NORTH CAROLINA Judicial COLLEGE

# Incompetency and Adult Guardianship Hearings for Clerks of Superior Court

**May 3-5, 2017**
**UNC School of Government, Chapel Hill, NC**

**Wednesday, May 3, 2017** **Room 2401**

**12:15 PM** **Welcome and Introductions**

**12:30 PM** **The Clerk's Role in Adult Guardianship Proceedings**
Meredith Smith, UNC SOG

**1:45 PM** **Screening the Case**
Meredith Smith, UNC SOG

**3:00 PM** **The Role of the Guardian Ad Litem**
Natalie J. Miller, Law Office of Natalie J. Miller, PLLC

**4:05 PM** **Break**

**4:15 PM** **The Clerk's Authority to Order Access to Medical, Mental Health, and Substance Abuse Records**
Mark Botts, UNC SOG

**5:15 PM** **Adjourn**

**Thursday, May 4, 2017** **Room 2401**

**8:45 AM** **Mental Health and Substance Abuse Conditions that Impair Capacity**
Jodi Flick, Clinical Assistant Professor, UNC School of Social Work

**10:45 AM** **Break**

**11: 00 AM** **Multidisciplinary Evaluations**
Meredith Smith, UNC SOG
Michelle Ball, Clerk of Superior Court, Johnston County

**11:50 AM** **Lunch** **Dining Room**

**12:45 PM** **Analyzing Capacity and Appointing the Guardian**
Meredith Smith, UNC SOG
James Stanford, Clerk of Superior Court, Orange County

**2:15 PM** **Break** **Room 2401**

**2:30 PM** **Accessing Publicly Funded Behavioral Health Services and Consent to Treatment**
Mark Botts, UNC SOG

**3:40 PM** **Break**

**3:45 PM** **Autism and Limited Guardianship**
Judge Kimberly Taylor, Autism Advocate and Former Superior Court Judge
Jeff Austin, Attorney GAL

**5:00 PM** **Adjourn**

**Friday, May 5, 2017** **Room 2401**

**8:45 AM** **Accessing APS Records and the Role of the County Department of Social Services – The Petitioner, the Evaluator, and the Guardian of Last Resort**
Aimee Wall, UNC SOG

**9:45 AM** **Status Reports: What's Required and What to Do with Them**
Evelyn Pitchford, NC DHHS, Division of Aging and Adult Services
Meredith Smith, UNC SOG

**10:30 AM** **Failure to File and Enforcement of Orders**
Meredith Smith

**11:30 AM** **Presiding Over Cases with Unrepresented Litigants**
Judge Beth Keever, District Court Judge, ret.

**12:15 PM** **Lunch** **Dining Room**

**1:00 PM** **Restoration of Competency: Legal Requirements and a Story of Restoration**
Meredith Smith, SOG
Corye Dunn, Disability Rights NC

**2:00 PM** **Mock Hearing**
Meredith Smith, SOG

**3:45 PM** **Adjourn**

**Incompetency and Adult Guardianship**

UNC School of Government - Judicial College

**May 3-5, 2017**

**EVALUATION**

**SESSION EVALUATION**

**Wednesday, May 3, 2017**

**The Clerk's Role in Adult Guardianship Proceedings**

Meredith Smith, UNC School of Government

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

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

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

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

**Screening the Case**
Meredith Smith, UNC School of Government

| *Please rate your instructor's teaching:* | *Strongly Disagree* | | *Neither* | | *Strongly Agree* |
|---|---|---|---|---|---|
| The instructor presented the material clearly. | SD | D | N | A | SA |
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*Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:*

**The Role of the Guardian Ad Litem**
Natalie J. Miller, PLLC

| *Please rate your instructor's teaching:* | *Strongly Disagree* | | *Neither* | | *Strongly Agree* |
|---|---|---|---|---|---|
| The instructor presented the material clearly. | SD | D | N | A | SA |
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**The Clerk's Authority to Order Access to Medical, Mental Health, and Substance Abuse Records**
Mark Botts, UNC School of Government

| *Please rate your instructor's teaching:* | *Strongly Disagree* | | *Neither* | | *Strongly Agree* |
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| The instructor presented the material clearly. | SD | D | N | A | SA |
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**Thursday, May 4**

**Mental Health and Substance Abuse Conditions that Impair Capacity**
Jodi Flick, UNC School of Social Work

| *Please rate your instructor's teaching:* | *Strongly Disagree* | | *Neither* | | *Strongly Agree* |
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*Please share any additional comments about the instructor's teaching and the session's content. If you indicated that you were dissatisfied with one or more aspects of the instructor's teaching or the session's content, we are particularly interested in learning how we can do better in the future:*

**Multidisciplinary Evaluations**
Meredith Smith, UNC School of Government
Michelle Ball, Clerk of Superior Court, Johnston County

| *Please rate your instructor's teaching:* | *Strongly Disagree* | | *Neither* | | *Strongly Agree* |
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**Analyzing Capacity and Appointing the Guardian**
Meredith Smith, UNC SOG
James Stanford, Clerk of Superior Court, Orange County

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Mark Botts, UNC School of Government

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**Autism and Limited Guardianship**

Judge Kimberly Taylor, Autism Advocate and Former Superior Court Judge
Jeff Austin, Attorney GAL

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**Friday, May 5**

**Accessing APS Records and the Role of the County Department of Social Services: The Petitioner, the Evaluator, and the Guardian of Last Resort**
Aimee Wall, UNC School of Government

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Evelyn Pitchford, NC DHHS
Meredith Smith, UNC School of Government

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Judge Beth Keever, District Court Judge, ret.

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Meredith Smith, School of Government
Corye Dunn, Disability Rights NC

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**Mock Hearing**
Meredith Smith, School of Government

| *Please rate your instructor's teaching:* | *Strongly Disagree* | | *Neither* | | *Strongly Agree* |
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**COURSE EVALUATION**

Course Content

*Please rate the usefulness and length of each session:*

| | Usefulness | | Session Length | | |
|---|---|---|---|---|---|
| | Keep Session | Omit Session | Too Short | Just Right | Too Long |
| The Clerk's Role in Adult Guardianship Proceedings | | | | | |
| Screening the Case | | | | | |
| The Role of the Guardian Ad Litem | | | | | |
| The Clerk's Authority to Order Access to Medical, Mental Health, and Substance Abuse Records | | | | | |
| Mental Health and Substance Abuse Conditions that Impair Capacity | | | | | |
| Multidisciplinary Evaluations | | | | | |
| Analyzing Capacity and Appointing the Guardian | | | | | |
| Accessing Publicly Funded Behavioral Health Services and Consent to Treatment | | | | | |
| Autism and Limited Guardianship | | | | | |
| Accessing APS Records and the Role of the County Department of Social Services – The Petitioner, the Evaluator, and the Guardian of Last Resort | | | | | |
| Status Reports: What's Required and What to Do with Them | | | | | |
| Failure to File and Enforcement of Orders | | | | | |
| Presiding Over Cases with Unrepresented Litigants | | | | | |
| Restoration of Competency: Legal Requirements and a Story of Restoration | | | | | |
| Mock Hearing | | | | | |

**OVER →**

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

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

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

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

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

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

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

# Tab 01: The Clerk's Role

**Incompetency and Adult Guardianship Proceedings before the Clerk**

**Introduction**

Turn to the people at your table and find out the following information from them.

1. Name
2. County
3. Why are you here?  What concerns you most?
4. What do you hope to leave with?

**During the Course…….**

Use the notecard in your materials to write down one thing you learn and plan to carry home with you regarding incompetency and adult guardianship proceedings

**The Clerk's Role in Incompetency and Guardianship Proceedings**

Protecting the person and the property of a person who lacks capacity is the fundamental justification for the existence of a guardianship proceeding. Respondents who are the subject of a guardianship proceeding come from all walks of life. There are as many reasons for an adjudication of incompetency and appointment of a guardian as there are cases filed. Some people may have been born with a condition that impairs their capacity. Others may have had something happen to them in life or developed a condition that impairs it. As we know, these issues affect all ages, races, genders, and socio-economic statuses. Think about someone you know or perhaps imagine yourself if you were in one of these situations.

a. What would you want that person's lived experience to be? If that person died, what would it take for people to look at their life and say that person lived a full and good life – an "enviable life." Think about what basic, human qualities and characteristics would be present for them day to day. Use the large white paper and work as a group to list these qualities and characteristics of that enviable life.

b. What is the clerk's role, if any, in assuring the ward is able to achieve this life?

_____
_____
_____
_____
_____

# You Have a Right to Appeal My Incompetency?

**Author :** Meredith Smith

**Categories :** Guardianship

**Tagged as :** appeal, Clerk of Superior CourtIncompetency

**Date :** March 30, 2016

Bob and Mary have been married for 60 years. They live at home together but recently Mary's health has started to decline significantly. Due to a concern over Mary's ability to care for herself, a friend of Mary's makes a report to the county department of social services (DSS). After an investigation, DSS decides to file a petition to adjudicate Mary incompetent and an application to have a guardian appointed on her behalf. DSS sends notice of the proceeding to both Bob and Jane, their daughter, as Mary's next of kin. After a hearing, the clerk of superior court finds that Mary is incompetent and appoints Jane as her general guardian.

Bob comes to you as his attorney and states that he wants to appeal the clerk's decision. Does he have standing to appeal?

**Two Orders - Two Separate Proceedings**

It is important to first identify which order Bob wants to appeal. This is because the adjudication of incompetency and appointment of a guardian are two separate proceedings resulting in two different orders.

The incompetency proceeding is initiated by a petition filed by a petitioner against a respondent, who is the alleged incompetent person. G.S. 35A-1105. The proceeding is treated as a special proceeding. In re Winstead, 189 N.C. App. 145, 146 (2008). At the hearing, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that the respondent is incompetent. G.S. 35A-1112.

In contrast, the guardianship proceeding is initiated by an application and is in the nature of an estate matter. Winstead, 189 N.C. App. at 151. During the guardianship proceeding, the court's role shifts to a more protective/oversight posture that considers the respondent's best interests. The court has the duty to inquire and receive evidence necessary to determine the needs and best interests of the respondent. G.S. 35A-1212(a). This shift in the court's role from adjudicating incompetency to determining best interests is similar to the two stage process of adjudication and disposition that is required in an abuse, neglect, dependency or termination of parental rights case.

Given the overlap in testimony and other evidence, some clerks will often hear the two matters simultaneously. However, because the clerk's duty changes between the two proceedings and an determination of incompetency must occur before a guardian may be appointed, some clerks prefer to hear the incompetency matter first before proceeding to the question of guardianship. Regardless of whether the clerk hears the matters simultaneously or sequentially, if the clerk finds that a respondent is incompetent or incompetent to a limited extent, as was the case with Mary, the clerk enters two orders: an order adjudicating incompetence and a second order appointing a guardian. Whether someone has a right to appeal depends, in part, on what order the person is challenging.

**Appeal of the Incompetency Order**

After hearing the evidence on incompetency, the clerk may enter an order that:

- The respondent is incompetent or incompetent to limited extent, or

- The petitioner failed to meet the requisite burden of proof and the proceeding is dismissed.

G.S. 35A-1112. Typically, the clerk uses AOC form SP-202, which is the Order on Petition for Adjudication of Incompetence. The appeal of the order on incompetency is to superior court for a trial de novo. G.S. 35A-1115. The appellant has 10 days from the entry of the clerk's order on incompetency to file a notice of appeal. G.S. 1-301.2(e).

1. **Order Respondent is Incompetent or Incompetent to a Limited Extent.**

If the clerk orders that the respondent is incompetent or incompetent to a limited extent, the **respondent** has the right to appeal. In addition, **any person entitled to notice of the proceeding also has standing to appeal as an interested party**. *See* In re Ward, 337 N.C. 443 (1994); In re Winstead, 189 N.C. App. 145 (2008). This includes (a) next of kin, (b) any person designated by the clerk to receive notice, and (c) a party to a lawsuit where the determination of incompetence may effect the tolling of an otherwise expired statute of limitations. Ward, 337 N.C. at 447; G.S. 35A-1109.

Because Bob is entitled to notice as a next of kin under G.S. 35A-1109, he has the right to appeal the order adjudicating Mary incompetent under G.S. 35A-1115. Winstead, 189 N.C. at 150. This is despite the fact that Bob was neither the petitioner nor the respondent in the incompetency proceeding and may not have the right to present evidence on the issue of incompetency without authorization from the court. G.S. 35A-1112(b) states that "[t]he petitioner and the respondent are entitled to present testimony and documentary evidence…and to examine and cross-examine witnesses at the hearing on the [incompetency] petition." In holding that an interested party entitled to notice has a right to appeal, the court in Ward and Winstead did not squarely address the right of such a party to present evidence in the original incompetency proceeding in light of G.S. 35A-1112(b). The court in Ward stated in dicta that an interested party after a motion and order for relief from judgment under Rule 60(b)(6) of the NC Rules of Civil Procedure has the right to offer evidence and contest the incompetency proceeding. 337 N.C. at 448.

2. **Order Dismissing the Proceeding**.

It is less clear who has the right to appeal if the clerk enters an order dismissing an incompetency proceeding. The facts in both Ward and Winstead dealt with the appeal of an order adjudicating incompetence and neither court directly addressed whether the petitioner or an interested party would have standing to appeal the clerk's order of dismissal. Both cases discussed G.S. 35A-1115, which addresses an appeal from the clerk's "order adjudicating incompetence." Both G.S. 35A-1115 and Article 1 of G.S. Chapter 35A are silent regarding a dismissal of the proceeding.

Although G.S. 35A-1102 provides that Article 1 of Chapter 35A sets forth the exclusive procedure for adjudicating a person to be an incompetent adult, NC appellate courts have looked to G.S. 1-301.2 to provide guidance where Article 1 is silent. Winstead, 189 N.C. App. at 147. G.S. 1-301.2 applies to special proceedings and provides that "a party aggrieved by an order or judgment of a clerk" may appeal for a hearing de novo. "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 (1997).

It is open to interpretation whether Bob, as an interested party entitled to notice, or even DSS as the petitioner would qualify as an aggrieved party with a right to appeal a dismissal of the proceeding related to Mary's competency. Notwithstanding a dismissal by the court, Bob, DSS, or any other person could file a new petition at a later date based on new facts and circumstances on the issue of Mary's incompetency. G.S. 35A-1105.

**Appeal of the Guardianship Order**

1. **Order Appointing a Guardian**

After hearing the evidence on guardianship, the clerk shall enter an order that, in part, sets forth the name of the person or entity appointed to fill the guardianship. G.S. 35A-1215. Typically, the clerk uses AOC form E-406, which is the Order on Application for Appointment of Guardian. The appeal of the order on guardianship is on the record to superior court. G.S. 1-301.3. The appellant has 10 days from the entry of the clerk's order on guardianship to file a notice of appeal. *Id.*

2**. Right to Appeal Guardianship Order**

The right to appeal a guardianship order depends on whether the person is (i) a party to the guardianship proceeding, and (ii) an aggrieved party. Winstead, 189 N.C. App. at 151.

The **parties** to the guardianship proceeding include the petitioner, the respondent, as well as any person or entity that filed an application to be the respondent's guardian. *Id.*

An **aggrieved party** has the right to appeal the guardianship order pursuant to G.S. 1-301.3(c), which applies to appeals from estate matters determined by the clerk. In applying G.S. 1-301.3(c) the court in Winstead held that a husband, who files an application to be his wife's guardian, does have standing to appeal the appointment of another person as her guardian. In that case, the husband and wife, like Bob and Mary, had been married and lived together for 60 years. In addition, the petitioner conceded that the husband was possibly aggrieved by the appointment of someone other than him as his wife's guardian. Based on the application of Winstead, Bob would have standing to appeal the appointment of Jane as Mary's guardian, provided that he filed an application to be Mary's guardian.

It is important to note that the clerk should always accept for filing a notice of appeal presented by any person absent a gatekeeper order restricting the authority of that person to file an appeal with the court. The discretion to determine whether a party has the right to appeal either order of the clerk lies with the superior court judge in the first instance and the appellate courts after that.

# THE NATIONAL PROBATE COURT STANDARDS: THE ROLE OF THE COURTS IN GUARDIANSHIP AND CONSERVATORSHIP PROCEEDINGS

*Paula L. Hannaford and Thomas L. Hafemeister*

*In this article, Ms. Hannaford and Professor Hafemeister confront the issue of who will ensure that the needs of the growing elderly population are met. The authors provide a history and overview of guardianship proceedings and also provide, for the first time, a quantitative description of guardianship usage in the United States. The authors assert that guardianships and conservatorships remain effective ways to protect the rights of the incompetent elderly person. Although these remedies create a legal right in the guardian to manage the financial and medical welfare of the elderly client, the authors argue that a lack of procedural protections and judicial oversight may permit the unscrupulous to take advantage of elderly wards. In 1994, the Commission on National Probate Court Standards developed new standards to provide courts with the necessary tools to address these problems. The authors conclude by discussing these new standards and their impact on the courts' ability to protect the rights of the incompetent elderly in the future.*

For policy makers in this country, perhaps the most critical demographic change of the past fifty years is the aging of

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Paula L. Hannaford is Research Associate, National Center for State Courts, Williamsburg, Virginia. Thomas L. Hafemeister is Senior Staff Attorney, National Center for State Courts' Institute on Mental Disability and the Law, Williamsburg, Virginia, and Project Director for the National Probate Court Standards Project; Adjunct Professor of Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia. This article was prepared in conjunction with the National Probate Court Standards Project and developed under grants from the State Justice Institute (SJI) (No. SJI-91-12L-070) and the American College of Trust and Estate Counsel (ACTEC) Foundation to the National College of Probate Judges (NCPJ) and the National Center for State Courts (NCSC). The points of view expressed are those of the authors and do not necessarily represent the official positions or policies of the SJI, ACTEC, NCPJ, or NCSC.

American society. According to U.S. Census Bureau reports, by 2035 the nation's elderly population will be seventy-one million persons—double the number in 1977.[1] Individuals over the age of eighty-five currently make up the fastest-growing segment of the American population.[2] The "aging of America" has given rise to many new demands on social resources and services for the elderly (e.g., income maintenance, health care, housing). The American judiciary is also confronting the consequences of aging in America. In their traditional role, the courts interpret and apply federal and state legislation and resolve litigation regarding the elderly.[3] In addition, the courts are taking steps to ensure that the elderly have reasonable access to judicial facilities and proceedings under the Americans with Disabilities Act.[4]

One of the principal legal remedies for addressing the needs of the elderly has been the statutory provisions enacted in all states to make guardianship and conservatorship proceedings available where needed.[5] In the process of evaluating traditional legal remedies for assisting and protecting the elderly, however, many commentators have determined that guardianship and conservatorship arrangements are not adequately or efficiently meeting the needs of the elderly. In fact, some argue that the imposition of guardianships and

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1. COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY & YOUNG LAWYERS DIV., AMERICAN BAR ASS'N, GUARDIANSHIP OF THE ELDERLY: A PRIMER FOR ATTORNEYS 1 (1990) [hereinafter COMMISSION ON LEGAL].

2. Louis A. Mezzullo & Michael C. Roach, *The Uniform Custodial Trust Act: An Alternative to Adult Guardianship*, 24 U. RICH. L. REV. 65, 67 (1989).

From 1970 to 1991, the percentage of persons aged 85 and older nearly doubled—from 0.7 to 1.3% of the U.S. population. In comparison, the second fastest-growing segment of the population—persons aged 30 to 34 years—increased only 57% over the same period. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 14 (113th ed. 1993) (Resident Population, by Age and Sex: 1970 to 1991).

3. A number of legislative enactments (e.g., the Age Discrimination in Employment Act, elder-abuse reporting statutes, Social Security and Medicare provisions, pension and insurance law, health care reform) specifically address the needs and concerns of the elderly.

4. 42 U.S.C. §§ 12,101-12,213 (Supp. 1992). Sections 12,131 and 12,134 specifically prohibit discrimination against disabled persons with respect to access to public services.

5. A number of states have adopted either the Uniform Probate Code (UPC) or the Uniform Guardianship and Protective Proceedings Act provisions for guardianship and conservatorship. UNIF. PROB. CODE, 8 U.L.A. 1 (Supp. 1991); UNIF. PROTECTIVE PROC. ACT, 8A U.L.A. 467 (Supp. 1993). Even in nonadopting states, however, these codes have influenced the development of their guardianship and conservatorship law and procedure. *See, e.g.*, Roger W. Andersen, *The Influence of the Uniform Probate Code in Nonadopting States*, 8 U. PUGET SOUND L. REV. 599 (1985).

conservatorships, without adequate procedural protections and judicial oversight, actually results in substantial loss of liberty and property for many of the persons that these arrangements are intended to protect.[6]

These sobering assertions have prompted courts to reevaluate and, where appropriate, reformulate their procedures for guardianship and conservatorship to accommodate the needs of the elderly. Specifically, the courts are struggling to strike a three-way balance that ensures that elderly persons receive the services they need, protects them from unwarranted restrictions on their freedom and autonomy, and responsibly maximizes and conserves the resources of the judiciary. Among the tools available to courts attempting to balance these competing goals are the *National Probate Court Standards*, one of the most recent attempts to fine-tune judicial procedures pertaining to guardianships and conservatorships.[7]

## I. Guardianship and Conservatorship: An Overview

Guardianship refers to a legal arrangement in which a person (the guardian) is given legal responsibility for another person (the ward) who is unable to take care of his or her affairs due to minority or incompetency.[8] In its most common interpretation, guardianship refers to the guardian's legal responsibility for the health and welfare of the person adjudged incompetent by a court.[9] In some jurisdictions, however, a guardian also may be responsible for an incompetent person's property. Other jurisdictions appoint two separate individuals—one to look after the ward's health and welfare and one (often called a conservator) to look after the ward's property. In spite of differences in terminology, the substantive law governing these ar-

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6. *See infra* notes 17-21 and accompanying text.

7. COMMISSION ON NAT'L PROBATE COURT STANDARDS, NATIONAL COLLEGE OF PROBATE JUDGES & NATIONAL CTR. FOR STATE COURTS, NATIONAL PROBATE COURTS STANDARDS (1993).

8. BLACK'S LAW DICTIONARY 706 (6th ed. 1990).

9. Guardianship (and conservatorship) proceedings are available when an individual is incompetent or is a minor. Some issues and requirements of protective proceedings for minors are unique, *see* UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT §§ 2-101 to 2-112 (Guardians of Minors), 2-301 to 3-335 (Protection of Property of Persons Under Disability and Minors), 8A U.L.A. 467-82, 499-542 (1982 & Supp. 1993); however, the prescribed proceedings for incompetents and minors are relatively similar. Like the *National Probate Court Standards*, the focus of this article will be on guardianship (and conservatorship) proceedings for adults who lack decision-making capacity and are found incompetent by a court.

rangements is similar or identical in most U.S. jurisdictions.[10] For the purposes of this article, guardianship will refer to both arrangements unless otherwise indicated.

