many judicial actions:
  - ✓ **Hearing.**
  - ✓ **Review Period.**
  - ✓ **Plans.**

5 STEPS IN JUDICIAL DETERMINATION OF CAPACITY

1. SCREEN CASE
2. GATHER INFORMATION
3. CONDUCT HEARING
4. MAKE DETERMINATION
5. ENSURE OVERSIGHT

STEP 1: SCREEN CASE

- Review trigger.
  - ✓ Identify the immediate issue or occurrences that brought the case to court at this time.
  - ✓ Ensure that the triggering issue concerns protection of the individual, and is not just for the convenience or benefit of a 3rd party, such as family, heir, hospital, or nursing home.
- Determine if guardianship is potentially appropriate. ⟹ If not, use less restrictive alternatives, such as **Durable Health Care and Financial Powers of Attorney.**

STEP 1: SCREEN CASE

- ✓ Is venue proper?
- ✓ Are notice and service proper?
- ✓ Has counsel been appointed if required or needed?
- ✓ Has individual and interested parties been informed of hearing rights?
- Determine if immediate risk of substantial harm. ⟹ If so, use emergency guardianship.
  - ✓ Petition for emergency guardianship.
  - ✓ Case presents a true emergency according tot state law.

STEP 2: GATHER INFORMATION

- Receive reports.
  - ✓ Court Investigator Report
  - ✓ Clinical Evaluation Report

- Ascertain if more information necessary.
  - ✓ State statutory requirements.
  - ✓ Temporary or reversible causes.
  - ✓ Clinical statement appears one-sided.

STEP 2: GATHER INFORMATION

- Obtain additional reports if a review of the information reveals that information is not available on all 6 pillars of capacity. ⟹ Obtain more information from clinician, court investigator, family, or other informants.

STEP 3: CONDUCT HEARING

- Take judicial note of reports.
- Receive testimony.
- Accommodate, observe, and/or engage individual.
  - ✓ Individual has a right to be present, but may not be present if a medical condition prevents it or the individual does not wish to come.
  - ✓ If present, allows his or her involvement in the proceedings and allows the judge an opportunity to observe. May shed a different light on the case.

STEP 4: MAKE DETERMINATION

- Analyze evidence in relation to the elements of state law.
  - ✓ Medical condition based on up-to-date clinical reports can determine the cause of the diminished capacity.
  - ✓ Cognitive functioning considers whether the individual is lucid or confused, alert or comatose, or can understand information, communicate, or can remember information over time.
  - ✓ Analyze everyday functioning, such as care of self, financial, medial, home and community life, and civil or legal.

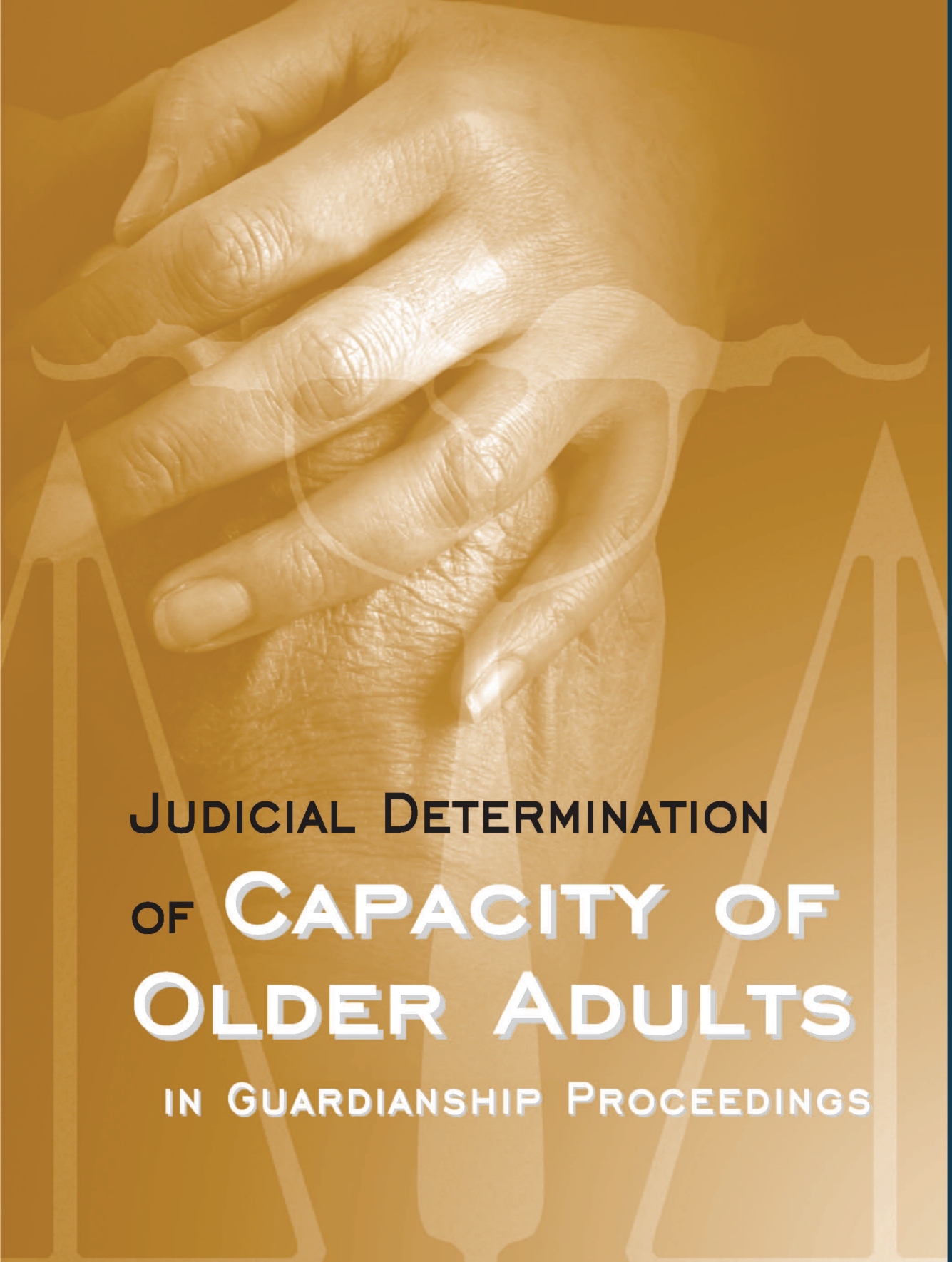
STEP 4: MAKE DETERMINATION

- Each factor must be weighed in view of the individual's history of choices and expressed values and preferences.
- Categorize Judgment.
  - ⇒ If minimal or no diminished capacity, use less **restrictive alternatives.**
  - ⇒ If severely diminished capacities on all fronts, **use plenary guardianship.**
  - ⇒ If mixed strengths and weaknesses, **use limited guardianship.**
- If limited, identify rights retained and/or removed.
- Identify statutory limits of guardian authority.

STEP 5: ENSURE OVERSIGHT

- Monitor changes in capacity and guardian actions.
  - ✓ Court Monitoring Programs.
  - ✓ Investigators.
  - ✓ Status Conferences.
  - ✓ Annual Reports.
- Instruct guardian.
  - ✓ Plan required in some jurisdictions.
  - ✓ Establish a baseline against which subsequent reports can be measured.
  - ✓ Reflect care-planning for nursing home residents under federal regulations.
- If condition may improve, **use time-limited guardianship.**

THE END

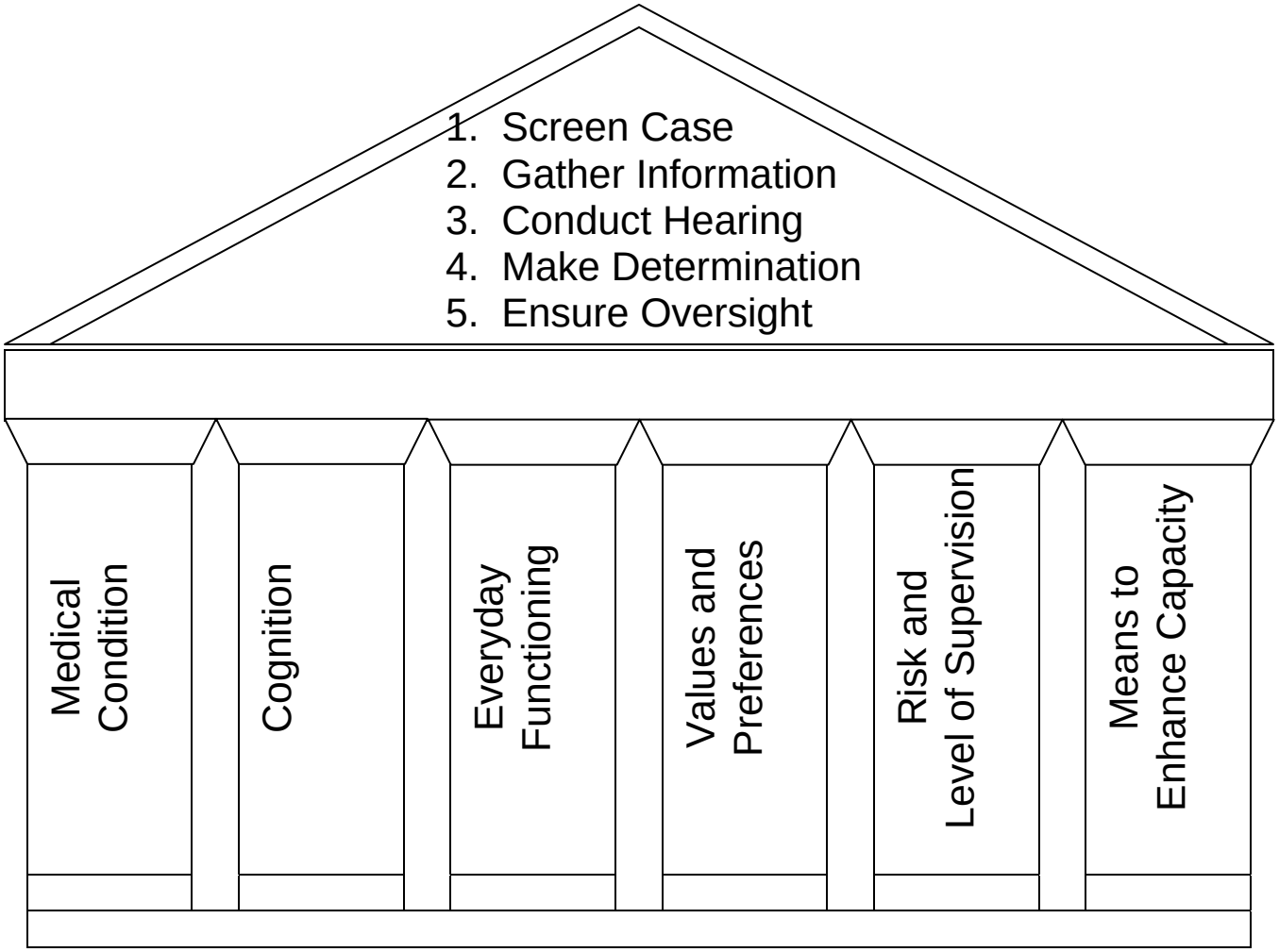


Judicial Determination of Capacity of Older Adults in Guardianship Proceedings

A HANDBOOK FOR JUDGES

American Bar Association Commission on Law and Aging
Defending Liberty Pursuing Justice
American Psychological Association
National College of Probate Judges

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings



American Bar Association
Commission on Law and Aging

American Psychological Association

National College of Probate Judges

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings

Disclaimer

The views expressed in this document have not been approved by the governing or policy-setting bodies of the American Bar Association, the American Psychological Association, or the National College of Probate Judges, and should not be construed as representing policy of these organizations. Materials in this book were developed based on the consensus of a working group.

This document is not intended to establish a standard of practice against which juridical or clinical practice is to be evaluated. Rather, it provides a framework that judges may find useful and effective in capacity determination.

Although the principles presented herein are intended to be generally relevant across all legal jurisdictions, law and practice differ across state jurisdictions and sometimes even across county lines. **Thus, this book is intended to supplement (and cannot substitute for) a judge's working knowledge of the capacity and guardianship statutes and case law specific to his/her jurisdiction**. This book focuses on issues in capacity determination, not all of adult guardianship.

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Judges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result—a wood staff—is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be 'released' by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it.[1]

Acknowledgements

This book is the result of a collaborative effort of members of the American Bar Association (ABA) Commission on Law and Aging, the American Psychological Association (APA), and the National College of Probate Judges (NCPJ).

This book was guided by a judicial advisory panel convened for this project: Hon. Steve M. King, of Texas, Hon. Gary Cassavechia, of New Hampshire, and Hon. John N. Kirkendall, of Michigan. The handbook was also reviewed by additional members of the Executive Committee of the National College of Probate Judges: Hon. Grace G. Connolly, Hon. Ramond C. Eubanks, Hon. William J. Bate, Hon. Luke Cooley, Hon. Joseph A. Egan Jr., Hon. Irvin G. Condon, Hon. John W. Voorhees, Hon. Jack R. Puffenberger, and Ms. Mary Joy Quinn. The handbook received additional review by members of the NCPJ, including Hon. Nikki Towry DeShazo, Hon John R. Maher, and Hon. Lawrence A. Belskis. Additional reviewers included Erica Berman, Ann Soden, and Jack Schwartz. Forms and guides in this book were informed and inspired by the work of others, including Hons. King, Kirkendall, and Cassavechia, the Carolina Legal Assistance, Joan O'Sullivan, and the Massachusetts Guardianship Task Force.

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings is the second work product of the ABA/APA Assessment of Capacity in Older Adults Project Working Group, established in 2003 under the auspices of the interdisciplinary Task Force on Facilitating APA/ABA Relations. The first work product, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* was published in 2005 and is available online at www.abanet.org/aging. Members of the ABA/APA Working Group for this project are: Deborah DiGilio, M.P.H.; Barry Edelstein, Ph.D.; Gregory Hinrichsen, Ph.D.; Daniel Marson, J.D., Ph.D.; Jennifer Moye, Ph.D.; David Powers, Ph.D.; Charles Sabatino, J.D.; and Erica Wood, J.D. The judicial book was written by Jennifer Moye, Erica Wood, Daniel Marson, and Charles Sabatino. Jennifer Moye was the editor of the judicial book. The working group expresses its special thanks to Jorge Armesto and Jamie Philpotts for their editorial assistance.

Finally, we wish to acknowledge the Borchard Foundation Center on Law and Aging and the Farnsworth Foundation for their financial support in the development, printing, and distribution of this book.

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Everyday Functioning and Functional Assessment

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Hearing: Maximizing Participation

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Jury Instructions

Less Restrictive Alternatives to Guardianship

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Means to Enhance Capacity

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Strategies for Improving Practice in Your Court

Temporary and Reversible Causes of Confusion

Useful Web Sites

Values

Introduction

Background

- Guardianships for older adults are **increasing**.
- Guardianship law and practice is undergoing **dramatic revision**. 💻
- Definitions of capacity have **evolved** to reflect modern understandings of the brain dysfunction, functional abilities, and the law:
  - ► Capacity is task specific, not global.
  - ► Capacity can fluctuate.
  - ► Capacity is situational.
- ► Capacity is contextual. 💻
- Determining capacity in older adults with complex impairments can be **difficult**.
- Limited guardianships based on partial loss of capacity can be **challenging** to craft.

Goals of This Book

- To provide **practical tools** for capacity determination.
- To address the needs of a **wide audience** of judges.
- To **improve communication** between judges and healthcare professionals.
- To provide resources useful in identifying **less restrictive alternatives** and fashioning **limited guardianship**, while recognizing that plenary guardianship often may be appropriate.
- To call attention to **temporary and reversible causes of impairment** in older adults.
- To assist courts in **enhancing the capacity** of older adults.

Use of This Book

- Forms and resources referenced herein are **available online** to download for ready use and modification at http://www.abanet.org/aging; http://www.apa.org/pi/aging; and http://www.ncpj.org. The symbol "💻" indicates that additional information can be found in the online version of the book.
- Forms and resources **may be reproduced** for use in guardianship proceedings (for other uses, refer to copyright page).
- Although the forms are generally relevant, each form will need to be modified to suit local practices. Judges are encouraged to **freely adapt** forms to jurisdictional needs and laws.
- This book is generally **consistent with the** *Uniform Guardianship and Protective Proceedings Act*[2] or **UGPPA**. 💻

The Role of Judges in Capacity Determinations

Judges Balance Multiple Goals 💻

- Decide capacity in a manner that balances well-being and rights.
- Promote self-determination.
- Identify less restrictive alternatives to guardianship. 💻
- Provide guidance to guardians. 💻
- Make determinations of restoration. 💻
- Craft limited guardianship when appropriate. 💻

What Is Limited Guardianship?

- A limited guardianship is a relationship in which the guardian "is assigned only those duties and powers that the individual is incapable of exercising."[3]

- The concept of limited guardianship is promoted in the UGPPA[4] and the *National Probate Court Standards,* which directs probate judges to "detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the individual." [5]

- In some cases, such as coma or advanced dementia, individuals are totally impaired by their medical condition. In other cases, a fine tuned assessment may help to identify specific areas—**even if relatively small in scope**—in which the individual may retain rights.

- Examples of limitations to guardianship include rights retained by an individual to:
    - Determine living arrangements.
    - Spend small amounts of money.
    - Make and communicate choices about roommates.
    - Initiate and follow a schedule of daily and leisure activities.
    - Establish and maintain personal relationships with friends and relatives.
    - Determine degree of participation in religious activities.

💻

Benefits of Limited Guardianship

- Maximizes the autonomy of the person with diminished capacity.[6]

- Is directly responsive to the concept of the least restrictive alternative.

- Supports an individual's mental health.[7]

- Encourages the guardian to take into account the wishes of the individual, moving the relationship more toward collaboration and compromise.

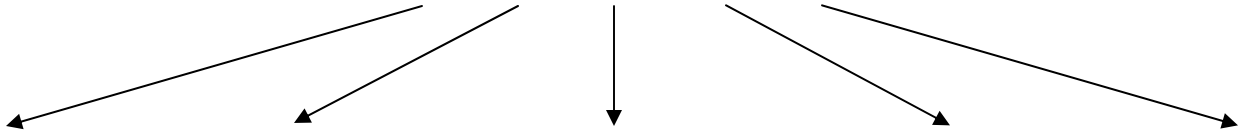
Risks of Limited Guardianship

- In some cases, the elder is at risk for or has been subject to abuse, and the use of limited guardianship could keep the elder at some degree of continuing risk. In these cases, plenary guardianship may be the appropriate protective mechanism.

Overview of Capacity Assessment

A comprehensive assessment of capacity for guardianship proceedings requires collecting information on six factors. In this book, these factors will be referred to as the "Six Pillars of Capacity Assessment." Information about these factors may be obtained from healthcare professionals, court investigators, guardians ad litem, family members, adult protective service workers, and other involved parties. This book describes the six pillars of capacity assessment and how they inform each judicial action step in adult guardianship proceedings. Links to related model forms and resources are provided throughout the book.

Six Pillars of Capacity Assessment					
Medical Condition	**Cognition**	**Everyday Functioning**	**Values and Preferences**	**Risk and Level of Supervision**	**Means to Enhance Capacity**



Five Steps in Judicial Determination of Capacity				
1. Screen Case	**2. Gather Information**	**3. Conduct Hearing**	**4. Make Determination**	**5. Ensure Oversight**
a. Review trigger b. Determine if guardianship is potentially appropriate ➔ If not, use less restrictive alternatives c. Determine if immediate risk of substantial harm ➔ If so, use emergency guardianship	a. Receive reports b. Ascertain if more information necessary c. Obtain additional reports	a. Take judicial note of reports b. Receive testimony c. Accommodate, observe, and/or engage individual	a. Analyze evidence in relation to the elements of state law b. Categorize Judgment ➔If minimal or no diminished capacity, use **less restrictive alternatives** ➔ If severely diminished capacities on all fronts, **use plenary guardianship** ➔If mixed strengths and weaknesses, **use limited guardianship** c. If limited, identify rights retained and/or removed d. Identify statutory limits of guardian authority	a. Monitor changes in capacity and guardian actions ➔ If condition may improve, **use time-limited guardianship** b. Instruct guardian

Six Pillars of Capacity

1. Medical Condition Producing Functional Disability

- Historically, many state statutes included "physical illness" or "physical disability" as a sufficient disabling condition, and some opened a very wide door by including "advanced age" and the catch-all "or other cause." Such amorphous and discriminatory labels invited overly subjective judicial determinations.

- Today, judges require information on the specific disorder causing diminished capacity. With aging, a wide range of neurological and psychiatric conditions may impact capacity. 💻

- Some conditions are temporary and reversible. 💻

2. Cognitive Functioning Component

- "Cognitive functioning" is a component of statutory standards for capacity in many states.

- The 1997 UGPPA defines an incapacitated person as an individual who … is **unable to receive and evaluate information or make or communicate decisions to such an extent** that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.[8]

- Cognitive functioning includes alertness or arousal, as well as memory, reasoning, language, visual-spatial ability, and insight. Neurological as well as psychiatric or mood disorders may impact information processing. 💻

3. Everyday Functioning Component

- Until recent years, the everyday functioning tests found in state law were fairly vague and subjective, such as "incapable of taking care of himself";[9] "unable to provide for personal needs and/or property management";[10] or "incapable of taking proper care of the person's self or property or fails to provide for the person's family."[11]

- Vague standards invite judgments of incapacity based upon the court's opinion of the reasonableness of one's behavior—essentially, a subjective test.

- Many states now set a higher and more objective bar for weighing functional behavior by focusing only on one's ability to provide for one's "essential needs," such as "inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety."[12]

- Healthcare professionals divide everyday functioning into the "activities of daily living" or "ADLs" (grooming, toileting, eating, transferring, dressing) and the "instrumental activities of daily living" or "IADLs"—abilities to manage finances, health, and functioning in the home and community. 💻

4. Consistency of Choices with Values, Preferences, and Patterns

- Capacity reflects the consistency of choices with the individual's life patterns, expressed values, and preferences. Choices that are linked with lifetime values are rational for an individual even if outside the norm.

- Knowledge of values is not only important in determining capacity, but also in the guardianship plan. The UGPPA provides that a guardian must "consider the expressed desires and personal values of the [individual] to the extent known to the guardian."[13]

- Core values may affect the individual's preference for who is named guardian, as well as preferences concerning medical decisions, financial decisions, and living arrangements. 💻

5. Risk of Harm and Level of Supervision Needed

- Most state statutes require that the guardianship is necessary to provide for the essential needs of the individual (i.e., there are no other feasible options), or that the imposition of a guardianship is the least restrictive alternative for addressing the proven substantial risk of harm.[14]

- The social and environmental supports may decrease the risk. Lack of supports may increase risk. In this manner, the degree of risk is not merely a consideration of the condition and its effects, but the consideration of these within the environmental supports and demands.

- The level of supervision determined by the judge must match the risk of harm to the individual and the corresponding level of supervision required to mitigate that risk.

- In some cases, the risk is low and the need can be addressed through a less restrictive alternative or limitation to guardianship. In other cases, less restrictive alternatives have failed or are inappropriate, and a plenary guardianship is necessary to protect the well being of the elder. 💻

6. Means to Enhance Capacity

- The judge must be vigilant for means to enhance capacity through practical accommodations and medical, psychosocial, or educational interventions. 💻

- The mere existence of a physical disability should not be a ground for guardianship, since most physical disabilities can be accommodated with appropriate medical, functional, and technological assistance directed by the individual.

- Information about enhancing capacity informs many judicial actions:
  - **Hearing**. How to maximize capacity at the hearing. 💻
  - **Review Period**. What is the appropriate period for judicial review, especially if **restoration** of capacity through treatments is possible.
  - **Plans**. What treatments, services, habilitation should be detailed in the guardianship plan. 💻

Step One: Screen the Case

1a. Review Trigger

- *What is bringing this case to court now?*

- Identify the immediate issue or occurrences that brought the case to court at this time—for example, a question of institutional placement, sale of property, medical treatment, or financial exploitation.

