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Guardianship Training for Clerks: Procedure and Evidence

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Overview

- Parties and Participants in a Guardianship Case
- Pleadings
- Proper Notice and Service
- Pretrial Issues:
 - Discovery and Pretrial Conferences, Ordering MDEs, Interim Guardians, Continuances
- Conducting the Hearing
 - Impaneling Juries, Closing Hearings, Burden of Proof, Order of Evidence, Evaluating Admissibility of Evidence, Jury Instructions
- Findings, Adjudication and Order

Parties, Participants, and Representatives



Parties

- Respondent
- Petitioner
- Applicant for Appointment of Guardian



Other Participants

- Next of Kin
- Other Interested Persons



Representatives

- Respondent's G.A.L.
- Respondent's Counsel
- Petitioner's Counsel

Parties, Participants, and Representatives

- Respondent
 - The adult the Petition alleges is incapacitated.
 - This person is the subject of the proceeding and is a party to it.

Parties, Participants, and Representatives

- Petitioner
 - Person or entity filing the Petition
 - Can be:
 - An individual
 - Corporation
 - Other legal “person”
 - Public agent (with no “interest”)
 - Any state or local human services agency through authorized representative.

Parties, Participants, and Representatives

- Petitioner can be non-resident of North Carolina
- Petitioner does not have to be relative, friend, or have any other particular relationship to Respondent.
 - Note that AOC Form Petition (AOC-SP-200) asks for “Petitioner’s Relationship to Respondent Or Interest in the Proceeding”

Parties, Participants, and Representatives

- Applicant
 - Person or entity other than Petitioner who files application for appointment of guardian for Respondent
 - Application can be filed at same time as Petition or after (and then joined with Petition)
 - This person is a party to the proceedings along with Respondent and Petitioner.

Parties, Participants, and Representatives

- Next of Kin and “Other Interested Persons” Designated by Clerk
 - Entitled to receive notice, but are not parties
 - May become parties if:
 - They file Application for Appointment of Guardian (become an “Applicant”)
 - Join the action pursuant to R. Civ. P. 24

Parties, Participants, and Representatives

- Respondent's Guardian ad Litem
 - Person appointed to exercise many of Respondent's rights on Respondent's behalf
 - Not a party
- Respondent's Counsel
 - Respondent has a right to obtain counsel
 - Doing so is likely to release g.a.l. of duties

Pleadings

How does the proceeding commence?

- Petition for Adjudication of Incompetence
- Application for Appointment of Guardian

AOC Form available: **AOC-SP-200** (includes both the Petition and the Application)

35A-1106; 35A-1210

Pleadings

- Petitioner must verify the Petition
 - Swear/affirm, duly notarized
 - 35A-1105
- As with other pleadings, Petitioner must sign, or if represented, the attorney must sign.
 - N.C. R. Civ. P. 11
- Note: AOC-SP-200 contains a verification block, but no block for attorney signature.
 - Attorneys typically draft their own petitions and applications or supplement the AOC form

Pleadings

- Petition must include (if known):
 - Petitioner's name, address, and county of residence
 - Petitioner's interest
 - Respondent's name, age, address, and county of residence
 - Contact information for next of kin and other interested persons
 - Facts that tend to show incapacity and statement of reasons determination is sought

Pleadings

- Petition must include (if known):
 - ...
 - Information regarding whether Respondent has been adjudicated incompetent in another state
 - Type of guardianship sought (general, estate, or person)
 - Name of the recommended guardian
 - Statement of Respondent's income, assets, liabilities, etc.

35A-1106; 35A-1210

Pleadings

- AOC-SP-200 provides blocks for this information
- If Form is not used, clerk should review Petition for compliance with statute (to the extent information is known or should be known to the Petitioner)

Pleadings

What must Respondent file in response?

- No responsive pleading is required by Respondent or her attorney or guardian ad litem
 - *Permitted*, but not required

Notice and Service

What type of notice is issued?

- Notice of Hearing issued by clerk
 - Stating date, time, and place of hearing
 - Issued within 5 days of Petition
 - *No summons required.*
 - Form: **AOC-SP-201**

Notice and Service

Upon whom is notice served, and how?

- On Respondent
 - By *personal service only (by sheriff)*
- On guardian ad litem
 - By any method permitted by N.C. R. Civ. P. 4
- On next of kin and “any other persons the clerk may designate”
 - By first-class mail within 5 days of Petition

35A-1109

Notice and Service

- Affidavit of Service required for Next of Kin mailing
- Useful Form: **AOC-SP-207**, “Certificate of Service (Incompetent Proceeding)”.

Notice and Service

When must notice be served?

Must be served on Respondent and g.a.l. by 10 days before hearing date.