Like much of American substantive law, the judicial approach to guardianship was grounded in precolonial English common law. In medieval England, the Lord Chancellor had responsibility for appointing a person or committee to protect persons with mental disabilities and their property.[11] Later, the London judiciary established a separate Court of Orphans "which had the care and guardianship of minor children of deceased citizens of London."[12] During the colonial period, England exported its judicial organization along with the common law to the American colonies,[13] where jurisdiction over guardianship generally fell to the courts exercising probate jurisdiction.[14] By the late nineteenth century, most of the American states had codified their procedures for imposing guardianships and delineated the rights and duties of guardians with respect to their wards.[15] Today, guardianship is a common legal remedy to provide for elderly persons who can no longer care for themselves due to dementia or infirmity.[16]

Despite its widespread availability, the use of guardianship as a means to serve the elderly has been tarnished over the past two decades. Some commentators bemoan the failure of the legislatures to establish and the courts to make use of modified or "limited" guardianships.[17] For elderly individuals requiring only partial assistance with their affairs, full guardianship is an unnecessary and inappropri-

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10. Provisions of the Uniform Probate Code (Article V, the Uniform Guardianship and Protective Proceedings Act), drafted by the National Conference of Commissioners on Uniform State Laws, serve as a widely emulated model. UNIF. PROB. CODE §§ 5-501 to 5-505, 8 U.L.A. 429-518 (1983 & Supp. 1993).

11. John Parry, *Incompetency, Guardianship, and Restoration, in* SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 369 (1985).

12. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America I*, 42 MICH. L. REV. 965, 979-80 (1942) (citing Woodward, J., in Horner & Roberts v. Hasbrouck, 41 Pa. 169, 178 (1861)).

13. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); ROSCOE POUND, ORGANIZATION OF COURTS (1940).

14. *See* POUND, *supra* note 13, at 78-79, 136-40; Simes & Basye, *supra* note 12, at 977-82; Thomas L. Hafemeister & Paula L. Hannaford, The Evolution of American Probate Courts and Standards to Guide Their Evolution 9-17 (1994) (unpublished manuscript, on file with the authors).

15. COMMISSION ON LEGAL, *supra* note 1, at 2; Mezzullo & Roach, *supra* note 2, at 69.

16. *See generally* COMMISSION ON LEGAL, *supra* note 1.

17. *See, e.g.*, Jan E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818 (1992).

ate restriction on their liberty and autonomy.[18] However, failure to order a full guardianship on the grounds that it is unwarranted, without recourse to a less restrictive alternative, may result in elderly individuals being denied any assistance.[19]

Other commentators appear more concerned that the courts lack sufficient means and determination to oversee and enforce existing guardianships. Pointing to instances of wards left alone and impoverished after dishonest guardians had stripped the assets from their estates,[20] these commentators charge that a lack of judicial monitoring results in substantial risk of abuse and neglect to the wards of these proceedings.[21] Complicating their concerns is the fact that very little information has been available with which to define the nature and scope of guardianships in the United States.[22]

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18. Rein frames the issue in contemporary guardianship law as a fundamental tension between freedom and safety. *Id.* at 1864-67. Some senior citizens, she asserts, "would prefer to give up safety if safety were to require them to relinquish control over their own lives." *Id.* at 1864.

19. Alison P. Barnes, *Florida Guardianship and the Elderly: The Paradoxical Right to Unwanted Assistance*, 40 U. FLA. L. REV. 949, 970 (1988) (discussing traditional "all-or-nothing" guardianship arrangements).

20. For example, a Missoula, Montana, court "had no record of what happened to the $131,000 estate of a 92-year-old man found ill and alone in a cabin in 1985 after a couple described as 'friends' became his guardians." Fred Bayles & Scott McCartney, *Declared 'Legally Dead' by a Troubled System, in* FRED BAYLES & SCOTT MCCARTNEY, GUARDIANSHIP OF THE ELDERLY: AN AILING SYSTEM 1 (Associated Press Special Report, Sept. 1987).

21. The Associated Press report described a "dangerously burdened and troubled system that regularly puts the lives of the elderly in the hands of others with little or no evidence of necessity, and then fails to guard against abuse, theft and neglect." *Id.* at 1. Specifically identified were a lack of resources to adequately monitor the activities of guardians and the financial and personal status of their wards, guardians with little or no training, a lack of awareness about alternatives to guardianships, and a general lack of due process protections for individuals for whom guardianships were proposed. *Id.* at 7-8, 11-12, 14-17, 23; *see also* Lawrence A. Frolik, *Abusive Guardians and the Need for Judicial Supervision*, TR. & EST., July 1991, at 41.

22. Even the most basic nationwide data on guardianships has been lacking. For example, the Associated Press report estimated that 300,000 to 400,000 persons were under guardianship in 1987 based on a random sampling of state court files. Bayles & McCartney, *supra* note 20, at 1. However, no state or federal agency has attempted an independent account of national guardianship statistics. As part of its State Court Statistics Project, the National Center for State Courts compiles data about the quantity and types of civil cases filed in state courts, including guardianship and conservatorship filings. The accuracy of the data, however, depends entirely upon the ability and willingness of the state courts to disclose reliable information. By extrapolating the data provided to the National Center for State Courts, project staff from the *National Probate Court Standards* estimated that in excess of 300,000 guardianship cases are filed each year in the United States. *See infra* text accompanying notes 39-43 and app. A.

In response to these concerns, both the legal community and other organizations serving the elderly have begun to closely examine and to recommend improvements to guardianships and related legal arrangements.[23] Several organizations and individuals have identified problems in guardianship proceedings, such as the evidentiary basis for determining competency[24] and the lack of due process protections for persons subjected to these proceedings.[25] Others object to the manner in which the courts carry out their mandates, particularly focusing on expensive and complicated filing procedures,[26] incomplete judicial investigations,[27] and inadequate judicial oversight of guardianships.[28]

## II. The National Probate Court Standards

Because many guardianship cases are adjudicated in courts exercising probate jurisdiction, the National College of Probate Judges (NCPJ) has been especially concerned that an appropriate response to these criticisms be forthcoming.[29] In 1991, supported by financial assistance from the State Justice Institute and the American College of

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23. *See, e.g.*, AMERICAN ASS'N OF RETIRED PERSONS, REPORT ON STATE SURROGATE FINANCIAL MANAGEMENT STATUTES (1990); AMERICAN ASS'N OF RETIRED PERSONS, TOMORROW'S CHOICES: PLANNING FOR DIFFICULT TIMES (1988); AMERICAN BAR ASS'N, DETERMINING COMPETENCY AND GUARDIANSHIP PROCEEDINGS (1990); COMMISSION ON THE MENTALLY DISABLED & COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASS'N, GUARDIANSHIP: AN AGENDA FOR REFORM (1989); SALLY B. HURME, STEPS TO ENHANCE GUARDIANSHIP MONITORING (1991); NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES (1986).

24. *See, e.g.*, Barnes, *supra* note 19, at 957-67 (discussing the relevant parameters of mental and physical impairment); Forrest Scogin & James Perry, *Guardianship Proceedings with Older Adults: The Role of Functional Assessment and Gerontologists*, 10 LAW & PSYCH. REV. 123, 124-27 (1986) (discussing optimal assessment criteria).

25. *See, e.g.*, Barnes, *supra* note 19, at 974-87; Lu-in Wang et al., *Trends in Guardianship Reform: Roles and Responsibilities of Legal Advocates*, 24 CLEARINGHOUSE REV. 561, 562-64 (1990).

26. Concerns that excessive court costs and legal fees impede disadvantaged persons' access to justice have been raised in proceedings other than guardianship. Such concerns are addressed in a broader context in other judicial performance standards. *See, e.g.*, COMMISSION ON TRIAL COURT PERFORMANCE STANDARDS, NATIONAL CTR. FOR STATE COURTS & THE BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, TRIAL COURT PERFORMANCE STANDARDS (1990).

27. *See infra* notes 44-48 and accompanying text.

28. *See generally* Frolik, *supra* note 21.

29. *See* COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 2-3. The National College of Probate Judges promotes the effective administration of justice in the probate courts of the United States and other state courts exercising jurisdiction over probate and related matters. Established in 1968, the NCPJ is

Trust and Estate Counsel Foundation, the NCPJ and the National Center for State Courts (NCSC) began a two-year project to develop national standards for courts with probate jurisdiction. A fifteen-member Commission on National Probate Court Standards[30] was convened to generate a management and planning tool for self-assessment and self-improvement by probate courts. The purpose of the resulting standards was to "bridge gaps of information, provide organization and direction to the development of these courts, and set forth aspirational goals for them."[31] The resulting document, the *National Probate Court Standards* (*Standards*), was published in February 1994.

The *Standards* consist of three sections: Probate Court Performance, Administrative Policies and Procedures, and Probate Practices and Proceedings. The first section, discussing applicable performance standards for probate courts,[32] noted that "[w]hile there is disagreement as to optimum structure and procedure, there can be considerable agreement on the ends to which these means should be applied."[33] Organized into five categories, these performance standards encompass access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence. These ends represent aspirational objectives to which courts exercising probate jurisdiction are encouraged to strive.

The next section includes standards for administrative policies and procedures in courts exercising probate jurisdiction. This section distinguishes the performance standards outlined in the first section from "the processes, the structures, and the means used by a court exercising probate jurisdiction . . . to accomplish its assigned duties."[34] The standards described in this section recommend that courts exercising probate jurisdiction adopt procedures with which to efficiently and effectively carry out their tasks. Among the standards included

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composed primarily of judges and probate court administrators and includes members from nearly every state.

30. *Id.* at 3. In addition to 10 probate court judges from across the country, the Commission included a probate court administrator, a law professor with extensive expertise in trust and estate law, a representative from the Legal Services Corporation, and two attorneys with considerable practice experience in probate matters.

31. *Id.* at 7.

32. This section drew heavily from existing compilations of performance standards. *See, e.g.*, COMMISSION ON TRIAL COURT PERFORMANCE STANDARDS, *supra* note 26.

33. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 11.

34. *Id.* at 27.

are recommendations that the probate courts develop and make full use of human and technological resources, resource and case-flow management techniques, and, where appropriate, alternative dispute resolution.[35]

The last section of the *Standards* describes procedures that address "the unique nature of the issues that the [probate] court is asked to resolve,"[36] especially those relating to decedents' estates, guardianships, and conservatorships.[37] These standards focus on specific ways in which courts handle these matters, including notice, court appointments, monitoring and accountings, fees, and interstate cooperation among courts. The eighteen standards on guardianships and the nineteen standards on conservatorships comprise the two largest sections of the *Standards*.

## III. Establishing the Scope of Guardianship Usage in the United States[38]

A pervasive problem for organizations examining the use of guardianship for the elderly has been the lack of accurate or reliable information concerning the number of persons actually under the protection of a guardian in the United States. Much of the criticism of guardianship proceedings stems from a few highly publicized, notorious, and particularly heinous examples of guardians' abuse and neglect of wards. Whether these examples constitute the exceptions or the rule of how guardianships actually function was unknown, however. To begin to address this problem, staff members from the National Probate Court Standards Project compiled statistical information about the number of guardianship cases filed in thirty-five states and the District of Columbia from 1990 through 1992.[39]

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35. *Id.* at 27-40.
36. *Id.* at 41.
37. Because of the lack of uniformity among the states with respect to jurisdiction over matters tangentially related to probate (e.g., adoptions, delinquency, child abuse and neglect, name-change applications, marriage and divorce, inheritance and estate taxes, and involuntary civil commitment), the *Standards* make only passing reference to these practices within the scope of the last section.
38. Portions of this section were derived from Ingo Keilitz et al., The Structure, Organization, and Caseloads of Probate Courts and Divisions of Courts in the United States (unpublished manuscript, on file at the National Center for State Courts, Williamsburg, Va.).
39. The data were gleaned from reports submitted to the State Courts Statistics Project, an annual undertaking of the National Center for State Courts and the Conference of State Court Administrators. Although all states contribute informa-

The number of guardianship cases filed varies widely among the states, both in terms of absolute numbers and relative to the state's population. The total number of filings was 86,622 for twenty-two states and the District of Columbia in 1990; 114,882 for thirty-two states and the District of Columbia in 1991; and 133,005 for thirty-four states and the District of Columbia in 1992. Taking into account only those states reporting filings for all three years (twenty-one states and the District of Columbia),[40] the number of filings increased twenty-five percent between 1990 and 1992. Seventeen states and the District of Columbia showed an increase in the number of filings during this period, with Alaska showing the largest percentage increase.[41] The range of the average number of filings for the three-year period varies between a low of 122 in the District of Columbia to a high of 22,675 in Michigan. When adjusted for population, the average number of guardianship filings per 100,000 ranged from a low of 10.9 filings in Virginia to a high of 241.8 in Michigan. Based on the 1992 figures provided by the state courts, the total number of guardianship cases filed in state courts exceeds 300,000 annually, with an average per capita filing estimated at 121.3 per 100,000 of U.S. population.[42]

Guardianship cases appear to be highly concentrated in particular states. The filings in Florida, Indiana, Michigan, New York, and Ohio—the five states with the largest guardianship caseloads—account for more than sixty-four percent of the total for 1990, more than fifty-four percent in 1991, and more than sixty-eight percent in 1992. However, all five are among the ten most populous states in the country. When adjusted for population, the five states with the highest average filing rates per 100,000 were: Michigan (241.8), Vermont (175.4), Connecticut (142.8), Arkansas (119.3), and Indiana (115.2). The five states with the lowest average filing rates, when adjusted for population, were: Virginia (10.9), the District of Columbia (20.5), Colorado (36.6), Washington (49.7), and Hawaii (54.6). These results may

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tion on court filings to this project, only 35 states and the District of Columbia indicate how many of these filings are for guardianship. *See infra* app. A.

40. Montana provided data on guardianship filings in 1990, but did not submit this information in subsequent years.

41. Alaska's reported guardianship filings increased almost 88% during this period.

42. These figures are based on U.S. population estimates for 1992, BUREAU OF THE CENSUS, *supra* note 2, at 28 tbl. 31 (Resident Population—States: 1970 to 1992), and were derived by calculating the per capita number of guardianship cases filed in the state courts reporting statistics and then weighing the resulting figures by the respective state's population with respect to the national population.

be partially explained by the fact that the states with the highest per capita number of guardianship filings also had an above-average proportion of persons over age eighty-five. Similarly, with the exception of the District of Columbia, the states with the lowest guardianship filing rates had a below-average proportion of persons over age eighty-five.[43] In other words, not surprisingly, states with a comparatively large proportion of elderly persons in their population have higher numbers of guardianship cases filed.

## IV. Procedural Protections for Persons Facing Guardianship Proceedings

In a yearlong investigation, the Associated Press (AP) examined courts with probate jurisdiction in all fifty states and the District of Columbia. Among the most significant problems identified by the AP was the lack of procedural protections available for respondents in guardianship proceedings.[44] In particular, the evidentiary basis for determining incapacity was described as exceedingly vague.[45] After examining 2200 guardianship case files, reporters found that the evidence introduced to prove incapacity was often no more than a one-sentence conclusion by a physician that the person was "unable to care for self or property."[46] Another common method of determining incapacity was an evaluation by a court examiner based on combinations of a brief conversation with the proposed ward, the physical appearance of the ward, and the condition of the ward's home at the time of the interview.[47] Such casual approaches to determining incapacity, critics argue, fail to account for either the degree of functional impairment suffered by the proposed ward or the possible temporary nature of his or her impairment.[48]

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43. BUREAU OF THE CENSUS, *supra* note 2, at 33 tbl. 35 (Resident Population, by Age and State: 1992).

44. Fred Bayles & Scott McCartney, *Declared 'Legally Dead' by a Troubled System, in* BAYLES & MCCARTNEY, *supra* note 20, at 1.

45. Fred Bayles & Scott McCartney, *Diagnosing Incompetence Is Tricky, Ill-Defined Job, in* BAYLES & MCCARTNEY, *supra* note 20, at 9.

46. *Id.*

47. *Id.*

48. Barnes, *supra* note 19, at 957-67. For example, reactions to medications often cause confusion or incoherence in the persons taking them. These symptoms are sometimes cited as evidence of incapacity, despite the fact that the condition is usually reversible if correctly diagnosed and treated. Bayles & McCartney, *supra* note 44, at 9.

In addressing the problem of determining the person's incapacity, the *Standards* support "an appraisal of the *functional* limitations of the respondent" as the relevant criteria for adjudging incapacity.[49] The *Standards* specifically observe that "incapacity is a multifaceted issue" and suggest that the court consider evidence from professionals other than physicians (e.g., nurses, psychologists, social workers, physical and occupational therapists, community mental health workers) who may possess special insights into whether the respondent is incapacitated.[50] Finally, if the respondent to a guardianship petition objects to written documents containing expert opinions concerning his or her purported incapacity, the *Standards* endorse mandating the expert's appearance at the hearing and availability for cross-examination.[51] If the expert is unavailable, the *Standards* note that "traditional rules of evidence may limit the ability of the fact finder to rely on the written report."[52]

In addition to the evidentiary basis for determining incapacity, commentators found numerous instances in which due process protections were neglected. The AP report observed that many "senior citizens facing guardianship are often denied courtroom rights considered essential to criminal defendants and those being committed to mental hospitals."[53] For example, in many states, notice of pending guardianship hearings was inadequate or nonexistent.[54] Moreover, in its survey of guardianship case files, the AP report noted that "44 percent . . . were not represented by attorneys [and] almost half did not attend their own hearings. . . . [M]ore than one in four cases had no

49. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 66 (emphasis added). The *Standards* recommend a relatively detailed examination of the respondent's condition which "avoid[s] the unfortunate practice of professionals and expert examiners providing cursory, conclusory evaluations to the court." *Id.* at 67.

50. *Id.* at 66; *see also* Thomas L. Hafemeister & Bruce D. Sales, *Interdisciplinary Evaluations for Guardianships and Conservatorships*, 8 LAW & HUMAN BEHAV. 335 (1984). *But see* Scogin & Perry, *supra* note 24 (questioning the feasibility of requiring expert testimony from multiple professionals regarding respondents' functional competence).

51. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 66.

52. *Id.*

53. Fred Bayles & Scott McCartney, *Many Elderly Never Get Their Day in Court*, *in* BAYLES & MCCARTNEY, *supra* note 20, at 7.

54. *Id.* Bayles and McCartney reported that guardianship petitions in many states were printed in "hard-to-read legalese" and contained little or no information about the implications of guardianships or the respondent's rights. *Id.*

hearings. And in [some] places, a proposed ward may not even get a judge—a court clerk conducts hearings and issues the ruling."[55]

The *Standards* make several recommendations to address these due process deficiencies. First, the *Standards* emphasize the importance of timely written notice of the filing of a guardianship petition and of the scheduling of proceedings "in plain language and in large type."[56] In addition, the court should ensure that when notice is delivered, or shortly thereafter, a court official or court visitor explains the notice and petition provisions in a manner the respondent is likely to understand.[57]

The *Standards* also recognize the importance of legal representation for persons facing guardianship proceedings and specifically advocate court appointment of counsel under certain circumstances.[58] They note that attorneys are often better equipped to safeguard the rights and interests of respondents than friends and family members, notwithstanding the latter's good intentions.[59] Consequently, the additional expense incurred for legal representation "is typically a *necessary* expense."[60]

Notwithstanding the importance of legal representation, the *Standards* recognize several instances in which court appointment of counsel would be either inappropriate or ineffective.[61] These occa-

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55. *Id.* Representation by counsel did not guarantee that the respondent's due process rights were always respected, however. Rather, the AP report found that attorneys often played a dual role as members of the examining committee called upon to determine competency. If convinced of the respondent's incompetence, the attorney could waive the respondent's rights to a hearing. *Id.* at 8.

56. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 63.

57. *Id.* In particular, the court official or court visitor should be specially trained to communicate and interact with elderly and disabled respondents. *Id.*

58. *Id.* at 59-61.

59. *Id.* at 60.

60. *Id.* at 61 (emphasis added). In cases where the petition for guardianship has not been filed in good faith, the court may charge the respondent's attorneys' fees to the petitioner. *Id.* Some state legislation also provides this option. *See, e.g.*, N.Y. MENTAL HYG. LAW § 81.10(f) (Consol. Supp. 1992).

61. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 60. Nevertheless, some reformers argue that court-appointed legal representation always should be provided for persons facing guardianship proceedings. *See, e.g.*, Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUMAN BEHAV. 39 (1992); *Standards for the Administration of Guardianship and Conservatorship Proceedings Are Issued*, NSCLC WASH. WKLY. (Nat'l Senior Citizens L. Ctr., Washington, D.C.), Feb. 11, 1994, at 20 ("Not all of the recommendations [in the *National Probate Court Standards*] are as far reaching as advocates for the respondent would like . . . . [The Standard on appointment of counsel] does not require the appointment of counsel in every case.").

sions include instances where the respondent has secured his or her own counsel or when family members, including the respondent, are working together in good faith to procure the guardianship.[62] Where the respondent is represented by counsel, however, the attorney is expected to be an advocate for the respondent and to advance the respondent's wishes and interests.[63]

To better protect the rights of the respondent, the *Standards* also endorse the respondent's right to attend and participate in all stages of the guardianship proceedings, including the hearing.[64] Where necessary, the court should make reasonable accommodations, such as moving the proceedings to an accessible location, to ensure the respondent's attendance and participation.[65]

## V. Limited Guardianships and Alternatives to Guardianships

Other major problems that the Associated Press reported were the extensive and unwarranted restrictions placed on the rights of persons under guardianship protection and the difficulty wards encountered while trying to overturn or modify guardianship provisions. In one case, a Florida woman was placed under guardianship protection after a traffic accident left her in a coma.[66] Although she recovered her mental capabilities within two months of the accident, an additional eight months elapsed before she was able to overturn the guardianship and regain her full rights.[67] In another case, a Kansas woman placed under guardianship protection following a stroke wanted to return home after her full recovery.[68] Instead, her guardian had her

62. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 60.

63. *Id.* at 61. Even when the respondent is currently unable to make his or her preferences known (e.g., where the respondent is comatose or otherwise incapacitated), the attorney should rely on prior statements or written advance directives as evidence of the respondent's wishes. *Id.* at 60.

64. *Id.* at 65.

65. *Id.* The respondent's participation in the proceedings includes the right to "present evidence, call witnesses, cross-examine witnesses including any court-appointed examiner or visitor . . . ." *Id.*

66. Dan Erwell, *Woman Fights Back from Coma, Then Against Guardianship System, in* BAYLES & MCCARTNEY, *supra* note 20, at 10.

67. *Id.* During the period that she was under protection, her guardian put her house up for sale and sold most of her furniture. In addition, she lost her job, her driver's license, and her right to vote. She even had difficulty drawing her money from bank accounts after she recovered. *Id.*

68. Fred Bayles & Scott McCartney, *Lack of Safeguards Leaves Elderly at Risk, in* BAYLES & MCCARTNEY, *supra* note 20, at 11-12.

sedated and placed in a nursing home.[69] In both cases, appropriate monitoring and restrictions on the duration of the guardianship and the authority of the guardians over their wards might have prevented these abuses.

The *Standards* address these issues in their discussions of temporary guardianship and less intrusive alternatives to guardianship.[70] The *Standards* specifically recognize that the imposition of a temporary guardianship—even when warranted under emergency circumstances—has "the potential to produce significant or irreparable harm to the interests of the respondent."[71] To prevent abuse, they recommend that probate courts award temporary guardianships only under very specific circumstances and that the duration and scope of the guardianship extend only as far as necessary to meet the requirements of the emergency.[72] In particular, the court should only consider an ex parte petition for an emergency or temporary guardianship if it is accompanied by a petition for a permanent guardianship.[73] They also specify that only under the most extraordinary circumstances should a temporary guardianship extend for more than thirty days.[74]

In addition to limiting the duration of a temporary guardianship order, the court should consider whether an alternative to guardianship is more appropriate under the circumstances.[75] For example, in a medical emergency, the court may issue a protective order permitting appropriate medical care but deferring a decision about imposing a guardianship for future proceedings.[76]

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69. *Id.*

70. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 61-63, 67-68.

71. *Id.* at 61.

72. *Id.* at 61-63.