- Ensure that the triggering issue concerns protection of the individual, and is not for the convenience or benefit of a third party, such as a family, heir, hospital, or nursing home. Judges may address the concerns of other parties, but "the interests of the incapacitated person should take precedence."[15]

1b. Determine if Guardianship Is Potentially Appropriate

- *Have all procedural requirements been met?*
  - Is venue proper?
  - Are notice and service proper?
  - Has counsel been appointed if required or if needed?
  - Has individual been informed of hearing rights?

- *Is guardianship necessary and helpful in this case?*
  Put a mechanism in place to screen out cases that are inappropriate for guardianship. Some courts have designated staff to work with petitioners, ensuring that cases that come before the court for judicial intervention are necessary and that petitioning the court for guardianship is, in reality, a last resort. Seek to determine that:

  ► There are no **less restrictive alternatives**. Perhaps the individual has executed durable health care and financial powers of attorney, and there is no allegation of abuse of those powers. Perhaps the only issue is authority for medical treatment and the state has a default surrogate law allowing family members to make health care decisions. Perhaps a more supervised housing setting or intensive in-home services would abrogate the need for a guardian. 💻

  ► A guardian **would solve the issue**. There are some situations where putting a guardian in place would not address the problem at hand. "Guardianship is not appropriate in some circumstances. A probate guardian cannot make a person reveal where assets, such as vehicles are hidden, cannot [in some instances] force mental health treatment, cannot provide personal services if the person is never at home, is threatening, locks caregivers out of the home, or is homeless by choice." [16]

1c. Determine if Immediate Risk of Substantial Harm

- *Is this a case of "emergency" guardianship?*

- A guardianship case may come before the judge as a petition for emergency guardianship. For example, there is need for an urgent medical procedure and no one to provide informed consent, or there is a family dispute and someone is seeking to "kidnap" the individual to an unknown location. Most states, as well as the UGPPA[17] and the *National Probate Court Standards*[18] have provisions for emergency guardianship.

- In some states, and in the *UGPPA*, the appointment of an emergency guardian is *not a finding of diminished capacity*, or evidence that a permanent guardian is needed.

- Because time is of the essence, procedural requirements for emergency guardianships are less than for permanent guardianship. Thus, it is important to exercise **caution**.

- Be sure the case presents a **true emergency** according to state law. That is, the individual's health, safety, or welfare will be substantially harmed over the time it takes for compliance with regular guardianship procedures.

- Be sure the emergency guardianship does not become an **automatic doorway** to permanent guardianship that bypasses procedural safeguards.

Step Two: Gather Information

2a. Receive Reports

- Information about the case may be brought by many parties.

- A **Court Investigator Report** (a guardian ad litem or other court investigator or visitor—the use of these terms varies by jurisdiction) may be required or requested.

  As the eyes and ears of the court, the investigator can identify the triggering issue, less restrictive alternatives, risk of harm, whether there is a need for clinical evaluation, whether the individual requires counsel, the family situation, who might provide important testimony, and suggestions for limitations to guardianship and/or elements of a guardian plan, as well as evaluate the six pillars of capacity.

  - See page 20 for a model court investigator report.

- A **Clinical Evaluation Report** may be required or requested.

  A comprehensive evaluation will cover all six pillars of capacity, namely: the medical condition, cognitive functioning, everyday functioning, values and preferences, risk and level of supervision needed (including social support), and means to enhance capacity at the hearing and later.

  - See page 23 for a model order for clinical evaluation.

- Families and other lay persons may submit affidavits providing important information.

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2b. Ascertain if More Information Is Necessary

- After reviewing the information, further assessment or investigation may be necessary for the following reasons:

  ► **State statutory requirements**. State statutes set out the necessary elements of a clinical evaluation, which generally reflect the elements in the state definition of "incapacitated person." [19] For specific statutory requirements of clinical evaluations, see http://www.abanet.org/aging/guardianship.html.

  ► **Red flags signaling need for more in-depth information**. If the individual has temporary or reversible causes of cognitive impairment or other mitigating factors that have not been addressed, a more sophisticated and in-depth evaluation is warranted. 💻

  ► **Clinical statement appears one-sided**. A clinical evaluation secured by the petitioner is for the purpose of supporting the petition and may lack attention to the individual's areas of strength, a prognosis for improvement, or important situational factors. An independent assessment can flesh out skeletal or purely one-sided information.

2c. Obtain Additional Reports

- If a review of the information reveals that information is not available on all six pillars of capacity assessment or has other shortcomings, then more information must be obtained from the clinician, court investigator, family, or other informants. a model order for independent evaluation.

- A judge may need to order an independent and more comprehensive evaluation by a clinical professional. See page 23 for a model order for independent evaluation.

Step Three: Conduct Hearing

3a. Take Judicial Note of Reports

The judge by his or her own motion may recognize the report of the guardian ad litem, or physician's report or other clinical statement, and admit them into evidence.

3b. Receive Testimony

The judge may receive testimony from witnesses, such as relatives, friends, neighbors, care providers, geriatric care managers, or others, called by the petitioner or the individual who is the subject of the petition. The individual, him or herself, may or may not speak. In some jurisdictions and in some cases, the guardian ad litem or court investigator makes a statement.

3c. Accommodate, Observe, and/or Engage the Individual

- The individual has **a right** to be present at the hearing.

- About half of the state laws and the UGPPA **require** that the individual be present unless good cause is shown.

- **The individual's presence is encouraged as it:**
    - Allows his or her involvement in the proceedings. Often, people may want their "day in court" and feel more satisfaction from the hearing if they are present and involved, whether a guardian is appointed or not.
    - Allows the judge an opportunity to observe, personally, the individual.
    - May shed a different light on the case.

- **The individual may not be present if:**
    - A medical condition prevents it (e.g., person is in a coma).
    - The individual does not wish to come.

- To determine if the individual can attend, obtain clinical or court investigative reports concerning the individual's presence at the hearing. Assessments of whether attendance at the hearing would be harmful or not realistically possible may be included in the petition, clinical evaluation form, or court investigator report.

- **The following questions may guide this process:**
    - Does the individual want to be present?
    - Would it be harmful in any way?
    - Would the individual understand at least some of the proceeding?
    - Would the individual be able to communicate in court?
    - What accommodations are needed (e.g., hearing amplifier, move location of hearing) to maximize participation?

The individual and his or her attorney will determine whether the person becomes a witness. However, in an uncontested case, the judge may gain insight and/or may make the person feel involved by engaging him or her with a few questions.

Step Four: Make Determination

4a. Analyze Evidence in Relation to Elements of State Law

1. The Medical Condition

What is the medical cause of the individual's alleged incapacities and will it improve, stay the same, or get worse? Based on up-to-date clinical reports, determine the cause of the diminished capacity. Depression and delirium are often mistaken for dementia and need to be ruled out.

2. Cognitive Functioning

In what areas is the individual's decision-making and thinking impaired and to what extent? Consider whether the individual is lucid or confused, alert or comatose, or can understand information, communicate, or can remember information over time. Consider areas of strength and weakness and the severity of impairment.

3. Everyday Functioning

What can the individual do and not do in terms of everyday activities? Does the individual have the insight and willingness to use assistance or adaptations in problem areas? Can the person:

Care of Self

- Maintain adequate hygiene, including bathing, dressing, toileting, dental
- Prepare meals and eat for adequate nutrition
- Identify abuse or neglect and protect self from harm

Financial

- Protect and spend small amounts of cash
- Manage and use checks
- Give gifts and donations
- Make or modify a will
- Buy or sell real property
- Deposit, withdraw, dispose, or invest monetary assets
- Establish and use credit
- Pay, settle, prosecute or contest any claim
- Enter into a contract, financial commitment, or lease arrangement
- Continue or participate in the operation of a business
- Resist exploitation, coercion, undue influence

Medical

- Make and communicate a healthcare decision or medical treatment
- Choose health facility
- Choose and direct caregivers
- Make an advance directive
- Manage medications
- Contact help if ill or in a medical emergency

Home and Community Life

- Maintain minimally safe and clean shelter
- Be left alone without danger
- Drive or use public transportation

- Make and communicate choices about roommates
- Initiate and follow a schedule of daily and leisure activities
- Travel
- Establish and maintain personal relationships with friends, relatives, co-workers
- Determine his or her degree of participation in religious activities
- Use telephone
- Use mail
- Avoid environmental dangers, such as the stove and poisons, and obtain appropriate emergency help

Civil or Legal

- Retain legal counsel
- Vote
- Make decisions about legal documents
- Other rights under state law

4. Consistency of Choices with Values, Patterns, and Preferences

Are the person's choices consistent with long-held patterns or values and preferences? Each of the above factors must be weighed in view of the individual's history of choices and expressed values and preferences. Do not mistake eccentricity for diminished capacity. Actions that may appear to stem from cognitive problems may in fact be rational if based on lifetime beliefs or values. Long-held choices must be respected, yet weighed in view of new medical information that could increase risk, such as a diagnosis of dementia.

Key areas to consider include matters such as:

- Does the individual want a guardian?
- Does the individual prefer that decisions be made alone or with others?
- Whom does the individual prefer to be guardian/make decisions?
- What makes life good or meaningful for an individual?
- What have been the individual's most valued relationships and activities?
- What over-arching concerns drive decisions—e.g., concern for the well-being of family, concern for preserving finances, concern for maintaining privacy, etc.?
- Are there important religious beliefs or cultural traditions?
- What are the individual's strong likes, dislikes, hopes, and fears?
- Where does the individual want to live?

5. Risk of Harm and Level of Supervision Needed

What is the level of supervision needed? How severe is the risk of harm to the individual? Determine what degree of supervision will address the individual's needs and mitigate the risk of harm.

6. Means to Enhance Functioning

What treatments might enhance the individual's functioning? Consider if treatments for the underlying condition might improve functioning. Notice whether the individual might be able to use technological aids to maintain independence. Key interventions are:

- Education, training, or rehabilitation
- Mental health treatment
- Occupational, physical, or other therapy
- Home or social services
- Medical treatment, operation, or procedure
- Assistive devices or accommodation

4b. Categorize Judgment and Make Findings

- There is no simple formula that will help judges make the determination. The following broad classification could serve as an initial schema:

  → If **minimal or no** incapacities, petition not granted, use less restrictive alternative.

  → If **severely diminished** capacities in all areas, or if less restrictive interventions have failed, use plenary guardianship.

  → If **mixed strengths and weaknesses**, use limited guardianship.

- When appropriate (or if required by law), a concise written record of the key findings and rationale for the judge's decision will serve as:
  - the basis for any appeal;
  - the basis for limiting the guardianship order; and
  - the basis for an effective plan to serve the individual's needs.

4c. If Limited Order, Identify Rights Retained and/or Removed

- The cases in which there are "mixed areas" of strengths and weaknesses present the greatest challenge—and the greatest opportunity—for the "judge as craftsman" to tailor a limited order to the specific needs and abilities of the individual.

4d. Identify Statutory Limits of Guardian's Authority

- State guardianship statutes, honed by state case law, will set the start-point on which to base the scope of the court order. Statutes vary in the extent of rights and duties automatically transferred to the guardian.

- In many states, most or all rights are transferred to the guardian unless retained with the incapacitated person by court order.

- In other states, all rights are retained unless specifically transferred to the guardian by court order.

- Some statutes carve out basic rights that are retained by the individual unless the court orders otherwise—such as the right to vote or the right to make a will.

Step Five: Ensure Court Oversight

5a. Monitor Changes in Capacity and Guardian Actions

- Court monitoring of guardianships has many critical functions, one of which is monitoring changes to the individual's level of capacity.

- **Short-term Review of Capacity**
  If the individual's level of capacity may improve soon with treatment (e.g., for subdural hematoma after a fall), the guardianship should be referred for review within a short time period.

- **Annual Review of Capacity**
  Unlike with probate of decedents' estates, in guardianship there is a living being whose needs may change over time, may last for many years, and may include excruciatingly complex decisions about medical treatment, placement, and trade-offs between autonomy and beneficence. An initial assessment on which the court made an original order may no longer be valid and a re-assessment may be required. A limited order or guardianship plan may require revision. Annual reports should note changes in capacity.

- See page 37 for a model annual report.

5b. Instruct Guardian

- The guardian can be provided immediate instructions by the court, which may include the frequency of reporting and the requirement to submit a guardianship plan.

- A guardianship plan, required in some jurisdictions, is a forward-looking document in which the guardian describes to the court the proposed steps to be taken for care of the individual. A guardianship plan provides an avenue to promote individual autonomy and rights, as well as to strengthen accountability. Guardianship plans are useful because they[20]:

  - ► Establish a baseline against which subsequent reports can be measured.
  - ► Reflect care-planning for nursing home residents under federal regulations.[21]
  - ► Allow for minor changes without consulting the court, but would require court approval for any substantial adjustments.

- Guardianship plans should involve the incapacitated person to the extent possible to outline the services and strategies that will be used to implement the order, including, most importantly, how those rights retained in limited orders will be ensured. Even where legal consent is not possible, the assent of the person should be sought.

- Guardianship plans can detail treatments and services and the values that should guide future decisions as have been discovered in the clinical and court investigative reports.

- See page 35 for a model guardianship plan.

APPENDIX 1: MODEL ORDERS AND FORMS

These materials are available online at http://www.abanet.org/aging; http://www.apa.org/pi/aging; and http://www.ncpj.org.

These forms match the general framework presented in this book.

Revise these forms according to your jurisdictional needs and laws.

Model Form for Confidential Judicial Notes

State of County of	In the XXX Court of Justice XXX Division File No.
In the Matter of:	

Procedural

Procedural Requirements.

Is venue proper?	[ ] yes [ ] no
Are notice and service proper?	[ ] yes [ ] no
Has counsel been appointed if required or if needed?	[ ] yes [ ] no
Has individual been informed of hearing rights?	[ ] yes [ ] no

Appropriateness of Guardianship.

Will guardianship solve this problem?	[ ] yes [ ] no
Have all less restrictive alternative been exhausted?	[ ] yes [ ] no

If emergency guardianship requested

Is there immediate risk of substantial harm?	[ ] yes [ ] no
Would individual be harmed if regular guardianship procedures used?	[ ] yes [ ] no

Clinical Reports.

Does it meet state requirements?	[ ] yes [ ] no
Is it balanced (vs. one sided)?	[ ] yes [ ] no
Are reversible causes of impairment / mitigating factors considered?	[ ] yes [ ] no

Determination

The Medical Condition

What is the medical condition affecting functioning?

How long has it been going on and other historical facts?

How severe is the condition?

Will it improve with time or treatment?

What are the reversible or mitigating factors?

Cognitive Functioning

In what areas are the individual's decision-making and thinking impaired and to what extent?

Everyday Functioning

Financial Strengths:

Weaknesses:

Health Care Strengths:

Weaknesses:

Personal Safety and Hygiene Strengths:

Weaknesses:

Home and Community Strengths:

Weaknesses:

Other Civil Matters Strengths:

Weaknesses:

Consistency of Choices with Values, Patterns, and Preferences
Does the individual want a guardian? If so, whom?

How does the person prefer decisions are made (alone or with others)?

Where does the person want to live? Why?

What makes life meaningful or good?

What factors are of greatest concern to this person in making decisions?

Are there any religious or cultural beliefs to be considered?

Risk of Harm and Level of Supervision Needed
What are the risks to the individual?

What social factors protect or increase risk?

How significant is this risk? How likely is the risk?

What level of supervision is needed to ensure safety while preserving autonomy?

Means to Enhance Functioning
What treatments or accommodations might enhance the individual's functioning?

Categorization of finding

[ ] **Minimal or no diminished** capacity → **less restrictive alternatives, dismiss petition.**

[ ] **Severely diminished** capacities on all fronts → **plenary guardianship.**

[ ] **Mixed** strengths and weaknesses → **limited guardianship.**

Limits, special:

Limits, statutory requirements:

Oversight

Period of Review

Condition may improve
[ ] Time-limited guardianship → guardianship will expire in ___ days.
or
[ ] Short-term review → guardian to [ ] file inventory/appraisal
[ ] report on medical status
in ___ days.
or
[ ] Annual review → guardian to file report in 12 months.

Guardian Report

Bond/Sureties:

Inventory/Appraisal:

Financial Accounting:

Guardianship Plan – Elements of Care Planning:
Treatments to be considered:
[ ] Education, training, or rehabilitation
[ ] Mental health treatment
[ ] Occupational, physical, or other therapy
[ ] Home or social services
[ ] Medical treatment, operation, or procedure
[ ] Assistive devices or accommodation

Notes on plan:

Medical needs:

Personal needs:

Financial needs:

Values to be considered:

Model Court Investigator Report

State of County of	In the XXX Court of Justice XXX Division File No.
In the Matter of:	

1. Screen Case

1a. Review Trigger

What brings the case to court now?

1b. Appropriateness of Guardianship

Have all procedural requirements been met? [ ] yes [ ] no

Will guardianship solve this problem? [ ] yes [ ] no
If not, why not?

Have less restrictive alternatives been explored? [ ] yes [ ] no
If not, suggest less restrictive alternatives to try:

1c. Appropriateness of Emergency Procedures (if Emergency Guardianship Requested)

Is there immediate risk of substantial harm? (medical emergency, abuse) [ ] yes [ ] no
Describe:

Would individual be harmed if regular guardianship procedures were used? [ ] yes [ ] no
How?

2. Gather Information

2a. Receive Reports

Who has submitted affidavits or reports?

[ ] Individual (alleged incapacitated person) [ ] Family
[ ] Healthcare Professionals [ ] Adult Protective Service
[ ] Other: _____

2b. If a Healthcare Professional Has Submitted a Report

Does it meet state requirements? [ ] yes [ ] no
Is it balanced (vs. one sided)? [ ] yes [ ] no
Is information sufficient for capacity? 💻

[ ] Medical conditions [ ] Severity [ ] Prognosis [ ] Reversible causes of dementia
[ ] Cognitive and emotional functioning [ ] Everyday functioning
[ ] Values and preferences [ ] Risk of harm
[ ] Treatments, accommodations, or devices that may improve capacity

2c. If Additional Information Is Needed, Obtain Additional Information

[ ] Written reports by the individual, family, healthcare professionals
[ ] Interviews with individual, family, healthcare professionals

Notice
Who served notice?
Where was notice served?
Describe how the individual's rights were communicated and the method (written, verbal) and language used:

What was the individual's understanding of the concept of guardianship?
[ ] good [ ] fair [ ] poor [ ] unable to determine

What was the individual's attitude towards guardianship?
[ ] consenting [ ] opposed [ ] unable to determine

Interview
Date and place of interview:

Physical health: [ ] excellent [ ] good [ ] fair [ ] poor
Comments:

Mental health: [ ] excellent [ ] good [ ] fair [ ] poor
Comments:

Cognitive functioning: [ ] excellent [ ] good [ ] fair [ ] poor
Comments:

Emotional functioning: [ ] depressed [ ] anxious [ ] manic [ ] psychotic
Comments:

Everyday abilities (ability to care for self, make financial and medical decisions, live independently):

Recommendations for the Hearing
Is the individual able to attend the hearing?

If yes, what accommodations should be made for the individual?

What needs are there regarding representation of the individual by counsel?

Who should testify at the hearing?

Recommendations for the Guardianship Order

Is guardianship needed?

Can this order be limited in any way? If yes, how?

Recommendations for the Guardianship Plan
What education, training, treatment, procedure, devices, or living situation might help the individual?

Supplemental Attachment for Court Investigator Report

Capacity Checklist

Use this checklist to determine if there is sufficient information regarding the individual's capacity.

1. Medical Condition

What are the physical diagnoses? How severe are they? Might they improve? When?
What are the mental diagnoses? How severe are they? Might they improve? When?
When did the problem start, how long has it been going on, are there any recent medical or social events, what treatments and services have been tried?:
What are the medications, including dosage? Could medications make capacity worse?
Have all temporary or reversible causes of cognitive impairment been evaluated and treated?
Are there any mitigating factors (e.g., hearing loss, vision loss, bereavement) that may cause the person to appear incapacitated and could improve with time or treatment?

2. Cognitive Functioning

What is the individual's level of alertness/arousal, orientation, memory and cognitive abilities, psychiatric and emotional state?

3. Everyday Functioning

What can the individual do in terms of taking care of self? Making financial decisions? Making medical decisions? Taking care of the home environment and functioning independently in the community?
What is the level of functioning related to any other specific legal matters in this case (e.g., sale of home, move to nursing home)?

4. Values

Does the person want a guardian? If yes, who does the person want to be guardian?
Where does the person want to live? What is important in a home environment?
What makes life good or meaningful for an individual? What have been the individual's most valued relationships and activities?
Does the individual prefer that decisions be made alone or with others? If others are involved, with whom does the individual prefer to make decisions?
What over-arching concerns drive decisions—e.g., concern for the well-being of family, concern for preserving finances, worries about pain, concern for maintaining privacy, etc.?
Are there important religious beliefs or cultural traditions? What are the individual's strong likes, dislikes, hopes, and fears?
Are there any specific preferences regarding decisions for personal care, financial, medical, or living situation?

5. Risk of Harm and Level of Supervision Needed

Is there immediate risk of substantial harm? Is there an ongoing level of risk of harm to the individual or others? How/why? Has the individual been victim to abuse, neglect, or exploitation? What level of supervision and what level of guardianship is needed to protect the individual?

6. Means to Enhance Capacity

Can the individual attend the hearing?
Are any accommodations necessary for the hearing, such as change of location, adjusting approach for hearing, visual, cognitive loss? Holding the hearing at bench or in chambers?
In the future, would any education, training, treatment, assistive device, or housing arrangement benefit the individual?

Model Order for Clinical Evaluation

State of County of	In the XXX Court of Justice XXX Division File No.
In the Matter of:	

1. Provide a clinical evaluation of *(name)* for the purposes of guardianship.

2. The purpose of this evaluation is to enable to the court to determine whether the individual identified above is incapacitated according to *(state)* definition, and requires a guardian. *(Add any other issues that are also facing the court, e.g., issues requiring special powers.)*

3. This individual is being evaluated for guardianship due to *(give any background information that is essential to understanding the case).*

4. Additional historical information that may be helpful to you in understanding the case is *(cite examples of problem behavior, social, medical, or legal background factors).*

5. For the purpose of guardianship in this state, the following definition of incapacity applies: *(cite statutory standard for an incapacitated person).*

6. Whenever possible, this court seeks to limit any guardianship orders, providing the guardian with authority only in the areas in which the individual needs decisional or functional assistance.

7. In your report, please address the following elements:

   (i). Describe mental or physical conditions impacting everyday functioning, including: diagnosis, severity of illness, prognosis, history, medications. Describe any medical or psychosocial factors that may be the cause of temporary and reversible impairment, such as depression, malnutrition, dehydration, transfer trauma, polypharmacy, alcohol use, or other factors that require immediate attention.

   (ii). Describe the level of alertness/arousal, cognitive functioning, and psychiatric or emotional symptoms.

   (iii). Describe the individual's strengths and weaknesses in the following areas:
   - Care of self
   - Financial
   - Health care
   - Home and community life
   - Civil matters

(iv) Indicate extent to which current choices are consistent with the individual's long-held commitments and values. Is there any information about the individual's values or preferences that should be considered in the guardianship determination and plan? Do educational potential, adaptive behavior, or social skills enhance current or future functioning?

(v) Given the above diagnosis and functional strengths/weaknesses, what is the immediate and ongoing risk of harm to the individual? What social and environmental demands/supports increase or decrease risk? What level of supervision is needed to prevent serious harm?

(vi) What treatments and services might help the person? What is the most appropriate housing situation? Can any needs can be met with any less restrictive alternatives to guardianship?

(vii). Can the individual attend the hearing? If so, what accommodations should be considered to maximize the individual's participation?

8. Record the results of your evaluation on the enclosed form.

9. Indicate your professional licensure and professional expertise.

10. Note that a court-ordered clinical evaluation for guardianship is a statement signed under the penalties of perjury.

Model Clinical Evaluation Report

State of County of	In the XXX Court of Justice XXX Division File No.
In the Matter of:	THIS SECTION TO BE COMPLETED BY THE COURT
Definition of Incapacity in the State of ___:	

See 💻 for instructions.
Note, text boxes appear in online form and will expand to size of text.

1. PHYSICAL AND MENTAL CONDITIONS

A. List Physical Diagnoses:

Overall Physical Health: ☐ Excellent ☐ Good ☐ Fair ☐ Poor

B. List Mental (DSM) Diagnoses:

Overall Mental Health: ☐ Excellent ☐ Good ☐ Fair ☐ Poor

Overall Mental Health will: ☐ Improve ☐ Be stable ☐ Decline ☐ Uncertain

If improvement is possible, the individual should be re-evaluated in _____ weeks.