35A-1108(a)

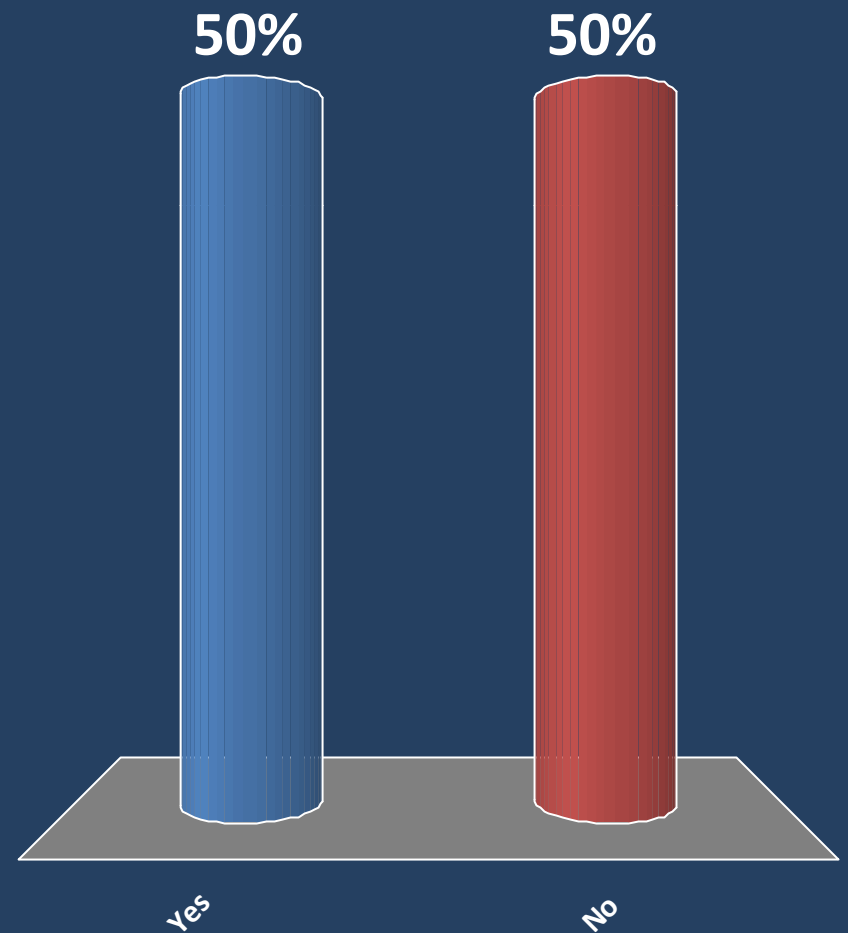


Quick Quiz 1

- John files Petition to declare his father-in-law, Chuck, incompetent.
- Chuck hires Attorney. Attorney files no answer or motions prior to hearing in response to Petition.
- Before the hearing begins, John files a motion with the clerk for a default judgment against Chuck.

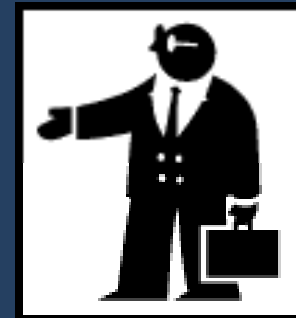
May the clerk order default?

1. Yes
- ✓ 2. No



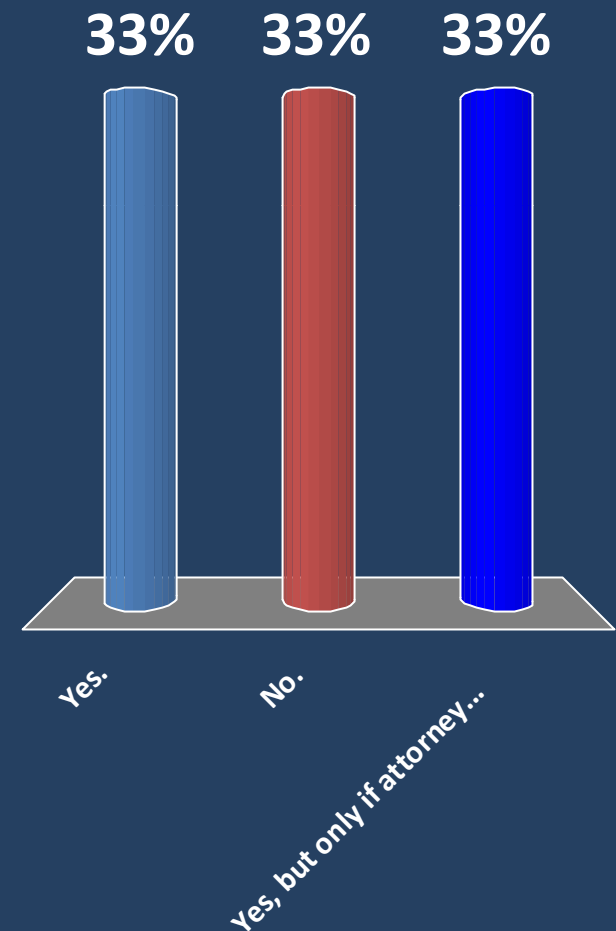
Quick Quiz 1 (con'd)

- John serves Chuck the Petition and Notice by delivering them to Chuck's attorney.
- Chuck's attorney agreed the day before to accept service on Chuck.
- Before the hearing, Chuck's attorney moves to dismiss the case, alleging John failed to properly serve Chuck, depriving the Court of personal jurisdiction.