73. *Id.* at 61. Specifically, the *Standards* state:

> By requiring the showing of an emergency and the simultaneous filing of a petition for a permanent guardianship, the court will confirm the necessity for the temporary guardianship and ensure that it will not extend indefinitely. When the temporary guardianship is established, the date for the hearing on the proposed permanent guardianship should be scheduled. The order establishing the temporary guardianship should provide that it will lapse automatically upon that hearing date.

*Id.* at 62.

74. *Id.*

75. *Id.*

76. *Id.* The *Standards* explain that "[t]he 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." *Id.*

Another alternative that the court may consider is limiting the guardian's powers over a ward to specifically delineated duties and responsibilities.[77] By restricting the authority of the guardian to the minimum required for the situation, the respondent's self-reliance, autonomy, and independence will be promoted, perhaps contributing to the respondent's ability to reestablish his or her functional capacity.[78] In addition, specifically enumerating the duties and powers of the guardian provides a guide for the court and others in evaluating and monitoring the performance of the guardian, as well as a road map for the guardian to use in determining what the guardian can or cannot do in carrying out assigned responsibilities.[79]

In determining the appropriate scope of a proposed guardianship, the court also should consider the preferences of the ward[80] and the availability of social service agencies to support limited guardianships or alternatives to guardianship.[81] The *Standards* recommend that courts defer to any appropriate alternatives previously established or proposed by the ward (e.g., in a durable health care power of attorney).[82] Furthermore, the *Standards* add that "[e]ven if the respondent [to a guardianship proceeding] lacks current capacity to make decisions regarding his or her personal care, the court should solicit the respondent's opinions and preferences and should give these appropriate consideration where they are not unreasonable."[83]

Finally, the *Standards* suggest that courts make greater use of court visitors,[84] thus promoting two goals: better protection of the proposed ward[85] and better conservation of judicial resources.[86] With

77. *Id.* at 67-68, 70-71. Even absent statutory authority to do so, the court may create a limited guardianship through its inherent or equity powers. *Id.* at 67; *see also* UNIF. PROB. CODE § 5-306(c), 8 U.L.A. 468 (1991) ("The Court . . . may limit the powers of a guardian . . . and thereby create a limited guardianship.").

78. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 67.

79. *Id.* at 70.

80. *Id.* at 67.

81. *Id.* at 56.

82. *Id.* at 56, 67.

83. *Id.* at 67.

84. The *Standards* describe the court visitor as one who "serves as the eyes and ears of the court, making an independent assessment of the need for a guardianship." *Id.* at 59; *see also* UNIF. PROB. CODE § 5-103(21), 8 U.L.A. 438 (1983) (" 'Visitor' means a person appointed in a guardianship or protective proceeding who is trained in law, nursing, or social work, is an officer, employee, or special appointee of the Court, and has no personal interest in the proceeding.").

85. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 58-59. The specific duties of the court visitor may vary according to the jurisdiction, particularly regarding the court visitor's responsibility for representing or speaking on behalf of the proposed ward. *Id.* at 58 & n.68.

respect to the first goal, the court visitor typically is responsible for explaining to the proposed ward the nature and purpose of the guardianship, as well as his or her legal rights during the proceedings. Such information will help ensure that the respondent's procedural rights are not violated. In addition, the *Standards* encourage the court visitor to conduct independent interviews with the respondent, the petitioner, and the proposed guardian, as well as with any professionals who have conducted evaluations of the respondent.[87] As a result, the court visitor is strategically placed to learn much about a given case. The court visitor's findings and recommendations can assist the court in determining whether a need for a guardianship exists and, if so, the appropriate scope of the guardianship and the proposed guardian's authority.[88]

Such independent evaluations will not only protect the proposed ward against inappropriate intrusions on his or her autonomy, they will also help the court conserve its own resources. Using the court visitor's evaluation and recommendations during a preliminary screening process, for example, can help divert inappropriate guardianship cases toward those services and treatment alternatives most likely to yield desirable results for the proposed ward, thus preventing unnecessary expenditures of judicial time and resources.[89]

## VI. Court Procedures to Monitor Guardians' Activities

In addition to concerns about the inappropriate imposition of guardianships, some commentators have argued that courts should engage in greater scrutiny of guardians' qualifications, training, and ongoing activities.[90] Of particular concern are public agencies and, more recently, entrepreneurial ventures that offer guardianship services.[91] To address these concerns, the *Standards* recommend that

86. Where available, the *Standards* also encourage the use of volunteer court visitors, such as specially trained Association for Retarded Citizens and American Association of Retired Persons volunteers to reduce the costs associated with independent judicial investigations. *Id.* at 59.

87. *Id.*

88. *Id.*

89. *Id.* at 55-56.

90. *See* Frolik, *supra* note 21, at 42-44.

91. *See* Fred Bayles & Scott McCartney, *Guardianship Entrepreneurs Entering the Field, in* BAYLES & MCCARTNEY, *supra* note 20, at 19; Fred Bayles & Scott McCartney, *Public Guardians Struggle to Keep Pace, in* BAYLES & MCCARTNEY, *supra* note 20, at 14; Sharon Cohen, *Public Guardian Patrick Murphy: Scourge of the Bureaucrats,*

courts carefully review the qualifications of proposed guardians[92] and provide appropriate training and orientation to newly appointed guardians to ensure that these individuals fully understand and are capable of carrying out their responsibilities.[93] In addition to ensuring that guardians are competent to meet the existing needs of their wards, the *Standards* exhort courts to ensure that appointed guardians are capable of handling responsibilities that may arise in the future.[94]

Among the duties frequently required of guardians is the filing of periodic reports with the court about the ward's condition.[95] The *Standards* recommend that these reports include a comprehensive description of the ward's physical condition, the services and care provided to the ward, significant actions taken by the guardian on behalf of the ward, expenses incurred in providing these services, and any major anticipated changes in the ward's treatment and care.[96] This information would keep the court fully apprised of the ward's condition. In addition, the *Standards* encourage courts to require guardians to file an initial guardianship plan to inform the court of how the guardian intends to carry out the assigned duties and responsibilities.[97] This initial plan also would encourage guardians to effectively plan how to meet the needs of the wards and to delineate the steps they should undertake to carry out their plans from the beginning.[98]

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*in* BAYLES & MCCARTNEY, *supra* note 20, at 17; George Esper, *Veterans Administration Watches over 124,000 Wards*, *in* BAYLES & MCCARTNEY, *supra* note 20, at 16.

92. In evaluating the ability of a proposed guardian to care for a ward, the *Standards* urge the court to consider "the training, education, and experience [including] . . . such factors as familiarity with health care decision making, residential placements, and social services benefits." COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 68.

93. *Id.* at 71-72.

94. *Id.* at 68. The National Guardianship Association and a number of state courts have developed training materials to inform newly appointed guardians of their duties toward the ward. *See, e.g.*, NATIONAL GUARDIANSHIP ASS'N, ETHICS AND STANDARDS FOR GUARDIANS (1991); SERVING AS GUARDIAN AND CONSERVATOR (Lang Telecommunications 1989) (training video produced for the Michigan Judicial Council); VIDEO IMAGINATION TELEVISION, INSTRUCTIONS FOR GUARDIANS AND CONSERVATORS (1990) (training video produced for the Pima County (Arizona) Superior Court).

95. The time frame permitted for filing these reports may vary according to the jurisdiction. *See* COMMISSION ON NAT'L PROBATE STANDARDS, *supra* note 7, at 72. The *Standards* recommend that an initial report be filed with the court within 60 days of the imposition of the guardianship and that annual reports be required thereafter for the duration of the guardianship. *Id.* The required content of these reports varies somewhat for conservatorships. *Id.* at 96-98.

96. *Id.* at 72-73.

97. *Id.* at 73.

98. *Id.*

As important as the requirement that guardians file reports with the courts is the need for courts to promptly review these reports. As one commentator observed, "[i]f an annual guardian report is merely going to be placed in a file, unread or at most given a cursory review, it is nothing but a palliative that squanders the guardian's time and energy."[99] Consequently, the *Standards* recommend "[p]rompt review of the guardian's report [to] enable the court to take early action to correct abuses made apparent by the reports [and] to take early action in issuing a show cause order if the guardian has violated a provision of the original order."[100] Additionally, the court's reporting procedures should include a mechanism for alerting the court when reporting deadlines occur and for providing prompt notice to guardians who fail to meet these deadlines.[101]

Finally, commentators have suggested that courts periodically reevaluate the necessity for continuing a guardianship.[102] Although most jurisdictions permit the ward or other interested persons to petition for a termination or change in the status of a guardianship, the *Standards* also encourage courts to establish procedures for sua sponte examinations of the need to continue the guardianship.[103] In addition to the guardian's annual report, the court may employ a court visitor to periodically investigate the ward's circumstances to determine if either a less intrusive alternative or termination of the guardianship might be more appropriate.[104] Moreover, the *Standards* note that "the court's review of the continuing need for a guardianship should not be limited by its established review date" but may be initiated "at any other time at [the court's] own discretion."[105]

## VII. Summary

The impact of America's changing demographics on the judicial system is reflected in calls for changes to guardianship and conserva-

99. Frolik, *supra* note 21, at 44.
100. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 72-73.
101. *Id.* The failure of a Virginia court to demand timely explanations for guardians' reporting delinquencies was cited as one of the contributing factors to that state's failure to prevent an attorney from embezzling nearly $42 million from his clients' accounts. DALE EVANS & KENNETH ARMSTRONG, SEE NO EVIL, DAILY PRESS (Newport News, Va.), Nov. 15-19, 1992, Special Report.
102. Frolik, *supra* note 21, at 42-44.
103. COMMISSION ON NAT'L PROBATE COURT STANDARDS, *supra* note 7, at 74-75.
104. *Id.*
105. *Id.*

torship procedures to better serve America's elderly population. In addition to changes in substantive law, the courts continue to weigh procedural reforms designed to ensure that the elderly receive services they require while maximizing their personal freedom and autonomy. Moreover, increasing public attention to the responsible use of public funds requires that courts achieve these goals while simultaneously ensuring the proper use of judicial resources. The *National Probate Court Standards* represent an attempt to set forth the appropriate nature and scope of guardianship proceedings and the role of the courts within those proceedings.

**APPENDIX A**
**1990-1992 Guardianship Filings***

| State | Total Number of Guardian Filings (1990) | Number of Filings per 100,000 (1990)† | Total Number of Guardian Filings (1991) | Number of Filings per 100,000 (1991)† | Total Number of Guardian Filings (1992) | Number of Filings per 100,000 (1992)† | Percent Change Total Filings (1990-1992)‡ |
|---|---|---|---|---|---|---|---|
| Alaska | 284 | 51.6 | 324 | 56.8 | 533 | 90.8 | 87.68 |
| Arizona | | | | | 4008 | 104.6 | |
| Arkansas | 2871 | 122.1 | 2726 | 114.9 | 2897 | 120.8 | 9.06 |
| Colorado | 1169 | 35.5 | 1149 | 34.0 | 1403 | 40.4 | 20.02 |
| Connecticut | 4313 | 131.2 | 4808 | 146.1 | 4961 | 151.2 | 15.02 |
| Delaware | 376 | 74.3 | 395 | 76.3 | 599 | 86.9 | 59.31 |
| D.C. | 106 | 17.5 | 97 | 16.2 | 164 | 27.8 | 54.72 |
| Florida | 7641 | 59.1 | 8125 | 61.2 | 7998 | 59.3 | 4.67 |
| Georgia | 5762 | 88.9 | 6816 | 102.9 | 5444 | 80.6 | -5.52 |
| Hawaii | 474 | 40.2 | 521 | 45.9 | 903 | 77.8 | 90.51 |
| Idaho | 810 | 80.5 | 847 | 81.5 | 813 | 76.2 | 0.37 |
| Indiana | 6090 | 109.8 | 6655 | 118.6 | 6644 | 117.3 | 9.10 |
| Iowa | | | 4199 | 150.2 | 3421 | 121.7 | -18.53 |
| Kansas | | | 2410 | 96.6 | 1225 | 48.6 | -49.17 |
| Maine | | | 882 | 71.4 | 2168 | 175.5 | 145.80 |
| Massachusetts | 5098 | 84.7 | 4736 | 79.0 | 5318 | 88.7 | 4.32 |
| Michigan | 18,870 | 203.0 | 20,499 | 218.8 | 28,656 | 303.7 | 51.86 |
| Minnesota | | | 2861 | 64.6 | 2471 | 55.2 | -13.63 |
| Missouri | 2841 | 55.5 | | | 4194 | 80.8 | 47.62 |
| Montana | | | 705 | 87.3 | | | |
| Nebraska | | | 2033 | 127.6 | 2028 | 126.3 | -0.25 |
| Nevada | 837 | 69.6 | 820 | 63.9 | 975 | 73.5 | 16.49 |
| New Hampshire | 916 | 82.6 | 1123 | 101.6 | 1260 | 113.4 | 37.55 |
| New York | 15,430 | 85.8 | 17,876 | 99.0 | 18,192 | 100.4 | 17.90 |
| North Dakota | 504 | 78.9 | 593 | 93.4 | 528 | 83.0 | 4.76 |
| Ohio | 7271 | 67.0 | 9096 | 83.2 | 10,121 | 91.9 | 39.20 |
| Oklahoma | | | 2338 | 73.6 | 2072 | 64.5 | -11.38 |
| Oregon | | | 2529 | 86.6 | 2533 | 85.1 | 0.16 |
| South Carolina | | | 2800 | 78.7 | 2412 | 66.9 | -13.86 |
| South Dakota | 708 | 101.7 | 755 | 107.4 | 679 | 95.5 | -4.10 |
| Tennessee | | | 2074 | 41.9 | 2671 | 53.2 | 28.78 |
| Utah | | | | | 1134 | 62.5 | |
| Vermont | 968 | 172.0 | 1005 | 177.3 | 1008 | 176.8 | 4.13 |
| Virginia | 651 | 10.5 | 762 | 12.1 | 645 | 10.1 | -0.92 |
| Washington | 2632 | 54.1 | 2323 | 46.3 | 2493 | 48.6 | -5.28 |
| Wyoming | | | | | 434 | 93.1 | |

* These figures are based on statistics reported by the state courts in conjunction with the National Center for State Courts' Court Statistics Project. The authors make no representations as to the accuracy or reliability of the data reported by the state courts.
† Calculations based on population figures are from the 1990 census, taken from the 1992 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY AND COUNTY DATA BOOK (Courtnay M. Slater & George E. Hall eds.) (1992).
‡ For states in which the total number of 1990 guardianship filings was unavailable, the percent change reflects the difference between the 1991 and 1992 figures.

# NATIONAL PROBATE COURT STANDARDS


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# TASK FORCE ON REVISION OF THE NATIONAL PROBATE COURT STANDARDS

**MARY JOY QUINN**, *President, National College of Probate Judges (2010-2011), Director (ret.), Probate, Superior Court, San Francisco, CA*

***HON.*** **TAMARA CURRY**, *Executive Committee, National College of Probate Judges (2010-2012), Associate Judge, Probate Court, Charleston, SC*

**ANNE MEISTER**, *Register of Wills, Probate Division, Superior Court, Washington, DC*

***HON.*** **WILLIAM SELF**, *President, National College of Probate Judges (2011-2012), Judge, Probate Court, Macon, GA*

***HON.*** **JEAN STEWART**, *Secretary-Treasurer, National College of Probate Judges (2010-2012), Judge (ret.), Probate Court, Denver, CO*

***HON.*** **MIKE WOOD**, *President, National College of Probate Judges (2012-2013), Judge, Probate Court No. 2, Houston, TX*

**KEVIN BOWLING**, *President, National Association for Court Management (2011-2012), Court Administrator, 20th Judicial Circuit Court, Ottawa County, MI*

**JUDE DEL PREORE**, *President, National Association for Court Management (2010-2011), Trial Court Administrator, Superior Court, Mount Holly, NJ*

***PROF.*** **MARY RADFORD**, *President, American College of Trust and Estate Counsel (2011-2012), Georgia State University College of Law, Atlanta, GA*

***ROBERT SACKS***, *Esq., American Bar Association Section on Real Property, Trust and Estate Law, Los Angeles, CA,*

***RICHARD VAN DUIZEND***, *Standards Reporter, National Center for State Courts*

***BRENDA K. UEKERT, Ph.D.***, *Standards Research Director, National Center for State Courts*

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# NATIONAL PROBATE COURT STANDARDS

*National College of Probate Court Judges*

***Richard Van Duizend***
*Reporter*

***Brenda K. Uekert***
*Research Director*

**Borchard Foundation**
*Center on Law & Aging*

**State Justice Institute**

ACTEC FOUNDATION

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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.

300 Newport Ave.
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


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# Tab 02: Screening the Case

UNC SCHOOL OF GOVERNMENT

SOCIAL SERVICES LAW BULLETIN NO. 46 | NOVEMBER 2016

# New Rules for Adult Guardianship Proceedings: Applying the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (G.S. Chapter 35B) in North Carolina

**Meredith Smith**

## I. Introduction

Dottie is an elderly widow who has lived her entire life in Iowa. She has two adult children, Eddie, who lives nearby, and Linda, who lives in North Carolina. Linda decides to take Dottie to North Carolina and place her in a nursing home. Linda then files a petition with a court in North Carolina to have her mother adjudicated incompetent and to be appointed her mother's *general guardian*.[1] Eddie files a similar petition with a court in Iowa. Which state's court has jurisdiction to enter an order regarding Dottie's competency and to appoint a guardian—North Carolina's or Iowa's?

Bob lives in North Carolina. A few years ago, a North Carolina court adjudicated Bob incompetent and appointed a county department of social services (DSS) to serve as Bob's *guardian of the person*[2] and a private attorney as his *guardian of the estate*.[3] Bob recently moved to New York to live with his daughter and her family. While Bob's daughter was unable to serve as his guardian at the time of his adjudication, DSS now feels that Bob's best interests will be served by living in New York with his daughter as his general guardian. How does DSS go about seeking transfer of the case from North Carolina to New York?

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Meredith Smith is a School of Government faculty member specializing in public law and government.

1. North Carolina law defines "general guardian" as "a guardian of both the estate and the person." Chapter 35A, Section 1202(7) of the North Carolina General Statutes (hereinafter G.S.).

2. A "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." G.S. 35A-1202(10). "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." *Id.* § 1202(15).

3. A "guardian of the estate" means "a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward." G.S. 35A-1202(9).

Cindy is the guardian of the person for her 22-year-old daughter, Mary, who is currently undergoing treatment for substance abuse and bipolar disorder. Cindy and Mary live in Virginia, where Mary's guardianship case is being administered. Cindy wants Mary to get in-patient treatment at UNC-Chapel Hill. However, the UNC facility will not accept Mary as a patient without proof of Cindy's authorization to act on Mary's behalf in North Carolina. What could Cindy do to obtain such authorization?

On June 30, 2016, North Carolina Governor Pat McCrory signed Session Law (hereinafter S.L.) 2016-72, also known as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (or UAGPPJA, pronounced, familiarly, as "you-ah-gap-jah"), to provide answers to questions like these.[4] UAGPPJA is not intended to change the established system for adjudicating an adult incompetent and appointing a guardian under Chapter 35A of the North Carolina General Statutes (hereinafter G.S.).[5] S.L. 2016-72 created a new G.S. Chapter 35B that is intended to resolve jurisdictional issues in incompetency and guardianship proceedings that involve or potentially involve North Carolina and another state[6] or foreign country.[7] It is modeled after, and has similarities to, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[8]

## A. The Purposes of UAGPPJA

Below are the four main purposes of UAGPPJA.

1. **Initial Filing**. Prevent jurisdictional disputes between the courts of different states over the initial filing of an incompetency and guardianship proceeding.
2. **Transfer**. Establish a procedure for transferring adult guardianship cases from one state to another.

4. S.L. 2016-72.

5. G.S. 35B-1(c). Under North Carolina law, adjudication of incompetency and appointment of a guardian are two separate proceedings resulting in two separate orders. The incompetency proceeding is initiated by a petition filed by a petitioner against a respondent, who is the alleged incompetent person. *Id.* § 35A-1105. The proceeding is treated as a special proceeding. *In re* Winstead, 189 N.C. App. 145, 146 (2008). At the hearing on the petition, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that the respondent is incompetent. *Id.* § 35A-1112. In contrast, the guardianship proceeding is initiated by an application and is in the nature of an estate matter. *Winstead*, 189 N.C. App. at 151. During the guardianship proceeding, the court's role shifts to a more protective/oversight posture that considers the respondent's best interests. The court has the duty to inquire and to receive evidence necessary to determine the needs and best interests of the respondent. *Id.* § 35A-1212(a).

6. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States. G.S. 35B-2(18).

7. G.S. 35B-1(b); *id.* § 35B-4 (providing that a North Carolina court may treat a foreign country as if it were a state for purposes of applying certain sections of UAGPPJA, including those that cover the initial filing and transfer of guardianship cases but not including the law's registration provisions).

8. A version of the UCCJEA was adopted in North Carolina in 1999 as G.S. Chapter 50A.

3. **Registration**. Provide a uniform national system for registration and enforcement of out-of-state adult guardianship orders.
4. **Cooperation among courts in different states**.[9] Facilitate cooperation and communication between courts in different states.[10]

UAGPPJA is a product of the Uniform Law Commission and has been adopted by all but a handful of states.[11] It is effective, as adopted in North Carolina, on December 1, 2016.[12] The provisions related to determining jurisdiction for an initial filing apply to all new incompetency and adult guardianship proceedings **filed on or after that date**.[13] However, the provisions of UAGPPJA applicable to transfer and registration of orders apply to all cases in North Carolina as of December 1, 2016, **regardless of when they were filed**.[14]

UAGPPJA does not apply to minor guardianships because those are already covered, in part, under North Carolina's version of the UCCJEA.[15] Similarly, UAGPPJA does not apply to adult protective services proceedings pertaining to disabled or older adults brought under G.S. Chapter 108A or to domestic violence and civil no-contact proceedings under G.S. Chapters 50B and 50C.[16]

The N.C. Administrative Office of the Courts (AOC), through the Estates and Special Proceedings Forms Subcommittee, revised two incompetency forms in response to this new law. Table 1, below, lists the revised forms, available as of December 1, 2016.

9. This bulletin covers the three main areas of UAGPPJA: initial filings, transfer, and registration. It does not address in any great detail provisions related to communication and cooperation between courts. Those provisions are found in G.S. 35B-5, -6, and -7.

10. G.S. 35B-1(d).

11. The Uniform Law Commission maintains a website with an up-to-date list of states that have enacted UAGPPJA. *See* Uniform Law Commission, *Adult Guardianship and Protective Proceedings Jurisdiction Act*, www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act (last visited Oct. 31, 2016). As of the date of this bulletin, Florida, Kansas, Michigan, Texas, Wisconsin, and the U.S. Virgin Islands have not adopted UAGPPJA. The bulletin specifically focuses on those situations where the states involved in the initial filing, transfer, and registration analysis have each adopted UAGPPJA. UAGPPJA as adopted in G.S. Chapter 35B does not limit its application to those instances when both states have adopted the uniform law. When dealing with a non-UAGPPJA state, a North Carolina court applies the relevant provisions as they relate to this state's actions. However, because the non-UAGPPJA state may have a different process, it requires a case-by-case analysis of how the two sets of laws fit together to determine which court has jurisdiction to act, whether the case may be transferred, and whether registration is possible.