Focusing on the mental diagnose(s) most impacting functioning, describe relevant history:

C. List all Medications:

Name Dosage/Schedule

These medications may impair mental functioning: ☐ Yes ☐ No ☐ Uncertain

D. Reversible Causes. Have temporary or reversible causes of mental impairment been evaluated and treated? ☐ Yes ☐ No ☐ Uncertain

Explain:

E. Mitigating Factors. Are there mitigating factors (e.g., hearing, vision or speech impairment, bereavement, etc.) that cause the person to appear incapacitated and could improve with time, treatment, or assistive devices?

☐ Yes ☐ No ☐ Uncertain

Explain:

2. COGNITIVE AND EMOTIONAL FUNCTIONING

A. Alertness/Level of Consciousness

Overall Impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Non Responsive
Describe:

B. Memory and Cognitive Functioning

Overall Impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe
Describe below or ☐ in Attachment

C. Emotional and Psychiatric Functioning

Overall Impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe
Describe below or ☐ in Attachment

D. Fluctuation. Symptoms vary in frequency, severity, or duration: ☐ Yes ☐ No ☐ Uncertain

3. EVERYDAY FUNCTIONING. Describe below or ☐ in Attachment the individual's strengths and weaknesses.

A. Activities of Daily Living (ADL'S)

Ability to Care for Self (bathing, grooming, dressing, walking, toileting, etc.)
Level of Function: ☐ Independent ☐ Needs Support ☐ Needs Assistance ☐ Total Care
Describe:

B. Instrumental Activities of Daily Living (IADL'S)

Financial Decision-Making (bills, donations, investments, real estate, wills, protect assets, resist fraud, etc.)
Level of Function: ☐ Independent ☐ Needs Support ☐ Needs Assistance ☐ Total Care
Describe:

Medical Decision-Making (express a choice and understand, appreciate, reason about health info, etc.)
Level of Function: ☐ Independent ☐ Needs Support ☐ Needs Assistance ☐ Total Care
Describe:

Care of Home and Functioning in Community (manage home, health, telephone, mail, drive, leisure, etc.)
Level of Function: ☐ Independent ☐ Needs Support ☐ Needs Assistance ☐ Total Care
Describe:

Other Relevant Civil, Legal, or Safety Matters (sign documents, vote, retain legal counsel, etc.)
Level of Function: ☐ Independent ☐ Needs Support ☐ Needs Assistance ☐ Total Care
Describe:

4. VALUES AND PREFERENCES. Describe below or ☐ in Attachment relevant values, preferences, and patterns. Note whether the person accepts/opposes guardianship, goals for where/how life is lived, religious or cultural considerations.

5. RISK OF HARM AND LEVEL OF SUPERVISION NEEDED

A. Nature of Risks. Describe the significant risks facing this person, and note whether these risks are due to this person's condition and/or due to another person harming or exploiting him or her.

B. Social Factors. Describe the social factors (persons, supports, environment) that decrease the risk or that increase the risk.

C. How **severe** is risk of harm to self or others: ☐ Mild ☐ Moderate ☐ Severe

D. How **likely** is it ☐ Almost Certain ☐ Probable ☐ Possible ☐ Unlikely

E. Level of Supervision Needed. In your clinical opinion:
☐ Locked facility ☐ 24-hr supervision ☐ Some supervision ☐ No supervision

Needs could be met by: ☐ Limited Guardianship ☐ Less Restrictive Alternative
If checked, Explain:

6. TREATMENTS AND HOUSING. The individual would benefit from:

Education, training, or rehabilitation	☐ Yes	☐ No	☐ Uncertain
Mental health treatment	☐ Yes	☐ No	☐ Uncertain
Occupational, physical, or other therapy	☐ Yes	☐ No	☐ Uncertain
Home and/or social services	☐ Yes	☐ No	☐ Uncertain
Assistive devices or accommodations	☐ Yes	☐ No	☐ Uncertain
Medical treatment, operation or procedure	☐ Yes	☐ No	☐ Uncertain
Other: _____	☐ Yes	☐ No	☐ Uncertain

Describe any specific recommendations:

7. ATTENDANCE AT HEARING

The individual can attend the hearing ☐ Yes ☐ No ☐ Uncertain

If no, what are the supporting facts:

If yes, how much will the person understand and what accommodations are necessary to facilitate participation:

8. CERTIFICATIONS

I am a ☐ Physician ☐ Psychologist ☐ Other _____ licensed to practice in the state of _____

Office Address:

Office Phone:

This form was completed based on:
☐ an examination for the purpose of capacity assessment
☐ my general clinical knowledge of this patient

Prior to the examination, I informed the patient that communications would **not** be privileged:
☐ Yes
☐ No

Date of this examination or the date you last saw the patient:

Time spent in examination:

Other sources of information for this examination:
☐ Review of medical record
☐ Discussion with health care professionals involved in the individual's care
☐ Discussion with family or friends
☐ Other

List any tests which bear upon the issue of incapacity and date of tests:

I hereby certify that this report is complete and accurate to the best of my information and belief. I further testify that I am qualified to testify regarding the specific functional capacities addressed in this report, and I am prepared to present a statement of my qualifications to the Court by written affidavit or personal appearance if directed to do so.

SIGNATURE of CLINICIAN DATE

Print name License type, number, and date

Supplemental Attachment/Links for Clinical Evaluation Report

These rating categories MAY be used in more complex cases when more detail is DESIRED by the clinician or court.

Cognitive Functioning

1. Sensory Acuity (detection of visual, auditory, tactile stimuli)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

2. Motor Activity and Skills (active, agitated, slowed; gross and fine motor skills)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

3. Attention (attend to a stimulus; concentrate on a stimulus over brief time periods)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

4. Working memory (attend to verbal or visual material over short time periods; hold ≥ 2 ideas in mind)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

5. Short term/recent memory and Learning (ability to encode, store, and retrieve information)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

6. Long term memory (remember information from the past)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

7. Understanding ("receptive language"; comprehend written, spoken, or visual information)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

8. Communication ("expressive language"; express self in words, writing, signs; indicate choices)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

9. Arithmetic (understand basic quantities; make simple calculations)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

10. Verbal Reasoning (compare two choices and to reason logically about outcomes)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

11. Visual-Spatial and Visuo-Constructional Reasoning (visual-spatial perception, visual problem solving)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

12. Executive Functioning (plan for the future, demonstrate judgment, inhibit inappropriate responses)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

Emotional and Psychiatric Functioning

1. Disorganized Thinking (rambling thoughts, nonsensical, incoherent thinking)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

2. Hallucinations (seeing, hearing, smelling things that are not there)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

3. Delusions (extreme suspiciousness; believing things that are not true against reason or evidence)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

4. Anxiety (uncontrollable worry, fear, thoughts, or behaviors)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

5. Mania (very high mood, disinhibition, sleeplessness, high energy)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

6. Depressed Mood (sad or irritable mood)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

7. Insight (ability to acknowledge illness and accept help)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

8. Impulsivity (acting without considering the consequences of behavior)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

9. Noncompliance (refuses to accept help)
Level of impairment: ☐ None ☐ Mild ☐ Moderate ☐ Severe ☐ Not eval.
Describe:

Everyday Functioning

1. Independent	2. Needs Support	3. Needs Assistance	4. Total Care	
				Care of Self (Activities of Daily Living (ADL's)) and related activities
☐	☐	☐	☐	Maintain adequate hygiene, including bathing, dressing, toileting, dental
☐	☐	☐	☐	Prepare meals and eat for adequate nutrition
☐	☐	☐	☐	Identify abuse or neglect and protect self from harm
☐	☐	☐	☐	Other:
				Financial (If appropriate note dollar limits)
☐	☐	☐	☐	Protect and spend small amounts of cash
☐	☐	☐	☐	Manage and use checks
☐	☐	☐	☐	Give gifts and donations
☐	☐	☐	☐	Make or modify will
☐	☐	☐	☐	Buy or sell real property
☐	☐	☐	☐	Deposit, withdraw, dispose, invest monetary assets
☐	☐	☐	☐	Establish and use credit
☐	☐	☐	☐	Pay, settle, prosecute, or contest any claim
☐	☐	☐	☐	Enter into a contract, financial commitment, or lease arrangement
☐	☐	☐	☐	Continue or participate in the operation of a business
☐	☐	☐	☐	Employ persons to advise or assist him/her
☐	☐	☐	☐	Resist exploitation, coercion, undue influence
☐	☐	☐	☐	Other:
				Medical
☐	☐	☐	☐	Give/ Withhold medical consent
☐	☐	☐	☐	Admit self to health facility
☐	☐	☐	☐	Choose and direct caregivers
☐	☐	☐	☐	Make or change an advance directive
☐	☐	☐	☐	Manage medications
☐	☐	☐	☐	Contact help if ill or in medical emergency
☐	☐	☐	☐	Other:
				Home and Community Life
☐	☐	☐	☐	Choose/establish abode
☐	☐	☐	☐	Maintain reasonably safe and clean shelter
☐	☐	☐	☐	Be left alone without danger
☐	☐	☐	☐	Drive or use public transportation
☐	☐	☐	☐	Make and communicate choices about roommates
☐	☐	☐	☐	Initiate and follow a schedule of daily and leisure activities
☐	☐	☐	☐	Travel
☐	☐	☐	☐	Establish and maintain personal relationships with friends, relatives, co-workers
☐	☐	☐	☐	Determine his or her degree of participation in religious activities
☐	☐	☐	☐	Use telephone
☐	☐	☐	☐	Use mail
☐	☐	☐	☐	Avoid environmental dangers such as stove, poisons, and obtain emergency help
☐	☐	☐	☐	Other:
				Civil or Legal
☐	☐	☐	☐	Retain legal counsel
☐	☐	☐	☐	Vote
☐	☐	☐	☐	Make decisions about legal documents
☐	☐	☐	☐	Other:

Values

1. **Values about guardianship**
   Does the person want a guardian?

   If yes, who does the person want to be guardian?

2. **Preferences for how decisions are made**
   Does the individual prefer that decisions be made alone or with others?

3. **Preferences for habitation**
   Where does the person want to live?

   What is important in a home environment?

4. **Goals and Quality of Life**
   What makes life good or meaningful for an individual?

   What have been the individual's most valued relationships and activities?

5. **Concerns, Values, Religious Views**
   What over-arching concerns drive decisions—e.g., concern for the well-being of family, concern for preserving finances, worries about pain, concern for maintaining privacy, desire to be near family, living as long as possible, etc.?

   Are there important religious beliefs or cultural traditions?

   What are the individual's strong likes, dislikes, hopes, and fears?

Model Order for Guardianship of Person and Estate[1]

State of _____ County of _____	In the XXX Court of Justice XXX Division File No. _____
In the Matter of:	**I. Order on Petition For Adjudication of Incapacity And Order Appointing Guardian**

This is matter is before the court on a petition for an adjudication of incapacity and appointment of a guardian for the individual. The court has read the petition and held a hearing to determine whether the court should enter the order requested in the petition.

THE COURT FINDS:

1. **JURISDICTION, VENUE, AND NOTICE.**
   A. This court has jurisdiction of the subject matter and of the person of the individual.
   B. This court is a proper venue.
   C. Notice was properly served.

2. **MEDICAL CONDITION AND CAPACITY**. Upon presentation of (*cite standard of evidence)* evidence, the above named individual by reason of the following medical conditions:

__ Is not incapacitated. The petition is dismissed.

__ Is an incapacitated person *(cite statutory standard for incapacity)*.

__ Is a partially incapacitated person.

Care of Self
Retained Capacities:

Financial Decisions
Retained Capacities:

Health Care Decisions
Retained Capacities:

Living in the Home and Community
Retained Capacities:

Other Civil Matters
Retained Capacities:

3. **VALUES AND PREFERENCES**. Relevant values, preferences, and patterns of past choices of the individual considered:

A reasonable effort was made to question the individual and he/she indicated:
[ ] no preference as to who should be appointed guardian.

[ ] that he/she preferred _____ to serve as guardian.

[1] This is a model form for guardianship of person and estate. For a model form for guardianship of estate, often called conservatorship, the form could include the same elements, but focus only on financial capacities and related actions of the conservator.

IT IS ORDERED:

4. **APPOINTMENT**. The court appoints *(name of guardian)* of *(address)* as guardian and directs issuance of letters of guardianship.

5. **LIMITATIONS AND POWERS**. The guardianship is

__ **Unlimited** (Plenary).

__ **Limited**. The above named individual shall retain the following legal rights and privileges *(cite all rights retained or removed).*

Further,

__ **Statutory Restrictions**. The guardian does not have the authority to *(cite any statutory or court-ordered restrictions, such as admission to mental health facility, modification of DNR, etc.):*

__ **Special Powers Granted**. The guardian has the authority to *(cite any powers being granted that require special court authority, such as admission to mental health facility, modification of DNR, etc.):*

6. **BOND**

__ The guardian must file a bond in the amount of $ with the Clerk of the Court, Probate Register, before issuance of the letters.

__ Bond is not required and is waived.

7. **INVENTORY AND PLAN**. The guardian is instructed to

__ **Inventory and Appraisement**. Within 90 calendar days, and with each required annual report, the guardian must prepare and file with the Clerk of the Court a detailed inventory of the individual's assets.

__ **Plan**. Within 90 calendar days, and with each required annual report, the guardian must prepare and file with the Clerk of the Court a plan detailing a plan of care for the individual and for the estate. The guardian shall consider the individual's values and preferences in making decisions.

__ **Report**. Annually the guardian must prepare and file with the Clerk of the Court a report.

8. **CHANGE OF ADDRESS**. The guardian shall immediately notify in writing to the court of any change in the address of him or herself or of the incapacitated person.

9. **REVIEW**. In addition to the annual review, it is further ordered, setting this matter for internal review within (no of days) ___ to determine

__ compliance with inventory and plan.
__ possible change in level of capacity.

10. **COSTS**. Pursuant to § ___, costs are: ___ waived ___ taxed to: ___ petitioner ___ individual

11. This order is the least restrictive alternative consistent with the court's finding, is necessitated by the individual's limitations and demonstrated need, and is designed to encourage the development of maximum self-reliance and independence.

Date:	Signature:

Model Plan for Guardian of Person and Estate[2]

State of _____ County of _____	In the XXX Court of Justice XXX Division File No. _____
In the Matter of:	**I. Order on Petition For Adjudication of Incapacity And Order Appointing Guardian**

Health Care Plan

1. Provide name of the person's physician:

2. Provide name(s) of other key healthcare professionals:

3. What instructions (such as advance directives) has this person provided about medical treatment?

4. Describe medical services to be provided (e.g., primary care visits, specialists, equipment, new medications, dental, etc.)

Personal Care Plan

1. Where is the person residing now and what kind of facility is it? (For example, is it a private residence, assisted living, or nursing home, etc.?)

2. Do you anticipate needing to change the person's residence? If so, when and why?

3. Describe social services and activities to be provided (e.g., home care workers, religious services, visits with friends/family, education/recreation).

[2] This is a model form for a plan of guardianship of person and estate. For a plan for guardianship of estate, often called conservatorship, the form could focus only on financial capacities and related actions of the conservator.

Financial Care Plan

1. Describe the person's estimated monthly income, monthly expenditures, and estimate total assets (tangible and monetary):

2. Describe how the person's financial needs will be met:

3. In view of the needs of the protected person at this time, what assets will need to be sold in the coming year?

4. Are there debts owed to the person to be pursued? If so, how do you intend to pursue those claims (note whether litigation is necessary)?

5. Are there bills, claims, or debts by the person to another unpaid at this time? If so, how do you intend to discharge those obligations?

6. Describe how funds for the support, care, and welfare of others entitled to be supported by the protected person will be administered: (If not applicable, so state).

7. Describe the estate plan, if any, and how you intend to preserve it.

Signature of Guardian	Date
Address and Telephone of Guardian	

Model Annual Report for Guardian of Person and Estate[3]

State of _____ County of _____	In the XXX Court of Justice XXX Division File No. _____
In the Matter of:	**I. Order on Petition For Adjudication of Incapacity And Order Appointing Guardian**

1. **PERIOD OF REPORT**
This is a full and true statement of account in the above matter, covering the period of

_____ day of _____ (month), _____ (year) to _____ day of _____ (month), _____ (year).

2. **CONTACT**
Approximate number of times the guardian had contact with the person during the reporting period:

Nature of those contacts (phone, in person, other):

Date last seen by the guardian:

3. **ADDRESS OF INCAPACITATED PERSON**
Street
City, State, Zip Code
Telephone

These living arrangements are best described as:
[ ] Own apartment or home
[ ] Private home or apartment of
[ ] guardian
[ ] relative, whose name and relationship is:
[ ] non-relative, whose name is:
OR
[ ] Foster, group, or boarding home
[ ] Nursing home
[ ] Assisted living
[ ] A medical facility or state institution

The name of the home, facility, or institution:
The name of an individual at the home, facility, or institution who has knowledge and is authorized to give information to the court:

The individual has been at the present residences since:
If moved within the past year, state the changes and reason for the change:

I rate the living situation as: [ ] excellent [ ] average [ ] below average (explain:)

I believe the adult is: [ ] content [ ] unhappy with the living situation

I recommend a more suitable living arrangement as follows:

[3] This is a model form for a report of guardianship of person and estate. For a model form for report on guardianship of estate, often called conservatorship, the form could focus only on financial capacities and related actions of the conservator.

4. **HEALTH**
The individual's physical conditions are:

The individual's mental conditions are:

Overall health [ ] excellent [ ] good [ ] fair [ ] poor

During the past year, overall health has [ ] improved [ ] worsened [ ] remained the same

During the past year the individual has been diagnosed with a terminal illness [ ] yes [ ] no

5. **FUNCTIONING**
The individual's cognitive and emotional functioning are:

The individual's everyday functioning (ability to care for self, make financial and medical decisions, live independently) is:

During the past year, overall functioning has [ ] improved [ ] worsened [ ] remained the same

6. **TREATMENTS**
During the past year, the individual has seen a doctor:

Date	Doctor Name	Reason	Findings

During the past year, the individual has received other treatments (list any education, training, therapy, assistive devices, recreational and social activities, or other treatments received):

7. **FINANCIAL ACCOUNTING**
Are you in control of any tangible property of the incapacitated person? [ ] yes [ ] no
If yes, describe

Are you in control of any other assets for the incapacitated person? [ ] yes [ ] no
If yes, describe

Have you paid to others any fees for the care of the individual or property? [ ] yes [ ] no
If yes, describe and attach accounting and receipts

Have any assets or items been transferred to you during the reporting time? [ ] yes [ ] no
If yes, describe and attach accounting and receipts.

Have any fees been paid to you in your role as guardian? [ ] yes [ ] no
If yes, describe and attach accounting and receipts.

SUMMARY OF ASSETS AND EXPENDITURES		
Beginning fair market value of non-cash assets	**$**	
Beginning balance of cash (savings, checking, stocks, bonds, etc.) assets	**+ $**	
Plus money received (pension, disability, interest, etc.) from any source on behalf of the person	**+ $**	
TOTAL	**$**	
Less total fees to other for care of person or estate	**- $**	
Less assets transferred to guardian	**- $**	
Less total fees paid to guardian	**- $**	
TOTAL CURRENT VALUE OF ESTATE	**$**	
The Guardian (or Conservator) represents that this account contains a correct statement of all receipts and disbursements and that its contents are true to the best knowledge and belief.		

I have on file a surety bond approved by the court [ ] yes [ ] no
If yes, the penal sum of the bond is $ with the company as surety.

9. **RECOMMENDATIONS**

The guardianship should be continued [ ] yes [ ] no
Because:

The guardianship should be modified as follows:

Other recommendations:

Signature of Guardian	Date
Address and Telephone of Guardian	

Sworn to me

Signature of Notary	Date
My Commission expires	

Glossary[4]

"**Activities of Daily Living**" means the basic tasks of everyday life, such as eating, bathing, dressing, toileting, and transferring.

"**Accommodations**" means adjustments or modifications to enable people with disabilities to enjoy equal opportunities.

"**Acuity**" means acuteness of perception. It may also refer to the immediate seriousness of an illness.

"**Affect**" refers to the expression of a person's feelings, tone, or mood. For example, a person may be sad if their mood is depressed.

"**Assistive Devices**" means items or equipment that is used to increase, maintain, or improve functioning of individuals with disabilities.

"**Autonomy**" means a person's ability to make independent choices.

"**Clinical**" means pertaining to or founded on observation and treatment of individuals, as distinguished from theoretical or basic science.

"**Clinician**" refers to any healthcare professional.

"**Cognitive**" means relating to thinking and information processing in the brain.

"**Conservator**" means a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

"**Court Investigator**" means a person appointed by the court to investigate the merits of the guardianship petition. In some states such a person may be referred to as a guardian ad litem.

"**Dementia**" means a medical condition characterized by a loss of memory and functioning.

"**Domain,**" when used in cognitive assessment, refers to a category of brain functioning, often associated with a specific region in the brain. For example a domain of cognitive assessment could be memory after a time delay, which is localized to the temporal lobe of the brain.

"**Guardian**" means a person who has qualified as a guardian of an incapacitated person pursuant to appointment by the court. The term includes a limited, emergency, and temporary substitute guardian, but not a guardian ad litem.

"**Guardian ad litem**" means a person appointed by the court to represent and protect the interests of an incapacitated person during a guardianship proceeding.

"**Incapacitated person**" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

[4] This glossary is meant to define terms **as used in this** book, and is not meant to define terms more universally. The glossary uses definitions from the UGPPA where available, and otherwise definitions are based on the consensus of the working group. Definitions of common mental disorders appear in the fact sheet on medical conditions.

"**Instrumental Activities of Daily Living**" means activities related to independent living, and include preparing meals, managing money, shopping for groceries or personal items, performing light or heavy housework, and using a telephone.

"**Least Restrictive Alternative**" means an intervention that causes the least disruption or change in a person's circumstances and that maximizes the person's independence and freedom.

"**Limited Guardianship**" means a guardianship appointment in which the guardian is assigned only those duties and powers that the incapacitated or partially incapacitated individual is incapable of exercising, rather than the full authority that could be assigned by the court.

"**Person**" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"**Plenary Guardianship**" means a full guardianship of the person and property in which all duties and powers concerning an individual under state law are assigned by the court to the guardian.

"**Polypharmacy**" means the unwanted duplication of drugs, which often results when patients go to multiple physicians or pharmacies. Polypharmacy occurs when prescribed medications duplicate or interact with each other.

"**Prognosis**" means the probable outcome of a disease.

"**Psychopathology**" refers to the manifestation of a mental disorder.

"**Reality Testing**" refers to the ability of a person to distinguish between the real in the external world and their internal world. For example, a person who has delusional thoughts (e.g., false beliefs that a person is trying to harm him or her) and cannot distinguish this from reality is said to have poor reality testing.

"**Respondent**" means an individual for whom the appointment of a guardian or conservator or other protective order is sought. In this book, we use the word "individual" when referring to the respondent.

"**Transfer Trauma**" means relocation stress and accompanying symptoms resulting from a transfer from one environment to another—as from one community residence to another, from a community residence to an institution or from one institution to another.

"**Ward**" means an individual for whom a guardian has been appointed. In this book, we use the word "individual" or "person" when referring to the respondent.

End Notes

[1] Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 Stetson L. Rev. 735 (Spring 2002).

[2] *Uniform Guardianship and Protective Proceedings Act* (1997).

[3] Bruce D. Sales, Matthew Powell, Richard Van Duizend & Associates, *Disabled Persons and the Law: State Legislative Issues* (ABA 1982).

[4] *Supra* n. 2.

[5] Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, *National Probate Court Standards* (1999) (which directs probate judges to "detail the duties and powers of the guardian, including limitations to the duties and powers, and the rights retained by the respondent").

[6] Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7(1) Maryland J. of Contemporary Legal Issues: Guardianship 143-189 (1995-96); Frolik, *supra* n. 1; Mary Joy Quinn, *Guardianships of Adults: Achieving Justice, Autonomy, and Safety* (Springer 2005).