Was Chuck served properly?

1. Yes.
- ✓ 2. No.
3. Yes, but only if attorney agreed in writing to accept service.

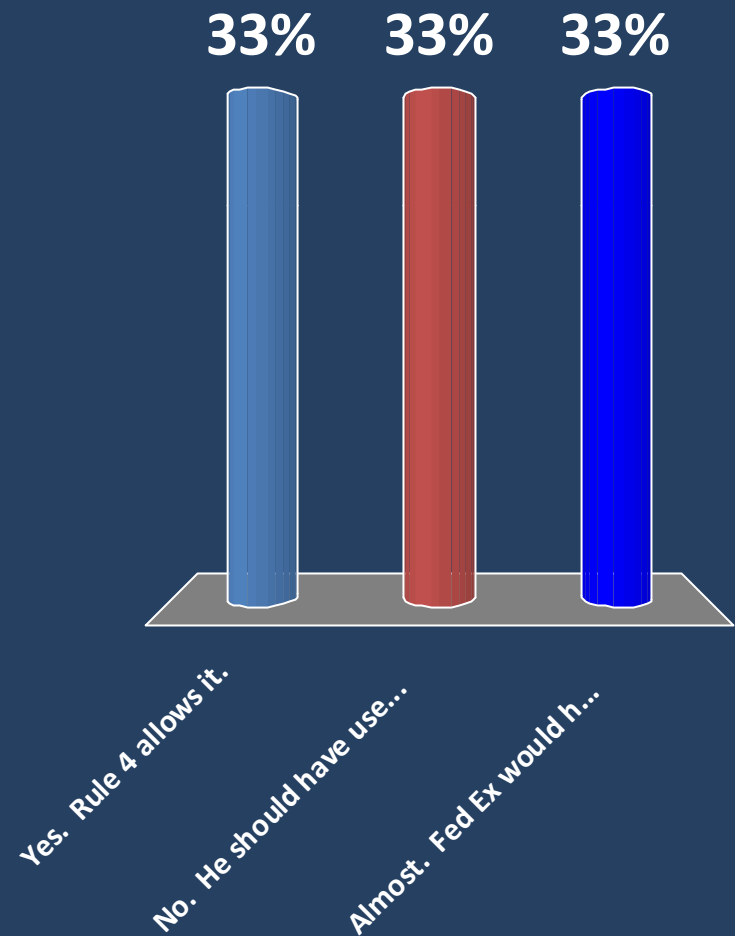


Quick Quiz 1 (con'd)

- Assume Chuck has no attorney.
- John serves Chuck's guardian ad litem by overnight UPS delivery service.
- The guardian ad litem signs the delivery receipt within 10 days of the hearing.

Did John use a proper method of service?

1. Yes. Rule 4 allows it.
- ✓ 2. No. He should have used personal service.
3. Almost. Fed Ex would have been acceptable.



Pre-Trial

What motions and other matters may arise between the Petition and the hearing?

What are the clerk's responsibilities as to these procedural steps?

Pre-Trial

- Appointment of Interim Guardian
- Discovery Scheduling
- Pre-Trial Conference
- Ordering Multidisciplinary Evaluation
- Continuances
- Voluntary Dismissals

Pre-Trial

- Appointment of Interim Guardian
 - Petitioner may file a verified motion seeking appointment of interim guardian
 - Usually is filed at same time Petition is filed, but can occur after Petition (but prior to adjudication)
 - AOC-SP-200 contains a block for this motion.

35A-1114

Pre-Trial

- Appointment of Interim Guardian
 - Motion must set forth facts to show:
 1. Reasonable cause to believe Respondent is incapacitated; and
 2. Either or both of the following:
 - a. That the Respondent's well-being is in imminent or foreseeable risk of harm that requires immediate intervention;
 - b. That the Respondent's estate is in imminent or foreseeable risk of harm that requires immediate intervention.

Pre-Trial

- Appointment of Interim Guardian
 - Upon receiving the motion, clerk immediately sets hearing date, place, time
 - To be held as soon as possible but not later than 15 days after motion is served
 - Respondent and guardian ad litem (and attorney if applicable) must receive service of motion and notice
 - AOC-SP-201 may be used as a notice for this motion.