12. S.L. 2016-72, § 4.

13. *Id.*

14. *Id.*

15. G.S. 35B-3(1). *See also* G.S. Chapter 50A. The UCCJEA applies to "child custody proceedings," which include proceedings where legal custody, physical custody, or visitation of the child is an issue. G.S. 50A-102(4). This likely includes minor guardianship proceedings under Article 5 of G.S. Chapter 35A and, specifically, guardianship of the person or general guardianship proceedings.

16. G.S. 35B-3(2) and (3).

**Table 1. Incompetency and Guardianship Forms Revised as a Result of UAGPPJA**

| Form Number | Form Name |
|---|---|
| SP-200 | Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian |
| SP-202 | Order on Petition for Adjudication of Incompetence |

## II. New Terminology

One key difference between UAGPPJA as adopted in North Carolina under G.S. Chapter 35B and existing G.S. Chapter 35A is the terminology used in the two chapters. To create a common language among states that enact UAGPPJA, G.S. Chapter 35B retains the terminology adopted by the Uniform Law Commissioners and refers to two types of proceedings:

1. guardianship proceedings and
2. protective proceedings.

The terms "guardianship proceeding", "guardianship order", and "incapacitated person" as used in G.S. Chapter 35B relate to proceedings for a guardian of the person and a general guardian.[17] In contrast, the terms "protective proceedings", "protective orders", and "protected persons" as used in G.S. Chapter 35B pertain to proceedings for a guardian of the estate, a general guardian, and to other orders related to management of an adult's property entered pursuant to G.S. Chapter 35A.[18] Table 2 discusses these terms.

**Table 2. The Relationship between Terminology in G.S. Chapters 35A and 35B**

| Term in G.S. Chapter 35B | Relation to Terminology in G.S. Chapter 35A |
|---|---|
| Guardianship Proceeding | Judicial proceeding seeking an order for the appointment of a guardian of the person or a general guardian |
| Guardianship Order | Order appointing a guardian of the person or a general guardian |
| Incapacitated Person | Adult for whom a guardian of the person or a general guardian has been appointed (the ward) |
| Protective Proceeding | Judicial proceeding seeking an order for the appointment of a guardian of the estate or a general guardian |
| Protective Order | Order appointing a guardian of the estate or a general guardian, or another order related to a person's property under G.S. Chapter 35A |
| Protected Person | Adult for whom a guardian of the estate or a general guardian has been appointed (the ward) |

17. G.S. 35B-2(7), (6), and (8).
18. G.S. 35B-2(15), (14), and (13).

# III. Initial Filing of the Incompetency Petition: Deciding Which State May Act

One purpose of UAGPPJA is to limit jurisdiction to adjudicate incompetency and appoint a guardian for an adult to the most appropriate state. UAGPPJA, as adopted in G.S. Chapter 35B, now provides the exclusive jurisdictional basis for the clerk of superior court[19] in North Carolina to adjudicate the incompetency of an adult and to appoint a guardian for that person.[20] Effectively, G.S. Chapter 35B is now a gatekeeper to G.S. Chapter 35A proceedings pertaining to adults.

For all new incompetency proceedings filed in North Carolina on or after December 1, 2016, the petitioner should allege that, and the clerk must determine whether, North Carolina has jurisdiction to adjudicate incompetence and to appoint a guardian of the estate, guardian of the person, or general guardian.[21] The clerk must ensure that jurisdiction is proper at the beginning of any hearing before getting into the substantive issues of incompetency and guardianship. If the clerk fails to ensure that jurisdiction is proper, it is possible that the clerk's orders related to incompetency and/or guardianship could be held void if it is later found that the clerk lacked jurisdiction.[22] The parties may not consent to subject matter jurisdiction if it is otherwise improper, nor may they waive any jurisdictional deficiency.[23] The court may only exercise jurisdiction in an incompetency and adult guardianship proceeding if it exists under G.S Chapter 35B. The better practice is for the clerk to make findings of fact to support a conclusion of law in the clerk's final incompetency and guardianship orders that the court has subject matter jurisdiction.

## A. When Does North Carolina Have Jurisdiction to Adjudicate Incompetency and Appoint a Guardian?

G.S. Chapter 35B establishes a waterfall provision giving jurisdictional priority first to the respondent's home state, then to a *significant-connection state*,[24] and finally to an "other" state when no home state or significant-connection state is appropriate or exists.[25] See Figure 1, below.

A flowchart summarizing the process for determining whether North Carolina may and should exercise jurisdiction in a particular case may be found in Appendix A, "Does North Carolina Have Jurisdiction to Enter an Incompetency and Adult Guardianship Order?"

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19. For purposes of G.S. Chapter 35B, the word "court" means the clerk of superior court to the same extent the clerk has original jurisdiction over incompetency and adult guardianship proceedings under G.S. Chapter 35A. G.S. 35B-2(2). *See also id.* §§ 35A-1103(a); -1203(a). Furthermore, an assistant clerk is authorized to perform all the duties and functions of the elected clerk of superior court, and any act of an assistant clerk "is entitled to the same faith and credit" as that of the elected clerk. *Id.* § 7A-102(b).

20. G.S. 35B-16.

21. *See* revised AOC forms SP-200 and SP-202.

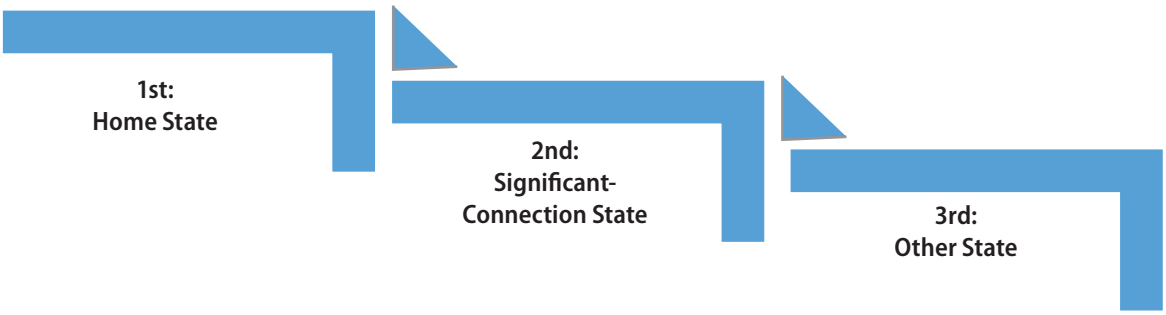
22. *See* State *ex rel.* Hanson v. Yandle, 235 N.C. 532, 535 (1952) (citations omitted) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment . . . and a void judgment may be attacked whenever and wherever it is asserted . . . .").

23. *In re* T.R.P., 360 N.C. 588 (2006).

24. See *infra* section III.A.2.b for a definition of this term.

25. G.S. 35B-17

**Figure 1. Jurisdictional Priority under G.S. Chapter 35B**




### 1. Home State Preferred

As noted above, the highest jurisdictional priority in the statute goes to the respondent's home state. A key factor in the jurisdictional analysis is the fact that a respondent can only have one home state. It is possible that a respondent will not have a home state if the respondent moved frequently prior to the filing of the petition, but there can never be more than one.

North Carolina has jurisdiction to adjudicate incompetency and enter a guardianship order if North Carolina is the respondent's home state. However, if another state is the respondent's home state, it impacts the authority of a North Carolina court to hear the case if a petition is filed here. Therefore, it is important to determine whether the respondent has a home state at all, even if that state is not North Carolina.

#### *a. When Is a State the Home State?*

There are two steps to determining whether a respondent has a home state. Both are based on the respondent's physical presence in a state but they have different "*lookback" periods*:[26] the first step has a six-month lookback, while the second step has a twelve-month lookback. Each step is described in more detail below. Note that neither step requires an analysis of the respondent's domicile or residence. The only thing that matters for purposes of determining the respondent's home state is the length of physical presence in a state.

##### i. Physical Presence Initial Lookback Period: Six Months Immediately Before the Petition for Adjudication of Incompetency Is Filed

To determine the respondent's home state, if in fact there is one, the clerk must initially determine whether the respondent was **physically present** in any state for the six months immediately preceding the date the petition for adjudication of incompetence was filed.[27] When evaluating the six-month period, the court should not take into account any periods of "temporary absence".[28] Although not defined in the statute, a *temporary absence* includes short trips away from the state for vacations, visits with family and friends, business trips, and short-term health care treatment. If the respondent was physically present in one state for six months immediately preceding the petition, that state is the respondent's home state.

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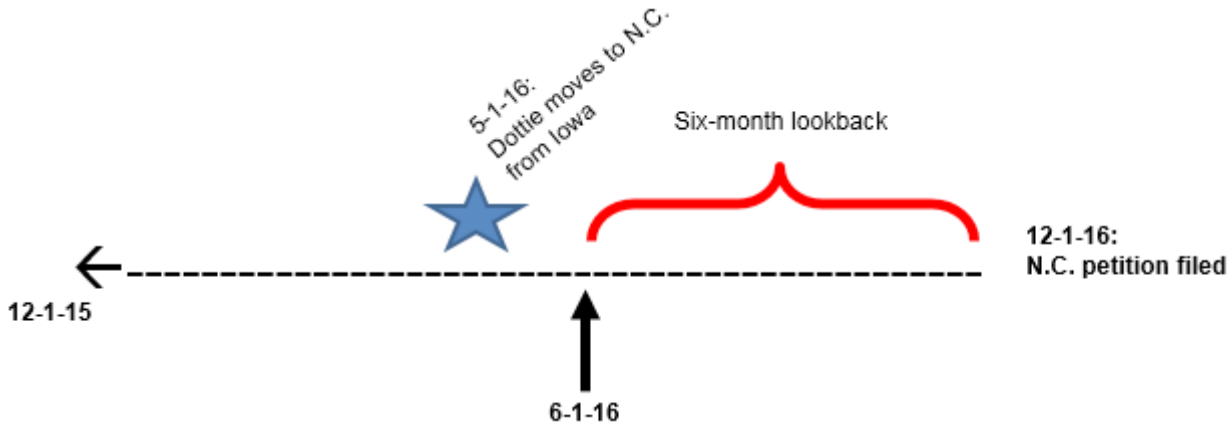
26. A "lookback period" is the period of time prior to and including the date the petition for adjudication of incompetency is filed; the court examines this period to determine whether jurisdiction is proper based on the physical presence of the respondent.

27. G.S. 35B-15(a)(2). Petitioners typically use the AOC form petition for adjudication, SP-200, available at www.nccourts.org/Forms/Documents/707.pdf.

28. G.S. 35B-15(a)(2).

**Figure 2. Timeline of Dottie's Case (1)**




***Dottie***

In Dottie's case, as described at the beginning of this bulletin, the clerk needs to know the date that Dottie, the respondent, moved to North Carolina from Iowa and then must compare that date with the date that Linda, the petitioner/daughter, filed the incompetency/general guardianship petition. If Dottie moved to North Carolina in May 1, 2016, and was physically present in North Carolina until Linda filed the petition on December 1, 2016, then North Carolina would be Dottie's home state (see Figure 2, above). As the home state, North Carolina has jurisdiction to proceed with the case over all other states.[29] North Carolina may, however, choose to decline jurisdiction as discussed in section III.A.4, below.

North Carolina's position as home state ensures that it will have jurisdiction to hear Dottie's case even if another petition is filed in a different state before a petition is filed in North Carolina. For example, if Dottie's son, Eddie, filed a competing petition in Iowa, a state that has also enacted UAGPPJA, an Iowa court would not have jurisdiction to later hear Dottie's case and would have to dismiss or stay the case given the pending proceeding in North Carolina, Dottie's home state.

#### ii. Physical Presence Secondary Lookback Period: Twelve Months Before the Petition for Adjudication of Incompetency Is Filed

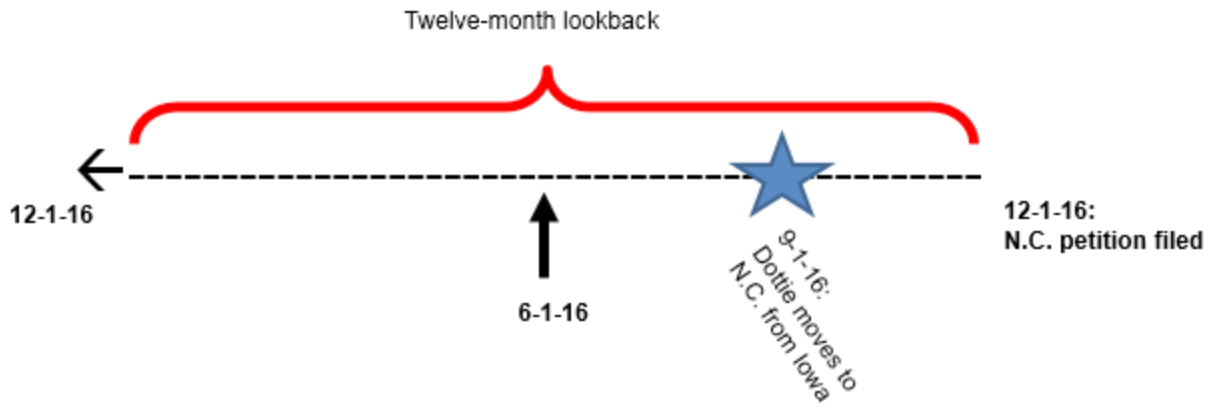
If the respondent was not physically present in any one state for six consecutive months immediately prior to the filing of the petition for adjudication of incompetence, the clerk must look back twelve months to determine whether the respondent was physically present in any one state for at least six consecutive months during the twelve-month period immediately prior to the filing of the incompetency petition.[30] If the respondent was physically present in any one state for six consecutive months during that time period, that state is the respondent's home state. This provision is intended to allow a home state to exercise jurisdiction to adjudicate incompetence and appoint a guardian for up to six months *after* a person physically moves to

29. G.S. 35B-17(1).
30. G.S. 35B-15(a)(2).

another state.[31] When evaluating this time period, the court should not take into account any periods of temporary absence.[32]

Thus, in our example, if Dottie moved to North Carolina from Iowa on September 1, 2016, and Linda filed the petition on December 1, 2016, Dottie's home state would be Iowa (see Figure 3, below). This is because Dottie was not physically present in one state for six consecutive months during the initial six-month lookback period before the filing of the petition in North Carolina (6-1-16 to 12-1-16). Once the court moves to the second step of the analysis, it would determine that Dottie was physically present in another state, Iowa, for at least six consecutive months (12-1-15 to 9-1-16) during the twelve-month lookback period.

**Figure 3. Timeline of Dottie's Case (2)**




However, if a petition is filed here and North Carolina is not the respondent's home state, as is the case shown above, or if the respondent does not have a home state, North Carolina may still have jurisdiction to act. Alternative bases for jurisdiction exist when North Carolina is a significant-connection or other state, or when special jurisdiction exists, as discussed in sections III.A.2, 3, and 5, respectively, below.

### 2. Significant-Connection State

If North Carolina is not the respondent's home state, a North Carolina court may still have jurisdiction to hear an incompetency and guardianship case if North Carolina is a significant-connection state.[33] This is true even if the respondent has a home state. While a respondent may only have one home state, if any, it is possible for him or her to have multiple significant-connection states. There are three steps to determine whether North Carolina has jurisdiction to act as a significant-connection state.

31. Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007), Prefatory Note at 3 (2015) (hereinafter *UAGPPJA*), www.uniformlaws.org/shared/docs/adult_guardianship/UAGPPJA_2011_Final%20Act_2015feb4.pdf.

32. G.S. 35B-15(a)(2). See *supra* section III.A.1.a.i for a discussion of what may constitute a temporary absence.

33. G.S. 35B-17.

#### *a. Is a Petition Pending in Another State?*

If, at the time the petition is filed in North Carolina, a petition for an order adjudicating incompetence or for the appointment of a guardian is pending in the respondent's home state or in a significant-connection state, a North Carolina court has jurisdiction to hear the case only if special jurisdiction exists or the other court declines jurisdiction in favor of North Carolina.[34] North Carolina lacks jurisdiction if there is a prior pending petition in the respondent's home state or in another significant-connection state even if North Carolina is also a significant-connection state. If the petitioner knows of a proceeding pending in another state, it would be important to include information about that proceeding in the petition filed in North Carolina. The clerk may also inquire about such pending proceedings at the hearing. If the North Carolina petitioner fails to notify the court that a proceeding is pending in another state, it is likely that another person notified of the North Carolina proceeding will inform the North Carolina court of the prior pending petition in another state.[35]

If a petition is pending in the respondent's home state or in another significant-connection state, the clerk must stay the proceeding and communicate with the court in the other state to determine whether that court intends to decline jurisdiction in favor of North Carolina as a more appropriate forum.[36] The clerk may allow the parties to participate in the communication[37] and must make a record of any such communication.[38] If the other state has jurisdiction as the home state or as a significant-connection state and does not decline to act, then the clerk must dismiss the North Carolina petition.[39]

#### *b. Is North Carolina a Significant-Connection State?*

If no petition is pending in another state at the time the North Carolina petition is filed, the petitioner may allege that, and then the clerk must analyze whether, North Carolina **is a significant-connection state**.[40] A significant-connection state is a state

- that is not the respondent's home state,
- that the respondent has a significant connection to beyond mere physical presence, and
- in which substantial evidence concerning the respondent is available.[41]

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34. Note: If an order adjudicating incompetence and appointing a guardian exists in another state, a person may be seeking to transfer the order to North Carolina. In those instances, a North Carolina court does have jurisdiction and should follow the procedure set forth *infra* section IV.

35. If a petition for adjudication of incompetence or an application for appointment of a general guardian or a guardian of the person or for issuance of a protective order is brought in North Carolina and North Carolina is not the home state on the date the petition was filed, then notice of the petition must also be given to persons entitled to notice had the proceeding been brought in the respondent's home state, and such notice must be given in the manner it would be given in North Carolina. G.S. 35B-22.

36. G.S. 35B-23(2); -5(a) (providing that a North Carolina court may communicate with a court in another state concerning a proceeding under G.S. Chapter 35B). The statute does not specify "a particular means of communication." *UAGPPJA*, Section 104, Comment. Communication may occur through electronic means, including email. *Id.* See *infra* section III.A.4.a for what constitutes a more appropriate forum.

37. G.S. 35B-5(a).

38. *Id.* The statute is silent as to what type of record the court must make. The comment to UAGPPJA suggests that the record may include an electronic recording of a telephone call, a memorandum summarizing a conversation, and email communications. *UAGPPJA*, Section 104, Comment.

39. G.S. 35B-23(2).

40. G.S. 35B-17(2).

41. G.S. 35B-15(a)(3).

A respondent may have multiple significant-connection states. In determining whether North Carolina is a significant-connection state, the petitioner should present evidence on the following subjects for the clerk to consider:

- the location of the respondent's family and other persons required to be notified of the proceedings;
- the length of time the respondent was physically present in North Carolina and the duration of any absences;
- the location of the respondent's property; and
- the extent to which the respondent has ties to a particular state, including voting registration, tax return filings, vehicle registration, driver's license, social relationships, and receipt of services.[42]

#### *c. May North Carolina Exercise Jurisdiction as a Significant-Connection State?*

If the clerk determines that North Carolina is a significant-connection state, then the clerk must find, based on the evidence presented, that one of the following is also true to exercise jurisdiction:

- the respondent does not have a home state; or
- the respondent's home state declined to exercise jurisdiction because North Carolina is a more appropriate forum; or
- before the clerk enters a final order adjudicating incompetency and appointing a guardian, all of the following are true:
  - a petition is not filed in the respondent's home state,[43]
  - an objection to the North Carolina court's jurisdiction is not filed by a person entitled to notice; and
  - the clerk determines that North Carolina is an appropriate forum based on the factors described in section III.A.4.a, below.[44]

If one of the above are true, North Carolina is a significant-connection state, and no prior petition is filed in the respondent's home state or in another significant-connection state, then North Carolina has jurisdiction to proceed with the case and to enter an incompetency and guardianship order as a significant-connection state. Under such circumstances, if the respondent has a home state, notice of the North Carolina petition must be given to any person entitled to notice of the proceeding in the respondent's home state.[45] Notice is required to be given in the same manner as notice is required to be given in North Carolina.[46] Before proceeding with the substantive incompetency and guardianship hearing as a significant-connection state, the clerk should confirm that the petitioner provided such notice if the respondent has a home state.

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42. G.S. 35B-15(b).

43. If a petition is filed in the respondent's home state before the clerk enters the final order adjudicating incompetency and appointing a guardian, the clerk must stay the proceeding and communicate with the court in the other state to determine whether that court intends to decline jurisdiction in favor of North Carolina as a more appropriate forum. G.S. 35B-23(2). If the home state does not decline to act, then the clerk must dismiss the North Carolina petition. *Id.* If a petition is filed after the clerk enters final orders adjudicating incompetence and appointing a guardian, the home state has no jurisdiction to act and must dismiss the proceeding. *Id.* § 35B-19.

44. G.S. 35B-17(2).

45. G.S. 35B-22.

46. *Id.*

Applying the above rules to Dottie's case, assume that she moved to North Carolina immediately before Linda filed the petition here and that, therefore, Iowa remained her home state. Linda stated in her petition that no other petition was pending when she filed her petition in North Carolina. North Carolina may be a significant-connection state, notwithstanding Dottie's short presence in this state, if there is evidence that Dottie has family in North Carolina, including Linda; that Dottie moved all her tangible property here; that Dottie registered her car and obtained a driver's license here; that Dottie has many friends in North Carolina because she vacationed here all her life; and there is other information supporting her ties to the state.

Under those circumstances, North Carolina would have jurisdiction to act if the clerk determined that there is no other prior pending proceeding and that this state is a significant-connection state and an appropriate forum. This is true even though Dottie has a home state. However, if Eddie (1) files a petition in Iowa, Dottie's home state, at any time before the clerk in North Carolina enters a final order adjudicating incompetence and appointing a guardian and (2) notifies the clerk in North Carolina of the Iowa petition, the clerk here must stay the proceeding and communicate with the court in Iowa to discuss which court will proceed with the case. This is because jurisdiction is lost if a petition is later brought in the respondent's home state before the entry of a final order in a significant-connection state.[47] As a result of Eddie's Iowa petition, Iowa would have jurisdiction to act as Dottie's home state unless it declined in favor of North Carolina as a more appropriate forum. If Iowa does not decline jurisdiction, the clerk must dismiss the North Carolina proceeding despite the fact that the clerk determined North Carolina is a significant-connection state and an appropriate forum.

If, instead of filing a petition in Iowa and before the clerk enters a final order adjudicating Dottie's competency and appointing a guardian, Eddie raises an objection before the clerk to North Carolina's jurisdiction, the clerk should examine whether there is a more appropriate forum to hear the case, such as Iowa. If the clerk determines that Iowa is a more appropriate forum in response to Eddie's objection, the clerk may enter an order declining jurisdiction as set forth in section III.A.4, below.

#### 3. Other State

Even if North Carolina is not a home state or a significant-connection state, a North Carolina court may exercise jurisdiction in another limited instance—when it is what is known as an "other" state. In such cases, North Carolina has jurisdiction to act in response to a petition filed here where

1. the respondent's home state and all other significant connection states decline jurisdiction because North Carolina is the more appropriate forum and
2. jurisdiction in North Carolina is consistent with the United States and the North Carolina Constitutions.[48]

If a petitioner alleges that North Carolina has jurisdiction on this basis, the petitioner should also present evidence that any home state and all significant-connection states have declined jurisdiction. If a court declines jurisdiction, there is no requirement under G.S. Chapter 35B

47. *UAGPPJA*, Section 209, Comment.
48. G.S. 35B-17(3).

that the court enter an order to that effect. However, it may be a best practice for a court to do so to create a record of the court's decision to decline jurisdiction. The North Carolina court could also communicate with the state that declined jurisdiction to confirm that the state did in fact do so.[49] The clerk shall make a record of any such communication.[50]

If the respondent has a home state and North Carolina is an "other" state, notice of the North Carolina petition must be given to any person entitled to notice of the proceeding had a proceeding been brought in the respondent's home state.[51] Notice is required to be given in the same manner as notice is required to be given in North Carolina.[52] Before proceeding with the substantive incompetency and guardianship hearing as an "other" state, the clerk should confirm that the petitioner provided such notice if the respondent has a home state.