[7] Peggy Dervitz, Shashi Jain & Joan Kakascik, *Preference/Choice/Decision: A Model for Limited Guardianship* (Guardianship Assoc. of N.J. 2003).; Peggy Dervitz, Shashi Jain & Joan Kakascik, *Assessing Capacity for People with Developmental Disabilities: Implementing the Model for Limited Guardianship* (Guardianship Assoc. of N.J. 2004).

[8] *Supra* n. 2, at § 102(5).

[9] Mass. Gen. Laws Ann. ch. 201, § 6 (West 1999).

[10] N.Y. Mental Hyg. Law, § 81.02(b) (McKinney 1999).

[11] Ohio Rev. Code Ann. § 2111.01(D) (Anderson 1999).

[12] *See, e.g.*, Idaho Code § 15-5-101(a)(1) (1999); Minn. Stat. Ann. § 525.54, subd. 2 (West 1998); N.H. Rev. Stat. Ann. § 464-A:2(XI) (1999).

[13] *Supra* n. 2, at § 314(a).

[14] Charles P. Sabatino & Susanna L. Basinger, *Competency: Reforming Our Legal Fictions*, 6 J. of Mental Health and Aging 119 (2000).

[15] *Supra* n. 1, at 737-738.

[16] Quinn, *supra* n. 6, at 133.

[17] *Supra* n. 2, at § 312.

[18] *Supra* n. 5, at Standard 3.3.6.

[19] Michael Mayhew, *Survey of State Guardianship Laws: Statutory Provisions for Clinical Evaluations*, 26 Bifocal, (newsletter of the ABA Comm'n on Law and Aging) 1 (Oct. 2005).

[20] Sally Balch Hurme & Erica Wood, *Now and Then: Factoids on Adult Guardianship Statutory Reform* (2001) (unpublished paper available through the ABA Comm'n on Law and Aging).

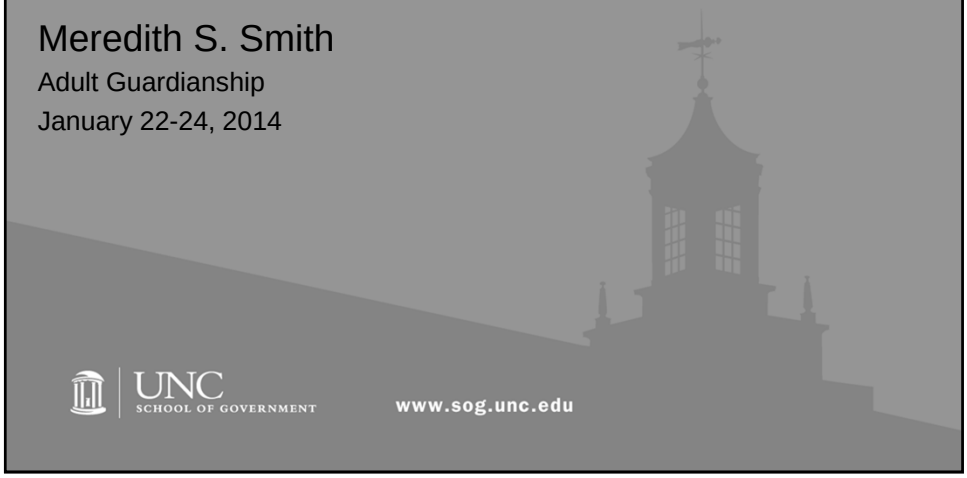
[21] 42 C.F.R. § 483.20.

TAB 10

Evidence

Evidence in Adult Incompetency and Guardianship Hearings

Meredith S. Smith
Adult Guardianship
January 22-24, 2014



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The Players

- Respondent
- Petitioner
- Guardianship Applicant(s)
- Next of Kin
- Other Interested Persons (DSS, etc.)
- Guardian Ad Litem
- Respondent's Counsel
- Petitioner's Counsel
- Counsel for Next of Kin and Other Interested Persons

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What Do You Think?

- Daughter, Bridget Fonda, files a petition for incompetency to declare her mother, Jane Fonda, incompetent
- Step-father and husband of Jane, Ted Turner, holds a POA and Health Care POA for Jane
- Ted appears at the hearing, represented by counsel ready to call witnesses and submit other exhibits as evidence
- Does he have a right to be present evidence?
  1. Yes
  2. No

UNC SCHOOL OF GOVERNMENT

Who Is Entitled to Present Evidence?

- **G.S. 35A-1112 – Incompetency**
  - Petitioner and respondent only – G.S. 35A-1112(a)
    - Unless Rule 24 Intervenor
  - Clerk's right to call witnesses – Evid. Rule 614
- **G.S. 35A-1212 – Guardianship**
  - Petitioner, Respondent, and any Applicant for Guardianship only
    - Unless Rule 24 Intervenor
  - Clerk's right to make such inquiry and receive such evidence as the clerk deems necessary to determine:
    - Who should be guardian
    - The nature and extent of the guardianship
    - Assets and liabilities and needs of the ward

UNC SCHOOL OF GOVERNMENT

Pre-Trial Preparation of the Evidence

- Discovery
- Pre-Trial Conferences
- Subpoena
- Multi-Disciplinary Evaluation

Discovery

Do Bridget and Jane have to ask the clerk's permission to conduct discovery?

1. Yes
2. No

Discovery

- Rules of Civil Procedure apply to guardianship hearings, including discovery
  - Discovery: Rules 26-37
  - Purpose:
    - Mechanism for parties to find out information prior to the hearing from each other
    - Prevent the hearing from becoming a fact-finding endeavor
    - Enable the parties to present their case more effectively and efficiently to the court
  - Example: Bridget wants to find out more about Jane's living situation and Ted's management of the POA/HCPOA

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Civ. Pro. Rule 16: Pre-Trial Conference

- Clerk can consider matters that will aid in the disposition of the case
  - Limiting expert witnesses
  - Simplify the issues
  - Obtain admissions of fact
  - **Set an abbreviated schedule for conducting discovery**
- *Remember* – If conference is held, the court must enter order setting forth what the parties agreed to.

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Civ. Pro. Rule 45: Subpoena

- Mechanism for parties to obtain documents relevant to the action from persons or entities that are not a party to a case
- Issues from the court where the action pending - Rule 45(a)(3)
  - Clerk may issue subpoena - G.S. 7A-103
- Two Types:
  - Produce documents
  - Testify

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Bridget and Jane

- Bridget is aware that her mother recently visited the hospital after a suffering a fall while at home.
- She wants to subpoena the records from her mother's most recent stay
  - So her attorney prepares the subpoena and sends it to the hospital and goes and picks up the records.
  - Right?

UNC SCHOOL OF GOVERNMENT

Subpoena + Medical Records

1. Custodian appears in person with records
2. Mail in Rule – Rule 45(c)(2)
   - Available where:
     1. Subpoena issued to a custodian of confidential "hospital medical records"
        - Includes any records made in connection with diagnosis care or treatment of any patient
     2. Subpoena does not require testimony
   - Mechanism to avoid **authentication** in person

UNC SCHOOL OF GOVERNMENT

Subpoena + Medical Records

Confidential Records:
- Federal HIPPA Requirements
- NC Statute – G.S. 122C-54(a) (mental health records); G.S. 90-109.1 (substance abuse treatment)

Doctor-patient privilege - G.S. 8-53
- Applies to information acquired in attending a patient that is necessary for treatment

Psychologist-patient privilege – G.S. 8-53.3
- Applies to information acquired in practice of psychology that is necessary to practice psychology

UNC SCHOOL OF GOVERNMENT

Subpoena + Medical Records

Privilege is personal to the patient. Doctor can't waive.

1. **Waive**: Confidentiality/Privilege may be *waived* by Respondent, express or implied
   - Express – voluntary and informed
   - Implied –
     - R fails to object
     - R testifies about communications with doctor
     - R calls doctor as a witness
2. **Compel Disclosure**: Clerk can compel disclosure of confidential/privileged information if "*necessary to a proper administration of justice*"
   1. Highly discretionary
   2. Whether the records have probative value to the material issue: incompetency

* GAL does not have right to obtain medical records unless Respondent consents, disclosure is authorized by law, or court orders disclosure.

UNC SCHOOL OF GOVERNMENT

Bridget and Jane

Do you enter an order finding that Jane's records from her hospital stay due to the fall and broken hip "necessary to a proper administration of justice?"

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Remember…

G.S. 122C-203 –

"The admission or commitment to a facility of an alleged mentally ill individual, an alleged substance abuser, or an alleged mentally retarded or developmentally disabled individual under the provisions of this Article **shall in no way affect** incompetency proceedings as set forth in Chapter 35A."

UNC SCHOOL OF GOVERNMENT

Multidisciplinary Evaluation

- Medical, psychological, and social work evaluation, as directed by the clerk
  - Purpose is to determine the nature and extent of disability and assist in guardianship plan
- Who can request an MDE?
  - Any party may file an motion for an MDE within 10 days after service of the petition on the respondent
  - Clerk may order on the Clerk's own motion at any time

UNC SCHOOL OF GOVERNMENT

Multidisciplinary Evaluation

- Clerk orders Jane to submit to attend an MDE evaluation
- Jane refuses to attend and does not appear
- MDE filed with the Clerk is incomplete
- Petitioner's counsel requests that the sheriff deliver Jane to the evaluation
- **How should the Clerk respond?**
  1. Order the sheriff to seize Jane.
  2. Hold Jane in contempt.
  3. Take no formal action against Jane
  4. Either 2 or 3
  5. 1, 2 or 3.

Rules of Evidence

- Rules of Evidence apply in hearings held before the clerk.
  - See Rule 101 and Rule 1101
- Govern what is admissible to prove the issues in the case
- Presumption that the hearing officer can distinguish between competent and incompetent evidence.
  - Decision of the clerk, including findings of fact in any order, should be based on competent, admissible evidence only.
  - Despite de novo review or GS 1.301.3(d)(3) on the record review

The "Good Feeling" Rule

- Rule 102: Purpose and Construction
  - Fairness
  - Eliminate expense and delay
  - Promote the growth and development of the law of evidence so that the truth may be ascertained and proceedings justly determined

UNC SCHOOL OF GOVERNMENT

Hearing: Three Key Rules of Evidence

1. **Relevance:**
   - **Is this relevant?**
2. Personal Knowledge:
   - Does the witness have personal knowledge?
3. Hearsay:
   - Is this hearsay? Can I consider it anyway?

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Relevance

Rule 401
- Evidence with <u>any tendency</u> to make a fact more or less probable

Rule 402
- All relevant evidence is admissible unless it is not (subject to privilege, not relevant, statute or law precludes).

Rule 403
- Relevant evidence **not** admissible if probative value is substantially outweighed by prejudicial effect.

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Is it Relevant?

Bridget testifies at the hearing that Jane refuses to take her medication and has become increasingly difficult to reason with because of her strong held beliefs in self-healing through meditation. Jane told Bridget that she is now an atheist and hates all people who follow organized religion, including her doctor.

1. Yes
2. No

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Steps for Assessing Relevancy

1. Identify the evidence at issue

2. Identify the fact of consequence to which the evidence relates

3. Determine whether:
   1. The evidence makes the fact more or less likely
   2. The evidence otherwise inadmissible, and
   3. The probative value is outweighed by the prejudicial effect.

UNC SCHOOL OF GOVERNMENT

Steps for Assessing Relevancy

1. **Identify the evidence at issue**
   - **Bridget's testimony**
     - Jane refuses to take her medication
     - Jane has become increasingly difficult to reason with
     - Jane believes in self-healing through meditation
     - Jane is an atheist
     - Jane hates all people who follow organized religion

2. **Identify the fact of consequence to which the evidence relates**
   - **Jane lacks capacity to manage her own affairs or make or communicate important decisions about person, family or property.**

3. **Determine whether the evidence makes the fact more or less likely, is otherwise inadmissible, and the probative value is outweighed by the prejudicial effect.**

UNC SCHOOL OF GOVERNMENT

Hearing:
Three Key Rules of Evidence

1. Relevance:
   - Is this relevant?
2. **Personal Knowledge:**
   - **Does the witness have personal knowledge?**
3. Hearsay:
   - Is this hearsay? Can I consider it anyway?

UNC SCHOOL OF GOVERNMENT

Personal Knowledge

Rule 602.

A witness may not testify to a matter unless he has personal knowledge of the matter.

- Personal knowledge can be shown through the testimony of the witness himself.

Q: How does Bridget know Jane refuses to take her medicine?

- **Rule 614** – Interrogation by the Court

UNC SCHOOL OF GOVERNMENT

Is it Personal Knowledge?

Bridget testifies at the hearing **that Jane refuses to take her medication….**

Q: How does Bridget know Jane refuses to take her medicine?

- **Rule 614** – Interrogation by the Court

Hearing: Three Key Rules of Evidence

1. Relevance:
   - Is this relevant?
2. Personal Knowledge:
   - Does the witness have personal knowledge?
3. **Hearsay:**
   - **Is this hearsay? Can I consider it anyway?**

Hearsay: What Is It?

UNC SCHOOL OF GOVERNMENT

Hearsay: What Is It?

Rule 801(c).

1. **Oral, written or nonverbal statement**
   - Includes affidavits
2. **Made by a person other than the person testifying at the hearing**
   - Think of the parrot
3. **Offered to prove the truth of the matter asserted**
   - *Key Question*: What is the evidence being offered to prove?

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Hearsay: Example

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.

- Is the report hearsay?
  - Identify the out of court statements.
  - Who made the statements?
  - What is it being offered to prove?

UNC SCHOOL OF GOVERNMENT

Hearsay: Example

- Is the report hearsay?
  - Identify the out of court statements.
    - Jane's family, social and medical history
    - Doctor's notes
    - Doctor's diagnosis
    - Doctor's conclusion
  - Who made the statements?
    - Jane
    - Doctor
  - What is it being offered to prove?
    - Jane is incompetent
- Other issues?
  - Privilege

UNC SCHOOL OF GOVERNMENT

Hearsay: Why Do We Worry About It?

- Out of court statement admissibility governed primarily by hearsay rules
  - Deprives the party the opportunity to cross-examine the declarant to determine misperception, reliability, faulty memory, bias, ambiguity, etc.
  - Statement not made under oath
  - Deprives you as the judge the opportunity to assess credibility and demeanor

UNC SCHOOL OF GOVERNMENT

Hearsay: Exceptions

- Even though the report may be hearsay, court may still admit it if it falls under an exception.
  - Almost 30 exceptions to the hearsay rule
  - Article 8 of G.S. 8C
- Why any exceptions at all?
  - Reliability is redeemed
  - Risk of falsity of the statement outweighed by other factors, such as circumstances in which the statement was made

UNC SCHOOL OF GOVERNMENT

Hearsay: Exceptions

Rule 801(d). Statement by Party Opponent.

Statement that is hearsay is admissible if it offered against the party and it is his or her own statement.

Hearsay: Exceptions

Rule 803(4). Statement for Purpose of Medical Diagnosis or Treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Hearsay: Exceptions

Rule 803(6). Business Records.
- Includes medical records.

Key Elements.
1. Report or other record
2. Kept in regular course of business
3. Of acts, events, conditions, opinions, or diagnosis
4. Report is made at the time of #3
5. Custodian testifies to the regularity of the practice of keeping the report

UNC SCHOOL OF GOVERNMENT

Hearsay + Affidavits

What if instead of handing up a report, Bridget instead handed you a verified affidavit from Dr. Doolittle that outlined his qualifications and extensive experience as a geriatrician and the affidavit contained the same information as the report in the earlier example?

UNC SCHOOL OF GOVERNMENT

More Hearsay….

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." Ted's attorney objects to the admission of these statements as hearsay.

- Do you sustain the objection and exclude her testimony?

1. Yes
2. No

§ 8-53. Communications between physician and patient.

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. 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, 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. (1885, c. 159; Rev., s. 1621; C.S., s. 1798; 1969, c. 914; 1977, c. 1118; 1983, c. 410, ss. 1, 2; c. 471.)

§ 8-53.3. Communications between psychologist and client or patient.

No person, duly authorized as a licensed psychologist or licensed psychological associate, nor any of his or her employees or associates, shall be required to disclose any information which he or she may have acquired in the practice of psychology and which information was necessary to enable him or her to practice psychology. Any resident or presiding judge in the district in which the action is pending may, subject to G.S. 8-53.6, compel disclosure, either at the trial or prior thereto, if in his or her 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.

Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for failure to report suspected child abuse or neglect to the appropriate county department of social services, or for failure to report a disabled adult suspected to be in need of protective services to the appropriate county department of social services. Notwithstanding the provisions of this section, the psychologist-client or patient privilege shall not be grounds for excluding evidence regarding the abuse or neglect of a child, or an illness of or injuries to a child, or the cause thereof, or for excluding evidence regarding the abuse, neglect, or exploitation of a disabled adult, or an illness of or injuries to a disabled adult, or the cause thereof, in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes, or to the Protection of the Abused, Neglected, or Exploited Disabled Adult Act, Article 6 of Chapter 108A of the General Statutes. (1967, c. 910, s. 18; 1983, c. 410, ss. 3, 7; 1987, c. 323, s. 2; 1993, c. 375, s. 2; c. 553, s. 78; 1998-202, s. 13(c).)

§ 8-44.1. Hospital medical records.

Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records, in accordance with G.S. 1A-1, Rule 45(c), or if they are certified, identified, and authenticated by the live testimony of the custodian of such records.

Hospital medical records are defined for purposes of this section and G.S. 1A-1, Rule 45(c) as records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1, G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes. (1973, c. 1332, s. 1; 1983, c. 665, s. 2.)

Rule 45. Subpoena.

(a) Form; Issuance. –

(1) Every subpoena shall state all of the following:

a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.

b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, electronically stored information, or tangible things in the possession, custody, or control of that person therein specified.

c. The protections of persons subject to subpoenas under subsection (c) of this rule.

d. The requirements for responses to subpoenas under subsection (d) of this rule.

(2) A command to produce records, books, papers, electronically stored information, or tangible things may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(3) A subpoena shall issue from the court in which the action is pending.

(4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.

(b) Service. –

(1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

(2) Service of copy. – A copy of the subpoena served under subdivision (b)(1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b).

(3) Subdivision (b)(2) of this subsection does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.

(c) Protection of Persons Subject to Subpoena. –

(1) Avoid undue burden or expense. – A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. – Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:
   a. The subpoena fails to allow reasonable time for compliance.
   b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
   c. The subpoena subjects a person to an undue burden or expense.
   d. The subpoena is otherwise unreasonable or oppressive.
   e. The subpoena is procedurally defective.

(4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall

be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, electronically stored information, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoenas. –

(1) Form of response. – A person responding to a subpoena to produce records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(2) Form of producing electronically stored information not specified. – If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.

(3) Electronically stored information in only one form. – The person responding need not produce the same electronically stored information in more than one form.

(4) Inaccessible electronically stored information. – The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person

responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, after considering the limitations of Rule 26(b)(1a). The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.

(5) Specificity of objection. – When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(d1) Opportunity for Inspection of Subpoenaed Material. – A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

(e) Contempt; Expenses to Force Compliance With Subpoena. –

(1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).

(2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay.

(f) Discovery From Persons Residing Outside the State. –

(1) Any party may obtain discovery from a person residing in another state of the United States or a territory or an insular possession subject to its jurisdiction in any one or more of the following forms: (i) oral depositions, (ii) depositions upon written questions, or (iii) requests for production of documents and tangible things. In doing so, the party shall use and follow any applicable process and procedures required and available under the laws of the state, territory, or insular possession where the discovery is to be obtained. If required by the process or procedure of the state, territory, or insular possession where the discovery is to be obtained, a commission may issue from the court in which the action is pending in accordance with the procedures set forth in subdivision (2) of this subsection.

(2) Obtaining a commission. –

a. The party desiring a commission to obtain discovery outside the State shall prepare and file a motion indicating the party's intent to obtain a commission and requesting that the commission be issued.

b. The motion shall indicate that the moving party has conferred, or describe fully the moving party's good faith attempts to confer, with counsel for all other parties regarding the request and shall indicate

whether the motion is unopposed. The motion shall also attach a copy of any proposed subpoena, notice of deposition, or other papers to be served on the person from whom the moving party is seeking to obtain discovery.

c. The motion shall indicate that counsel for the moving party has read the applicable rules and procedures of the foreign state and that the moving party will comply with those rules and procedures in obtaining the requested discovery.

d. If the motion reflects that it is unopposed or indicates that the moving party has made reasonable, good faith efforts to confer with all other parties and that no other party has indicated that it opposes the motion, the motion shall immediately be placed on the calendar for a hearing within 20 days before the court in which the action is pending where the commission shall be issued. However, if the court determines, in its discretion, that the moving party has failed to make reasonable, good faith efforts to confer with all other parties prior to filing the motion, the court shall refuse to issue the commission, and the motion shall be denied.

e. If the motion does not reflect that it is unopposed or that the moving party has made reasonable, good faith efforts to confer with all other parties and that no other party has indicated that it opposes the motion, any party wishing to oppose the motion shall file written objections to issuance of the commission within 10 days of being served with the motion, and the motion shall immediately be placed on the calendar for a hearing to be held within 20 days before the court in which the action is pending. The hearing may be held by telephone in the court's discretion. The court may refuse to issue the commission only upon a showing of substantial good cause to deny the motion.

f. If the court, in its discretion, determines that any party opposing the motion did so without good cause, the court shall require the party opposing the motion to pay the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys' fees, unless circumstances exist which make an award of expenses unjust.

(3) In addition to any terms required by the foreign jurisdiction to initiate the process of obtaining the requested discovery, the commission shall:

a. State the time and place at which the requested discovery is to occur;

b. State the name and address of the person from whom the discovery is sought, if known, and, if unknown, a general description sufficient to identify the person or the particular class or group to which he or she belongs; and

c. Attach a copy of any case management order, discovery order, local rule, or other rule or order establishing any discovery deadlines in the North Carolina action. (1967, c. 954, s. 1; 1969, c. 886, s. 1; 1971, c. 159; 1975, c. 762, s. 3; 1983, c. 665, s. 1; c. 722; 1989, c. 262, s. 1; 2003-276, s. 1; 2007-514, s. 1; 2011-199, s. 6; 2011-247, s. 3.)

TAB 11

Role of the Guardian ad Litem

Incompetency and Adult Guardianship for Clerks

Role of the Guardian ad Litem

January 22-24, 2014 Chapel Hill, NC

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Appointment procedure for counsel

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.

N.C.Gen.Stat. § 35A-1107(a)

How does a respondent retain an attorney?

- A respondent may contact an attorney upon service of the petition.
- A friend or family member may retain an attorney on the respondent's behalf **BUT**

Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

To discharge or not to discharge?

N.C.Gen.Stat. § 35A-1107(a) provides that the Clerk ***may*** discharge the appointed guardian ad litem if the respondent retains an attorney.

Responsibility of Appointed Counsel

- 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.

N.C.Gen.Stat. § 35A-1107(b)

1. Does the respondent contest the guardianship?
2. Who would the respondent propose as a guardian?

Responsibility of Appointed Counsel

- The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings.

N.C.Gen.Stat. § 35A-1107(b)

Responsibility of Appointed Counsel

- 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.

N.C.Gen.Stat. § 35A-1107(b)

Responsibility of Appointed Counsel

- 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.

N.C.Gen.Stat. § 35A-1107(b)

Responsibility of Retained Counsel

- Retained counsel solely advocates for the express wishes of the respondent and NOT their best interest

Right to a Jury Trial

- The respondent has a right, upon request by him, his counsel, or his guardian ad litem, to trial by jury.

N.C.Gen.Stat. § 35A-1110

Right to close the hearing

- 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.

N.C.Gen.Stat. § 35A-1112(a)

Multi-disciplinary evaluation

- … the clerk, on his own motion or the motion of any party, may order that a multidisciplinary evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be made in writing and filed with the clerk within 10 days after service of the petition on the respondent.

N.C.Gen.Stat. § 35A-1111(a)

Manner of Representation

- 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.

  N.C.Gen.Stat. § 35A-1112(b)

How does an appointed guardian ad litem decide what is best?