Pre-Trial

- Appointment of Interim Guardian
 - Clerk's Order
 - If clerk is satisfied there is reasonable cause to believe the facts stated in the motion, clerk must appoint interim guardian
 - If interim guardian will handle estate matters, clerk must require bond in an amount set by clerk

Pre-Trial

- Appointment of Interim Guardian
 - Clerk's Order must contain:
 - Specific findings of fact to support clerk's conclusions
 - Interim guardian's powers and duties (limited only to what is necessary to resolve risk of immediate harm)
 - Form **AOC-SP-900M** may be used.

Pre-Trial

- Appointment of Interim Guardian
 - Interim Guardianship terminates
 - On date specified in clerk's order
 - 45 days from date of clerk's order (unless clerk extends for good cause an additional 45 days)
 - Clerk appoints permanent guardian pursuant to Petition and Application; or when
 - Clerk dismisses Petition and Application

Pre-Trial

- Discovery
 - Rules of Civil Procedure governing discovery provide mechanisms for parties to find information to prepare for hearing.
 - Following the timeframes in the discovery rules, N.C. R. Civ. P. 26-37, can take many months.
 - The scheduling of guardianship proceedings, however, is much more rapid.
 - Pretrial conferences can provide a scheduling solution.

Pre-Trial



- Pretrial Conferences
 - N.C. R. Civ. P. 16.
 - Gives the clerk the opportunity to direct the parties as to any matters that “may aid in the disposition of the case”
 - Clerk can help the parties set a more rapid schedule for conducting necessary discovery.

Pre-Trial

- Subpoenas
 - Parties may obtain documents relevant to the action through the use of subpoenas.
 - N.C. R. Civ. P. 45.
 - The clerk may also issue subpoenas, compel document production, and commission the testimony of witnesses through his or her authority as presiding judicial officer.
 - G.S. 7A-103(1), (3).

Pre-Trial

- Multi-disciplinary Evaluations (MDEs)
 - MDEs are prepared (or assembled) by a human services agency as directed by the clerk.
 - Clerk may order an MDE in connection with either the incompetency determination or guardianship appointment.

Pre-Trial

- Multi-disciplinary Evaluations (MDEs)

“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.”

35A-1101(14)

Pre-Trial

- Multi-disciplinary Evaluations (MDEs)
 - AOC Form: **AOC-SP-901M**, “Request and Order for Multidisciplinary Evaluation”

Pre-Trial

- Multi-disciplinary Evaluations (MDEs)
 - Parties may also make motion for an MDE.
 - Motion must be made within 10 days following service of Petition on Respondent.

Pre-Trial

- Multi-disciplinary Evaluations (MDEs)
 - Agency must file MDE with clerk within 30 days of order.
 - If MDE is incomplete, agency must file it anyway and explain.
 - MDE is sent to Petitioner and Respondent's counsel or g.a.l.
 - NOT PUBLIC RECORD. Only clerk can order its contents released.