In Dottie's case, North Carolina may fall under this "other" category if Linda moved Dottie to North Carolina only a few days before Linda filed the petition. North Carolina would not be Dottie's home state and may not yet be a significant-connection state. However, as discussed further in section III.A.4.a, below, Iowa may decline jurisdiction in favor of North Carolina if, for example, Dottie expressed a preference for living in North Carolina with Linda; Dottie will live permanently at home with Linda; Dottie has no other property in Iowa; and no abuse, neglect, or exploitation of Dottie has occurred or is likely to occur.[53] Once Iowa declines jurisdiction, provided there are no significant-connection states that also must decline jurisdiction, a North Carolina court may have jurisdiction to act if Dottie is physically present and served in North Carolina. If necessary, the North Carolina court could use the cooperation and testimony provisions in G.S. 35B-6 and -7 to obtain information relevant to the North Carolina proceeding from witnesses, documents, and other evidence located out of state.[54] These provisions include, but are not limited to, the ability of a North Carolina court to request a court in another state to hold an evidentiary hearing; order a person to produce evidence or give testimony; order an evaluation of the respondent; and issue an order for the release of information, including protected health information.[55]

#### 4. North Carolina's Authority to Decline Jurisdiction

If North Carolina has jurisdiction to act either as the home state, as a significant-connection state, or as an "other" state, North Carolina may decline jurisdiction and not hear the case if the North Carolina court determines that (1) another state is a more appropriate forum or (2) North Carolina acquired jurisdiction through unjustifiable conduct.[56]

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49. G.S. 35B-5.

50. G.S. 35B-5(a).

51. G.S. 35B-22.

52. *Id.*

53. These are the factors a court would apply to determine that North Carolina is a more appropriate forum under G.S. 35B-20.

54. Note: The provisions related to cooperation between courts and testimony from other states apply to any incompetency and guardianship proceeding in North Carolina, not just when North Carolina exercises "other" jurisdiction.

55. G.S. 35B-6.

56. G.S. 35B-20; -21.

***a. More Appropriate Forum***

Even though North Carolina has jurisdiction to act, a court may decline to exercise jurisdiction if the court decides that another state is a more appropriate forum.[57] The clerk must consider all relevant factors in deciding whether there is a more appropriate forum, including

- any expressed preference of the respondent;
- whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- the length of time the respondent was physically present in or was a legal resident of this or another state;
- the distance of the respondent from the court in each state;
- the financial circumstances of the respondent's estate;
- the nature and location of relevant evidence;
- the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- the familiarity of the court of each state with the facts and issues in the proceeding; and
- if an appointment was made, the court's ability to monitor the conduct of the guardian.[58]

If a proceeding is properly before the court in North Carolina but the clerk determines that another state is a more appropriate forum, the clerk may either dismiss or stay the proceeding.[59] The clerk may also enter any order the clerk determines is just and proper, including the condition that a petition for the appointment of a general guardian or a guardian of the person or for the issuance of a protective order be filed promptly in another state.[60]

In Dottie's case, if she moved to North Carolina in May 2016 and was physically present in this state until Linda filed the incompetency/guardianship petition on December 1, 2016, then North Carolina is Dottie's home state under the first step of the home state definition. This is because she was physically present in North Carolina for the six consecutive months immediately preceding the petition. North Carolina would have jurisdiction to hear the case. However, a North Carolina court may decide to decline to exercise jurisdiction in favor of Iowa as the more appropriate forum if, for example, Dottie expresses a desire to move back to Iowa and she still has many friends, family, and medical providers in Iowa. In that instance, the North Carolina court is allowed, but not required, to enter an order staying the proceeding and directing Linda to promptly file a petition in Iowa. A similar analysis would apply if Dottie was from a foreign country. A North Carolina court may decline jurisdiction because a foreign country is a more appropriate forum.[61]

***b. Unjustifiable Conduct***

A North Carolina court with jurisdiction to hear a case may also decline to exercise jurisdiction at any time, including after appointing a guardian of the person or a general guardian or after issuing a protective order, if the court determines that jurisdiction was obtained by unjustifiable

57. G.S. 35B-20.
58. G.S. 35B-20(c).
59. G.S. 35B-20(b).
60. *Id.*
61. G.S. 35B-4; *UAGPPJA*, Section 103, Comment.

conduct.[62] "Unjustifiable conduct" is not defined in G.S. Chapter 35B. According to the comments accompanying UAGPPJA, this ambiguity and flexibility was intentional.[63] The provision is intended to address the problem of "granny snatching," which is when someone uproots an adult who may lack capacity from his or her home, moves the adult to another state, and seeks to be appointed as his or her guardian. Typically, this happens when the petitioner wants to gain control of the adult's financial resources. The adult is in an unfamiliar place away from family and from other evidence material to the guardianship proceeding. In this situation, the adult may be more likely to suffer abuse, neglect, or exploitation. In these and other instances, the court could decline to exercise jurisdiction if it appears that the court obtained jurisdiction because of unjustifiable conduct. The unjustifiable conduct does not have to be by a party or, specifically, by the petitioner who filed the case.[64]

The "unjustifiable conduct" concept affords the court the authority to "fashion an appropriate remedy" when it has inappropriately acquired jurisdiction."[65] In addition to or in lieu of declining jurisdiction, the court may exercise jurisdiction for the limited purpose of ensuring the health, safety, and welfare, or protecting property, of the respondent.[66] This includes staying the proceeding until a guardianship petition is filed in another state with jurisdiction and then declining jurisdiction.[67] In spite of finding unjustifiable conduct, a North Carolina court may decide to proceed with the case after considering certain factors identified in G.S. 35B-21(a)(3).

If a party committed the unjustifiable conduct that resulted in a North Carolina court having jurisdiction over the case, the court may assess reasonable expenses, including attorneys' fees and court costs, against that party.[68]

#### 5. Special Jurisdiction in the Case of an Emergency or Property Located in North Carolina

If a North Carolina court lacks jurisdiction because it is not a home state, a significant-connection state, or an "other" state, the court still has jurisdiction to act in case of an emergency related to the ward's person or when the person's real or tangible personal property is located in North Carolina.[69] This is known as *special jurisdiction*.

##### *a. Appointment of Guardian of the Person in an Emergency*

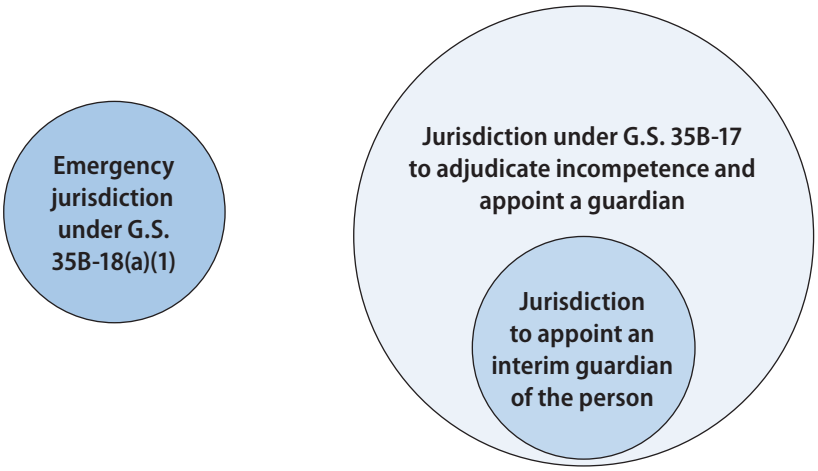
A North Carolina court otherwise lacking jurisdiction has special jurisdiction to appoint a guardian of the person in the event of an emergency for a respondent who is physically present in North Carolina.[70] "Emergency" is defined as a circumstance that will likely result in substantial harm to a respondent's health, safety, or welfare, and for which an appointment of a guardian of the person is necessary because there is no other person who has the authority and is willing to act on the respondent's behalf.[71] If a petition is filed and the clerk finds that the respondent is physically present in North Carolina and that an emergency exists, then the clerk

62. G.S. 35B-21(a).
63. *UAGPPJA*, Section 207, Comment.
64. *Id.*
65. *Id.*
66. G.S. 35B-21(a)(2).
67. *Id.*
68. G.S. 35B-21(b).
69. G.S. 35B-18.
70. G.S. 35B-18(a)(1).
71. G.S. 35B-15(a)(1).

may enter an order appointing a guardian of the person for a term not exceeding ninety days based on this special jurisdiction.[72] The emergency appointment should not be converted into a "de facto permanent appointment."[73] It is an appointment for a limited time in a temporary location.[74] The emergency proceeding must be dismissed if a petition is later filed in the respondent's home state and the home state requests that North Carolina dismiss the emergency proceeding, regardless of whether the request is before or after the appointment.[75]

For example, if a person is in a car accident while driving through North Carolina that results in her incapacity, a North Carolina court could appoint a guardian of the person to make medical decisions on behalf of the injured person in North Carolina. In the order appointing the emergency guardian of the person, the court should make findings as to whether the respondent has an agent under health care power of attorney authorized to act in North Carolina or another person authorized to make medical decisions on the person's behalf. An emergency only exists if the respondent lacks an authorized and willing surrogate decision maker. In the absence of an emergency, the court lacks the special jurisdiction to appoint a guardian of the person.

*Interim guardian of the person cases distinguished.* Note that special jurisdiction in an emergency is different from the court's authority to appoint an interim guardian of the person under G.S. 35A-1114. An interim guardian of the person appointment occurs as part of and pursuant to a motion filed in the underlying G.S. Chapter 35A incompetency proceeding.[76] To appoint an interim guardian of the person, the North Carolina court must first have jurisdiction as a home state, as a significant-connection state, or as an "other" state. By contrast, the special jurisdiction in an emergency provision discussed above applies when such jurisdiction does not exist.




72. *Id.*
73. *UAGPPJA*, Section 204, Comment.
74. *Id.*
75. G.S. 35B-18(b).
76. G.S. 35A-1114(a) (emphasis added) (stating that *"[a]t the time of or subsequent to the filing of a petition [for adjudication of incompetence,]* the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian").

Note that AOC forms SP-200, Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian; SP-202, Order on Petition for Adjudication of Incompetence; and E-406, Order on Application for Appointment of Guardian, are not appropriate to use in the event the court is exercising special jurisdiction in an emergency. As of the date of this bulletin, there is no AOC published form petition or order for a person seeking such an appointment.

#### *b. Issuance of a Protective Order for Real and Tangible Property in North Carolina*

A North Carolina court that lacks jurisdiction as a home state, as a significant-connection state, or as an other state also has special jurisdiction to issue a "protective order" related to real or tangible personal property located in North Carolina.[77] As discussed earlier, the term "protective order" has a specific meaning in this context. The term refers to an order appointing a guardian of the estate or a general guardian, or to another order related to the management of an adult's property entered pursuant to G.S. Chapter 35A.[78] This jurisdiction may serve as a basis for the appointment of an ancillary guardian under G.S. 35A-1280 to manage a nonresident ward's real and tangible property located in North Carolina, for a special proceeding to remove a nonresident's tangible personalty from the state under G.S. 35A-1281, or for the appointment of an interim guardian of the estate under G.S. 35A-1114.

## IV. Transfer of Cases to and from North Carolina

The second major purpose of UAGPPJA is to provide a process for transferring an existing case in or out of the state. It is intended to address scenarios like Bob's, described at the start of this bulletin, where a person under guardianship permanently moves or has a significant connection to another state. In Bob's case, his guardian of the person, the county department of social services, determined that it was in his best interests to move from North Carolina to live in New York with his daughter and for his daughter to serve as his guardian there. The transfer provisions do not apply when a guardian seeks to take some limited action in a state on behalf of a nonresident ward. In those cases, registration, which is discussed in section V, below, and not transfer, of the case would be appropriate.

The process for transferring Bob's case out of North Carolina is set forth in G.S. 35B-30. A flowchart providing a step-by-step guide to the "transfer out" process is found in Appendix B. The process for transferring a case from another state to North Carolina is set forth in G.S. 35B-31. A flowchart providing a step-by-step guide to the "transfer in" process is found Appendix C. S.L. 2016-72 repealed the existing process for transferring cases into North Carolina under G.S. 35A-1113.

77. G.S. 35B-18(a)(2). This does not include intangible property such as bank accounts. *See UAGPPJA*, Section 204, Comment.

78. G.S. 35B-2(14).

## A. Transferring a Case Out of North Carolina

A case may be transferred out of North Carolina only upon the petition of the guardian of the person, the guardian of the estate, or the general guardian.[79] A petition for transfer is a request to transfer both the incompetency (special proceeding (SP)) and the guardianship (estate proceeding (E)) cases.[80] The guardian must serve a copy of the petition by first-class mail[81] on any person who is entitled to notice of the original incompetency and guardianship proceedings.[82] This includes the ward; any next of kin; the ward's attorney or guardian ad litem, if appointed by the clerk;[83] other parties of record, including any guardian other than the petitioner; and anyone else designated by the clerk.[84]

On the clerk's motion or on the motion of the petitioner or any person entitled to notice of the proceeding, the clerk must hold a hearing on the petition for transfer.[85] If no one moves for a hearing but there is an indication that the petition for transfer is contested, it is best practice for the clerk, on the clerk's own motion, to hold a hearing. However, the clerk may decide the matter summarily, meaning without a hearing.[86] In the absence of a motion for a hearing, it is not clear from the statute when the clerk may decide the matter summarily after service of the petition on the requisite persons. It is also not clear by what date a person entitled to notice would need to move for a hearing after service of the petition for transfer. Finally, the petition is not required to be verified, and, therefore, is not under oath. If the clerk proceeds summarily, the clerk should wait a reasonable time before entering a provisional order granting the transfer petition to allow notified persons time to file an objection to transfer.

79. G.S. 35B-30(a).

80. *Id.*

81. The statute does not specify how the petition must be served. *See generally* G.S. 35B-30. Because the petition is filed in an existing proceeding, it is likely that service by first-class mail or other service in compliance with Rule 5 of the N.C. Rules of Civil Procedure is sufficient.

82. G.S. 35B-30(b).

83. Given that service is required on the ward's attorney or guardian ad litem (GAL), it raises the question as to whether a GAL must be appointed when a petition to transfer is filed. G.S. 35A-1217 provides that the clerk shall appoint a GAL to represent a ward in a guardianship proceeding if the ward has been adjudicated incompetent and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the GAL are pursuant to rules adopted by the N.C. Office of Indigent Defense Services (IDS). G.S. 35A-1217. Therefore, unless prohibited by IDS rules, it would be logical for the clerk to appoint a GAL in response to a petition to transfer if the clerk determines that the ward's interests are not adequately represented. Automatic appointment of a GAL in every case may create unnecessary expense where the petition for transfer is uncontested or where the ward's interests are otherwise adequately represented.

84. G.S. 35A-1109; -1211.

85. G.S. 35B-30(c).

86. *Id. See also UAGPPJA*, Article 3, General Comment.

Furthermore, before entering a provisional order authorizing transfer of the incompetency and guardianship case, the clerk must find, based on the evidence presented, that

- the other state will likely accept the transfer;[87]
- the ward is physically present in or is reasonably expected to move permanently to the other state, or, if the guardian is a guardian of the estate, the ward has a *significant connection*[88] to the other state;
- no objection to transfer has been made, or, if an objection has been made, the objecting party failed to establish that transfer would be contrary to the interests[89] of the ward; and
- plans for the ward's care and services in the other state are reasonable and sufficient, if the ward has a guardian of the person, or adequate arrangements will be made for the management of the ward's property, if the ward has a guardian of the estate.[90] If the ward has a general guardian, the clerk must find both reasonable and sufficient plans for care and services and adequate arrangements for property.[91]

If the clerk makes these findings, then the clerk must enter a provisional order granting the petition to transfer and directing the guardian to petition for transfer in the other state.[92] The clerk may enter a final order confirming transfer once the clerk receives and approves a final accounting from the guardian of the estate or the general guardian and receives a copy of the provisional order accepting transfer from the other state.[93]

Returning to Bob's case, either the county department of social services (DSS), as Bob's guardian of the person, or the private attorney, as Bob's guardian of the estate, could petition to transfer the case to New York. If either of them petition, the clerk considers transfer of the incompetency proceeding along with the entire guardianship, both the guardianship of the person and of the estate. The statute does not state expressly that a guardianship may not be split. However, if transfer is granted, it seems reasonable to transfer both the guardianship of the person and of the estate along with the incompetency proceeding in order to avoid conflicting courts with dueling authority, an essential purpose of UAGPPJA.[94]

If DSS believes that transferring the case to New York so that Bob's daughter may serve as guardian there is in Bob's best interests, DSS should first file a motion to remove itself as the guardian of the person and to appoint Bob's daughter as his guardian of the person on the basis that doing so is in the best interests of Bob. This is because one of the criteria the receiving

87. If the county department of social services (DSS) is serving as guardian of the person, guardian of the estate, or general guardian in North Carolina and initiates the transfer of a case from North Carolina, one of the findings the accepting state must make is that the guardian is eligible for appointment in the accepting state. G.S. 35B-31(d)(2). A North Carolina DSS is not eligible for appointment in another state. One solution to this dilemma is discussed further in the example set forth at the end of this subsection.

88. This, term for purposes of transfer, is defined in G.S. 35B-15(b) and described *supra* section III.A.2.b.

89. *See UAGPPJA*, Article 3, General Comment (stating that the term "interests" was chosen over "best interests" to reflect the strong autonomy values in modern guardianship law).

90. G.S. 35B-30(d) and (e).

91. G.S. 35B-30(f).

92. G.S. 35B-30(d), (e), and (f).

93. The provisional order accepting transfer from the other state must be issued in accordance with provisions similar to G.S. 35B-31 in the other state, which governs accepting a transfer of a case from another state.

94. G.S. 35B-1(d)(1).

court must find before entering an order authorizing transfer is that the guardian is eligible for appointment under that state's laws.[95] A North Carolina DSS would not be eligible for appointment in New York. Therefore, before seeking to transfer the case, DSS or Bob's daughter could file a motion to remove DSS and appoint Bob's daughter as the guardian of the person, and then the daughter could file a petition to transfer the case to New York. See Appendix B, "Transfer of an Existing Incompetency and Adult Guardianship Case from North Carolina to Another State."

## B. Transferring a Case to North Carolina

To transfer a guardianship from another state to North Carolina, the general guardian, guardian of the person, or guardian of the estate files a petition for transfer in North Carolina, along with a certified copy of the other state's provisional order of transfer.[96]

A copy of the petition and the order is served on those persons entitled to notice of the original incompetency and guardianship proceeding in North Carolina *and* in the transferring state.[97] Notice must be given in the same manner as notice is required in those original proceedings in North Carolina.[98] This likely means that the following parties must be served in the following manner based on North Carolina service requirements:

- the ward/respondent by personal service;
- the next-of-kin by first-class mail;
- the ward's counsel or guardian ad litem, if appointed,[99] pursuant to Rule 4 of the N.C. Rules of Civil Procedure;[100]
- the other parties of record, including any guardian that is not the petitioner, and any other persons required to be noticed in the transferring state by first-class mail; and
- anyone else designated by the clerk by first-class mail.[101]

The petitioner should identify in the petition to accept transfer whether the transferring state's laws require notice to any other person in addition to those listed who are noticed under North Carolina law.[102] The clerk should confirm that service has been made on such other persons if there are any additional persons whom the other state requires to be noticed that North Carolina law does not.

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95. G.S. 35B-31(d)(2).
96. G.S. 35B-31(a).
97. G.S. 35B-31(b).
98. *Id.*
99. It may be unnecessary to appoint a guardian ad litem (GAL) for purposes of making a decision on whether to accept transfer, given that the court is charged with accepting the transfer *unless* the guardian is ineligible for appointment or a person entitled to notice files an objection and establishes that the transfer will be contrary to the interests of the ward. Otherwise, the court's decision to accept transfer is not discretionary. Therefore, it may be good practice, when a petition to accept transfer is filed, to wait and see whether or not there is an objection to the transfer before appointing a GAL in response to a petition accepting transfer.
100. G.S. 1A-1, Rule 4.
101. G.S. 35A-1109; -1211.
102. G.S. 35B-31(b).

On the clerk's motion or on the motion of the petitioner or any person entitled to notice of the proceeding, the clerk must hold a hearing on the petition to accept transfer.[103] However, the clerk may decide the matter summarily.[104] As discussed in the previous section on transfer of a proceeding out of North Carolina, the clerk should wait a reasonable time after the petition is filed before entering a provisional order accepting transfer without a hearing to ensure that there are no objections.

The court must enter a provisional order accepting transfer unless (1) an objection is made to the transfer and the objector establishes that the transfer would be contrary to the interests[105] of the ward or (2) the general guardian, guardian of the estate, or guardian of the person is ineligible for appointment in North Carolina.[106] Once the North Carolina court enters a provisional order accepting transfer, the court has the authority to appoint a general guardian, a guardian of the estate, or a guardian of the person in North Carolina.[107] The court then enters a final order accepting transfer once it receives a copy of the final order from the other state granting transfer.[108] By entering a final order accepting transfer from another state, the North Carolina court recognizes that state's adjudication of incompetency and appointment of the guardian.[109]

Within ninety days from the date the clerk enters the final order accepting transfer of the guardianship to North Carolina, the clerk must determine whether the guardianship needs to be modified to comply with North Carolina law.[110] This may include, for example, requiring a bond or modifying a bond amount. It is advisable for the clerk to schedule a status hearing and to notice the guardian of the hearing so that he or she may appear before the court to go over North Carolina requirements to file accountings and status reports, if required, and to take the oath and receive North Carolina letters of appointment.[111] Once the case is transferred to North Carolina, the clerk may also consider any other motions pertaining to the adult's capacity or guardianship, including whether limited guardianship or restoration are appropriate. See Appendix C, "Transfer of an Existing Incompetency and Adult Guardianship Case to North Carolina from Another State."

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103. G.S. 35B-31(c).

104. *Id. See also UAGPPJA*, Article 3, General Comment. The statute does not state how long the court must wait after service before summarily entering a provisional order accepting transfer.

105. *See UAGPPJA*, Article 3, General Comment (stating that the term "interests" was chosen over "best interests" to reflect the strong autonomy values in modern guardianship law).

106. G.S. 35B-31(d). This may include, for example, whether or not the guardian is eligible to be bonded if the guardian is a guardian of the estate or a general guardian. The transferring state may not have required a bond.

107. G.S. 35B-18(a)(3).

108. The final order granting transfer from the other state must be issued in accordance with provisions similar to those found in G.S. 35B-30, which govern transferring a case from another state.

109. G.S. 35B-31(g). The purpose of this provision is to eliminate "the need to prove the case in the second state from scratch, including proving the respondent's incapacity and choice of guardian. . . ." *See UAGPPJA*, Article 3, General Comment. It does not prohibit the accepting court from modifying the guardianship to a limited guardianship or restoring the person's competency if a motion for either is later brought before the court.

110. G.S. 35B-31(f).

111. The court may find it necessary to appoint a guardian ad litem (GAL) in connection with this hearing to allow the GAL to make recommendations to the court about whether the guardianship needs to be modified to conform to the laws of North Carolina.