- Interview the respondent multiple times
- Interview collateral contacts
- Review medical records if applicable
- Family dynamics

Ethical concerns

Guardians ad litem always have the duties of:

- Candor to the tribunal
- Being fair to opposing counsel, whether for petitioner or for the respondent
- Refraining from having ex-parte communications with the Clerk
- Dishonesty, fraud and misrepresentation

Incompetency and Adult Guardianship for Clerks

Role of the Guardian ad Litem

January 22-24, 2014 Chapel Hill, NC

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TAB 12

Public Guardianship

PUBLIC GUARDIANSHIP AND THE DEPARTMENT OF SOCIAL SERVICES
ATTORNEY PERSPECTIVE

I. Adult Protective Services Referrals

A. Abused, Neglected, Exploited
B. Disabled Adult?
C. Needs Services?
D. Understand Needs
   (1) Refuses Services
   (2) Close Case
E. Lacks Understanding

II. Adult Protective Services Investigation

A. Needs
B. Environment
C. Family or Other Caregiver
D. Legal Representative
E. Medical Condition
F. Medical Record
G. Family Members
H. History

III. Petitioning Process

A. Personal Information
B. Allegations
C. Family Members
D. Medical Information
E. Recommended Guardian
F. Guardianship Questionnaire

IV. Petitioning Difficulties

A. No Current Medical Information
B. Respondent Refuses Medical Attention
C. Respondent Unable or Unwilling to Provide Information
D. Families Withhold Information
E. Serving Family Members

V. Preparation for Hearing

A. Prepare Evidence
B. Locate and Interview Witnesses
C. Contact Guardian ad Litem
D. Meet with Social Worker
   1. Report on Visit with Respondent
   2. Update Documentation

VI. Hearing

A. Present Evidence for Adjudication
   1. Witnesses
   2. Documentation
B. Cross Examine Guardian ad Litem Witnesses
C. If Adjudicated Incompetent, Recommend Guardian

VII. Hearing Obstacles

A. Difficulty Getting Current Medical Information
B. Doctors Refusing to Cooperate
C. HIPAA Used to Obstruct
D. Orders with Subpoenas
E. Availability of Court Time When as Needed
F. Respondent Not at Hearing
G. Limiting Hearings to What is Required
H. Serious Consideration of Limited Guardianships

VIII. DSS Receives Notice from Clerk after Petition Filed

A. DSS Being Considered for Guardian
B. Notifies/Consults with Adult Protective Services
C. Social Worker, When Time, Visits Respondent
D. Social Worker Looks for Family or Interested Person
E. Attorney/Social Worker Appears at Hearing
F. Learns about Respondent
G. Preparation for Director to Qualify

IX. Notice That DSS Has Been Appointed Guardian

A. No Time to Investigate Ward's Issues
B. No Time to Determine Ward's Needs for Guardianship
C. No Time to Determine Reason for Petition
D. Unable to Participate in Petitioning Process
E. Unable to Participate in Hearing
F. No Time to Locate and Evaluate Family for Guardian
G. No Time to Prepare to Be Guardian

X. Shared Frustrations

A. Needs of Respondent
B. Limited Resources
C. Needs Versus Capacity
D. Lack of Reasonable Alternatives to Guardianships
E. Conflicts of Interest
F. Lack of Guardianship Funding
G. DSS the Only Disinterested Public Agent Option

XI. DSS As Guardian

A. Limited Resources, Especially to Meet Mental Health Needs
B. High Number of Wards/Limited Personal Contact
C. Wards with Complicated, Difficult Issues
D. Overburdened Social Workers
E. Requests Limited Guardianship When Appropriate
F. Moves to Restore Competency As Soon As Possible

XII. DSS Major Complaints

A. Hospitals and Others File Petitions Because of Behavior Problems
B. File Petitions Because Inpatient Refuses Proposed Placement
C. DSS Appointed Guardian But Not Notified
D. Limited Guardian Seen as Plenary Guardian
E. Appointing DSS as Guardian of the Estate

XIII. Complaints with Limit and Restore

A. Limited Guardianships
   (1) Too Little Focus on Demonstrated Functioning
   (2) Too Much Focus on Lack of Capacity
   (3) Too Little Credit for Ability and Wisdom of Respondent
   (4) Too Much Concern for Needs That May Occur Later
B. Restoration of Competency
   (1) Too Little Focus on Capacity
   (2) Too Much Focus on Safety Concerns
   (3) Likelihood of Another Petition

XIV. Special Orders

A. Non-DSS Guardian Cannot Be Reached in an Emergency
B. Non-DSS Guardian Causing Injury to Ward's Estate
C. To Transport Respondent/Ward

XV. Conflicts within Families

A. The Basis
B. Real Interest in the Respondent
C. Family Dissatisfied with DSS as Guardian
D. Frequent Phone Calls/Letters/emails
E. Complaints to Public Officials
F. Responding to Motions Filed by Family Members

XVI. DSS Attorney and the Ward

A. Consulted in Matters of Life and Death
B. Pre-Need Burial and Other Contracts
C. Veterans' Benefits
D. Social Security Problems
E. Will and Real Estate Matter Interpretations
F. Consulting with Other Attorneys

XVII. Accolades to Clerks

A. Take Incompetency Matters Seriously
B. Concern for the Welfare of the Disabled
C. Ability to Handle So Many Varied Responsibilities
D. Making Time for Lengthy Hearings as Necessary
E. Naming Qualified Guardians ad Litem
F. Requiring Guardians ad Litem to Represent Their Clients
G. Professional in the Most Trying Circumstances

XVIII. Thanks to the Clerks

A. For the Confidence Placed in DSS as Guardian
B. For the Support and Guidance Provided to DSS.

PUBLIC GUARDIANSHIP AND THE DEPARTMENT OF SOCIAL SERVICES

DSS ATTORNEY PERSPECTIVE

DSS ATTORNEY ROLE

Petition initiated by DSS

DSS notified when petition filed

DSS notified before hearing

DSS notified after appointment

ATTORNEY ROLE
DSS PETITIONER

- PETITIONING PROCESS
- COLLECTING EVIDENCE
- PARTY TO THE ACTION
- PRESENTING EVIDENCE
- EXAMINES WITNESSES
- PRESENTS DOCUMENTARY EVIDENCE
- CROSS EXAMINES WITNESSES

ATTORNEY IN AGENCY

- Consultation and guidance
- Evaluates case
- Avoids faulty filings
- Interviews witnesses
- Coordinates with Guardian ad Litem
- Provides objective review of documentation
- Seeks orders when needed

ISSUES AT PETITIONING STAGE

- Locating next of kin
- Reliable assessments
- Obtaining medical reports
- Getting clients to see a doctor
- Necessary documentation
- Interviewing potential witnesses
- Family withholding information
- Family members being hostile

OBSTACLES TO HEARING

- Medical Information not current
- Doctors refuse to cooperate
- Doctors use HIPAA to obstruct
- Orders and Subpoenas
- Limitations on Court time
- Respondent not at hearing
- Getting guardianship limited

DSS NOT PETITIONER

POTENTIAL GUARDIAN
THE SOONER NOTIFIED THE BETTER
Social Worker can

Meet the person
Evaluate needs
Search for willing and able individual
Prepare for appointment as guardian
Consult with Attorney

HEARING PENDING

DSS NOTICED WHEN PETITION FILED
ALLOWS TIME TO INVESTIGATE:

- Previous DSS involvement
- Financial and medical status
- Individual as guardian
- Allegations
- Can Request Party Status

SHORT HEARING NOTICE

- Time constraints
  - No social worker available
  - No knowledge of respondent
  - No chance to look at allegations
  - No chance to meet with family
  - Conflicts not identified

NOTICE: APPOINTED

- Unable to be at Hearing
- Directed to apply for letters
  - No knowledge of Ward
    - Where is she/he?
    - Basis of incompetency?
    - Needs?
  - Placement required
    - FL-2
    - PASARR
    - Funding
  - No chance to locate or assess an individual to serve
  - No time to prepare to be guardian

APPOINTED—NO NOTICE

No knowledge—No action

- Ward left in limbo
- Unprepared to care for ward
- Ward may be in harm's way
- Unnecessary costs may accrue

SHARED FRUSTRATIONS

- Needs of Respondent/Ward
- Limited Resources
- Functional Capacity
- Lack of Reasonable Alternatives to Guardianship
- Conflicts of Interest
- Lack of Guardianship Funding
- DSS the Only Agency Option

DSS AS GUARDIAN

- Can access only limited resources
- High number of wards/limited personal contact from overworked social workers
- Wards with complicated, difficult issues
- Mental Health issues with few resources
- Requests limited guardianships when appropriate.
- Restoration when possible

LIMITED GUARDIANSHIP

DSS experience when requested:

Too little focus on ability to function
Too little focus on demonstrated capacity
Too little credit for ability and wisdom
Too much concern for capacity statements
Too much emphasis on safety of ward
Too much focus on future needs of ward
Too little emphasis on rights of ward

RESTORATION OF COMPETENCY

- DSS required to work toward
- DSS concerns
  - Held to higher standard for restoration of competency than for adjudication of incompetence
  - Too little focus on demonstrated capacity
  - Too much focus on safety concerns
  - Likelihood of another incompetency petition

DSS MAJOR COMPLAINTS

- Petitions filed because of behavior issues
- Petitions filed when patient refuses treatment
- Petitions filed when patient refuses placement
- Reluctance to restore competency
- Family member not given a chance to serve
- Appointed guardian of the person when lack of capacity is only financial
- Appointed and not notified
- Limited guardian seen as plenary

DSS ATTORNEY AND THE GUARDIAN

- Consulted in matters of life and death
- Review pre-need and other contracts
- Veteran's Benefits and Social Security issues
- Wills, Estates, and Real Estate interpretations
- Responses to complaints from families
- Consults with other attorneys
- Prepares Motions and other legal documents

ACCOLADES TO CLERKS

- Takes Incompetency matters seriously
- Concern for the welfare of the disabled
- Ability to handle many responsibilities
- Makes time for contested, lengthy hearings
- Names qualified guardians ad litem
- Requires guardians ad litem to represent their clients
- Professional in the most trying circumstances

Thanks to Clerks

- For the confidence placed in DSS as guardian
- For the support and guidance provided to DSS
- For understanding the trials and triumphs of DSS as a disinterested public agent guardian.
- Thanks and thanks again.

TAB 13

Ethics and Ex Parte Communications

ETHICS AND PROFESSIONALISM
INCOMPETENCY AND ADULT GUARDIANSHIP
NORTH CAROLINA JUDICAL COLLEGE

James Drennan
January 2014

1. In your office one of your assistants who works in estates and special proceedings has a sister who works as a paralegal for the primary lawyer in your community who handles incompetencies and guardianships. How do you handle this situation? What if the lawyer were her sister?

2. You have an opening your office for the person who works as a floater doing odd jobs, including manning the front to greet people who come in for guardianships. It is a temporary position. Your nephew is home from college for the summer and would like a job. Would you offer him the position? What about your daughter? Your sister-in-law? Your second cousin, who really needs a job?

3. How would you handle these situations?
    a. At Christmas, the local law firm that has the largest estate and property law practice in your community invites you to ride in their convertible in the local Christmas parade. Do you go?

    b. A prominent attorney, active in the courthouse, brings by a nice breakfast spread for your estates division one morning, unannounced. It consists of ham, sausage and bacon biscuits, great coffee, and hot cinnamon rolls. Apart from the diabetic implications of such a feast, what action do you take?

    c. Your estate clerk is welcomed on a Monday morning with a gift certificate to the nicest local restaurant, worth $50. It comes from a family whose mother's estate was closed out a few weeks earlier. What do you tell her to do?

    d. It's Christmas, and the local bank with whom you do business tells you that it wants to send over small boxes of chocolate for each employee in your office. What do you say? What if the bank were a competitor of the company you do business with?

    e. A classmate of yours from high school offers you tickets to the Carolina football game with Duke, at Duke. Do you accept them? (Do they have any value?)

    f. Which of these situations poses the greatest ethical challenges? Why?

4. You will be up for reelection in a couple of years. You tell your staff that you plan to run. You encourage them to let you know what kind of support you can plan on receiving from them. Is there a problem with doing that?

    a. You have filed for re election and you have a primary opponent, and if you are successful there, a general election opponent. What do you say to your employees? What are the ethics concerns applicable to this situation? Are there legal concerns in what you say to your employees?

    b. You have signs and other campaign materials available to be distributed. Can you tell your employees where they are and how to get them? Are there any restrictions on how you do that?

    c. It is still election season. You are running unopposed for re-election. The sheriff and DA are not, and they, as well as a prominent gubernatorial candidate and a candidate for chief justice, ask you to endorse their candidacies. You are supportive of each of them. What action do you take?

5. Your estate assistant is married to the county commission's chair. She comes to you to let you know that her family is planning to endorse a candidate in a hotly contested District Attorney primary in your party, as well as in a contested state Senate primary. What action do you take?

6. One Monday morning two requests to approve trust funds come into your office. One is to use $2,000 to pay for criminal defense costs for a 17 year old female who is charged with drug possession and sale of cocaine. The other is to use $750 to pay for an abortion for a 16 year old girl. In both cases, the parents of the girls join in the petition, alleging that they do not have sufficient funds to pay these bills. Do you approve the bills? If not, why not?

7. A person who plays golf at the same course you do, and is a member of the same Rotary Club as you is a beneficiary of his mother's estate which is being administered in another state. His sister was appointed executor—the brother and sister do not get along. Whenever you see him, he tells you about the abusive way the sister treats him, how she is not taking care of the mother's house and how she has suddenly been able to buy a new car after always being in trouble with her finances. The rumor is that the mother did have some cash lying around the house in strange places. It has not shown up on the preliminary inventories. How do you handle the conversations with the brother?
    a. What if the estate were handled in another county?
    b. What if the estate were handled in your county?
    c. When, if ever, is the sister entitled to be told about the conversations?

8. A local legislator drops by to chat. Among other things he tells you that his seatmate in the legislature has receive a speeding ticket in your county and that he (your local legislator) would appreciate any help you can provide to his seatmate. How do you respond? What if the legislator himself had gotten the ticket? Would your response be any different? Would it matter if the legislator were the chair of the appropriations committee?

9. An elderly widow in your community has a substantial amount of money. She has always been eccentric but now you hear from people at the restaurant where you have breakfast, and in the civic club where you have lunch every week that she is doing strange things—like giving lots of money to her housekeeper and to a local charity that animal rescue services. You also hear that she is not taking her medicine that keeps her blood circulating to her brain and other organs. And finally, at the local YMCA, a friend of hers tells you that the widow's daughter is having money trouble and would like to have more access to her mother's money. After you hear this, you receive a petition to have her declared incompetent by her daughter. Does all the local gossip you've heard have any impact on how you handle the petition? Does it matter that you heard the gossip before the petition was filed?

10. In your community, feelings run deep on several social issues—the role of religion in public activities (some want the county commissioners to post the 10 Commandments in the courthouse, and display a manger scene on the courthouse grounds at Christmas, if either can be done legally); on illegal immigration (some want the sheriff to contact the federal immigration authorities whenever an Hispanic person is arrested, and others want the county commissioners to make it illegal to rent housing to illegal immigrants); on the tensions presented in America's dealing with Islam (a local library is sponsoring a community book reading program using a book about the experiences of a Muslim girl growing up in the South, and parts of your community are outraged at the way it portrays some religious and cultural views of non-Muslims). It's two years until you file for re-election, and a prominent local organization is sponsoring a series of community discussions about these issues. You are invited to be on a panel of public officials to discuss these issues. How do you respond?
    a. Would your answer be any different if it were an election year?
    b. Would your answer be any different if you were in your last term and have decided not to seek re-election?

11. You are invited to give a speech at the local women's [Republican] [Democratic] Women's Club. You go and talk about the office of the clerk and the role the courts play in your community. Assume now that you go, and you have a good time. As you leave the program chair gives you a check for $75 as an honorarium for speaking.
    a. Do you go?
    b. Do you take the honorarium?
    c. Would your answer be different if it were the local Chamber of Commerce?
    d. The local bar association?
    e. The State Banker's Association?

Drennan
School of Government
January 2014

Selected General Statutes Relevant to the Ethical Duties of Clerks of Court

§ 7A-104. Disqualification; waiver; removal; when judge acts.

(a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;

(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;

(3) If clerk or the clerk's spouse is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;

(4) If clerk or the clerk's spouse is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

(a1) The clerk may disqualify himself in a proceeding in circumstances justifying disqualification or recusement by a judge.

(a2) The parties may waive the disqualification specified in this section, and upon the filing of such written waiver, the clerk shall act as in other cases.

(b) When any of the disqualifications specified in this section exist, and there is no waiver thereof, or when there is no renunciation under subdivision (a)(4) of this section, any party in interest may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, for an order to remove the proceedings to the clerk of superior court of an adjoining county in the district or set of districts; or he may apply to the judge to make either in vacation or during a session of court all necessary orders and judgments in any proceeding in which the clerk is disqualified, and the judge in such cases is hereby authorized to make any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceedings.

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county may make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the proper records to be made by the clerk.

§ 7A-105. Suspension, removal, and reinstatement of clerk.

A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court district attorney, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension.

Canon 3
A judge should perform the duties of the judge's office impartially and diligently.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

C. Disqualification.

(1) On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) The judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) The judge knows that he/she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself/herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself/herself about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee and guardian;

(c) "Financial interest" means ownership of a substantial legal or equitable interest (*i.e.*, an interest that would be significantly affected in value by the outcome of the subject legal proceeding), or a relationship as director or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, cultural, historical, religious, charitable, fraternal or civic organization is not a "financial interest" in securities held by the organization.

D. Remittal of disqualification.

Nothing in this Canon shall preclude a judge from disqualifying himself/herself from participating in any proceeding upon the judge's own initiative. Also, a judge potentially disqualified by the terms of Canon 3C may, instead of withdrawing from the proceeding, disclose on the record the basis of the judge's potential disqualification. If, based on such disclosure, the parties and lawyers, on behalf of their clients and independently of the judge's participation, all agree in writing that the judge's basis for potential disqualification is immaterial or insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all lawyers, shall be incorporated in the record of the proceeding. For purposes of this section, *pro se* parties shall be considered lawyers.

Chapter 138A.
State Government Ethics Act.
Article 1.
General Provisions.

§ 138A-1. Title.

This Chapter shall be known and may be cited as the "State Government Ethics Act". (2006-201, s. 1.)

§ 138A-2. Purpose.

The purpose of this Chapter is to ensure that elected and appointed State agency officials exercise their authority honestly and fairly, free from impropriety, threats, favoritism, and undue influence. To this end, it is the intent of the General Assembly in this Chapter to ensure that standards of ethical conduct and standards regarding conflicts of interest are clearly established for elected and appointed State agency officials, that the State continually educates these officials on matters of ethical conduct and conflicts of interest, that potential and actual conflicts of interests are identified and resolved, and that violations of standards of ethical conduct and conflicts of interest are investigated and properly addressed. (2006-201, s. 1.)

§ 138A-3. Definitions.

The following definitions apply in this Chapter:

(1) Blind trust. – A trust established by or for the benefit of a covered person or a member of the covered person's immediate family for divestiture of all control and knowledge of assets. A trust qualifies as a blind trust under this subdivision if the covered person or a member of the covered person's immediate family has no knowledge of the holdings and sources of income of the trust, the trustee of the trust is independent of and not associated with or employed by the covered person or a member of the covered person's immediate family and is not a member of the covered person's extended family, and the trustee has sole discretion as to the management of the trust assets.

(1c) Board. – Any State board, commission, council, committee, task force, authority, or similar public body, however denominated, created by statute or executive order, as determined and designated by the Commission, except for those public bodies that have only advisory authority.

(2) Business. – Any of the following organized for profit:

a. Association.
b. Business trust.
c. Corporation.
d. Enterprise.
e. Joint venture.
f. Organization.
g. Partnership.
h. Proprietorship.
i. Vested trust.
j. Every other business interest, including ownership or use of land for income.

(3) Business with which associated. – A business in which the covered person or filing person or any member of that covered person's or filing person's immediate family does any of the following:

a. Is an employee.
b. Holds a position as a director, officer, partner, proprietor, or member or manager of a limited liability company, irrespective of the amount of compensation received or the amount of the interest owned.
c. Owns a legal, equitable, or beneficial interest of ten thousand dollars ($10,000) or more in the business or five percent (5%) of the business, whichever is less, other than as a trustee on a deed of trust.
d. Is a lobbyist registered under Chapter 120C of the General Statutes.

For purposes of this subdivision, the term "business" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:

1. The covered person, filing person, or a member of the covered person's or filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
2. The fund is publicly traded, or the fund's assets are widely diversified.

(4) Commission. – The State Ethics Commission.

(5) Committee. – The Legislative Ethics Committee as created in Part 3 of Article 14 of Chapter 120 of the General Statutes.

(6) Compensation. – Any money, thing of value, or economic benefit conferred on or received by any covered person or filing person in return for services rendered or to be rendered by that covered person or filing person or another. This term does not include campaign contributions properly received and, reported as required by Article 22A of Chapter 163 of the General Statutes.

(7) Confidential information. – Information defined as confidential by the law.

(8) Constitutional officers of the State. – Officers whose offices are established by Article III of the North Carolina Constitution.

(9) Contract. – Any agreement, including sales and conveyances of real and personal property, and agreements for the performance of services.

(10) Covered person. – A legislator, public servant, or judicial officer, as identified by the Commission under G.S. 138A-11.

(11) Repealed by Session Laws 2008-213, s. 84(c), effective August 15, 2008.

(12) Employing entity. – For public servants, any of the following bodies of State government of which the public servant is an employee or a member, or over which the public servant exercises supervision: agencies, authorities, boards, commissions, committees, councils, departments, offices, institutions and their subdivisions, and constitutional offices of the State. For legislators, it is the house of which the legislator is a member. For legislative employees, it is the authority that hired the individual. For judicial employees, it is the Chief Justice.

(13) Extended family. – Spouse, lineal descendant, lineal ascendant, sibling, spouse's lineal descendant, spouse's lineal ascendant, spouse's sibling, and the spouse of any of these individuals.

(14) Filing person. – An individual required to file a statement of economic interest under G.S. 138A-22.

(14a), (14b) Reserved for future codification purposes.

(14c) Financial benefit. – A direct pecuniary gain or loss to the legislator, the public servant, or a person with which the legislator or public servant is associated, or a direct pecuniary loss to a business competitor of the legislator, the public servant, or a person with which the legislator or public servant is associated.

(15) Gift. – Anything of monetary value given or received without valuable consideration by or from a lobbyist, lobbyist principal, liaison personnel, or a person described under G.S. 138A-32(d)(1), (2), or (3). The following shall not be considered gifts under this subdivision:

a. Anything for which fair market value, or face value if shown, is paid by the covered person or legislative employee.
b. Commercially available loans made on terms not more favorable than generally available to the general public in the normal course of business if not made for lobbying.
c. Contractual arrangements or commercial relationships or arrangements made in the normal course of business if not made for lobbying.
d. Academic or athletic scholarships based on the same criteria as applied to the public.

e. Anything of value properly reported as required under Article 22A of Chapter 163 of the General Statutes.

f. Expressions of condolence related to a death of an individual, sent within a reasonable time of the death, if the expression is one of the following:

1. A sympathy card, letter, or note.
2. Flowers.
3. Food or beverages for immediate consumption.
4. Donations to a religious organization, charity, the State or a political subdivision of the State, not to exceed a total of two hundred dollars ($200.00) per death per donor.

(15a) through (15c) Reserved for future codification purposes.

(15d) Governmental unit. – A political subdivision of the State, and any other entity or organization created by a political subdivision of the State.

(16) Honorarium. – Payment for services for which fees are not legally or traditionally required.

(17) Immediate family. – An unemancipated child of the covered person residing in the household and the covered person's spouse, if not legally separated. A member of a covered person's extended family shall also be considered a member of the immediate family if actually residing in the covered person's household.

(18) Judicial employee. – The director and assistant director of the Administrative Office of the Courts and any other individual, designated by the Chief Justice, employed in the Judicial Department whose annual compensation from the State is sixty thousand dollars ($60,000) or more.

(19) Judicial officer. – Justice or judge of the General Court of Justice, district attorney, clerk of court, or any individual elected or appointed to any of these positions prior to taking office.

(20) Legislative action. – As the term is defined in G.S. 120C-100.

(21) Legislative employee. – As the term is defined in G.S. 120C-100.

(22) Legislator. – A member or presiding officer of the General Assembly, or an individual elected or appointed a member or presiding officer of the General Assembly before taking office.