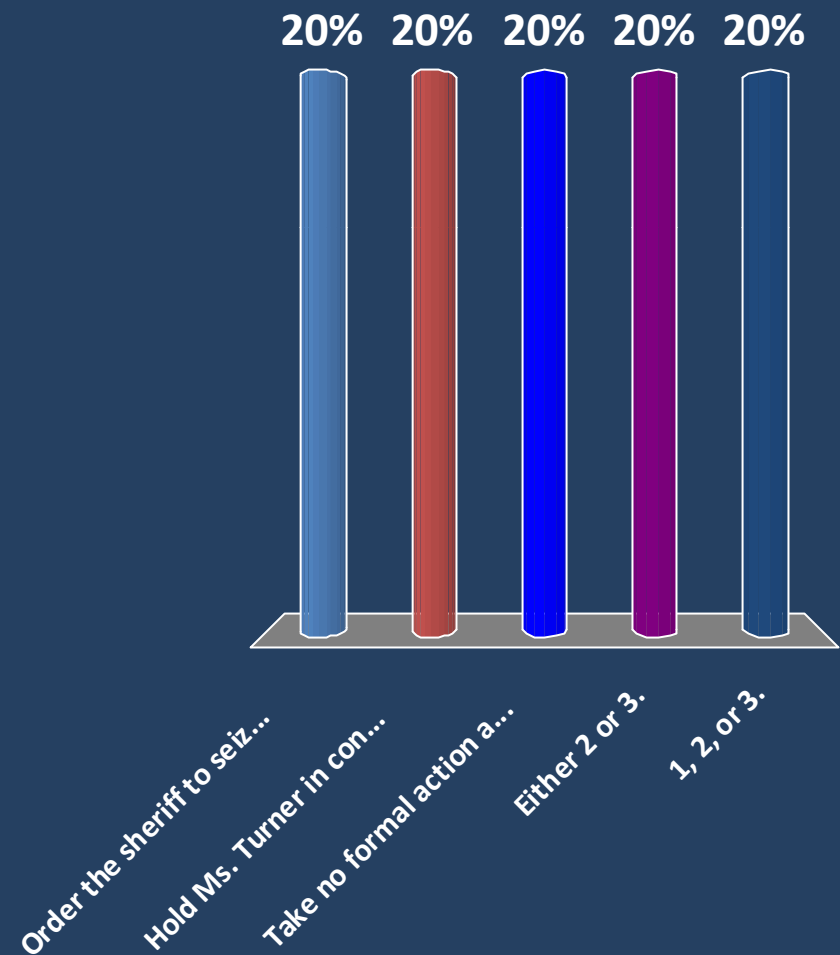
Quick Quiz 2



- Clerk Smith orders Respondent Turner to attend an evaluation so that an agency can prepare an MDE.
- Respondent Turner refuses to attend, and her g.a.l. is unable to persuade her.
- The MDE is filed with the court incomplete.
- Petitioner's counsel requests that Clerk Smith order the sheriff's office to "deliver" Ms. Turner to an evaluation.

How might Clerk Smith respond to the request?

1. Order the sheriff to seize Ms. Turner.
2. Hold Ms. Turner in contempt.
3. Take no formal action against Ms. Turner.
- ✓ 4. Either 2 or 3.
5. 1, 2, or 3.



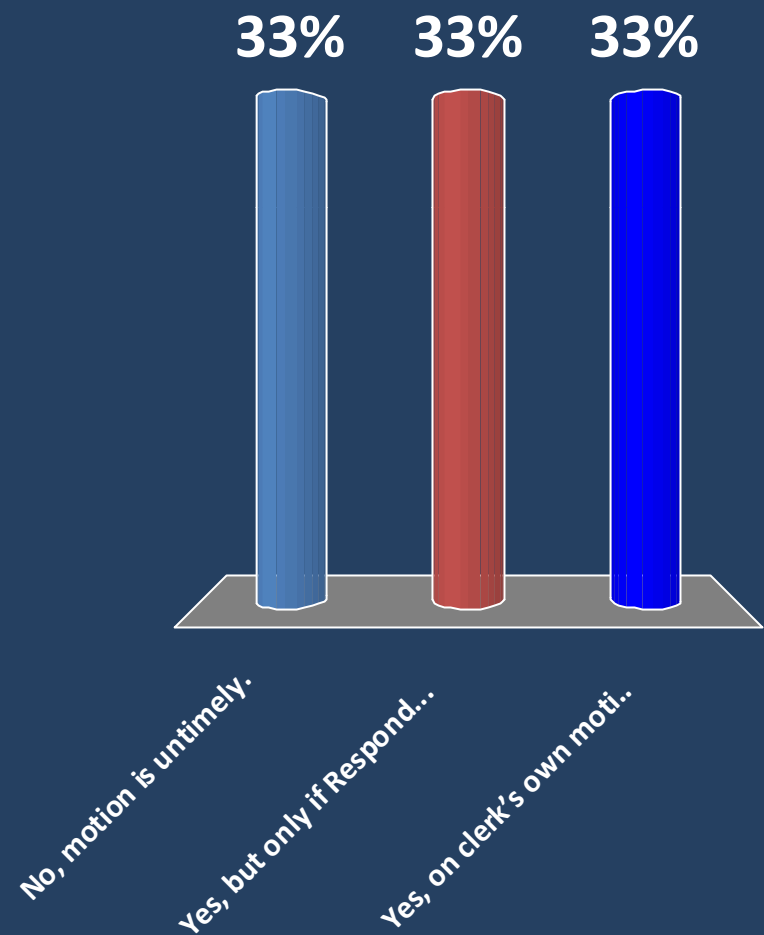
Quick Quiz 3



- Mr. Davis files Petition on July 1 for adjudication of incompetence for Uncle Joe.
- After pre-trial conference and discovery order, clerk orders hearing set for October 1.
- After some discovery, on September 1, Petitioner Davis files motion requesting MDE.
- Respondent Uncle Joe (through his g.a.l.) objects to the motion as untimely.

May clerk order the MDE?

1. No, motion is untimely.
2. Yes, but only if Respondent consents.
3. Yes, on clerk's own motion if clerk believes MDE is appropriate.



Pre-Trial

- Continuances
 - Clerk may grant continuance of hearing date for many reasons:
 - For good cause, on own motion or party's motion
 - For completion of discovery
 - For completion of MDE (even after hearing begins)
 - For mediation
 - Clerk must notify parties in writing of any continuance.

Pre-Trial

- Voluntary Dismissals
 - General Rule: Petitioner may dismiss a Petition pursuant to Rule 41. 35A-1112(g).
 - Exception: If Petitioner has moved for interim guardian appointment, Rule 41 dismissal cannot occur after that hearing has commenced. 35A-1114(f).

Conducting the Hearing

- Applicable Rules
- Jury or Non-Jury; Impaneling a Jury
- Bifurcating the Hearing
- Burden of Proof
- Public's Access to the Hearing
- Order and Admissibility of Evidence
- Findings, Adjudication, and Order

Applicable Rules

- N.C. Rules of Civil Procedure
- N.C. Rules of Evidence

...except where Chapter 35A makes adjustments.