# V. Registration

The purpose of registration is to facilitate the enforcement of guardianship orders from other states.[112] The types of scenarios that typically invoke registration issues are when a nonresident of North Carolina owns real or personal property here or when he or she seeks some sort of medical or other personal care service in North Carolina. The nonresident is incapacitated and a guardian has been appointed on his or her behalf in another state. The guardian and the ward have no intention of moving to North Carolina, thus transfer of the case is inapplicable. However, the guardian does want to exercise some decision-making authority in North Carolina, either with respect to the person or to the property of the ward.

## A. Process to Register an Out-of-State Order in North Carolina

On and after December 1, 2016, a guardian of the person, a guardian of the estate, or a general guardian[113] appointed in another state may register an out-of-state order in North Carolina.[114] Registration is available whether the guardianship is full or limited.[115] G.S. 35B-36 prescribes the process for registering a guardianship of the person order. G.S. 35B-37 sets forth the process for registering a general guardianship order or a "protective order."

The guardian commences the registration process by giving notice to the court that appointed the guardian of his or her intent to register the order. The guardian obtains certified copies of the order appointing the guardian and letters of office[116] from the court, as well as the copy of any bond.[117] Authenticated copies are not required.[118]

Next, the guardian files certified copies of the other state's letters and the order and a copy of the bond, if any, in North Carolina, and the North Carolina court files the copies as a foreign judgment.[119] If the order is an order for a guardian of the person, it may be filed by the guardian of the person in any appropriate county.[120] For example, a county where a ward seeks treatment or other health care. If the order is an order for a guardian of the estate or for a general guardian, then the documents may be filed in any county where the ward has property.[121]

---

112. *UAGPPJA*, Article 4, General Comment.

113. Keep in mind that different terminology may be used. A guardian of the person in another state may simply be a "guardian", while a guardian of the estate may be a "conservator".

114. G.S. 35B, Article 4.

115. *Id.*

116. Under North Carolina law, whenever a guardian is duly appointed and qualified, the clerk must issue the guardian "letters of appointment" signed and sealed by the clerk. G.S. 35A-1206. Generally, letters specify the type of guardian appointed and the nature and extent of the guardian's authority. *Id.* In other states, letters of appointment may be called "letters of office" or referred to by some other term.

117. G.S. 35B-36; -37.

118. *UAGPPJA*, Article 4, General Comment.

119. G.S. 35B-36; -37. A guardian of the person may not register an order in North Carolina if a petition for the adjudication of incompetence and an application for the appointment of a guardian of the person is pending in North Carolina. G.S. 35B-36. Similarly, a guardian of the estate or a general guardian may not register an order in North Carolina if a petition for the adjudication of incompetence and an application for the appointment of a guardian of the estate is pending in North Carolina. *Id.* § 35B-37.

120. G.S. 35B-36.

121. G.S. 35B-37.

## B. Effect of Registration in North Carolina

Registration of an out-of-state guardianship order in North Carolina gives the guardian the authority to exercise all powers in North Carolina authorized in the order appointing the guardian from the other state, unless an action is prohibited by the laws of North Carolina.[122]

The most significant impact of the new registration provisions will be on the enforcement of out-of-state guardianship orders pertaining to a person. These provisions address situations like the one described at the start of this bulletin involving Cindy and her daughter, Mary, who live in Virginia. A Virginia court adjudicated Mary incompetent and appointed Cindy as her guardian. That court retains jurisdiction over the case. Cindy wants Mary to receive mental health treatment at a facility in North Carolina. Mother and daughter do not intend to move to North Carolina and do not want to permanently transfer the case here. However, the North Carolina care provider refuses to recognize an out-of-state guardianship order. By registering the order in North Carolina, Cindy, as the guardian, would have the authority to exercise all powers authorized by the out-of-state order and not prohibited under North Carolina law, including making certain health care decisions. If a third-party refuses to recognize any validly registered order in North Carolina, the court may grant any relief available under North Carolina law to enforce the registered order.[123]

The impact of the new registration provisions is less significant with respect to guardianships involving property. The legislation expressly preserved the existing provisions in G.S. Chapter 35A applicable to ancillary guardianship under G.S. 35A-1280 and removal of personalty from the state under G.S. 35A-1281.[124] As a result, registering a protective order or an order related to the nonresident ward's property in North Carolina does not eliminate the obligation

- to seek the appointment of an *ancillary guardian*[125] in North Carolina when a nonresident ward has real or personal property in North Carolina that will remain in the state[126] or
- to initiate a special proceeding by petition to remove personal property of a nonresident ward from North Carolina.[127]

Because these requirements were retained in North Carolina law, registration of an out-of-state order appointing a guardian to manage a nonresident ward's property will often be redundant. This is in part because registration of the order in North Carolina does not appear necessary for the North Carolina court to obtain jurisdiction over those proceedings. A North

122. G.S. 35B-38(a).

123. G.S. 35B-38(b).

124. S.L. 2016-72, § 3.

125. An ancillary guardian is person appointed guardian by a North Carolina court, through the authority of a guardian in another state, for a nonresident ward having real or personal property in North Carolina. G.S. 35A-1280; Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual vol. II, pt. VI, ch. 86, p. 58 (UNC School of Government, 2012). Once appointed in North Carolina, an ancillary guardian has all the powers, duties, and responsibilities over the ward's estate, including the obligation to post a bond, as a guardian appointed in North Carolina. G.S. 35A-1280(b).

126. S.L. 2016-72, § 3; G.S. 35A-1280. The requirements for ancillary guardianship are described in Anderson & Brannon, *supra* note 125, at vol. II, pt. VI, ch. 86, pp. 58–59, § XIV.

127. S.L. 2016-72, § 3; G.S. 35A-1281. The requirements of this process are more fully described in Anderson & Brannon, *supra* note 125, at vol. II, pt. VII, ch. 122, pp. 1, 4.

Carolina court always has special jurisdiction to issue an order with respect to real or tangible personal property located in North Carolina.[128]

One area that is not redundant: registration of an order that is the other state's equivalent of a general guardianship order appears to now provide the general guardian appointed by another state with the authority to maintain actions and proceedings in North Carolina on behalf of the incapacitated person.[129] If the general guardian initiating or defending an action is not a resident of North Carolina, the guardian is subject to conditions imposed upon nonresident parties by North Carolina law.[130]

## Conclusion

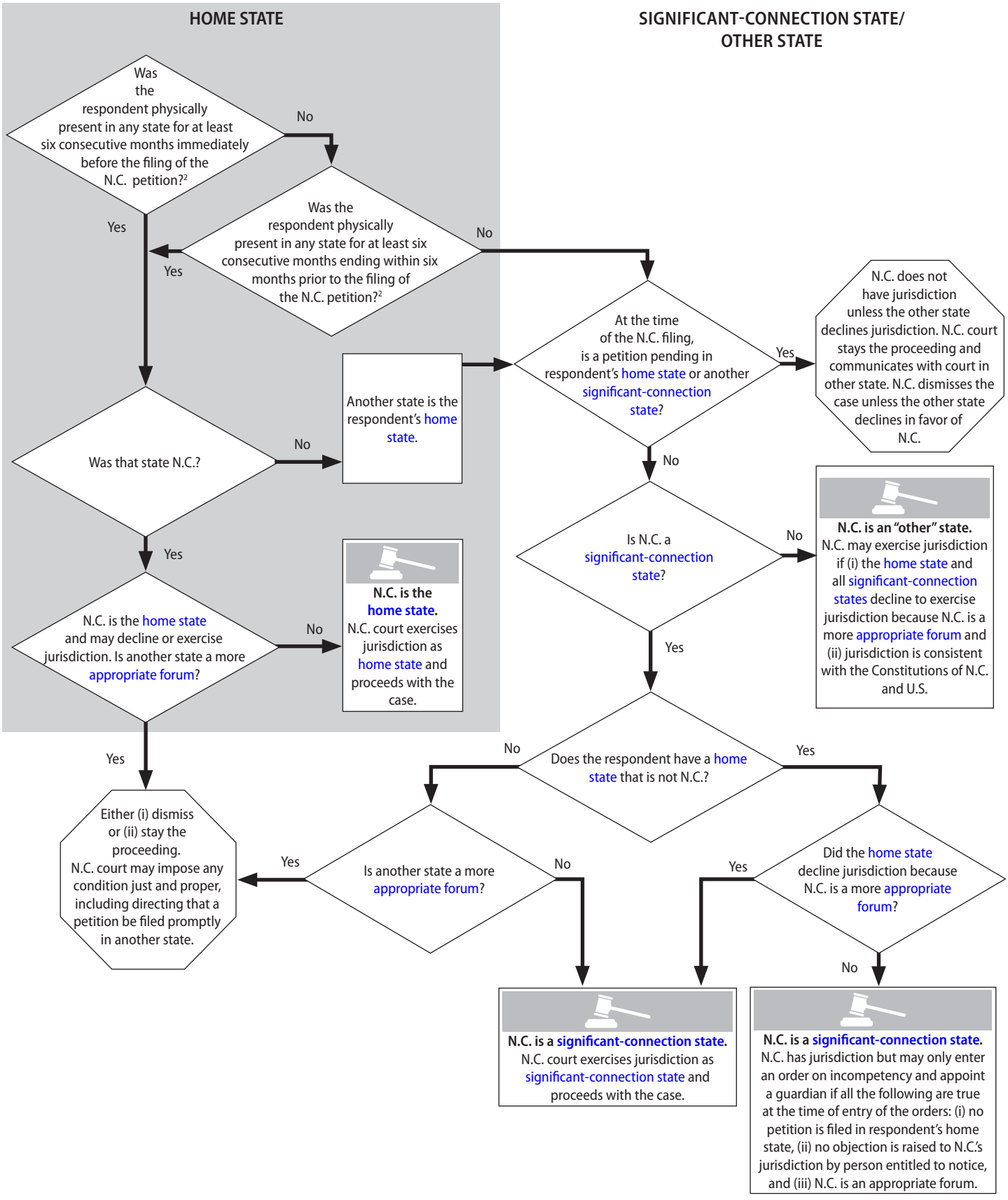
UAGPPJA is now a part of North Carolina law in the form of a new G.S. Chapter 35B. In addition to creating a framework for court communication and cooperation, it serves as a gatekeeper to the courts' authority under G.S. Chapter 35A to adjudicate incompetence and appoint guardians in North Carolina in the first instance. It also provides a means to transfer certain cases to and from North Carolina. Finally, UAGPPJA sets forth a mechanism to register out-of-state orders in North Carolina when a nonresident guardian seeks to take some action with respect to the ward's person or property located in North Carolina. This bulletin provides an overview for each of these new processes. There will likely be additional information as new forms and rules of recordkeeping are created and other administrative aspects of implementing this new law play out.

128. G.S. 35B-18(a)(2).

129. *See* G.S. 35B-38(a); 1A-1, Rule 17(b)(1) and (2) (providing that a general or testamentary guardian "within this State" has the authority to sue or defend on behalf of an incompetent person).

130. G.S. 35B-38(a).

# Appendix A. Does North Carolina Have Jurisdiction to Enter an Incompetency and Adult Guardianship Order?[1] (G.S. Chapter 35B, Article 2)




Notes:
1. This flowchart does not cover an N.C. court's authority to exercise special jurisdiction.
2. The court does not take into account periods of temporary absence.

## Definitions/Explanation of Terms Used in Appendix A

**Home State (G.S. 35B-15(a)(2)).** The state where the respondent was physically present, including periods of temporary absence, for at least six consecutive months immediately prior to the filing of the petition; or, if none, the state in which the respondent was physically present, including periods of temporary absence, for at least six consecutive months ending within the six months prior to filing of the petition.

**Temporary Absence.** Temporary absence is not defined in G.S. Chapter 35B but includes short-term out-of-state travel for most purposes (e.g., vacation, business, or visits with family or friends).

**Significant-Connection State (G.S. 35B-15(a)(3) and (b)).** A state, other than the home state, with which the respondent has a significant connection other than mere physical presence and in which substantial evidence concerning respondent is available. To determine significant connection, the court shall consider

- the location of the respondent's family and of other persons required to be notified of the proceedings;
- the length of time the respondent was physically present in North Carolina and the duration of any absence;
- the location of the respondent's property; and
- the extent to which the respondent has ties to a particular state, including voting registration, tax return filings, vehicle registration, driver's license, social relationships, and receipt of services.

**Appropriate Forum (G.S. 35B-20).** To determine whether a state is an appropriate forum, the court shall consider all relevant factors, including but not limited to the following:

- any expressed preference of the respondent;
- whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- the length of time the respondent was physically present in or was a legal resident of this or another state;
- the distance of the respondent from the court in each state;
- the financial circumstances of the respondent's estate;
- the nature and location of relevant evidence;
- the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- the familiarity of the court of each state with the facts and issues in the proceeding; and
- if an appointment was made, the court's ability to monitor the conduct of the guardian.

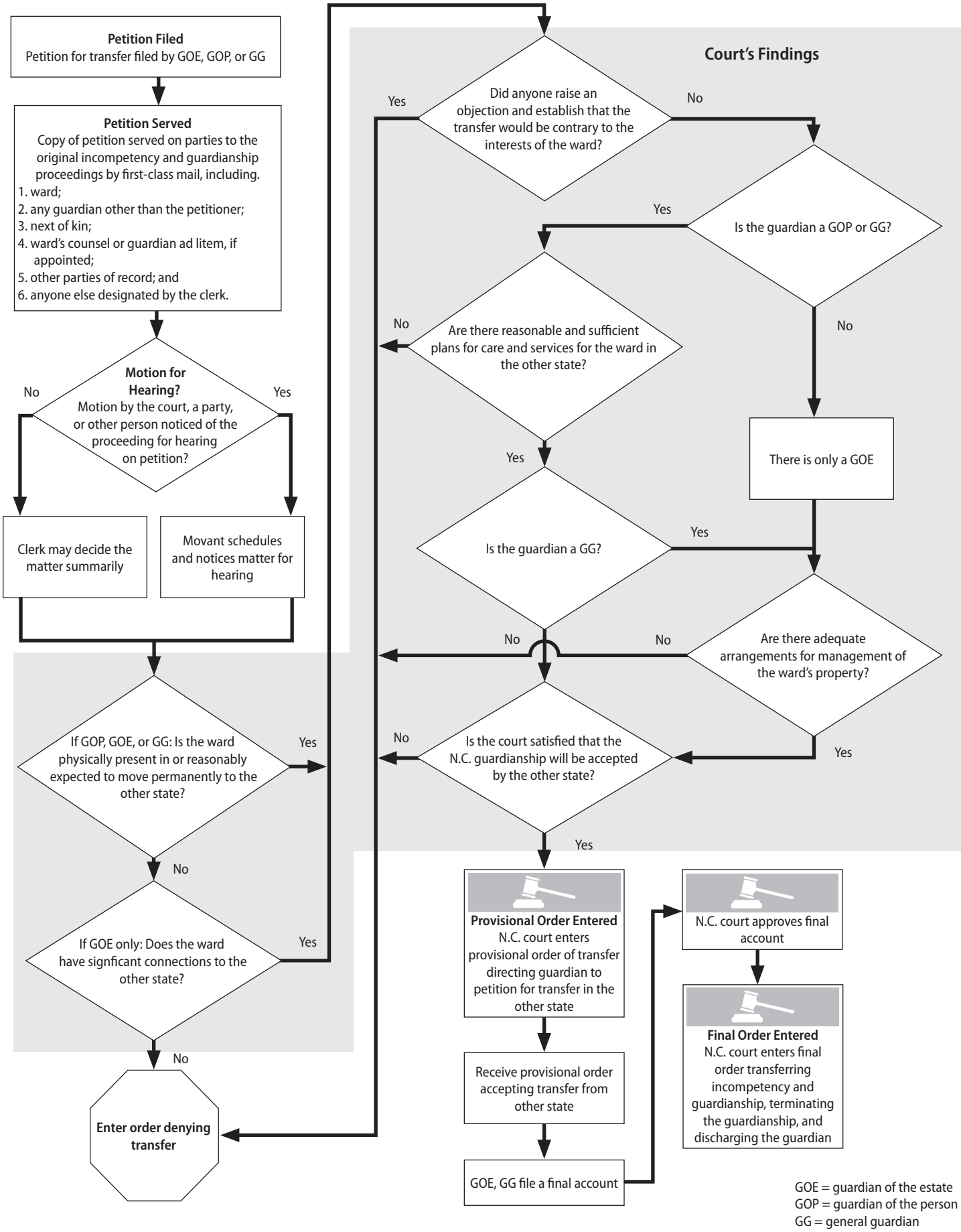
**Special Jurisdiction (G.S. 35B-18).** A court that lacks jurisdiction as a home state, significant-connection state, or "other" state has special jurisdiction to

1. appoint a guardian of the person for up to ninety days if an *emergency* exists and the respondent is present and served in North Carolina (G.S. 35B-18(a)(1)) and

2. issue a protective order with respect to real or tangible personal property located in N.C. (G.S. 35B-18(a)(2))

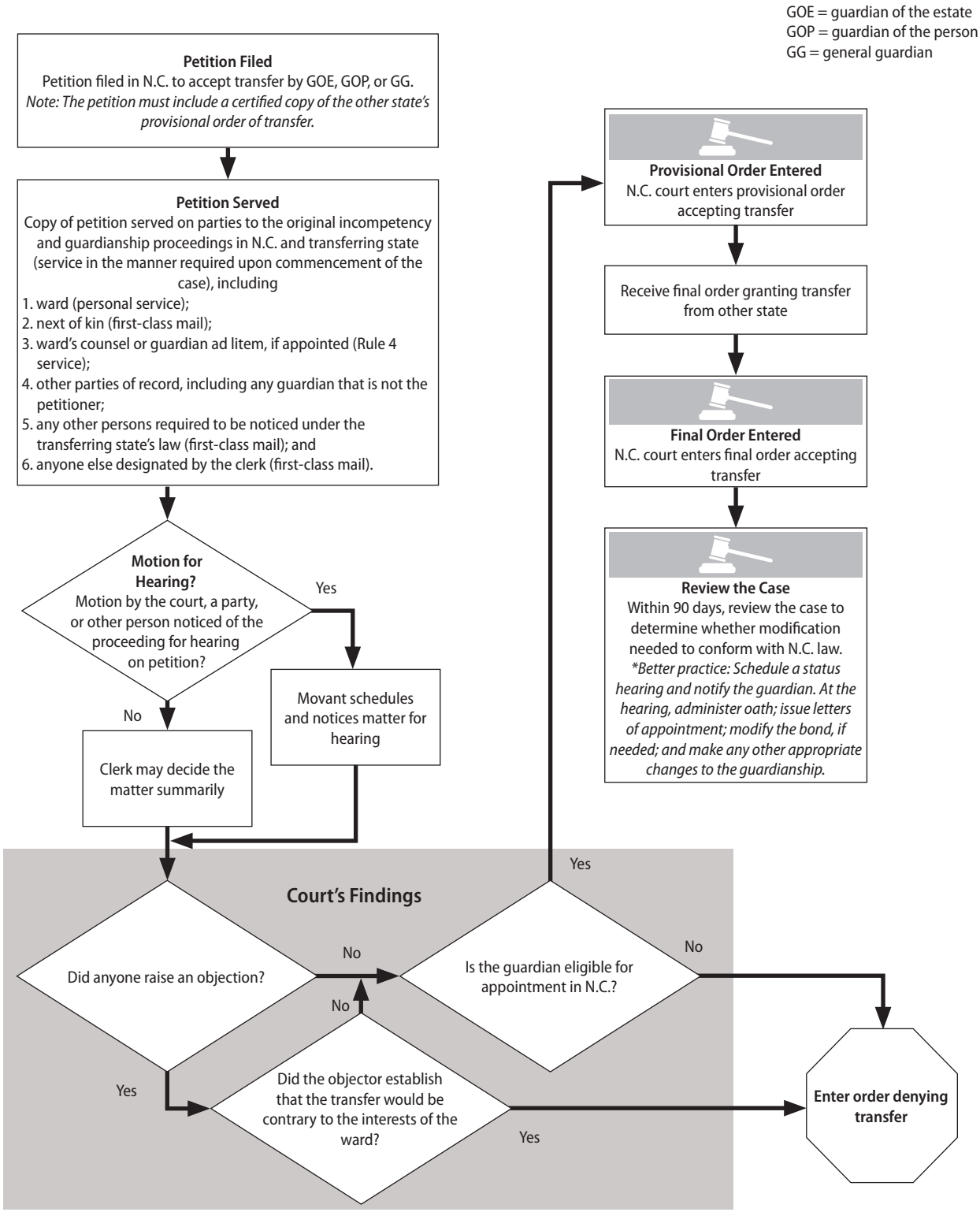
An emergency in this context is a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian of the person is necessary because no other person has authority and is willing to act on the respondent's behalf. G.S. 35B-15(a)(1).

# Appendix B. Transfer of an Existing Incompetency and Adult Guardianship Case from North Carolina to Another State (G.S. 35B-30)




GOE = guardian of the estate
GOP = guardian of the person
GG = general guardian

# Appendix C. Transfer of an Existing Incompetency and Adult Guardianship Case to North Carolina from Another State (G.S. 35B-31)



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# Some Things to Remember About Interim Guardianship

**Author :** Meredith Smith

**Categories :** Guardianship

**Tagged as :** Clerk of Superior Court, Incompetencyinterim guardianship

**Date :** May 4, 2016

Betty is 75 years old and lives alone. She was recently diagnosed with dementia. Betty's daughter, Pam, helps look after her mother and pay her monthly bills, but has noticed a decline in Betty's memory and ability to communicate. Upon reviewing Betty's monthly bank statement, Pam noticed three large payments to companies Pam did not recognize. After some investigation, Pam discovered that the drafts were the result of a telemarketer scam. To stop future drafts, Pam went to the bank and asked them to close Betty's account. However, the bank refused to close the account without Betty's authorization and told Pam that she would need to obtain guardianship of Betty to be able to close the account. Betty refused to consent to close the account as she was afraid Pam was trying to take too much control over her life.

Pam went online, did some research, and decided to seek interim guardianship of her mother so that she can quickly block the telemarketers from accessing her mom's account. What are some things Pam should keep in mind about interim guardianship before heading down to the courthouse?

1. **An interim guardianship motion cannot exist on its own.**

An interim guardian is a temporary guardian appointed prior to adjudication of incompetence. G.S. 35A-1101(11). The purpose of the interim guardianship is to provide protection 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. *Id.* A verified motion for interim guardianship may only be filed **at the time of or subsequent to** the filing of a petition for the adjudication of incompetence. G.S. 35A-1114(a).

Once the court holds a hearing on the motion for appointment of an interim guardian, the petitioner may not voluntarily dismiss the petition for adjudication of incompetence. G.S. 35A-1114(f). The full hearing on the respondent's competency must be held. At the full hearing on the petitioner's competency, the clerk has the authority to either enter an order:

(1) adjudicating the respondent incompetent, or

(2) dismissing the proceeding if the court does not find the respondent to be incompetent.

G.S. 35A-1112(c) and (d). There is not clear authority for the clerk to dismiss the incompetency proceeding after the hearing simply on the basis that the original emergency was resolved through the interim guardianship, particularly if there is sufficient evidence that the respondent is incompetent and the appointment of a guardian will give the individual a fuller capacity for exercising his or her rights. G.S. 35A-1201(4).