(23) Lobbying. – As the term is defined in G.S. 120C-100.

(24) Nonprofit corporation or organization with which associated. – Any not for profit corporation, organization, or association, incorporated or otherwise, that is organized or operating in the State primarily for religious, charitable, scientific, literary, public health and safety, or educational purposes and of which the covered person, filing person, or any member of the covered person's or filing person's immediate family is a director, officer, governing board member, employee, lobbyist registered under Chapter 120C of the General Statutes, or independent contractor. Nonprofit corporation or organization with which associated shall not include any board, entity, or other organization created by this State or by any political subdivision of this State.

(25) Official action. – Any decision, including administration, approval, disapproval, preparation, recommendation, the rendering of advice, and investigation, made or contemplated in any proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, investigation, charge, or rule making.

(26) Participate. – To take part in, influence, or attempt to influence, including acting through an agent or proxy.

(26c) Permanent designee. – An individual designated by a public servant to serve and vote in the absence of the public servant on a regular basis on a board on which the public servant serves.

(27) Person. – Any individual, firm, partnership, committee, association, corporation, business, or any other organization or group of persons acting together. The term "person" does not include the State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State.

(27a), (27b) Reserved for future codification purposes.

(27c) Person with which the legislator is associated. – Any of the following:
- a. A member of the legislator's extended family.
- b. A client of the legislator.
- c. A business with which the legislator or a member of the legislator's immediate family is associated.
- d. A nonprofit corporation or association with which the legislator or a member of the legislator's immediate family is associated.
- e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the legislator or a member of the legislator's immediate family.

(27d) Person with which the public servant is associated. – Any of the following:
- a. A member of the public servant's extended family.
- b. A client of the public servant.
- c. A business with which the public servant or a member of the public servant's immediate family is associated.
- d. A nonprofit corporation or association with which the public servant or a member of the public servant's immediate family is associated.
- e. The State, a political subdivision of the State, a board, or any other entity or organization created by the State or a political subdivision of the State that employs the public servant or a member of the public servant's immediate family.

(28) Political party. – Either of the two largest political parties in the State based on statewide voter registration at the applicable time.

(29) Repealed by Session Laws 2008-213, s. 49, effective August 15, 2008.

(30) Public servants. – All of the following:
- a. Constitutional officers of the State and individuals elected or appointed as constitutional officers of the State prior to taking office.
- b. Employees of the Office of the Governor.
- c. Heads of all principal State departments, as set forth in G.S. 143B-6, who are appointed by the Governor.
- d. The chief deputy and chief administrative assistant of each individual designated under sub-subdivision a. or c. of this subdivision.
- e. Confidential assistants and secretaries as defined in G.S. 126-5(c)(2), to individuals designated under sub-subdivision a., c., or d. of this subdivision.
- f. Employees in exempt positions designated in accordance with G.S. 126-5(d)(1), (2), or (2a) and confidential secretaries to these individuals.
- g. Any other employees or appointees in the principal State departments as may be designated by the Governor to the extent that the designation does not conflict with the State Personnel Act.
- h. Judicial employees.
- i. All voting members of boards, including ex officio members, permanent designees of any voting member, and members serving by executive, legislative, or judicial branch appointment.
- j. For The University of North Carolina, the voting members of the Board of Governors of The University of North Carolina, the president, the vice-presidents, and the chancellors, the vice-chancellors, and voting members of the boards of trustees of the constituent institutions.
- k. For the Community College System, the voting members of the State Board of Community Colleges, the President and the chief financial officer of the Community College System, the president, chief financial officer, and chief administrative officer of each community college, and voting members of the boards of trustees of each community college.
- l. Members of the Commission, the executive director, and the assistant executive director of the Commission.
- m. Individuals under contract with the State working in or against a position included under this subdivision.

n. The director of the Office of State Personnel.
o. The State Controller.
p. The chief information officer, deputy chief information officers, chief financial officers, and general counsel of the Office of Information Technology Services.
q. The director of the State Museum of Art.
r. The executive director of the Agency for Public Telecommunications.
s. The Commissioner of Motor Vehicles.
t. The Commissioner of Banks and the chief deputy commissioners of the Banking Commission.
u. The executive director of the North Carolina Housing Finance Agency.
v. The executive director, chief financial officer, and chief operating officer of the North Carolina Turnpike Authority.

(30a) through (30j) Reserved for future codification purposes.

(30k) State agency. – An agency in the executive branch of the government of this State, including the Governor's Office, a board, a department, a division, and any other unit of government in the executive branch.

(31) Vested trust. – A trust, annuity, or other funds held by a trustee or other third party for the benefit of the covered person or a member of the covered person's immediate family, except a blind trust. A vested trust shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if:

a. The covered person or a member of the covered person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund; and
b. The fund is publicly traded, or the fund's assets are widely diversified. (2006-201, s. 1; 2007-347, ss. 7, 8; 2007-348, ss. 19-26; 2008-187, s. 44; 2008-213, ss. 40-54, 84(c); 2010-169, ss. 10, 17(n), (o); 2010-170, s. 14.)

§ 138A-10. Powers and duties.

(a) In addition to other powers and duties specified in this Chapter, the Commission shall:

(1) Provide reasonable assistance to covered persons in complying with this Chapter.

(2) Develop readily understandable forms, policies, and procedures to accomplish the purposes of the Chapter.

(3) Identify and publish the following:

a. A list of nonadvisory boards.
b. The names of individuals subject to this Chapter as covered persons and legislative employees under G.S. 138A-11.

(4) Receive and review all statements of economic interests filed with the Commission by prospective and actual covered persons and evaluate whether (i) the statements conform to the law and the rules of the Commission, and (ii) the financial interests and other information reported reveals actual or potential conflicts of interest. Pursuant to G.S. 138A-24(e), this subdivision does not apply to statements of economic interest of legislators and judicial officers.

(5) Conduct inquiries of alleged violations against judicial officers, legislators, and legislative employees in accordance with G.S. 138A-12.

(7) Render advisory opinions in accordance with G.S. 138A-13 and G.S. 120C-102.

(10) Adopt procedures and guidelines to implement this Chapter.

(12) Publish annually statistics on complaints filed with or considered by the Commission, including the number of complaints filed, the number of complaints referred under G.S. 138A-12(b), the number of complaints dismissed under G.S. 138A-12(c)(4), the number of complaints dismissed under G.S. 138A-12(f), the number of complaints referred for criminal prosecution under G.S. 138A-12, the number of complaints dismissed under G.S. 138A-12(h), the number of complaints referred for appropriate

action under G.S. 138A-12(h) or G.S. 138A-12(k)(3), and the number and age of complaints pending action by the Commission.

(13) Perform other duties as may be necessary to accomplish the purposes of this Chapter.

§ 138A-11. Identify and publish names of covered persons and legislative employees.

The Commission shall identify and publish at least quarterly a listing of the names and positions of all individuals subject to this Chapter as covered persons or legislative employees. The Commission shall also identify and publish at least annually a listing of all boards to which this Chapter applies. This listing may be published electronically on a public Internet Web site maintained by the Commission. (2006-201, s. 1; 2008-213, s. 56.)

§ 138A-12. Inquiries by the Commission.

(a) Jurisdiction. – The Commission may receive complaints alleging unethical conduct by covered persons and legislative employees and shall conduct inquiries of complaints alleging unethical conduct by covered persons and legislative employees, as set forth in this section.

(a1) Notice of Allegation. – Upon receipt by the Commission of a written allegation of unethical conduct by a covered person or legislative employee, or the initiation by the Commission of an inquiry into unethical conduct under subsection (b) of this section, the Commission shall immediately notify the covered person or legislative employee subject to the allegation or inquiry in writing.

(c) Complaint. –

(1) A sworn complaint filed under this Chapter shall state the name, address, and telephone number of the individual filing the complaint, the name and job title or appointive position of the covered person or legislative employee against whom the complaint is filed, and a concise statement of the nature of the complaint and specific facts indicating that a violation of this Chapter or Chapter 120 of the General Statutes or G.S. 126-14 or the criminal law in the performance of that individual's official duties has occurred, the date the alleged violation occurred, and either (i) that the contents of the complaint are within the knowledge of the individual verifying the complaint, or (ii) the basis upon which the individual verifying the complaint believes the allegations to be true.

(2) Except as provided in subsection (d) of this section, a complaint filed under this Chapter must be filed within two years of the date the complainant knew or should have known of the conduct upon which the complaint is based.

(3) The Commission may decline to accept, refer, or conduct an inquiry into any complaint that does not meet all of the requirements set forth in subdivision (1) of this subsection, or the Commission may, in its sole discretion, request additional information to be provided by the complainant within a specified period of time of no less than five business days.

(4) In addition to subdivision (3) of this subsection, the Commission may decline to accept, refer, or conduct an inquiry into a complaint if it determines that any of the following apply:

a. The complaint is frivolous or brought in bad faith.

b. The covered person or legislative employee and conduct complained of have already been the subject of a prior complaint.

c. The conduct complained of is primarily a matter more appropriately and adequately addressed and handled by other federal, State, or local agencies or authorities, including law enforcement authorities. If other agencies or authorities are conducting an investigation of the same actions or conduct involved in a complaint filed under this section, the Commission may stay its complaint inquiry pending final resolution of the other investigation.

(5) The Commission shall send a copy of the complaint to the covered person or legislative employee who is the subject of the complaint and the employing entity, within 10 business days of the filing.

(d) Conduct of Inquiry of Complaints by the Commission. – The Commission shall conduct an inquiry into all complaints properly before the Commission in a timely manner. The Commission shall initiate an inquiry into a complaint within 10 business days of the filing of the complaint. The Commission is authorized to initiate inquiries upon request of any member of the Commission if there is reason to believe that a covered person or legislative employee has or may have violated this Chapter. Commission-initiated complaint inquiries under this section shall be initiated within two years of the date the Commission knew of the conduct upon which the complaint is based, except when the conduct is material to the continuing conduct of the duties in office. In determining whether there is reason to believe that a violation has or may have occurred, a member of the Commission may take general notice of available information even if not formally provided to the Commission in the form of a complaint. The Commission may utilize the services of a hired investigator when conducting inquiries.

(e) Covered Person and Legislative Employees Cooperation With Inquiry. – Covered persons and legislative employees shall promptly and fully cooperate with the Commission in any Commission-related inquiry. Failure to cooperate fully with the Commission in any inquiry shall be grounds for sanctions as set forth in G.S. 138A-45.

(f) Dismissal of Complaint After Preliminary Inquiry. – The Commission shall conclude the preliminary inquiry within 20 business days. The Commission shall dismiss the complaint, if at the end of its preliminary inquiry the Commission determines that any of the following apply:

(1) The individual who is the subject of the complaint is not a covered person or legislative employee subject to the Commission's jurisdiction and authority under this Chapter.

(2) The complaint does not allege facts sufficient to constitute a violation within the jurisdiction of the Commission under subsection (b) of this section.

(3) The complaint is determined to be frivolous or brought in bad faith.

(g) Commission Inquiries. – If at the end of its preliminary inquiry, the Commission determines to proceed with further inquiry into the conduct of a covered person or legislative employee, the Commission shall provide written notice to the individual who filed the complaint and the covered person or legislative employee as to the fact of the inquiry and the charges against the covered person or legislative employee. The covered person or legislative employee shall be given an opportunity to file a written response with the Commission.

(h) Action on Inquiries. – The Commission shall conduct inquiries into complaints to the extent necessary to either dismiss the complaint for lack of probable cause of a violation under this section, or:

(1) For public servants, decide to proceed with a hearing under subsection (i) of this section.

(2) For legislators, except the Lieutenant Governor, refer the complaint to the Committee.

(3) For judicial officers, refer the complaint to the Judicial Standards Commission for complaints against justices and judges, to the senior resident superior court judge of the district or county for complaints against district attorneys, or to the chief district court judge for the district or county for complaints against clerks of court.

(4) For legislative employees, refer the complaint to the employing entity.

(l) Notice of Dismissal. – Upon the dismissal of a complaint under this section, the Commission shall provide written notice of the dismissal to the individual who filed the complaint and the covered person or legislative employee against whom the complaint was filed. The Commission shall forward copies of complaints and notices of dismissal of complaints against legislators to the Committee, against legislative employees to the employing entity for legislative employees, and against judicial officers to the Judicial Standards Commission for complaints against justices and judges, and the senior resident superior court judge of the district or county for complaints against district attorneys, or the chief district court judge of the district or county for complaints against clerks of court. The Commission shall also forward a copy of the notice of dismissal to the employing entity of the covered person against whom a complaint was filed if the employing entity received a copy of the complaint under subdivision (5) of subsection (c) of this section. Except as provided in subsection (n) of this section, the complaint and notice of dismissal are confidential and not public records.

(m) Reports and Records. – The Commission shall render the results of its inquiry in writing. When a matter is referred under subdivision (h)(2) and (3), or subsection (k) of this section, the

Commission's report shall consist of the complaint, response, and detailed results of its inquiry in support of the Commission's finding of a violation under this Chapter.

(n) Confidentiality. – Complaints and responses filed with the Commission and reports and other investigative documents and records of the Commission connected to an inquiry under this section, including information provided pursuant to G.S. 147-64.6B or G.S. 147-64.6(c)(19), shall be confidential and not matters of public record, except as otherwise provided in this section or when the covered person or legislative employee under inquiry requests in writing that the complaint, response, and findings be made public. Once a hearing under this section commences, the complaint, response, and all other documents offered at the hearing in conjunction with the complaint, not otherwise privileged or confidential under law, shall be public records. If no hearing is held at such time as the Commission reports to the employing entity a recommendation of sanctions, the complaint and response shall be made public.

(p) Authority of Employing Entity. – Any action or failure to act by the Commission under this Chapter, except G.S. 138A-13, shall not limit any authority of any of the applicable employing entities to discipline the covered person or legislative employee.

(t) Concurrent Jurisdiction. – Nothing in this section shall limit the jurisdiction of the Committee or the Judicial Standards Commission with regards to legislative or judicial misconduct, and jurisdiction under this section shall be concurrent with the jurisdiction of the Committee and the Judicial Standards Commission.

§ 138A-13. Request for advice.

(a) At the request of any public servant or legislative employee, any individual who is responsible for the supervision or appointment of a public servant or legislative employee, legal counsel for any public servant or legislative employee, any ethics liaison under G.S. 138A-14, or any member of the Commission, the Commission shall render advice on specific questions involving the meaning and application of this Chapter and the public servant's or legislative employee's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate prospectively to real or reasonably anticipated fact settings or circumstances.

f) This section shall apply to judicial officers only for advice related to Article 3 of this Chapter.

§ 138A-21. Purpose.

The purpose of disclosure of the financial and personal interests by covered persons is to assist covered persons and those who appoint, elect, hire, supervise, or advise them identify and avoid conflicts of interest and potential conflicts of interest between the covered person's private interests and the covered person's public duties. It is critical to this process that current and prospective covered persons examine, evaluate, and disclose those personal and financial interests that could be or cause a conflict of interest or potential conflict of interest between the covered person's private interests and the covered person's public duties. Covered persons must take an active, thorough, and conscientious role in the disclosure and review process, including having a complete knowledge of how the covered person's public position or duties might impact the covered person's private interests. Covered persons have an affirmative duty to provide any and all information that a reasonable person would conclude is necessary to carry out the purposes of this Chapter and to fully disclose any conflict of interest or potential conflict of interest between the covered person's public and private interests, but the disclosure, review, and evaluation process is not intended to result in the disclosure of unnecessary or irrelevant personal information. (2006-201, s. 1; 2008-213, s. 63.)

§ 138A-22. Statement of economic interest; filing required.

(a) Every covered person subject to this Chapter who is elected, appointed, or employed, including one appointed to fill a vacancy in elective office, except for public servants (i) included under G.S. 138A-3(30)b., e., f., or g. whose annual compensation from the State is less than sixty thousand dollars ($60,000), or (ii) who are ex officio student members under Chapters 115D and 116 of the General Statutes, shall file a statement of economic interest with the Commission prior to the covered person's initial appointment, election, or employment and no later than April 15 of every year thereafter, except as otherwise filed under subsections (c1) and (d) of this section. A prospective covered person required to file a statement under this Chapter shall not be appointed, employed, or receive a certificate of election, prior to submission by the Commission of the Commission's evaluation of the statement in accordance

with this Article. The requirement for an annual filing under this subsection also shall apply to covered persons whose terms have expired but who continue to serve until the covered person's replacement is appointed. Once a statement of economic interest is properly completed and filed under this Article, the statement of economic interest does not need to be supplemented or refiled prior to the next due date set forth in this subsection.

(b) Notwithstanding subsection (a) of this section, individuals hired by, and appointees of, constitutional officers of the State may file a statement of economic interest within 30 days after their appointments or employment when the appointment or employment is made during the first 60 days of the constitutional officer's initial term in that constitutional office.

(c) Notwithstanding subsection (a) of this section, public servants, under G.S. 138A-3(30)j. and k., who have submitted a statement of economic interest under subsection (a) of this section, may be hired, appointed, or elected provisionally prior to submission by the Commission of the Commission's evaluation of the statement in accordance with this Article, subject to dismissal or removal based on the Commission's evaluation.

(c1) A public servant reappointed to a board between January 1 and April 15 shall file a current statement of economic interest prior to the reappointment.

(c2) A public servant appointed to a board determined and designated as nonadvisory under G.S. 138A-10(a)(3) shall file the initial statement of economic interest within 60 days of notification of the designation by the Commission and as provided in this section thereafter.

(d) A candidate for an office subject to this Article shall file the statement of economic interest at the same place and in the same manner as the notice of candidacy for that office is required to be filed under G.S. 163-106 or G.S. 163-323 within 10 days of the filing deadline for the office the candidate seeks. An individual who is nominated under G.S. 163-114 after the primary and before the general election, and an individual who qualifies under G.S. 163-122 as an unaffiliated candidate in a general election, shall file a statement of economic interest with the county board of elections of each county in the senatorial or representative district. An individual nominated under G.S. 163-114 shall file the statement within three days following the individual's nomination, or not later than the day preceding the general election, whichever occurs first. An individual seeking to qualify as an unaffiliated candidate under G.S. 163-122 shall file the statement of economic interest with the petition filed under that section. An individual seeking to have write-in votes counted for that individual in a general election shall file a statement of economic interest at the same time the candidate files a declaration of intent under G.S. 163-123. A candidate of a new party chosen by convention shall file a statement of economic interest at the same time that the president of the convention certifies the names of its candidates to the State Board of Elections under G.S. 163-98.

(d1) In addition to subsections (a) and (d) of this section, a covered person holding elected office or a former covered person who held elected office subject to this Article shall file a statement of economic interest in all of the following instances, as specified:

(1) Filed on or before April 15 of the year following the year a covered person or former covered person does not file a notice of candidacy or petition for election, or does not receive a certificate of election, to the position making that individual a covered person, with all information provided in the statement of economic interest current as of the last day of December of the preceding year.

(2) Filed on or before April 15 of the year following the year the covered person or former covered person resigns from the position making that individual a covered person, with all information provided in the statement of economic interest current as of the last day in the position.

(e) The State Board of Elections shall provide for notification of the statement of economic interest requirements of this Article to be given to any candidate filing for nomination or election to those offices subject to this Article at the time of the filing of candidacy.

(f) Within 10 days of the filing deadline for office of a covered person, the executive director of the State Board of Elections shall send to the State Ethics Commission a list of the names and addresses of each candidate who have filed as a candidate for office as a covered person. A county board of election shall forward any statements of economic interest filed with the board under this section to the State Board of Elections. The executive director of the State Board of Elections shall forward a certified copy of the statements of economic interest to the Commission for evaluation upon its filing with the State Board of Elections under this section.

(g) The Commission shall issue forms to be used for the statement of economic interest and shall revise the forms from time to time as necessary to carry out the purposes of this Chapter. Except as otherwise set forth in this section and in G.S. 138A-15(h), upon notification by the employing entity, the Commission shall furnish to all other covered persons the appropriate forms needed to comply with this Article. (2006-201, s. 1; 2007-29, s. 2; 2007-348, ss. 32, 33; 2008-213, s. 64; 2009-549, s. 13; 2010-169, ss. 12, 22(b).)

§ 138A-23. Statements of economic interest as public records.

(a) The statements of economic interest filed by prospective public servants under this Article for appointed or employed positions and written evaluations by the Commission of these statements are not public records until the prospective public servant is appointed or employed by the State. All other statements of economic interest and all other written evaluations by the Commission of those statements are public records.

(b) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals elected by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the election and made available to all members of the General Assembly. The statements of economic interest filed by public servants elected to positions by the General Assembly, and written evaluations by the Commission of those statements, are not public records until the prospective public servant is sworn into office.

(c) The statements of economic interest filed by prospective public servants, and the written evaluations by the Commission of those statements, for individuals confirmed for appointment as a public servant by the General Assembly shall be provided to the chair of the standing committee handling the legislation regarding the appointment. The statements of economic interest filed by prospective public servants for confirmation for appointment by the General Assembly, and written evaluations by the Commission of those statements, are public records at the time of the announcement of the appointment. (2006-201, s. 1; 2007-347, s. 10; 2008-213, ss. 65, 66.)

§ 138A-24. Contents of statement.

(a) Any statement of economic interest filed under this Article shall be on a form prescribed by the Commission. Answers must be provided to all questions. The form shall include the following information about the filing person and the filing person's immediate family:

(1) Except as otherwise provided in this subdivision, the name, current mailing address, occupation, employer, and business of the filing person. Any individual holding or seeking elected office for which residence is a qualification for office shall include a home address. A judicial officer may use a current mailing address instead of the home address on the form required in this subsection. The filing person may also use the initials instead of the name of any unemancipated child of the filing person who also resides in the household of the filing person. If the filing person provides the initials of an unemancipated child, the filing person shall concurrently provide the name of the unemancipated child to the Commission. The name of an unemancipated child provided by the filing person to the Commission shall not be a public record under Chapter 132 of the General Statutes and is privileged and confidential.

(2) A list of each asset and liability included in this subdivision of whatever nature (including legal, equitable, or beneficial interest) with a value of at least ten thousand dollars ($10,000) owned by the filing person and the filing person's immediate family, except assets or liabilities held in a blind trust. This list shall include the following:

a. All real estate located in the State owned wholly or in part by the filing person or the filing person's immediate family, including descriptions adequate to determine the location by city and county of each parcel.

b. Real estate that is currently leased or rented to or from the State.

c. Personal property sold to or bought from the State within the preceding two years.

d. Personal property currently leased or rented to or from the State.

e. The name of each publicly owned company. For purposes of this sub-subdivision, the term "publicly owned company" shall not include a widely held investment fund, including a mutual fund, regulated investment company, or pension or deferred compensation plan, if all of the following apply:
    1. The filing person or a member of the filing person's immediate family neither exercises nor has the ability to exercise control over the financial interests held by the fund.
    2. The fund is publicly traded, or the fund's assets are widely diversified.

f. The name of each nonpublicly owned company or business entity, including interests in sole proprietorships, partnerships, limited partnerships, joint ventures, limited liability companies, limited liability partnerships, and closely held corporations.

g. For each company or business entity listed under sub-subdivision f. of this subdivision, if known, a list of any other companies or business entities in which the company or business entity owns securities or equity interests exceeding a value of ten thousand dollars ($10,000).

h. Repealed by Session Laws 2010-169, s. 13(a), effective January 1, 2011, and applicable to statements of economic interest filed on or after that date.

i. Recodified as subdivision (a)(16) by Session Laws 2010-169, s. 13(c), effective January 1, 2011, and applicable to statements of economic interest filed on or after that date.

j. For a vested trust created, established, or controlled by the filing person of which the filing person or the members of the filing person's immediate family are the beneficiaries, excluding a blind trust, the name and address of the trustee, a description of the trust, and the filing person's relationship to the trust.

k. A list of all liabilities, excluding indebtedness on the filing person's primary personal residence, by type of creditor and debtor.

l. Repealed by Session Laws 2007-348, s. 34. See Editor's note for effective date.

m. A list of all stock options in a company or business not otherwise disclosed on this statement.

(3) The name of each source (not specific amounts) of income of more than five thousand dollars ($5,000) received during the previous year by business or industry type, if that source is not listed under subdivision (2) of this subsection. Income shall include salary, wages, professional fees, honoraria, interest, dividends, rental income, and business income from any source other than capital gains, federal government retirement, military retirement, or social security income.