Jury or Non-Jury Trial?

- In both jury and non-jury cases, clerk is presiding officer and determines questions of law.
- In non-jury cases, clerk also is finder of fact.
- In jury cases, clerk is presiding officer and determines questions of law, and jury is finder of fact.

Jury or Non-Jury Trial?

- Respondent has right to jury trial on issue of incompetence/incapacity.
- Neither Petitioner nor Respondent has right to jury trial on issue of appointment of guardian.

35A-1110.

Jury or Non-Jury Trial?

- If Respondent wants jury trial, g.a.l. or attorney must demand it within 10 days of service of Petition on Respondent.
 - This demand may not be withdrawn unless parties consent or clerk permits withdrawal.
- Clerk may order a jury trial on own motion.

Impaneling the Jury

- 12 Jurors chosen from regular jury list
 - Parties may stipulate to fewer jurors
 - Parties may stipulate that the decision be made by majority, rather than unanimously
- If practical, clerk should schedule hearing during jury session of district or superior court to draw from regular jury pool already in attendance

Impaneling the Jury

Clerk's Initial Preparation of Jury Pool:

- Introduce yourself and the courtroom personnel. Establish authority.
- Summarize a juror's duties in North Carolina.
- Hear and allow/deny excuses.
 - Remember: Excuses must involve truly exceptional circumstances
- Administer oath/affirmation to remaining pool.

Impaneling the Jury

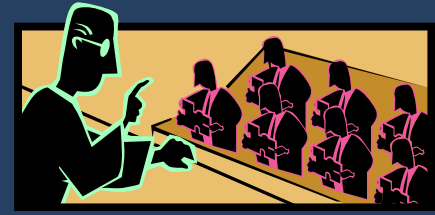
Jury Selection:

- Explain selection process to remaining pool
- Briefly introduce case, parties, attorneys
- Select “first 12” randomly by one of two methods:
 - Manual system: Drawing numbered slips
 - Call first 12 names from randomized list
- Question (or allow parties to question) the 12 on fitness to participate.

Impaneling the Jury

Jury Selection (con'd):

- Proper “fitness” questions:
 - Acquaintance, friendship, bad feelings about the parties, attorneys, or witnesses
 - Personal experience that is likely to create bias
 - Prior jury service and whether verdict was reached
 - Any reason the juror would not be able to be fair
 - Occupation of juror and family members.



Impaneling the Jury

Jury Selection (con'd):

- Allow parties to exercise their challenges
- Parties are allowed:
 - Peremptory challenges:
 - Challenges made for any reason; no reason need be stated
 - Up to 8 per party
 - Challenges for cause
 - Fairness/bias challenges
 - No limit

Impaneling the Jury

Jury Selection (con'd):

- Continue process of questioning and challenges until parties agree on 12.
- Impanel the jury
- Make preliminary statement
 - Introduces jurors to incompetency proceedings, their task ahead, and the order of evidence
 - See example in Clerk's Manual, Appendix V (p. 85.41)

A Two-Part Hearing: Bifurcation?

- Two determinations:
 1. Incapacitated? If so,
 2. Who should be appointed guardian, and to what extent?
- The first question must be answered before the second set is addressed.
- Clerk has the option of bifurcating a hearing to determine the issues separately.
 - May be especially practical in jury trials.

Public Access to Hearing

- General Rule: Hearing is open to the public.



- Exception: If Respondent or Respondent's counsel or g.a.l. requests the hearing be closed, clerk must exclude the public.