Once the court enters an order adjudicating an adult incompetent and appoints a guardian, guardianship terminates in only one of two ways: (1) upon death of the adult, or (2) upon entry of an order by the clerk restoring the adult's competency. G.S. 35A-1295(a). The clerk may tailor the guardianship order and provide for a limited guardianship or only appoint a guardian of the person or guardian of the estate, depending on the ward's needs, but the guardianship remains ongoing until death or restoration.

Therefore, if Pam chooses to seek interim guardianship, she should be cognizant of the fact that it may result in a domino effect that ends up in a plenary guardianship until Betty passes away. In addition, a plenary guardianship may require regular status reports on Betty's well-being, if ordered by the clerk pursuant G.S. 35A-1242, and an inventory and regular accountings of her assets under G.S. 35A-1261 and G.S. 35A-1264. Pam could end up with a much broader, more restrictive, and more permanent solution to a very limited problem by seeking interim guardianship because the interim guardianship cannot exist on its own.

2. **The clerk is required to make specific findings of fact in the interim guardianship order.**

The clerk's order on appointing the interim guardian must include specific findings of fact. G.S. 35A-1114(e). Frequently, the clerk uses AOC Form SP-900M when ordering an interim guardianship, which includes a space for the clerk to write in findings of fact. In the order, the clerk must include sufficient findings to support the conclusions of law. G.S. 35A-1114(e). At a minimum, this should include facts to support each of the following conclusions of law:

1. there is reasonable cause to believe the respondent is incompetent;
2. there is an imminent or foreseeable risk of harm to the respondent's physical well-being and/or estate; and

- there is a need for immediate intervention by a guardian to protect the respondent or the respondent's interest (essentially, there should be some evidence as to why waiting for a full hearing would not adequately protect the respondent).

G.S. 35A-1114(d).

If Pam seeks interim guardianship, she must present sufficient evidence at the interim guardianship hearing for the clerk to make such findings and the necessary conclusions of law set forth in G.S. 35A-1114(d). If, for example, no money remains in Betty's account, the immediacy of the need for an interim guardian may be significantly diminished, particularly if Betty previously executed a durable power of attorney and no other account access is threatened.

3. **The authority of the interim guardian is limited.**

The appointment of an interim guardian does not give blanket authority to the interim guardian to make all decisions about the person and/or property of the respondent. Interim guardianship is intended to give the interim guardian the ***specific power or duty*** to protect the respondent or the respondent's property in response to an imminent or foreseeable risk. G.S. 35A-1114(d). It is a limited authority and extends only so far as is "necessary to meet the conditions necessitating the appointment of an interim guardian." G.S. 35A-1114(e). The clerk must specify the powers and duties of the interim guardian on the interim guardianship order and such powers and duties must be tailored to meet the risk necessitating the appointment. *Id.* If the interim guardian takes some action on behalf of the respondent that is not set forth in the clerk's order, the interim guardian risks acting without authority.

If, for example, a petitioner sought the appointment of an interim guardian because a person lacks capacity and needed an emergency medical procedure, the interim guardian's authority is limited to provide such consent. It would not include the authority to access the person's bank accounts or to make decisions about where the person lives or who visits him or her at the hospital.

4. **The order appointing the interim guardian may not continue indefinitely.**

The interim guardianship terminates on the **earliest** of the following:

1. the date specified in the clerk's order for interim guardianship;
2. 45 days after entry of the clerk's interim guardianship 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

1. when the petition for the adjudication of incompetence is dismissed by the court.

G.S. 35A-1114(e). **As a practical matter, the longest period of time that an interim guardianship could possibly be in place is 90 days from entry of the clerk's order.** After that time, the interim guardian no longer has authority to act because the interim guardianship terminates. Chapter 35A does not state the clerk has the discretion to extend the appointment beyond that date, even if the hearing on the petition for adjudication of incompetence has been continued outside that time period (this may be the case if the parties and the court are waiting on a multidisciplinary evaluation to be returned to the court).

Perhaps law enforcement or the adult protective services division of the county department of social services could have helped Pam address Betty's situation from the outset without resulting in the permanent appointment of a guardian. My colleague, Aimee Wall, recently published a bulletin on financial exploitation of older adults and disabled adults in North Carolina, which touches other options outside of guardianship. I'll leave a side by side comparison on the use of guardianship versus adult protective services to provide protection for disabled adults for another day.

What are your thoughts? What might cause someone to seek guardianship versus a more temporary remedy through adult protective services, law enforcement, or otherwise? Leave them below.

## APPENDIX I

### INFORMATIONAL SHEET

INCOMPETENCY AND GUARDIANSHIP
(G.S. CHAPTER 35A)

When an adult person is able to comprehend and understand but simply needs assistance in various areas of his or her personal and business affairs, a POWER OF ATTORNEY may be more appropriate. The person signing the POWER OF ATTORNEY will choose someone to act on his or her behalf in certain matters as outlined in the POWER OF ATTORNEY. This is a legal document usually prepared by an attorney.

One of the strongest presumptions under North Carolina law, other than the presumption of innocence, is the presumption of competency. A petitioner has the burden of proof in a court of law before a jury and judge, or a judge alone in some instances, to show that the respondent is incompetent, and in need of a guardian. A guardian cannot be appointed for an adult person until that person has been adjudicated incompetent.

An 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. [G.S. § 35A-1101(7)]

An incompetent child is a minor who is at least 17 ½ 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. [G.S. § 35A-1101(8)]

### HOW TO BEGIN A COURT PROCEEDING FOR AN INCOMPETENCY ADJUDICATION

**BASIS FOR PETITION**
If you believe that the person you are inquiring about meets the definition set out above for an incompetent adult or an incompetent minor, there is a basis for the petition.

**WHO CAN FILE A PETITION?**
Any person who has personal knowledge that the facts set forth on the petition are true. This person is the "petitioner." The person the petitioner seeks to have this court declare incompetent is the "respondent."

**FILING OF PETITION**
The petitioner should fully complete an original and 3 copies of PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-SP-200), typewritten or hand written legibly in ink, signed and sworn to

before a notary or Clerk of Court. Form AOC-SP-200 is available from the Clerk of Superior Court or at the North Carolina Court System Web site at www.nccourts.org.

This petition (original and 3 copies) must be filed with the Clerk of Superior Court, with the appropriate filing fee, in the county in which the respondent resides, is domiciled, or is an inpatient in a treatment facility. In cases of indigency, fees may be waived.

The clerk must appoint a Guardian Ad Litem to represent the respondent in the proceedings and will set a date for the hearing, issue a NOTICE OF HEARING, and cause a copy of the Petition and Notice to be served on the respondent and Guardian Ad Litem and any other interested parties. **Respondent must be served personally. (The Sheriff cannot leave papers with any other person.)** The petitioner will be responsible for serving additional persons, such as next of kin and other interested persons.

Upon the filing of a petition the Court may order a MULTIDISCIPLINARY EVALUATION. This means that a team of professional caregivers will make a report to the court. The petitioner or respondent may request the clerk to seek a MDE or the clerk may order one on his or her own motion.

**PREPARATION OF CASE FOR HEARING**

Petitioner (by and through an attorney, if necessary) must prepare the case for hearing and subpoena proper witnesses or secure their attendance otherwise. Proper witnesses may include health care providers, sitters or family members who see the respondent on a daily basis and can testify under oath to his or her condition. The evidence must accurately reflect the respondent's current condition. The sworn statement of the primary doctor will be received into evidence if the matter is not contested and if there is no objection by the Guardian Ad Litem or attorney for respondent. Any psychological evaluations should be certified before being submitted as evidence.

The petitioner should be prepared to present the case in a court of law and to provide all necessary documents. If the petitioner is unable to do so according to the North Carolina Rules of Evidence, an attorney may be needed. The clerk has no authority to appoint counsel or to provide counsel to the petitioner.

Although the respondent may appear at the hearing, there is no statutory requirement that he or she be present.

**WHO WILL SERVE AS GUARDIAN?**

The court will appoint a guardian upon an adjudication of incompetency according to the following order of priority: an individual; a corporation; or a disinterested public agent. [G.S. § 35A-1214]

**HOW DO I PROCEED FROM HERE?**

In any matter of concern for the welfare of any person, it is advisable to contact an attorney before filing a petition.

The laws governing guardianships are complex, and this brief outline is not intended to cover all legal matters that may arise.

The clerk is not allowed to act as legal counselor to any party to this matter. You should consult an attorney for this function.

CLERK OF SUPERIOR COURT, _____ COUNTY

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## APPENDIX I

### GUARDIANSHIP GUIDELINES
**Guardianship File No.: _____**
**Date of Appointment: _____**

The laws governing Guardianships are complicated and they place a heavy responsibility upon the Guardian. Briefly, the following must take place in the appointment process:

You must be appointed by the Clerk of the Superior Court;

You must take an oath; and

You must give a bond to insure the proper accounting of all property and funds that may come into your hands as Guardian.

### INVESTMENTS

The Guardian is not simply a conservator of property. A Guardian has a duty to invest any portion of guardianship funds that are not needed for the maintenance and support of the Ward. North Carolina law requires the Guardian to invest the funds within a reasonable time. [G.S. § § 35A-1251(16) and –1252(13)] A failure to invest funds within a reasonable time may make the Guardian liable for any amount of income that would have been earned had the Guardian made a timely investment.

In investing and managing property for the benefit of another, a Guardian must observe the standard of judgment and care that an ordinarily prudent person of discretion and intelligence, **who is a fiduciary of the property of others**, would observe. If a Guardian has special skills or is named a Guardian on the basis of representations of special skills or expertise, he or she is under a duty to use those skills. [G.S. §§ 36A-1 and 36A-2]

(1.) Investments shall be in the name of the Ward by the Guardian.

EXAMPLE: John H. Smith, Minor by Jane E. Smith, Guardian. **(At no time can funds be invested under a custodian.)**

(2) At the time accounts are required to be filed, the Clerk must require the Guardian to exhibit all investment and bank statements showing cash balance. **(A guardian must use an organization that will provide cancelled checks.)**

(3) Separate bank accounts should be established for each Guardianship in order to provide a clear record of transactions, interest accrued, rents, etc. **(At no time should a guardian deposit any funds other than Guardianship funds into these accounts.)**

(4) The Court requests that all investments be made with an accredited banking institution that would insure all investments.

### MANAGEMENT OF THE WARD'S ESTATE

(1) A guardian of the estate or a general guardian shall take possession, for the use of the Ward, of all the Ward's estate. [G.S. § 35A-1253(1)]

(2) With the approval of the Clerk of Superior Court, a Guardian may purchase or sell assets of the Ward. **To avoid complications, a Guardian should consult his or her attorney frequently.** The law allows a Guardian to employ an attorney to advise or assist the Guardian in the performance of the Guardian's duties. [G.S. § 35A-1251(14)]

(3) Final Account: A Guardian is required to file a final account within 60 days after a guardianship is terminated. [G.S. § 35A-1266]

**WHAT ACCOUNTS MUST CONTAIN**

Accounts filed with the Clerk of Superior Court must be signed under oath and shall contain:

(1) The period that the Account covers and whether it is an Annual or Final Accounting.

(2) Receipts: The amount and value of the Property of the Guardianship, the amount of income and additional property received during the period being accounted for, and all gains from the sale of any property.

(3) Disbursements: All payments, charges, and losses. The Guardian will need cancelled checks or verified proof for all payments in lieu of vouchers. Any disbursements may only come from estate income, not principal.

(4) Balance held on investments: The clerk must require the Guardian to exhibit all investments and bank statements showing cash balances.

(5) Such other facts and information determined by the Clerk to be necessary to an understanding of the account.

The law places upon the Clerk of Superior Court the responsibility for the supervision of Guardianships. For the clerk to properly supervise a guardianship, the Guardian must file inventory and accounts. The clerk may mail you a Notice to file an Inventory or Account by a certain date: **THE GUARDIAN SHOULD HEED THIS NOTICE.** Take notice if the report is not filed, nor good cause shown for the failure to do so, the Guardian may be removed from office. All fees and costs for issuing orders, citations, summonses, or other process against Guardians for their supposed defaults shall be paid by the party found in default.

NORTH CAROLINA LAW PROHIBITS THE CLERK OF SUPERIOR COURT FROM ASSISTING ANYONE WITH THE PREPARATION OF AN ACCOUNT. THIS IS A PROPER FUNCTION FOR AN ATTORNEY.

KEEP ACCURATE RECORDS OF INCOME AND DISBURSEMENTS IN REFERENCE TO THE GUARDIANSHIP.

_____

**Clerk of Superior Court**
**_____ County**

AOC-SP-850, April 2010

NORTH CAROLINA
ADMINISTRATIVE OFFICE
*of the* COURTS

# Responsibilities of Guardians in North Carolina

# GUARDIANSHIP LAW IN NORTH CAROLINA

***for***

***General Guardians - Guardians of the Person-Guardians of the Estate***

## IMPORTANT

- The Clerk of Superior Court in all 100 counties in North Carolina serves as the judge of probate and cannot practice law or give legal advice. Therefore, you should not ask the clerk or the clerk's staff to prepare your petitions, orders or accounts or to advise you on the completion of forms or any legal issue.
- You must keep accurate records of the ward's accounts and investments.
- You must file timely and accurate accountings.
- You must use the ward's money for his or her own needs and not for yourself or anyone else.
- Court costs and fees must be paid to the Clerk of Superior Court. You will be informed about the amounts by the clerk's office.

## DEFINITIONS

1. **Guardian** is the person (or corporation) who has the fiduciary duty and responsibility for caring for the ward's person and/or estate. Also, state agencies may be appointed as a disinterested public agent guardian.
2. **Guardian *ad litem*** is a person appointed by the Clerk of Superior Court to represent the ward if the ward does not have an attorney. The Guardian *ad litem* must be an attorney.
3. **Fiduciary** is a person who has a duty to act primarily for another person's benefit.
4. **Fiduciary duty** is like a trust (promise), in which in the fiduciary is to protect the interest of ward, by managing the ward's estate, preserving the ward's assets in secure investments, or providing for the ward's shelter, food and health care. A fiduciary may not do anything which could appear to be for the fiduciary's own interest.
5. **Law** regarding guardians is found in Chapter 35A of the North Carolina General Statutes. The North Carolina General Statutes can be found at most public libraries, law schools and on-line at www.ncleg.net.
6. **Ward** is the person who has been declared incompetent (or a minor). [G.S. §35A-1202(15)] The ward is called the respondent at the incompetency proceeding stage.
7. **Clerk** means the clerk of superior court.

This pamphlet is provided as a public service to assist persons who have been or are about to be appointed guardians in understanding their duties, responsibilities and role. **It is not meant as substitute for legal advice. You should contact an attorney should you have any legal questions about the role of a guardian.**

## PRINCIPLES FOR THE GUARDIAN

The Guardian must:

1. Ensure that the loyalty and duty of the guardian are to the "actual" needs of the ward.

2. Make decisions that ensure the health and well being of the ward.

3. Involve the person in all decision-making to the extent possible, consistent with the ward's ability.

4. Ensure that the need for guardianship is periodically reviewed and alternatives, including restoration to competency or limited guardianship, are considered.

## PRINCIPLES FOR THE WARD

1. The Ward should be involved in all decision making to the extent possible, consistent with the ward's ability.

2. The Ward has the right to petition the court for periodic review of the guardianship, including restoration to competency,

3. The Ward is entitled to a guardian *ad litem* who represents the expressed interest of the Ward in the guardianships proceedings, and may make recommendations to the clerk concerning the best interests of the Ward, if those interests differ from the expressed interests. [G.S. 35A-1107]

## TYPES OF GUARDIANS

1. **Guardian of the Estate:** A guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward. [G.S. 35A-1202(9)]

2. **Guardian of the Person:** A guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward. The guardian of the person does not handle any of the ward's money or property. [G.S. 35A-1202(10)]

3. **General Guardian:** A guardian of both the estate and the person. [G.S. 35A-1202(7)]

4. **NOTE:** The powers and duties of the guardian may be limited by the order of appointment. See 'Powers and Duties of the Guardian'.

**SPECIAL CONSIDERATIONS – GUARDIANS FOR MINORS**

1. Children under the age of 18 are presumed to be incompetent by law, so there is no need for an incompetency proceeding before appointing a guardian. However, a hearing is required. A parent or other person may be appointed guardian of the estate of the minor.

2. A guardian of the person may be appointed only if the minor has no living parents, or the rights of the parents have been terminated. [G.S. 35A-1224(a)]

3. A minor's funds **SHOULD NOT** be used by the minor's parents (acting as appointed guardians) for maintenance (food, shelter, clothing) and education of the minor, since the parents are legally obligated to pay for their children's maintenance and education until the children reach age 18. Should a parent/guardian be unable to provide for the minor's basic maintenance needs the guardian may petition the Clerk for permission to use some of the minor's funds for those needs. The Clerk, however, has total discretion in determining whether the request should be granted. See "Prohibited Acts Of All Guardians".

4. A minor's real property may not be sold unless the guardian of the estate or the general guardian petitions the court in advance, and a court order is entered approving the sale. A guardian of the estate or general guardian, without court order, may sell up to $5,000 of the ward's personal property in any one accounting period and report the sale and the use of the proceeds on the next annual accounting. A guardian of the estate or general guardian may not sell more than $5,000 of the ward's personal property in any one accounting period without petitioning the court in advance and obtaining a court order approving the sale. See 'Property, Investments and Verifications.'

5. There are special duties and limitations on the types of property or investments that a guardian may make on behalf of a minor. See "Property, Investment and Verification".

6. There are special requirements regarding the duty of a guardian to file an inventory of the minor's property with the court, and to file annual accountings regarding all income, disbursements, distributions, investments and/or balances or property held or invested on behalf of the minor. See "Accountings".

7. When a minor ward reaches 18 years of age (or is sooner emancipated by marriage or court order) the guardianship shall terminate. [G.S. 35A-1295, 1202(12)] The guardian shall file a final accounting with the Clerk of Superior Court within 60 days of the termination. Any remaining assets of the estate must be paid to the former minor and a receipt should be obtained from the former minor and filed with the final accounting in the guardianship. See "Termination of Guardianship".

## APPOINTMENT AND DUTIES OF GUARDIANS

All guardians are bound by the law and must abide by their fiduciary duties to protect the interests of the ward. Specific duties of a guardian depend on what type of guardianship (i.e., estate, person or general) was created.

1. **Qualification As Guardian**

   *(a) Application to Qualify*

   A person who seeks to serve as a guardian for an incompetent or a minor must apply to the Clerk of Superior Court of the county of residence of the minor or incompetent, or where the incompetent is an inpatient, on a form provided by the clerk's office. The form calls for a preliminary inventory of all assets and liabilities of the ward. Therefore, the applicant will need to have a general knowledge of the ward's real estate, bank accounts, stocks, bonds, motor vehicles, and other personal property, an estimated value of these assets, and estimated amount of the ward's debts (mortgages, taxes, credit cards, etc.) to complete the application. The instructions for that form should assist you in completing the form. [G.S. 35A-1210, 1251 (incompetents); 35A-1221, 1225 (minors)]. *[Forms -Application for Letters of Guardianship of the Estate, Guardianship of the Person, General Guardianship for an Incompetent Person, AOC-E-206 or Application for Appointment of Guardianship of the Estate, Guardianship of the Person, General Guardianship for a Minor, A0C-E-208.]*

*(b) Qualified Persons (to serve as guardian for an incompetent)*

The Clerk of Superior Court will grant letters of guardianship to a person(s) or corporation who applies and is qualified to serve, in the following order:

(1) An adult individual

If the individual is not a North Carolina resident, he or she must agree to submit to the jurisdiction of North Carolina courts and appoint a resident process agent.

(2) A corporation if its corporate charter authorizes the corporation to serve as a guardian or in other similar fiduciary capacities;

(3) A disinterested public agent (Director of the local Social Services, Health or Mental Health Departments, etc.). [G.S. 35A-1213,1214]

*(c) Qualified Persons (to serve as guardian for a minor)*

(1) An adult individual

a. must appoint a resident process agent if serving as General Guardian or Guardian of the Estate and is not a resident of North Carolina. [G.S. 35A-1230]

(2) A corporation if its corporate charter authorizes the corporation to serve as a guardian or in other similar fiduciary capacities. [G.S. 35A-1224]

*(d) Disqualified persons*

No person may serve as a guardian who in the opinion of the clerk would not look out for the best interest of the ward. [G.S. 35A-1214]

*(e) Oath (Affirmation)*

All guardians must take an oath (or affirmation) in which the guardian swears (or affirms) to faithfully and honestly discharge the duties of the guardian to the best of the guardian's ability and according to law. *[Forms-Oath, AOC-E-400]*

*(f) Bond*

When serving as a General Guardian or Guardian of the Estate, the guardian must post a bond, approved by the clerk, to secure the faithful performance of the guardian's duties. There are some limited circumstances in which a bond may be reduced based on a dispository aggreement approved by the clerk. The Clerk of Superior Court also has the *discretion to require a bond for non-resident guardian of the person.* [*G.S. 35A-1230]. [Forms-Bond, AOC-E-401]*

*(g) Orders*

The clerk may, with or without a hearing, authorize letters of guardianship to be issued to the named fiduciary (guardian). [G.S. 35A-1213, 1214, 1215, 1226]. *[Forms-Order on Application for Appointment of Guardian, AOC-E-406; Order Authorizing Issuance of Letters, AOC-E-402]*

(*h) Letters*

The clerk will issue letters to the person who is appointed guardian. The letters are the guardian's proof of authority to act on behalf of the ward. (See above for definitions of different types of guardianships). *[Forms-Letters of Appointment, Guardian of the Estate, AOC-E-407; Guardian of the Person, AOC-E-408; General Guardian, AOC-E-413]*

2. **Powers and Duties of Guardian**

*(a) Guardian of the Estate*

Unless limited by court order, the Guardian of the Estate has the general 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…." The complete listing of powers can be found in G.S. 35A-1251 and 1253 (Incompetent) and G.S. 35A-1252 and 1253 (Minor).

In addition to duties imposed by law or by order of the clerk, the guardian of the Estate also has the duty to take possession, for the ward's use, of the ward's estate, to collect monies due the ward, to pay debts of the ward including taxes, to obey all lawful orders of the court and to observe the standard of judgment and care that an ordinary prudent person serving as a fiduciary would take in acquiring and maintaining the ward's property.

***(****b) Guardian of the Person*

Unless limited by court order, a guardian of the person has custody of the ward and is responsible for making provisions for the ward's care, including medical and psychological treatment; comfort, including shelter; and maintenance, including education, training, and employment. [G.S. 35A-1241] If the ward has written advance instructions for the ward's medical or mental health care, the guardian should honor those instructions.

(*c*) *General Guardian*

Unless otherwise limited by court order, a General Guardian has all the powers and duties of a guardian of the estate and guardian of the person. [G.S.35A-1202(7)]
**NOTE:** The powers and duties of the guardians referenced in sub-paragraphs (a), (b), and (c) may be limited by court order allowing the ward to retain certain designated rights and responsibilities.

3. **Property, Investments and Verifications**

*(a) Property*

The ward's property, real and personal, must be maintained in such a manner to ensure the ward has a place to live or money with which to pay for his or her living expenses. The guardian must maintain an accurate accounting of the ward's property, income, expenses and disbursements.

To the extent possible, only the ward's income (rather than any portion of the principal) should be used to pay for his or her care. The guardian of the estate or general guardian must petition the clerk in advance should real property need to be sold to pay for the ward's needs, or if more than $5,000 of the ward's personal property needs to be sold in any one accounting period to pay for the ward's needs.