(4) If the filing person is a practicing attorney, an indication of whether the filing person, or the law firm with which the filing person is affiliated, earned legal fees during the past year in excess of ten thousand dollars ($10,000) from any of the following categories of legal representation:

a. Administrative law.
b. Admiralty law.
c. Corporate law.
d. Criminal law.
e. Decedents' estates law.
f. Environmental law.
g. Insurance law.
h. Labor law.
i. Local government law.
j. Negligence or other tort litigation law.
k. Real property law.
l. Securities law.
m. Taxation law.

n. Utilities regulation law.

(5) Except for a filing person in compliance under subdivision (4) of this subsection, if the filing person is a licensed professional or provides consulting services, either individually or as a member of a professional association, a list of categories of business and the nature of services rendered, for which payment for services were charged or paid during the past year in excess of ten thousand dollars ($10,000).

(6) An indication of whether the filing person, the filing person's employer, a member of the filing person's immediate family, or the immediate family member's employer is licensed or regulated by, or has a business relationship with, the board or employing entity with which the filing person is or will be associated. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.

(7) A list of societies, organizations, or advocacy groups, pertaining to subject matter areas over which the public servant's agency or board may have jurisdiction, in which the public servant or a member of the public servant's immediate family is a director, officer, or governing board member. This subdivision does not apply to a legislator, a judicial officer, or that legislator's or judicial officer's immediate family.

(8) A list of all things with a total value of over two hundred dollars ($200.00) per calendar quarter given and received without valuable consideration and under circumstances that a reasonable person would conclude that the thing was given for lobbying, if such things were given by a person not required to report under Chapter 120C of the General Statutes, excluding things given by a member of the filing person's extended family. The list shall include only those things received during the 12 months preceding the reporting period under subsection (d) of this section, and shall include the source of those things. The list required by this subdivision shall not apply to things of monetary value received by the filing person prior to the time the filing person filed or was nominated as a candidate for office, as described in G.S. 138A-22, or was appointed or employed as a covered person.

(9) A list of any felony convictions of the filing person, excluding any felony convictions for which a pardon of innocence or order of expungement has been granted.

(10) Any other information that the filing person believes may assist the Commission in advising the filing person with regards to compliance with this Chapter.

(11) A list of any nonprofit corporation or organization with which associated during the preceding calendar year, including a list of which of those nonprofit corporations or organizations with which associated do business with the State or receive State funds and a brief description of the nature of the business, if known or with which due diligence could reasonably be known.

(12) A statement of whether the filing person or the filing person's immediate family is or has been a lobbyist or lobbyist principal registered under Chapter 120C of the General Statutes within the preceding 12 months.

(13) A list of all contributions as defined in G.S. 163-278.6(6) with a cumulative total of more than one thousand dollars ($1,000) made by the filing person only, during the preceding calendar year, to the candidate or candidate campaign committee of the covered person as defined in G.S. 138A-3(30)a. appointing the filing person to the covered board.

(14) A statement indicating "Yes" or "No" as to whether the filing person engaged in each of the following activities during the preceding calendar year, with respect to or on the behalf of the candidate or candidate campaign committee of the covered person as defined in G.S. 138A-3(30)a. appointing the filing person: (i) collected contributions from multiple contributors, took possession of such multiple contributions, and transferred or delivered those collected multiple contributions, (ii) hosted a fund-raiser in the filing person's residence or place of business, or (iii) volunteered for campaign-related activity. This subdivision only applies to filing persons in the following categories:

a. A public servant, or a prospective appointee to, as defined in G.S. 138A-3(30)c.

b. A judicial officer that serves on, or a prospective appointee to, the Supreme Court, the Court of Appeals, the superior court, or the district court.

c. A covered person serving on, or a prospective appointee to, one of the following panels or boards:

1. Alcoholic Beverage Control Commission.
2. Coastal Resources Commission.
3. State Board of Education.
4. State Board of Elections.
5. Division of Employment Security.
6. Environmental Management Commission.
7. Industrial Commission.
8. State Personnel Commission.
9. Rules Review Commission.
10. Board of Transportation.
11. Board of Governors of the University of North Carolina.
12. Utilities Commission.
13. Wildlife Resources Commission.

(15) The name of each business with which associated that the filing person or a member of the filing person's immediate family is an employee, director, officer, partner, proprietor, or member or manager.

(16) For any company or business entity listed under subdivision (15) of this subsection and sub-subdivisions f. and g. of subdivision (2) of this subsection, if known, a statement whether that company or business entity has any material business dealings or business contracts with the State, or is regulated by the State, including a brief description of the business activity.

(b) The Supreme Court, the Committee, constitutional officers of the State, heads of principal departments, the Board of Governors of The University of North Carolina, the State Board of Community Colleges, other boards, and the appointing authority or employing entity may require a filing person to file supplemental information in conjunction with the filing of that filing person's statement of economic interest. These supplemental filings requirements shall be filed with the Commission and included on the forms to be filed with the Commission. The Commission shall evaluate the supplemental forms as part of the statement of economic interest. The failure to file supplemental forms shall be subject to the provisions of G.S. 138A-25.

(c) Each statement of economic interest shall contain a certification by the filing person that the filing person has read the statement and that, to the best of the filing person's knowledge and belief, the statement is true, correct, and complete. The filing person's certification also shall provide that the filing person has not transferred, and will not transfer, any asset, interest, or other property with the intent to conceal it from disclosure while retaining an equitable interest therein.

(c1) Reserved for future codification purposes.

(c2) Recodified as G.S. 138A-22(c2) by Session Laws 2010-169, s. 22(b), effective August 2, 2010.

(d) All information provided in the statement of economic interest shall be current as of the last day of December of the year preceding the date the statement of economic interest was due.

(e) The Commission shall prepare a written evaluation of each statement of economic interest relative to conflicts of interest and potential conflicts of interest. This subsection does not apply to statements of economic interest of legislators and judicial officers. The Commission shall submit the evaluation to all of the following:

(1) The filing person who submitted the statement.

(2) The head of the agency in which the filing person serves.

(3) The Governor for gubernatorial appointees and employees in agencies under the Governor's authority.

(4) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(5) The appointing or hiring authority for those public servants not under the Governor's authority.

(6) The State Board of Elections for those filing persons who are elected.

(7) Repealed by Session Laws 2008-213, s. 74, effective August 15, 2008.

(f) The Commission shall prepare a written evaluation of each statement of economic interest for nominees of the Board of Governors of The University of North Carolina elected pursuant to G.S. 116-6, and nominees of the State Board of Community Colleges elected pursuant to G.S. 115D-2.1 within seven days of the submission of the completed statement of economic interest to the Commission. (2006-201, s. 1; 2007-29, s. 1; 2007-348, s. 34; 2008-187, s. 32; 2008-213, ss. 67-72(a), 73, 74, 74.5, 91; 2009-549, s. 14; 2009-570, s. 45; 2010-169, ss. 13(a)-(d), 17(q), 22(b); 2011-401, s. 3.18.)

§ 138A-25. Failure to file.

(a) Within 30 days after the date due under G.S. 138A-22, the Commission shall notify filing persons who have failed to file or filing persons whose statement has been deemed incomplete. For a filing person currently serving as a covered person, the Commission shall notify the filing person and the ethics liaison that if the statement of economic interest is not filed or completed within 30 days of receipt of the notice of failure to file or complete, the filing person shall be subject to a fine as provided for in this section.

(b) Any filing person who fails to file or complete a statement of economic interest within 30 days of the receipt of the notice, required under subsection (a) of this section, shall be subject to a fine of two hundred fifty dollars ($250.00), to be imposed by the Commission.

(c) Failure by any filing person to file or complete a statement of economic interest within 60 days of the receipt of the notice, required under subsection (a) of this section, shall be deemed to be a violation of this Chapter and shall be grounds for disciplinary action under G.S. 138A-45. (2006-201, s. 1; 2008-213, s. 75; 2009-549, s. 15.)

§ 138A-26. Concealing or failing to disclose material information.

A filing person who knowingly conceals or knowingly fails to disclose information that is required to be disclosed on a statement of economic interest under this Article shall be guilty of a Class 1 misdemeanor and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

§ 138A-27. Penalty for false information.

A filing person who provides false information on a statement of economic interest as required under this Article knowing that the information is false is guilty of a Class H felony and shall be subject to disciplinary action under G.S. 138A-45. (2006-201, s. 1.)

Article 4.

Ethical Standards for Covered Persons.

§ 138A-31. Use of public position for private gain.

(a) Except as permitted under G.S. 138A-38, a covered person or legislative employee shall not knowingly use the covered person's or legislative employee's public position in an official action or legislative action that will result in financial benefit to the covered person or legislative employee, a member of the covered person's or legislative employee's extended family, or business with which the covered person or legislative employee is associated. This subsection shall not apply to financial or other benefits derived by a covered person or legislative employee that the covered person or legislative employee would enjoy to an extent no greater than that which other citizens of the State would or could enjoy, or that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the covered person's or legislative employee's ability to protect the public interest and perform the covered person's or legislative employee's official duties would not be compromised.

(b) A covered person shall not mention or authorize another person to mention the covered person's public position in nongovernmental advertising that advances the private interest of the covered person or others. The prohibition in this subsection shall not apply to any of the following:

(1) Political advertising.
(2) News stories and articles.
(3) The inclusion of a covered person's public position in a directory or a biographical listing.
(4) The inclusion of a covered person's public position in an agenda or other document related to a meeting, conference, or similar event when the disclosure could

reasonably be considered material by an individual attending the meeting, conference, or similar event.

(5) The inclusion of a covered person's public position in a charitable solicitation for a nonprofit business entity qualifying under 26 U.S.C. § 501(c)(3).

(6) The disclosure of a covered person's position to an existing or prospective customer, supplier, or client when the disclosure could reasonably be considered material by the customer, supplier, or client.

(c) Notwithstanding G.S. 163-278.16A, no covered person shall use or permit the use of State funds for any advertisement or public service announcement in a newspaper, on radio, television, magazines, or billboards, that contains that covered person's name, picture, or voice, except in case of State or national emergency and only if the announcement is reasonably necessary to the covered person's official function. This subsection shall not apply to fund-raising on behalf of and aired on public radio or public television.

§ 138A-32. Gifts.

(a) A covered person or a legislative employee shall not knowingly, directly or indirectly, ask, accept, demand, exact, solicit, seek, assign, receive, or agree to receive anything of value for the covered person or legislative employee, or for another person, in return for being influenced in the discharge of the covered person's or legislative employee's official responsibilities, other than that which is received by the covered person or the legislative employee from the State for acting in the covered person's or legislative employee's official capacity.

(b) A covered person may not solicit for a charitable purpose any thing of monetary value from any subordinate State employee. This subsection shall not apply to generic written solicitations to all members of a class of subordinates. Nothing in this subsection shall prohibit a covered person from serving as the honorary head of the State Employees Combined Campaign.

(d) No public servant shall knowingly accept a gift from a person whom the public servant knows or has reason to know any of the following:

(1) Is doing or is seeking to do business of any kind with the public servant's employing entity.

(2) Is engaged in activities that are regulated or controlled by the public servant's employing entity.

(3) Has financial interests that may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the public servant's official duties.

(d1) No public servant shall accept a gift knowing all of the following:

(1) The gift was obtained indirectly from a person described under subdivision (d)(1), (2), or (3) of this section.

(2) The person described under subdivision (d)(1), (2), or (3) of this section intended for an ultimate recipient of the gift to be a public servant.

(e) Subsections (c), (d), and (d1) of this section shall not apply to any of the following:

(1) Food and beverages for immediate consumption in connection with any of the following:

a. An open meeting of a public body, provided that the open meeting is properly noticed under Article 33C of Chapter 143 of the General Statutes.

b. A gathering of a person or governmental unit with at least 10 or more individuals in attendance open to the general public, provided that a sign or other communication containing a message that is reasonably designed to convey to the general public that the gathering is open to the general public is displayed at the gathering.

c. A gathering of a person or governmental unit to which the entire board of which a public servant is a member, at least 10 public servants, all the members of the House of Representatives, all the members of the Senate, all the members of a county or municipal legislative delegation, all the members of a recognized legislative caucus with regular meetings other than meetings with one or more lobbyists, all the members of a committee, a standing subcommittee, a joint committee or joint commission of the House of

Representatives, the Senate, or the General Assembly, or all legislative employees are invited, and one of the following applies:

1. At least 10 individuals associated with the person or governmental unit actually attend, other than the covered person or legislative employee, or the immediate family of the covered person or legislative employee.
2. All shareholders, employees, board members, officers, members, or subscribers of the person or governmental unit located in North Carolina are notified and invited to attend.

For purposes of this sub-subdivision only, the term "invited" shall mean written notice from at least one host or sponsor of the gathering containing the date, time, and location of the gathering given at least 24 hours in advance of the gathering to the specific qualifying group listed in this sub-subdivision. If it is known at the time of the written notice that at least one sponsor is a lobbyist or lobbyist principal, the written notice shall also state whether or not the gathering is permitted under this section.

(2) Informational materials relevant to the duties of the covered person or legislative employee.

(3) Reasonable actual expenditures of the legislator, public servant, or legislative employee for food, beverages, registration, travel, lodging, other incidental items of nominal value, and entertainment, in connection with (i) a legislator's, public servant's, or legislative employee's attendance at an educational meeting for purposes primarily related to the public duties and responsibilities of the legislator, public servant, or legislative employee; (ii) a legislator's, public servant's, or legislative employee's participation as a speaker or member of a panel at a meeting; (iii) a legislator's or legislative employee's attendance and participation in meetings of a nonpartisan state, regional, national, or international legislative organization of which the General Assembly is a member or that the legislator or legislative employee is a member or participant of by virtue of that legislator's or legislative employee's public position, or as a member of a board, agency, or committee of such organization; or (iv) a public servant's attendance and participation in meetings as a member of a board, agency, or committee of a nonpartisan state, regional, national, or international organization of which the public servant's agency is a member or the public servant is a member by virtue of that public servant's public position, provided the following conditions are met:

a. The reasonable actual expenditures shall be made by a lobbyist principal, and not a lobbyist.
b. Any meeting must be attended by at least 10 or more participants, have a formal agenda, and notice of the meeting has been given at least 10 days in advance.
c. Any food, beverages, transportation, or entertainment must be provided to all attendees or defined groups of 10 or more attendees as part of the meeting or in conjunction with the meeting.
d. Any entertainment must be incidental to the principal agenda of the meeting.
e. If the legislator, public servant, or legislative employee is participating as a speaker or member of a panel, then that legislator, public servant, or legislative employee must be a bona fide speaker or participant.

(4) A plaque or similar nonmonetary memento recognizing individual services in a field or specialty or to a charitable cause.

(5) Gifts accepted on behalf of the State for use by the State or for the benefit of the State.

(6) Anything generally made available or distributed to the general public or all other State employees by lobbyists or lobbyist principals, or persons described in subdivisions (d)(1), (2), or (3) of this section.

(7) Gifts from the covered person's or legislative employee's extended family, or a member of the same household of the covered person or legislative employee.

(10) Gifts given or received as part of a business, civic, religious, fraternal, personal, or commercial relationship provided all of the following conditions are met:

a. The relationship is not related to the public servant's, legislator's, or legislative employee's public service or position.

b. The gift is made under circumstances that a reasonable person would conclude that the gift was not given to lobby.

(g) A prohibited gift shall be, and a permissible gift may be, promptly declined, returned, paid for at fair market value, or donated to charity or the State.

(h) A covered person or legislative employee shall not accept an honorarium from a source other than the employing entity for conducting any activity where any of the following apply:

(1) The employing entity reimburses the covered person or legislative employee for travel, subsistence, and registration expenses.

(2) The employing entity's work time or resources are used.

(3) The activity would be considered official duty or would bear a reasonably close relationship to the covered person's or legislative employee's official duties.

An outside source may reimburse the employing entity for actual expenses incurred by a covered person or legislative employee in conducting an activity within the duties of the covered person or legislative employee, or may pay a fee to the employing entity, in lieu of an honorarium, for the services of the covered person or legislative employee. An honorarium permissible under this subsection shall not be considered a gift for purposes of subsection (c) of this section.

(i) Acceptance or solicitation of a gift in compliance with this section without corrupt intent shall not constitute a violation of the statutes related to bribery under G.S. 14-217, 14-218, or 120-86

§ 138A-33. Other compensation.

A public servant or legislative employee shall not solicit or receive personal financial gain, other than that received by the public servant or legislative employee from the State, or with the approval of the employing entity, for acting in the public servant's or legislative employee's official capacity, or for advice or assistance given in the course of carrying out the public servant's or legislative employee's duties.

§ 138A-34. Use of information for private gain.

A public servant or legislative employee shall not use or disclose nonpublic information gained in the course of, or by reason of, the public servant's or legislative employee's official responsibilities in a way that would affect a personal financial interest of the public servant or legislative employee, a member of the public servant's or legislative employee's extended family, or a person or governmental unit with whom or business with which the public servant or legislative employee is associated. A public servant or legislative employee shall not improperly use or improperly disclose any confidential information.

§ 138A-40. Employment and supervision of members of covered person's or legislative employee's extended family.

A covered person or legislative employee shall not cause the employment, appointment, promotion, transfer, or advancement of an extended family member of the covered person or legislative employee to a State office, or a position to which the covered person or legislative employee supervises or manages, except for positions at the General Assembly as permitted under G.S. 120-32(2). A public servant or legislative employee shall not supervise, manage, or participate in an action relating to the discipline of a member of the public servant's or legislative employee's extended family, except as specifically authorized by the public servant's or legislative employee's employing entity.

Article 5.
Violation Consequences.

§ 138A-45. Violation consequences.

(a) Violation of this Chapter by any covered person or legislative employee is grounds for disciplinary action. Except as specifically provided in this Chapter and for perjury under G.S. 138A-12 and G.S. 138A-24, no criminal penalty shall attach for any violation of this Chapter.

(f) Nothing in this Chapter affects the power of the State to prosecute any person for any violation of the criminal law.

TAB 14

Post-Appointment Issues

LIFE AFTER THE APPOINTMENT

UNC School of Government
January 24, 2014
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 adult with mental health, developmental disability and substance abuse issues

Guardianship experience dating back to 1999, fulltime since 2006

Employed by LME/MCO as Guardian Representative

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.
- Representative Payees hold all the cards, because wards want money and that person can sabotage treatment goals. If they are not on board (3wks)
- Social Security Administration or Medicare will only speak to the Representative Payee or the Person (at times)
- 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
  - Can they follow a prescribed diet and will they, are two different things (cholestoral)
- 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

POST APPOINTMENT CONCERNS/ISSUES:

- 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 wants to talk to family not guardian or to question guardian.
  - 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

POST APPOINTMENT CONCERNS/ISSUES:

- 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
  - Placement difficulties due to DOJ settlement and additional PASRR requirements (Pre-Admission Screening and Resident Review
- 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.
- 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?

POST APPOINTMENT CONCERNS/ISSUES:

- 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.

ALTERNATIVES TO GUARDIANSHIP

- Power of Attorney
  - Health
  - Financial
  - Durable
- Representative Payee
- Advanced Directives
  - Health
  - Mental Health
- WRAP http://www.mentalhealthrecovery.com
  http://www.youtube.com/watch?v=0BK_jLMToeM&feature=youtu.be/
- Crisis Plan

CRISIS PREVENTION AND INTERVENTION PLAN
(Use this form or attach your crisis plan.)

Significant event(s) that may create increased stress and trigger the onset of a crisis. (Examples include: Anniversaries, holidays, noise, change in routine, inability to express medical problems or to get needs met, etc. Describe what one may observe when the person goes into crisis. Include lessons learned from previous crisis events):

- *Include information on health and wellness issues. Are there physical medical issues that contribute to this person's vulnerability to crisis? Are there physical medical issues that need to be addressed in the wake of a crisis?*
- *Describe in detail the known behaviors a person/family may identify which indicate to others that they need to take over responsibility for that person's care and make decisions on that person's behalf. Include information on the kinds of supports that may be effective for this person*
- *Include information on environmental factors that may contribute to the onset of crisis and how those could possibly be controlled.*
- *Include information learned from previous episodes that may contribute to the success of crisis de-escalation or crisis diversion actions.*
- *Incorporate information gathered from the One Page Profile.*

Crisis prevention and early intervention strategies that have been effective. (List everything that can be done to help this person **AVOID** a crisis):

- *List coping skills the person has learned or has used in the past to decrease the potential of going into crisis.*
- *Provide a detailed description of strategies that will be used to assist the person in avoiding a crisis. Strategies should be based on knowledge, information, and feedback from the person/family and other team members as well as strategies that have been effective in the past. Include opportunities for the person to exercise self-soothing skills developed and calming strategies such as consciously breathing deeply.*
- *Incorporate information gathered from the One Page Profile.*

Strategies for crisis response and stabilization. (Focus first on natural and community supports. Begin with least restrictive steps. Include process for obtaining back-up in case of emergency and planning for use of respite, if an option. List everything you know that has worked to help this person to become stable):

- *Provide a detailed description of strategies to be implemented to help the person/family stabilize during a crisis. Strategies should be based on knowledge, information and feedback from the person/family and other team members as well as effective intervention strategies identified during the person's day to day life and from previous crises and problem resolution.*
- *Steps should focus first on natural and community supports, starting with the least restrictive interventions.*
- *Positive behavioral supports and approaches other than calling in law enforcement to deal with a crisis should be sought. Law enforcement should be called as a last resort only. If calling law enforcement is part of the plan, law enforcement should be involved in the plan development and their role determined ahead of time.*

Describe the systems prevention and intervention back-up protocols to support the individual. (i.e. Who should be called and when, how can they be reached? Include contact names, phone numbers, hours of operation, etc. Be as specific as possible.)

This list might typically include, but is not limited to the following people:

- *Legally Responsible Person, if not the person.*
- *Psychiatric service provider*
- *Medical service provider*
- *Family members*
- *Respite provider*
- *Crisis Services provider*

Specific recommendations for interacting with the person receiving a Crisis Service:

Remember, this information is for use at a Crisis Service, most likely by staff who do not know this individual/family well or at all. What do they need to know or do immediately?

List specific detailed information learned from this person/family about the type of interaction and treatment that is helpful during a crisis and also the type of things that need to be avoided.

Incorporate information gathered from the One Page Profile.

RIGHTS RETAINED

The right to…

- Appeal the adjudication of incompetence decision
- File legal action for restoration to competence
- Make decisions when able
- Vote
- Have children
- Marry
- Be a witness
- Enter into a contract if they understand the consequences of that contract
- Refuse medications and treatment

QUESTIONS? COMMENTS?

TAB 15

Restoration

Restoration to Competency
G.S. 35A-1130

Meredith S. Smith
Adult Guardianship
January 22-24, 2014

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

Who Can Petition for Restoration?

1. Ward
2. Guardian
3. Any Other Interested Person

G.S. 35A-1130(a)

What Does The Petitioner File?

- "Party **Petitions** for Restoration
  By Filing a **Motion in the Cause"**

UNC SCHOOL OF GOVERNMENT

Motion in the Cause
Form AOC-E-415

- Would you allow it?

IN THE MATTER OF:	
Name And Current Address Of Ward	**MOTION IN THE CAUSE TO MODIFY GUARDIANSHIP**
County Of Residence Of Ward / *Date Of Birth*	G.S. 35A-1201, -1207, -1212
Name, Street Address, PO Box, City, State And Zip Code Of Moving Party	*Name, Street Address, PO Box, City, State And Zip Code Of Moving Party's Attorney*
County Of Residence Of Moving Party / *Telephone No. Of Moving Party*	*Telephone No. Of Moving Party's Attorney* / *State Bar No.*
Moving Party's Relationship To Ward Or Interest In Proceeding	*Nature Of Impairment*

The undersigned requests that the Court, after notice and hearing:

- ☐ modify general guardianship to guardian of the person.
- ☐ modify general guardianship to guardian of the estate.
- ☐ modify guardian of the person to general guardianship.
- ☐ modify guardianship of the estate to general guardianship.
- ☐ add to the rights and privileges of the ward.
- ☐ limit the rights and privileges of the ward.
- ☐ Other/Comment: _____

UNC SCHOOL OF GOVERNMENT

Take a step back….