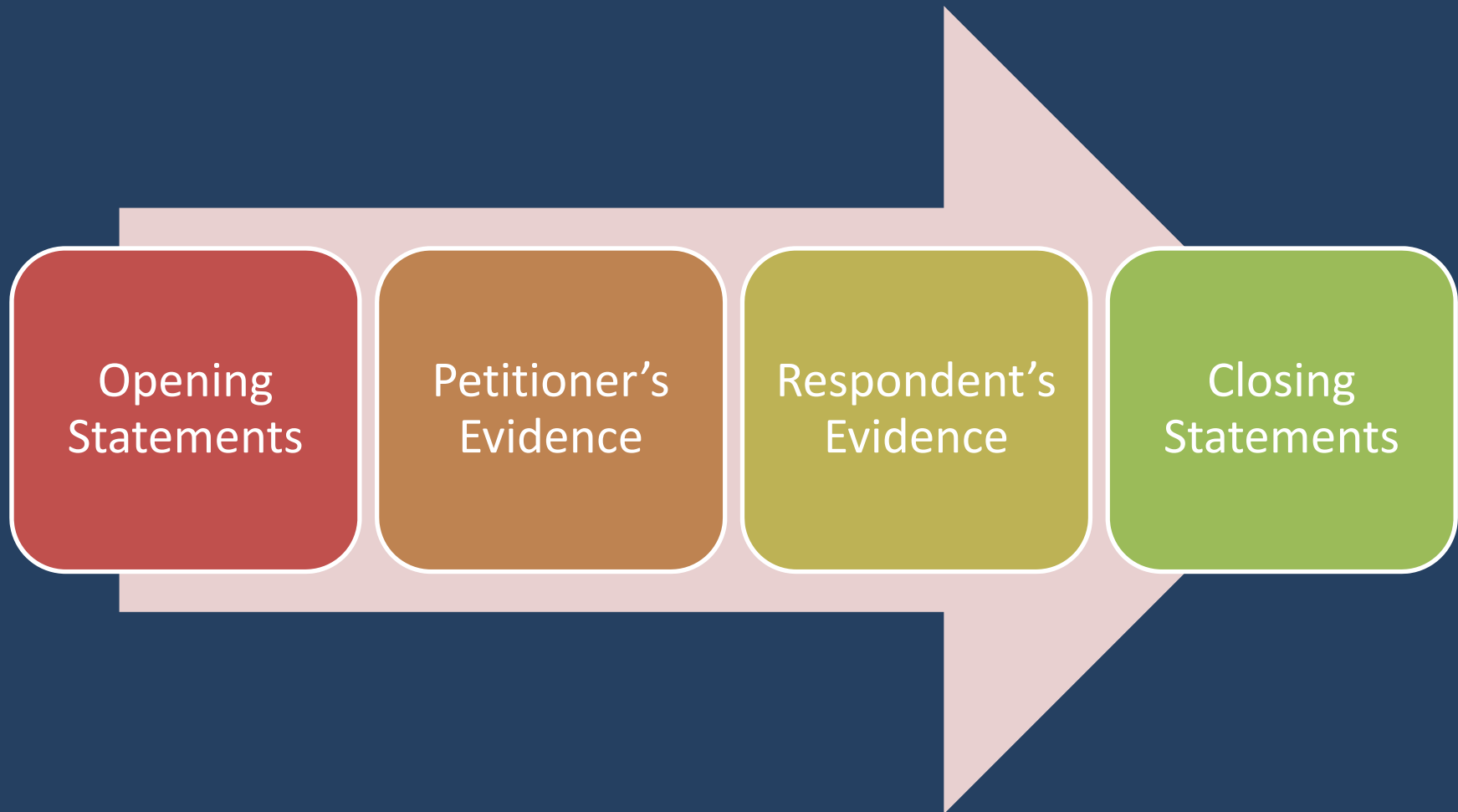
Standard and Burden of Proof

- Petitioner has burden of presenting evidence sufficient to prove that Respondent is incapacitated and appropriateness of guardianship.
 - Respondent is not required to prove she has capacity and does not need guardian.
- Petitioner must prove its case with clear, cogent, and convincing evidence.

Order of Evidence

- In clerk's discretion
- Typical order:
 - Petitioner presents its evidence.
 - Respondent cross-examines.
 - Petitioner rests.
 - Respondent presents evidence, if he or she desires.
 - Petitioner cross-examines.
 - Respondent rests.
- Each witness should be sworn and each expert qualified before testifying.

Order of Evidence



Types of Evidence

- Lay (non-expert) witness testimony
- Expert witness testimony
- Documentary exhibits

Hearsay Objections

Hearsay is

“A statement, other than one made by the declarant while testifying at hearing, offered in evidence to prove the truth of the matter asserted.”

Hearsay Objections

- Hearsay is inadmissible unless it falls within an exception provided in the Rules of Evidence.
 - Common exceptions:
 - Statements of the party-opponent
 - Statements made for purposes of medical diagnosis or treatment
 - Excited utterances
 - Business records

Basic Hearsay Example 1

- Petitioner Alice takes the stand to testify about her mother, the Respondent.
- After Alice states her observations of her mother, she says, “My sister, June, also told me that she saw Mom batter and deep fry her stamp collection.”
- June is in California and did not attend the hearing.

Basic Hearsay Example 1 (con'd)

- What is the objectionable “statement”?
- Is it a statement “other than one made by the declarant while testifying at the hearing”?
 - Whose statement is it? Is she at the hearing? Can she be cross-examined on the statement?
- Is the statement offered “to prove the truth of the matter asserted” (to prove that Mom deep-fried non-food items)?

Basic Hearsay Example 2

- Petitioner Jane calls her cousin, Flora, to the stand. Flora has spent lots of time with the Respondent, Aunt Sue, at the nursing home.
- Flora brings her diary with her to the stand.
- Flora reads from the diary:
 - “Today, I spoke with Aunt Sue’s roommate. She said that Aunt Sue had been forgetting names, forgetting to bathe, and had been asking for Uncle Jack.”
[Uncle Jack died in 1987.]

Basic Hearsay Example 2 (con'd)

- What is the objectionable “statement”?
- Is it a statement “other than one made by the declarant while testifying at the hearing”?
 - Whose statement is it? Is that person at the hearing? Can she be cross-examined on the statement?
- Is the statement offered “to prove the truth of the matter asserted” (Aunt Sue’s recent behavior)?

Basic Hearsay Example 3

- Petitioner's attorney introduces the affidavit of Mr. Lewis, Respondent's accountant.
- Mr. Lewis is not present at the hearing and has not been subpoenaed for testimony.
- The affidavit contains Mr. Lewis's observations of Respondent's behavior.
- It also recounts statements by Mr. Lewis's secretary about Respondent's behavior.

Basic Hearsay Example 3 (con'd)

- What are the objectionable “statements”?
- As to each:
 - Is the statement “other than one made by the declarant while testifying at the hearing”?
 - Whose statement is it? Is that person at the hearing? Can he or she be cross-examined on the statement?
 - Is the statement offered “to prove the truth of the matter asserted” (Respondent’s behavior)?

Physician-Patient Privilege

- Communications between Respondent and her doctor related to her treatment (and information in her medical records) are privileged and protected from disclosure. N.C. Gen. Stat. § 8-53.

Physician-Patient Privilege

- How do these records come in?
 1. Waiver by Respondent:
 - a. Express waiver by g.a.l. or counsel
 - b. Implicit waiver:
 - i. Failure to object
 - ii. Calling respondent's doctor as a witness with respect to Respondent's condition
 - iii. Respondent testifies as to communications with doctor
 - iv. Respondent's g.a.l. or attorney directly places Respondent's condition at issue.

Physician-Patient Privilege

2. Clerk orders the information to be admitted upon finding that disclosure is necessary for proper administration of justice.

N.C. Gen. Stat. § 8-53.

Admissibility: Lay Witnesses

- Lay (non-expert) witness testimony
 - Admissible to establish facts based on the witness's own observations and knowledge
 - Opinions by non-expert witnesses about the Respondent's capacity is admissible only if:
 - It is rationally based on witness's own perception and will help clerk or jury understand witness's testimony.

N.C. R. Evid. 701.

Admissibility: Experts

- Expert witness testimony
 - Witness must be qualified as an expert witness in the field about which he or she is about to testify.
 - Clerk determines whether the party has properly established the expert's credentials as an expert witness.
 - Upon qualification, expert may give opinion about Respondent's capacity to the extent it is within his or her expertise.

N.C. R. Evid. 704.

Admissibility: Documents

- Documentary Evidence
 - Documents may be admitted as evidence, where relevant, if a foundation has been set and a witness has properly authenticated them.

Admissibility: Documents

- Self-authenticating documents need not first be authenticated by a witness to be admissible.
 - MDEs are admissible without testimony of agency per 35A-1111(e).

Findings, Adjudication, and Order

- At close of evidence, finder of fact must make determination of capacity.

Findings, Adjudication, and Order

- If jury trial:
 - Clerk holds jury instruction (“charge”) conference with parties to determine final jury instructions. (Can be done earlier if practical.)
 - Clerk gives instructions to jury.
 - Sample jury instruction: Clerk’s Manual, 85.42-47.
 - Jury deliberates, renders verdict, is discharged.
 - Sample verdict sheet: [AOC-CPM-1](#).
 - Clerk records verdict on Order. [AOC-SP-202](#).

Findings, Adjudication, and Order

- If non-jury trial
 - Clerk makes finding
 - Clerk records finding on Order. [AOC-SP-202](#).

Findings, Adjudication, and Order

- If finder of fact finds that clerk is not incompetent/incapacitated, clerk must dismiss case.

Findings, Adjudication, and Order

- If finder of fact adjudicates Respondent incompetent, clerk must proceed with guardianship phase.
 - If trial has been bifurcated, clerk proceeds with evidence as to appointment of guardian.

Findings, Adjudication, and Order

- If trial was not bifurcated, clerk proceeds with determinations as to guardianship.
 - AOC Forms: **AOC-E-406**, “Order on Application for Appointment of Guardian”, and AOC-E-206, -407, 408, 413, 417, 418, 419 (Letters)

Findings, Adjudication, and Order

- Later topics:
 - Appointment of Guardians
 - Costs, Fees, Appeals
 - Mediations

Findings, Adjudication, and Order

- Later topics:
 - Appointment of Guardians
 - Costs, Fees, Appeals
 - Mediations

Bonus Hearsay Question

- Petitioner Jane calls Nurse Amy to the stand to testify about the Respondent, Jane's mother.
- Nurse Amy works in Respondent's nursing home and Respondent is her regular patient.
- Nurse Amy testifies that Respondent told her on several occasion that she does not feel like she can handle her affairs anymore.

Should the Nurse's testimony be admitted?

- ✓ 1. Yes
- 2. No