- Petition must have:

  Civ. Pro. Rule 8:

  1. A plain statement of the claim for relief to give the court and parties notice of what the petitioner seeks to prove
  2. A demand for the relief the petitioner is seeking
  3. A verification
     1. Signed by the petitioner
     2. Under Oath
     3. Before a notary public or other authorized officer
     4. Under a declaration of penalty of perjury
     5. That the information in the petition is true and correct

  GS 35A-1130:

  1. Facts tending to show the ward is competent

UNC SCHOOL OF GOVERNMENT

Motion in the Cause
Form AOC-E-415 – Page 1

IN THE MATTER OF:

Name And Current Address Of Ward

County Of Residence Of Ward | *Date Of Birth*

MOTION IN THE CAUSE TO MODIFY GUARDIANSHIP

G.S. 35A-1201, -1207, -1212

Name, Street Address, PO Box, City, State And Zip Code Of Moving Party

Name, Street Address, PO Box, City, State And Zip Code Of Moving Party's Attorney

County Of Residence Of Moving Party | *Telephone No. Of Moving Party* | *Telephone No. Of Moving Party's Attorney* | *State Bar No.*

Moving Party's Relationship To Ward Or Interest In Proceeding | *Nature Of Impairment*

The undersigned requests that the Court, after notice and hearing:

- ☐ modify general guardianship to guardian of the person.
- ☐ modify general guardianship to guardian of the estate.
- ☐ modify guardian of the person to general guardianship.
- ☐ modify guardianship of the estate to general guardianship.
- ☐ add to the rights and privileges of the ward.
- ☐ limit the rights and privileges of the ward.
- ☐ Other/Comment: _____

UNC SCHOOL OF GOVERNMENT

Motion in the Cause
Form AOC-E-415 – Page 2

IN THE MATTER OF	File No.
Name Of Ward	

5. The movant requests that the current guardianship be modified as follows: *(Describe how you want the guardianship to be changed. Be specific.)*

Verification

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		Date
Date	Signature Of Person Authorized To Administer Oaths	Name Of Moving Party (Type Or Print)
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		Signature Of Moving Party
☐ Notary	Date Commission Expires	
SEAL	County Where Notarized	

1. Signed by the petitioner or the petitioner's attorney
2. Under oath
3. Before a notary public or other authorized officer
4. Under a declaration of penalty of perjury that the information contained in the petition is true and correct

Verification

- Form AOC-SP-200 – Petition for Adjudication and Appointment of Guardian

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 Commission Expires	
SEAL	County Where Notarized	

What is NOT Required to File?

1. Doctor's letter or other medical professional's statement of competency or recommendation for restoration
2. Attorney
3. Time limits

Dealing with Repetitive Filers

- Option 1:Tax cost and fees to the petitioner
  - Standard: whether the petitioner had reasonable grounds to bring the restoration action
  - Includes: GAL fees and court costs

UNC SCHOOL OF GOVERNMENT

Dealing with Repetitive Filers

- **Option 2: Gatekeeper orders**
  - Narrowly tailored for specific set of circumstances showing abuse and a specific filer
  - Subject of the order should be given notice and opportunity to respond at a hearing before the order is entered
  - Gatekeeper Order should include:
    - History of the abuse in detail
    - Means to file a legitimate action
      - Meet with clerk before filing
      - Obtain certification from an attorney that the petition contains new facts showing competence

UNC SCHOOL OF GOVERNMENT

Filing the Petition

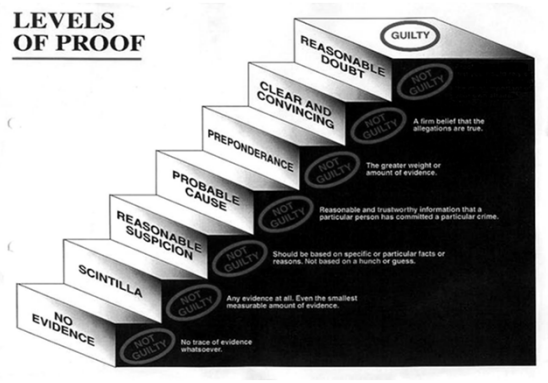
- The petition is filed in the original special proceeding.
- The petition is file in the county where the guardianship is currently being administered, even if the county is not the county where the ward was originally adjudicated incompetent.
- The matter may not be transferred to superior court, even if equitable issues arise.

Guardian Ad Litem

- Ward has right to an attorney
  - If indigent + no attorney
    - Clerk **must** appoint a GAL
    - IDS pays GAL fees
  - If NOT indigent + no attorney
    - Clerk **may** appoint a GAL if the clerk finds that the ward's interests are not adequately represented by the ward's guardian
    - IDS does not pay GAL fees

Burden of Proof

- Burden on the PETITIONER
- Preponderance of the evidence



UNC SCHOOL OF GOVERNMENT

Other Hearing Matters…..

- **Jury Trial (6)**
  - Ward
  - GAL
  - Ward's attorney
- **MDE**
  - Any party
  - Clerk

  *No time limit

UNC SCHOOL OF GOVERNMENT

Effect of Restoration

- Effective immediately upon entry of clerk's order restoring ward's capacity
- Ward can exercise all rights as if never adjudicated incompetent
- What does the order look like?

UNC SCHOOL OF GOVERNMENT

Restoration and Guardian of the Estate

- Includes General Guardian and Guardian of the Estate
  - Must file final accounting within 60 days of restoration order
  - Accounting period runs from the last annual accounting filed until the date of restoration
  - Clerk reviews and enters an order discharging guardian from further liability
    - NOT discharged until clerk enters order

UNC SCHOOL OF GOVERNMENT

Case Problem

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 and Rule 8 of the North Carolina Rules of Civil Procedure.

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 you to make a decision on the restoration petition.

3. 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?

(TYPE OR PRINT IN BLACK INK)

STATE OF NORTH CAROLINA

Randam County

File No. 13-E-1041

In The General Court Of Justice
Superior Court Division
Before the Clerk

IN THE MATTER OF:

Name And Current Address Of Ward
Bobby Valentine
2224 Wisa Rd
Sanford, NC

County Of Residence Of Ward: Randam
Date Of Birth: 10-26-86

MOTION IN THE CAUSE TO MODIFY GUARDIANSHIP

G.S. 35A-1201, -1207, -1212

Name, Street Address, PO Box, City, State And Zip Code Of Moving Party
same as above

Name, Street Address, PO Box, City, State And Zip Code Of Moving Party's Attorney

County Of Residence Of Moving Party

Telephone No. Of Moving Party: 222-242-4444

Telephone No. Of Moving Party's Attorney

State Bar No.

Moving Party's Relationship To Ward Or Interest In Proceeding: Ward

Nature Of Impairment

The undersigned requests that the Court, after notice and hearing:

- ☐ modify general guardianship to guardian of the person.
- ☐ modify general guardianship to guardian of the estate.
- ☐ modify guardian of the person to general guardianship.
- ☐ modify guardianship of the estate to general guardianship.
- ☐ add to the rights and privileges of the ward.
- ☐ limit the rights and privileges of the ward.
- ☐ Other/Comment:

In support of this Motion, the undersigned states:

☒ 1. The current guardian is:

Name And Address Of Current Guardian
Watchful Eye, LLC, Stacey Skradski
1 Guardian Lane, Sanford NC

☒ 2. The ward's next of kin, if any, and other persons known to have an interest in the proceeding are:

Name And Address	Name And Address
Tom Valentine 1 Fatherly Way Sanford, NC	
Telephone No. 222-242-2222	Telephone No.
Relationship To Ward Or Interest In Proceeding Father	Relationship To Ward Or Interest In Proceeding
Name And Address	Name And Address
Telephone No.	Telephone No.
Relationship To Ward Or Interest In Proceeding	Relationship To Ward Or Interest In Proceeding

(Over)

☒ 3. General statement of ward's assets and liabilities, including any income and receivable to which he/she is entitled:

Assets		Liabilities		Income and Receivables	
Real Property	$ ∅	Mortgage Loans	$ ∅	Wages & Salaries	$ 300/mo
Tangible Personal Property	$ 1,000.00	Other Secured Loans	$ ∅	Rents	$ ∅
Other Personal Property	$	Unsecured Loans	$ ∅	Pensions	$ ∅
	$			Allowances	$ ∅
				Insurance & Compensation	$ Medicaid
				Other (including SSI/SSDI)	$ ∅

There is a representative payee for government benefits. ☐ Yes ☒ No
There is a Durable Power of Attorney in place. ☐ Yes ☒ No
There is a special needs or other trust in place. ☐ Yes ☒ No

☒ 4. Capacity Information

NOTE TO CLERK: *Complete only if changing the ward's rights and privileges.*

The ward has the capacities listed below.

A. **Language and Communication.** (understands/participates in conversations, can read and write, understands signs such as "keep out," "men," "women")
☒ has capacity. ☐ lacks capacity. Comment: very sociable, can read and write and understand what I read.

B. **Nutrition** (makes independent decisions about eating, prepares food, purchases food)
☒ has capacity. ☐ lacks capacity. Comment: very healthy diet including nutrition supplements.

C. **Personal Hygiene** (bathes, brushes teeth, uses proper hygiene when using the restroom)
☒ has capacity. ☐ lacks capacity. Comment: very clean person, showers daily and makes personal hygiene a priority each day

D. **Health Care** (makes and communicates choices about medical treatment/caregivers, notifies others of illness, follows medication instructions, reaches emergency health care)
☒ has capacity. ☐ lacks capacity. Comment: works with a therapist + psychiatrist to ensure mental stability

E. **Personal Safety** (recognizes danger and seeks assistance as needed, protects self from exploitation/personal harm)
☒ has capacity. ☐ lacks capacity. Comment: personal safety is always a priority

F. **Residential** (makes and communicates decisions about residence/roommates, maintains safe shelter)
☒ has capacity. ☐ lacks capacity. Comment: currently have a stable home living with my grandmother.

G. **Employment** (makes and communicates decisions about employment, demonstrates work skills such as neatness and punctuality, writes or dictates application form)
☒ has capacity. ☐ lacks capacity. Comment: work for my family and maintains my family farm. Also working on a small business

H. **Independent Living** (follows a daily schedule, conducts housekeeping chores, uses community resources such as bank, store, post office)
☐ has capacity. ☐ lacks capacity. Comment: I cook, clean and maintain yard at my grandmother's house where I live

I. Civil (knows to contact advocate if being exploited, understands consequences of committing a crime, registers to vote)
☒ has capacity. ☐ lacks capacity. Comment: No legal trouble. I am registered to vote and understand consequences of committing a crime.

J. **Financial**

1. Makes and communicates decisions about paying bills and spending discretionary money, and makes change for $1, $5, and $20
☒ has capacity. ☐ lacks capacity. Comment: I am able to count and perform math functions.

2. Makes and communicates decisions regarding management of a personal bank account and savings, investments, real estate, and other substantial assets
☒ has capacity. ☐ lacks capacity. Comment: I pay my credit card on time and have no financial trouble.

3. Can resist attempts at financial exploitation by others
☒ has capacity. ☐ lacks capacity. Comment: I do not fall for scheme and don't give away my personal information to anyone who isn't a legitimate business.

IN THE MATTER OF	File No. 13-E-1041
Name Of Ward	

5. The movant requests that the current guardianship be modified as follows: *(Describe how you want the guardianship to be changed. Be specific.)*

I am requesting that my guardianship is terminated and my competency restored. I believe it is an appropriate time to restore my competency and so does my guardian. I am competent and can handle my own affairs. The diagnosis used at the first hearing was incorrect and my illness does not impair me from working or living a normal life.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		Date 8-19-2013
Date 8-19-13	Signature Of Person Authorized To ~~Administer~~ Oaths	Name Of Moving Party (Type Or Print) Bobby Valentine
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court		Signature Of Moving Party
☒ Notary	Date Commission Expires 10-14-15	
~~SEAL~~	County Where Notarized Random	

§ 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.)

Article 3.

Restoration to Competency.

§ 35A-1130. Proceedings before clerk.

(a) The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion in the cause of the incompetency proceeding with the clerk who is exercising jurisdiction therein. The motion shall be verified and shall set forth facts tending to show that the ward is competent.

(b) Upon receipt of the motion, the clerk shall set a date, time, and place for a hearing, which shall be not less than 10 days or more than 30 days from service of the motion and notice of hearing on the ward and the guardian, or on the one of them who is not the petitioner, unless the clerk for good cause directs otherwise. The petitioner shall cause notice and a copy of the motion to be served on the guardian and ward (but not on one who is the petitioner) and any other parties to the incompetency proceeding. Service shall be in accordance with provisions of G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(c) At the hearing on the motion, the ward shall be entitled to be represented by counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services if the ward is indigent and not represented by counsel. Upon motion of any party or the clerk's own motion, the clerk may order a multidisciplinary evaluation. The ward has a right, upon request by him, his counsel, or his guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. Provided, if there is a jury in a proceeding for restoration to competency, it shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of the General Statutes.

(d) If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk shall enter an order adjudicating that the ward is restored to competency. Upon such adjudication, the ward is authorized to manage his affairs, make contracts, control and sell his property, both real and personal, and exercise all rights as if he had never been adjudicated incompetent.

(e) The filing and approval of final accounts from the guardian and the discharge of the guardian shall be as provided in Subchapter II of this Chapter.

(f) If the clerk or jury fails to find that the ward should be restored to competency, the clerk shall enter an order denying the petition. The ward may appeal from the clerk's order to the superior court for trial de novo. (1987, c. 550, s. 1; 2000-144, s. 34.)

Rule 614. Calling and interrogation of witnesses by court.

(a) Calling by court. – The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. – The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. – No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled. (1983, c. 701, s. 1.)

Rule 706. Court appointed experts.

(a) Appointment. – The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. – Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. – In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. – Nothing in this rule limits the parties in calling expert witnesses of their own selection. (1983, c. 701, s. 1.)

GATEKEEPER ORDERS
(PRE-FILING INJUNCTIONS)

Michael Crowell
UNC School of Government
November 2012

Basics of gatekeeper orders

Courts have the inherent authority to enter pre-filing injunctions — also referred to as gatekeeper orders — restricting individuals from filing new lawsuits or other papers without court approval, when necessary to prevent abuse of the judicial process and protect other parties.

The gatekeeper order should be the judge's last resort after other attempts to control the litigant, such as Rule 11 sanctions, have failed. As with any disciplinary matter, the subject should be given notice of the proposed order and a chance to respond before it is entered. The order should be limited to the circumstances showing abuse — that is, if all the abusive litigation is directed at one particular party, the order should only limit filings related to that party, or if the frivolous filings all are in one court, the order should be limited to that court.

The order needs to specify the history that has led to its entry, in sufficient detail that an appellate court can review for the trial court's abuse of discretion.

The order must include a means for the person to file legitimate actions. One possibility is to require that the proposed filing be first submitted to a designated judge to be approved for filing. Another option is to allow a filing if it is accompanied by a certificate from a lawyer that the lawyer has read the document and has also read the gatekeeper order and concludes that the filing meets the standards of Rule 11. A lawyer's certification should not be the only alternative available, however, because that would have the effect of requiring the person to employ a lawyer.

Either in the gatekeeper order or separately the court should instruct the clerk's office on how to handle improperly filed documents. The clerk might be instructed to not accept for filing any papers from the litigant without a signed approval from a judge, for example. Notice of the gatekeeper order also should be given to all parties who have been on the other side of cases from the abusive litigant, so they will know of relief available to them if frivolous documents get filed despite the order.

North Carolina appellate cases

Although there are few North Carolina appellate decisions on gatekeeper orders, and most of them are unpublished, the appellate courts clearly condone such orders and indeed have entered their own gatekeeper orders. There is little discussion of gatekeeper orders in the appellate cases because the

litigants are *pro se* and typically fail to properly preserve issues for appeal, leading to dismissal on procedural grounds.

Some state appellate cases dealing with gatekeeper orders are:

Estate of Dalenko v. Monroe, N.C. Ct. of App., No. COA08-844 (May 19, 2009) (unpublished) —

> Ms. Dalenko, acting *pro se*, was appealing the dismissals of claims she filed on behalf of her father's estate in 2007. The dismissals were based, at least in part, on the claims being filed in violation of a gatekeeper order entered in 2001. The case with the gatekeeper order itself had been appealed unsuccessfully. Because of the earlier history the Court of Appeals did not discuss the standard for issuance of a pre-filing injunction, but the opinion implicitly accepts the validity of the gatekeeper order, and quotes it extensively, making the order a useful example of the kind of findings which support a pre-filing injunction.
>
> The gatekeeper order violated by Ms. Dalenko included findings that she had been sanctioned by five other judges and had exhibited a pattern of disregard for the rules that would have required reporting her to the State Bar if she were a lawyer. The order also specifically found that Dalenko had filed frivolous claims for the purpose of harassment and had placed an undue burden on the judicial system. The order prohibited her from filing any document with the Wake County clerk's office without a certificate by a lawyer that the lawyer had read the document, that the document complied with Rule 11, and that the lawyer had read the gatekeeper order.
>
> In the appeal of the dismissal of the 2007 claims Ms. Dalenko argued that the 2001 pre-filing injunction was not intended to apply outside the case in which it was entered and that, if so applied, the order would violate Rule 65(d) of the Rules of Civil Procedure which says injunctions are binding only on parties, their lawyers and others in active concert or participation with them. The Court of Appeals rejected her arguments, saying, among other things, that there was no violation of Rule 65(d) because Ms. Dalenko was a party to the action in which the gatekeeper order was entered even if the defendants in her newest lawsuit were not.

Dalenko v. Wake Cty Dep't of Human Servs., 157 N.C. App. 49, *disc. rev. denied*, 357 N.C. 458 (2003), *cert. denied*, 540 U.S. 1178 (2004) —

> This is Ms. Dalenko's appeal of the lawsuit in which the 2001 gatekeeper order was entered. The gatekeeper order itself is not discussed, but the court approved another method of addressing abusive litigants. After an earlier frivolous lawsuit the trial judge had invoked G.S. 1-109 to require Dalenko to post a prosecution bond of $20,000 to proceed in her new lawsuit against the same agency. The previous lawsuit had resulted in sanctions against Dalenko, and the new lawsuit was based on the same allegations. The $20,000 prosecution bond was calculated to cover anticipated costs for the defendants, based on the experience in the previous litigation. The Court of Appeals

held that the trial court had discretion to go beyond the $200 specified in G.S. 1-109 for prosecution bonds.

Smith v. Noble, 155 N.C. App. 649 (2002) —

Smith tried to sue the judge, law enforcement officers, the clerk of court and others over the handling of her civil cases. After dismissing the cases, the trial court entered a pre-filing injunction prohibiting Smith from filing any lawsuit in state court without approval of the senior resident superior court judge for the district. Smith appealed on various grounds, including that the injunction violated the open courts provision of the North Carolina Constitution (Art. I, § 18: "All courts shall be open . . . .") as well as her free speech and due process rights. The appeal was dismissed for Smith's failure to present arguments and cite authority.

Lee v. O'Brien, N.C. Ct. of App., No. COA01-1231 (Aug. 6, 2002) (unpublished) —

Lee was permanently enjoined from calling police with unwarranted complaints against her neighbor O'Brien, and from filing any civil action or criminal complaint in Wake County without approval of a district judge. The order was based on findings that Lee, acting *pro se*, had filed multiple unsupported civil actions and criminal complaints; that the filings were motivated by harassment and annoyance; and that she would continue to do so unless enjoined; and that she had failed to respect the authority of the courts. The Court of Appeals held that the gatekeeper order did not deny Lee access to law enforcement and the courts because it prohibited only "unfounded or harassing complaints" to the police; the order was limited to complaints against the named defendants; and court filings were allowed with approval of a judge.

Wendt v. Tolson, N.C. Ct. of App., No. COA03-1680 (Aug. 16, 2005) (unpublished) —

Wendt had filed and lost three lawsuits after losing an administrative appeal concerning tax liability. As a Rule 11 sanction the trial judge ordered Wendt not to file any other lawsuit without the approval of the senior resident superior court judge of the county. The Court of Appeals accepted without discussion that a gatekeeper order was an available sanction, but held that the imposition of sanctions required findings of fact which were missing in this case. Because the record contained evidence to support the sanction, the appellate court remanded to the trial court to enter specific findings and conclusions.

State v. Rowe, N.C. Ct. of App., No. COA05-210 (Dec. 20, 2005) (unpublished) —

The Court of Appeals rejected a prisoner's appeal of contempt based on his violation of a pre-filing injunction, because he had not properly raised the constitutional issues in the trial court. The injunction prohibited the prisoner from filing any more motions for appropriate relief or other filings seeking relief from his larceny and habitual felon convictions, after 24 such motions and filings had been rejected.

Federal cases

In federal court, the All Writs Act, 28 U.S.C. § 1651(a), authorizes trial courts to restrict access to the courts by parties who repeatedly file frivolous litigation. That statute gives federal judges statutory authority in addition to the authority they share with state court judges, *i.e.*, the inherent authority to prevent abusive litigation and the Rule 11 authority to impose sanctions for frivolous lawsuits.

Some useful federal cases include:

Safir v. United States Lines Inc., 792 F.2d 19 (2nd Cir. 1986) —

This is a frequently cited case that lists the factors to be considered by the trial judge in deciding whether to restrict a litigant's future access to the courts. The factors to be considered are:

- The litigant's history of litigation and whether it has included harassing or duplicative lawsuits.
- The litigant's motive in pursuing the litigation, e.g., whether the litigant has an objective good faith expectation of prevailing.
- Whether the litigant is represented by counsel.
- Whether the litigant has caused needless expense to other parties or has imposed an unnecessary burden on the court and its personnel.
- Whether other sanctions would be adequate to protect the court and other parties.

"Ultimately, the question the court must answer is whether a litigant who has a history of vexatious litigation is likely to continue to abuse the judicial process and harass other parties." At 24.

Cromer v. Kraft Foods North American, Incorporated, 390 F.3d 812 (4th Cir. 2004) —

This is the leading Fourth Circuit case on the standards for issuance of a gatekeeper order. In addition to adopting the *Safir* list of factors to be considered the court offered this guidance:

- A pre-filing injunction is a drastic remedy to be used sparingly and only when exigent circumstances justify it.
- Use of such measures against a *pro se* litigant should be approached with particular caution.
- The pre-filing injunction must be narrowly tailored to fit the circumstances. (In *Cromer* the injunction was not narrowly tailored because it restricted the defendant from filing any lawsuit without court approval although his history showed only vexatious litigation related to his employment discrimination lawsuit.)
- The litigant must be given notice and an opportunity to be heard before a gatekeeper order is entered.

Procup v. Strickland, 793 F.2d 1069 (11th Cir. 1986) —

> This opinion is useful as a reference because it includes a long list of citations for different kinds of measures courts have taken to stop abusive filings by federal prisoners, including orders that the prisoner obtain court approval for any new filing; that the prisoner provide an affidavit that claims are novel, subject to contempt for false swearing; that the prisoner may file only a specified number of complaints; that the prisoner include a list of all previous filings with each new filing; that the prisoner not serve as a writ writer for any other prisoner; limiting the number of pages allowed in each new filing; and requiring an affidavit as to the attempts made by the prisoner to obtain a lawyer.

Armstrong v. Koury Corporation, 16 F.Supp.2d 616 (MDNC 1998) —

> This is a good example of a gatekeeper order entered by a federal district court in North Carolina.

Article 8.
Hearsay.

Rule 801. Definitions and exception for admissions of a party-opponent.

The following definitions apply under this Article:

(a) Statement. – A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. – A "declarant" is a person who makes a statement.

(c) Hearsay. – "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy. (1983, c. 701, s. 1.)

Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by statute or by these rules. (1983, c. 701, s. 1.)

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. – A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. – A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. – A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or

diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6). – Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. – Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. – Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. – To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. – Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. – Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. – Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. – The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. – A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. – Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market Reports, Commercial Publications. – Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. – To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. – Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation Concerning Boundaries or General History. – Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to Character. – Reputation of a person's character among his associates or in the community.

(22) (Reserved).

(23) Judgment as to Personal, Family or General History, or Boundaries. – Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of

offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

Rule 804. Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability. – "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. – Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. – A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) Statement Against Interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History. – (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as

evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement. (1983, c. 701, s. 1.)

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. (1983, c. 701, s. 1.)

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. (1983, c. 701, s. 1.)