*(b) Investments*

The ward's funds shall be invested in interest bearing accounts or other approved investment accounts [G.S. 35A-1251; 1252] in the name of the ward, and showing the name of the guardian who is acting on behalf of the ward. The guardian must properly manage the funds to ensure money is available to pay for the ward's needs, such as shelter, food, clothing and medical care.
**NOTE: Failure to properly manage and secure the ward's funds may result in personal liability for the guardian's breach of fiduciary duty. Investment of the ward's funds in securities or other investment devices that subject those funds to loss of principal, may, under the reasonable prudent man rule, subject the guardian to personal liability for breach of fiduciary duty.**

*(c) Verifications*

The guardian must maintain cancelled checks and receipts of all expenditures, and provide them to the clerk with each accounting, together with bank statements, titles, or other documentary evidence of balances still held or invested.

4. **Miscellaneous Responsibilities**

(a) Promptly notify the clerk if you change your name or address.

(b) Promptly notify the clerk if you change the residence of the ward.

5. **Prohibited Acts of all Guardians**

- The real and personal property of the ward may not be used for anything or anyone other than the ward.
- The money belonging to the ward must be kept separate from the personal funds of the guardian. The guardian should appear on any guardianship account as acting on behalf of the ward. The guardian should not be listed on any such account as a joint account holder with or without right of survivorship, or as a payee on death.
- The guardian may not borrow money from the ward or loan the ward's money to anyone unless ordered by the court.
- The guardian shall not write any checks for "cash" unless regular cash distributions to the ward are authorized by the court.
- The ward's real property may not be sold unless the sale is ordered in advance by the court. A guardian of the estate or general guardian, without court approval, may not sell more than $5,000 of the ward's personal property in any one accounting period.
- The ward's real property may not be sold unless the general guardian or the guardian of the estate files a special proceeding seeking authority and approval of the court in advance.
- If the general guardian or guardian of the estate wishes to sell personal property of the ward, during any one accounting period, which has a value of over $5,000.00, the guardian must file a motion in the estate proceeding seeking authority and approval by the court, prior to the sale. Sales of less than $5,000.00 in value during any one accounting period do not need prior court approval, and need only be reported on the next annual accounting.
- Minor's funds **should not** be used by the minors parents for maintenance (food, shelter, clothing) and education of the minor, since the parents are legally obligated to pay for their children's maintenance and education until the children reach age 18. Should a parent or guardian be unable to provide for the minor's basic maintenance needs the guardian may petition the Clerk for permission to use some of the minor's funds for those needs. The clerk, however, has total discretion in determining whether the request should be granted.
- The minor's property must be delivered to the minor once the minor has reached 18 and the clerk has approved the final accounting.
- Guardian may not consent to have the ward sterilized. A ward may only be sterilized when medically necessary treatment for an illness may result in sterilization and that treatment is approved by the clerk.

## EXPENSES, REIMBURSEMENTS AND COMMISSIONS

1. **Allowable Expenses and Reimbursements**

   The Clerk may approve certain expenses of the guardian to be reimbursed from the ward's estate, such as bond premiums and court costs. [G.S. 35A-1267]

   If the ward is living with the guardian or some other person, the Clerk may also approve payment to the guardian or other person to pay the ward's share of the household expenses, food and other necessary items.

2. **Commissions** (Applies only to Guardians of the Estate and General Guardians)
   The guardian may receive a commission for the guardian's time and trouble in handling of the ward's estate. The amount or method of compensation is set by the Clerk of Superior Court, in the clerk's discretion, up to, but not to exceed five percent (5%) of the qualified estate receipts and disbursements. [NOTE: Any commissions with respect to principal are allocated (divided) over the time remaining in the estate (i.e., the number of years until the minor reaches age 18, or the remaining life expectancy of the incompetent calculated under G.S. 8-46).] The clerk will consider the time, responsibility, trouble, and skill involved in the management of the estate. Commissions to guardians are accounted for as costs and expenses of administration. The commission is to cover any ordinary expenses, such as telephone, mailing, and travel, incurred by the guardian in performing the duties of the guardian, as well as paying the guardian for his or her services in managing the estate. In limited circumstances, the clerk may approve additional reimbursement for out of pocket expenses. The guardian must petition the Clerk for approval of a commission or additional reimbursement for out of pocket expenses before making distribution of that commission. [G.S. 35A-1269]

3. **Attorney's Fees** (Applies only to Guardians of the Estate and General Guardians)

   The guardian may choose to hire an attorney to represent the estate. However, the funds of the estate may not be used to pay the attorney's fee unless the clerk finds that the fee is reasonable. Unless the attorney's services are beyond the normal scope of estate administration, the attorney's fees allowed may reduce the amount of the guardian's commission. Not all attorney's fees may be approved by the clerk and if not allowed, the guardian will be personally responsible for the attorney's fees.

## ACCOUNTINGS

(Applies only to Guardians of the Estate and General Guardians)

1. **Types of Accountings**

   *(a) Inventory [Inventory For Guardianship Estate, AOC-E-510]*

   Within three (3) months from the date of qualification, the guardian must file with the Clerk of Superior Court's office an accurate inventory of the ward's estate, giving descriptions and values of all real and personal property owned by the ward as of the date of qualifying. The guardian should obtain copies of signature cards and deposit contracts associated with any joint accounts from the depository financial institution and submit them with the inventory. [G.S. 35A-1261] Property discovered later must be reported on a supplemental inventory. [G.S. 35A-1263.1] Income of the ward's estate (e.g., pension payments, interest, social security, etc.), property later acquired by the estate, or asset conversions (e.g., sale of real estate or stock, foreclosure of deed of trust, etc.) must be reported on the next annual accounting.

   (*b) Annual Accounting [Account, AOC-E-506]*

   The guardian **must** file an annual accounting no later than thirty (30) days after the expiration of one year from the date on which he or she qualified to serve. The accounting **may** be filed earlier. The guardian must then file annual accounts every year thereafter until the final accounting is filed. [G.S. 35A-1264]

   *(c) Final Accounting [Account, AOC-E-506]*

   The guardian **must** file a final accounting within sixty (60) days after the termination of the guardianship. [G.S. 35A-1266]

2. **Proofs**

   All accountings must be accompanied by cancelled checks or other proof satisfactory to the clerk for all disbursements and distributions, and for all balances held or invested (e.g., bank or brokerage statement showing balance held, vehicle title, recorded deed to real estate, etc.). [G.S. 35A-1268]

3. **Contents Of Accountings**

All accountings filed with the Clerk of Superior Court must be signed under oath and contain:

(a) The period which the account covers and whether it is an annual accounting or final accounting;

(b) The amount and value of the property of the estate according to the inventory and appraisal, or according to the previous accounting; the manner and nature of any investments; the amount of income and additional property received during the accounting period; and all gains or losses from the sale of any property or otherwise;

(c) All payments, charges, losses, and distributions;

(d) The property on hand constituting the balance of the estate, if any;

(e) Any other facts and information determined by the clerk to be necessary to an understanding of the account. [G.S. 35A-1264, 1266]

4. **Failure to File Accountings**

If the guardian fails to account as required, or if he or she renders an unsatisfactory account, the Clerk of Superior Court may, after notice, issue an order for the guardian to appear and show cause as to why she or he failed to file an inventory or account. If, within 20 days after service of such an order, she or he does not make the required filing, the clerk may have the sheriff serve the guardian with an order of contempt and commitment, and the sheriff will place the guardian in the county jail until she or he complies with the order. The guardian shall be personally liable for all costs associated with such proceedings. The clerk may also remove the guardian from office and appoint someone else to complete the administration of the estate. [G.S. 35A-1265]

## TERMINATION OF GUARDIANSHIP

1. **Resignation or Death of Guardian**

(a) *Resignation*

A guardian who wishes to resign, must petition the Clerk of Superior Court for an order authorizing the resignation. [G.S. 35A-1292] The clerk may approve the resignation upon approval of a final account.

*(b) Death*

Upon the death of a guardian, the clerk will appoint a successor guardian following the same procedure for the initial appointment. [G.S. 35A-1293]

2. **Removal**

*(a) Mandatory*

The clerk must remove a guardian or take other action when the guardian has been adjudged incompetent, has been convicted of a felony, was initially unqualified, fails to renew a bond, fails to file accountings, fails to obey any citation, notice or process served on the guardian or the guardian's process agent, or the clerk finds the guardian to be unsuitable to continue serving. The complete listing of bases for mandatory removal is found at G.S. 35A-1290(c).

(*b) Discretionary*

The clerk may remove a guardian or take other action when the clerk determines that the guardian has mismanaged or wasted the ward's money or estate, neglected to provide care for the ward, violated a fiduciary duty or has become insolvent. The complete listing of bases for discretionary removal is found at G.S. 35A-1290(a) and (b).

*(c) Emergency*

The clerk may remove a guardian without a hearing upon finding reasonable cause to believe an emergency exists that threatens the well being of the ward or the ward's estate.

*(d) Interim Orders*

When a guardian is removed the clerk may make such interim orders as the clerk finds necessary for the protection of the ward or ward's estate.

3. **Restoration to Competency**

When a ward's competency is restored (See, Restoration below) the guardianship shall terminate and a final accounting must be filed within sixty (60) days. [G.S. 35A-1295]

4. **Death of the Ward**

Upon the death of the ward, guardianship shall terminate and a final accounting must be filed within sixty (60) days. [G.S. 35A-1295] Any remaining assets of the estate must be paid to the personal representative of the estate of the deceased ward and a receipt should be obtained from the personal representative and filed with the final accounting in the guardianship.

5. **Minor Reaches Majority**

When a minor ward reaches 18 years of age (or is sooner emancipated by marriage or court order) the guardianship shall terminate. [G.S. 35A-1295, 1202(12)] The guardian shall file a final accounting with the Clerk of Superior Court within 60 days of the termination. Any remaining assets of the estate must be paid to the former minor and a receipt should be obtained from the former minor and filed with the final accounting in the guardianship.

## RESTORATION TO COMPETENCY

1. **Petition**

   A guardian, ward, or other interested person may file a petition (as a motion in the cause) with the Clerk of Superior Court for partial or full restoration of the ward's competency. The petition must be served on the ward and guardian. There is no AOC form for this proceeding. No petition or proceeding is required for a minor reaching the age of 18.

2. **Hearing**

   The clerk will schedule and hold a hearing to consider evidence of the ward's competency.

3 **Guardian ad *litem* or attorney**

   The ward is entitled to be represented at the hearing by an attorney or the clerk will appoint a guardian ad litem attorney.

4. **Order**

   (a) *Full restoration.*

   If the clerk finds by a preponderance of the evidence that the ward is competent, the clerk will enter an order restoring the ward to competency. The ward may then handle his or her own affairs and enter into contracts as if he or she had never been adjudicated incompetent.

   (b) *Alternative to full restoration*

   If the clerk finds that the ward is able to make some of his own decisions, the clerk may enter an order changing the guardianship to a limited guardianship. A limited guardianship permits the ward to have input into or to make certain decisions, such as housing and medical care, as designated by the clerk.

   (c) *Against restoration.*

   If the clerk finds there is insufficient evidence to restore the ward's competency, the clerk will enter an order to that effect. The guardian of the ward will continue to serve. [G.S. 35A-1130]

IMPORTANT INFORMATION, DATES AND CHECKLIST

| *Name Of Ward* | *Social Security Number* |
|---|---|
| *File No.* | *County Of Appt.* |
| *Name Of Guardian* | *Date Qualified* |
| *Name Of Attorney* | *Telephone No.* |

| *Bond* $ | *Name Of Surety (Bonding Company, etc.)* |
|---|---|

| *Date Inventory Due* | *Date Inventory Filed* | *Date Of Annual Account(s)* |
|---|---|---|

| *Date Final Account Due Upon Termination of Guardianship* | *Date Final Account Filed* |
|---|---|

**FOR GENERAL GUARDIANS AND GUARDIANS OF THE ESTATE ONLY**

- ☐ Determine all assets and debts
- ☐ Lock box searched
- ☐ Guardianship bank account opened in name of ward

Bank _____ No. _____

_____

- ☐ Court approval obtained to sell property
- ☐ Income tax returns filed
- ☐ Other:

_____
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## *Notes*

North Carolina
Administrative Office
*of the* Courts

www.nccourts.org

# Tab 03: Role of the Guardian Ad Litem

ADMINISTRATION OF JUSTICE

**Number 2005/06 October 2005**

# THE ROLE AND RESPONSIBILITIES OF COURT-APPOINTED LAWYERS IN GUARDIANSHIP PROCEEDINGS

■ John L. Saxon*

Section 35A-1107 of the North Carolina General Statutes (G.S. 35A-1107) requires the Clerk of Superior Court to appoint an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding unless the respondent retains counsel.[1]

But what, exactly, is the role and what are the responsibilities of a court-appointed lawyer in a guardianship proceeding?[2]

- What authority and responsibilities are inherent in the role of a guardian ad litem? Are the responsibilities of a guardian ad litem appointed under G.S. 35A-1107 the same as those of guardians ad litem appointed to represent allegedly incompetent adults in other types of legal proceedings?
- Does G.S. 35A-1107 require a lawyer who is appointed as the guardian ad litem for an allegedly incompetent respondent to act as the respondent's attorney?

* Mr. Saxon is an Institute of Government faculty member. His areas of responsibility include guardianship and elder law. He may be reached at 919-966-4289 or saxon@iogmail.iog.unc.edu.

[1] A legal proceeding to determine whether an adult is mentally incompetent is a special proceeding before the Clerk of Superior Court. A proceeding to appoint a guardian for an adult who has been determined to be incompetent is an estate proceeding within the original jurisdiction of the Clerk of Superior Court. Legal proceedings to adjudicate incompetency and appoint a guardian for an incompetent adult may be consolidated or bifurcated. If the proceedings are bifurcated, the attorney appointed in connection with the incompetency proceeding continues to represent the respondent in the guardianship proceeding until a guardian is appointed. For the sake of convenience, this bulletin uses the term "guardianship proceeding" to refer to special proceedings to adjudicate incompetency and estate proceedings to appoint a guardian for an incompetent adult.

[2] This bulletin generally uses the term "court-appointed lawyers" to refer to lawyers who are appointed as guardians ad litem under G.S. 35A-1107.

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- Does a lawyer appointed under G.S. 35A-1107 represent the "best interests" of an allegedly incompetent adult? May she act or make recommendations regarding the respondent's "best interest" when her actions or recommendations are contrary to the respondent's express wishes?[3] Does the extent of the respondent's mental impairment affect the guardian ad litem's authority, responsibility, or role?
- Does a guardian ad litem appointed under G.S. 35A-1107 act on behalf of the court as a neutral investigator or fact-finder?
- To what extent is a lawyer subject to the State Bar's Revised Rules of Professional Conduct in connection with her service as a guardian ad litem under G.S. 35A-1107? Are the respondent's communications with her protected by the attorney-client privilege? Is information she obtains regarding the respondent confidential? May she communicate with a petitioner who is represented by counsel? May she testify at the guardianship hearing?
- How can a lawyer who is appointed under G.S. 35A-1107 assess the mental capacity of an allegedly incompetent respondent? How can she determine whether the respondent is incompetent or retains sufficient mental capacity to make competent decisions or retain certain rights?
- May a court-appointed lawyer be held liable for professional malpractice or breach of fiduciary duty in connection with her service as guardian ad litem?
- Does a respondent who is the subject of a guardianship proceeding have a constitutional right to a court-appointed attorney if he is unable to retain legal counsel? If so, is this right satisfied by appointing an attorney as the respondent's guardian ad litem?

This bulletin addresses these questions by examining the roles and responsibilities of court-appointed lawyers in guardianship proceedings under North Carolina law, the guardianship statutes of other states, the rules of professional conduct for lawyers, and the U.S. and North Carolina constitutions.

[3] For the sake of convenience, this bulletin will refer to the court-appointed lawyer as "she" and to the allegedly incompetent respondent as "he."

# North Carolina's Guardianship Statutes: Past and Present

## North Carolina's Pre-1977 Guardianship Law

Before 1977, North Carolina's statutes governing guardianship proceedings (former G.S. Ch. 35)

1. did not recognize an allegedly incompetent respondent's right to be represented by legal counsel in connection with the proceeding;
2. did not provide for the appointment of an attorney to represent an allegedly incompetent adult who failed to retain counsel; and
3. did not provide for the appointment of a guardian ad litem for an allegedly incompetent respondent.[4]

In at least some instances, however, North Carolina courts appointed guardians ad litem to represent allegedly incompetent adults in guardianship proceedings pursuant to Rule 17 of North Carolina's Rules of Civil Procedure (or similar statutes, such as former G.S. 1-65.1).[5] In one case, the court appointed a lawyer as the respondent's guardian ad litem and the lawyer who was appointed as the guardian ad litem retained another lawyer to act as the respondent's attorney in the guardianship proceeding.[6]

## The 1977 and 1979 Amendments

In 1977, the General Assembly amended North Carolina's guardianship statutes to

1. recognize, for the first time, an allegedly incompetent adult's right to retained counsel in a guardianship proceeding initiated under Article 1A of G.S. Ch. 35 (which applied to adults who were incompetent due to mental retardation, epilepsy, cerebral palsy, or autism and provided an alternate procedure for the appointment of guardians for mentally ill adults) [former G.S. 35-1.16(a)];
2. require the court to appoint a lawyer to act as the respondent's attorney in a guardianship proceeding under G.S. Ch. 35, Art. 1A if the

[4] Comment: North Carolina Guardianship Laws—The Need for Change, 54 N.C. L. Rev. at 403. *See also* Guardianship Law in North Carolina (Chapel Hill: Institute of Government, The University of North Carolina at Chapel Hill, 1963).

[5] *See* In re Barker, 210 N.C. 617, 188 S.E. 205 (1936); In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

[6] In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

petition alleged that the respondent was indigent [former G.S. 35-1.16(a)];

3. require the court to appoint a guardian ad litem[7] for an allegedly incompetent respondent in a guardianship proceeding under G.S. Ch. 35, Art. 1A if the respondent was indigent, waived appointment of counsel, and lacked the capacity to waive his right to counsel [former G.S. 35-1.16(a)]; and
4. require the court to appoint a guardian ad litem for an allegedly incompetent adult when a guardianship proceeding was initiated under Article 2 of G.S. Ch. 35 (which applied to adults who were inebriates or mentally incompetent due to reasons other than mental retardation, epilepsy, cerebral palsy, or autism and provided an alternate procedure for the appointment of guardians for mentally ill adults) [former G.S. 35-2].[8]

In 1979, the General Assembly amended former G.S. 35-1.16 to require the appointment of counsel *or* a guardian ad litem for nonindigent respondents who failed to retain legal counsel in guardianship proceedings under G.S. Ch. 35, Art. 1A.[9]

The 1977 and 1979 amendments to former G.S. Ch. 35, therefore, established two possible roles for court-appointed lawyers in guardianship proceedings:

1. the role of attorney for an allegedly incompetent respondent; or
2. the role of the respondent's guardian ad litem (a role that could be filled by either a lawyer or a nonlawyer).

The 1977 and 1979 amendments to G.S. Ch. 35, however, did not expressly describe the roles or responsibilities of court-appointed attorneys and guardians ad litem in guardianship proceedings.

## The 1987 Revised Guardianship Law

In 1987, the General Assembly revised, rewrote, and consolidated North Carolina's guardianship statutes, repealing the guardianship statutes in former G.S. Ch. 35 and enacting a new Chapter 35A of the General Statutes.[10]

The 1987 legislation enacted G.S. 35A-1107, which, like the 1977 amendments to former G.S. Ch. 35, recognized an allegedly incompetent respondent's right to be represented in guardianship proceedings by retained counsel of his own choice. Like the 1977 and 1979 amendments to G.S. Ch. 35, the 1987 legislation included provisions requiring the court to appoint lawyers to represent allegedly incompetent respondents who failed to retain legal counsel.[11] But, unlike the 1977 and 1979 amendments to former G.S. Ch. 35, the 1987 legislation

1. defined the role of a court-appointed lawyer in a guardianship proceeding as that of the respondent's guardian ad litem, rather than the respondent's attorney;[12] and

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[7] The 1977 amendments defined "guardian ad litem" as a guardian ad litem under N.C. R. Civ. P. Rule 17. G.S. 35-1.7(8) (repealed).

[8] N.C. Sess. Laws 1977, ch. 725. *See* In re Farmer, 60 N.C. App. 421, 299 S.E.2d 262 (1983) (appellate record indicates that a lawyer was appointed as guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding under former G.S. Ch. 35, Art. 2).

[9] N.C. Sess. Laws 1979, ch. 751. *See* In re Bidstrup, 55 N.C. App. 394, 285 S.E.2d 304 (1982) (appellate record indicates that a lawyer was appointed as legal counsel for a nonindigent respondent in a guardianship proceeding under former G.S. Ch. 35, Art. 1A). The 1979 statute also rewrote former G.S. 35-1.39 to require the appointment of counsel or a guardian ad litem in proceedings seeking restoration of competency. The provisions of former G.S. 35-1.39, however, did not apply to proceedings for restoration of competency under former G.S. 35-4.

[10] N.C. Sess. Laws 1987, ch. 550. The 1987 legislation was based on the recommendations of a committee that was established in 1984 by the state's Administrative Office of the Courts (AOC) and the state Division of Social Services (DSS) to address problems that clerks of superior court and state and county social services agencies had experienced in connection with guardianship proceedings. The committee was composed of clerks of superior court, county social services directors, and staff from the AOC, DSS, and the state Division of Mental Health, Mental Retardation, and Substance Abuse Services. Legal and drafting assistance was provided by staff from the Attorney General's office and the Institute of Government.

[11] G.S. 35A-1107. The 1987 legislation and current law allow, but do not require, the court to discharge an appointed guardian ad litem if the respondent retains legal counsel. A 2000 amendment to G.S. 35A-1107 requires that the appointment and discharge of lawyers as guardians ad litem in guardianship proceedings be in accordance with rules adopted by the Office of Indigent Defense Services.

[12] Like the 1977 amendments, the 1987 legislation defined "guardian ad litem" as a guardian ad litem appointed pursuant to Rule 17 of North Carolina's Rules of Civil Procedure.

2. required that all guardians ad litem appointed to represent respondents in guardianship proceedings be attorneys.[13]

It is not entirely clear, however, whether, or exactly how, the 1987 legislation changed the role and responsibilities of court-appointed lawyers in guardianship proceedings. Although the 1987 legislation made some substantive changes to North Carolina's guardianship statutes, much of the substance of former G.S. Ch. 35 was unchanged.[14] Issues or problems regarding the representation of allegedly incompetent respondents in guardianship proceedings do not appear to have been raised during the study and deliberations that resulted in the drafting and enactment of the revised guardianship statute, and the provisions regarding representation of respondents included in the 1987 legislation were not identified by contemporary commentators as involving substantive changes in existing law.[15]

Although the 1987 legislation described the role of a court-appointed lawyer as that of the respondent's "guardian ad litem," the fact that the General Assembly required that these guardians ad litem be attorneys may suggest that these court-appointed lawyers were intended to act, at least in part, as attorneys for allegedly incompetent respondents, as was the case with respect to attorneys appointed under the 1977 and 1979 amendments to former G.S. Ch. 35. And this interpretation may be strengthened by other provisions included in the 1987 legislation.

The 1987 statute, for example, required the court to appoint a lawyer as the respondent's guardian ad litem *unless* the respondent retained legal counsel, and it allowed the court to discharge the guardian ad litem if the respondent retained legal counsel.[16] This may suggest that the role of a lawyer who was appointed as a respondent's guardian ad litem under the 1987 statute was sufficiently similar to that of an attorney who was retained as the respondent's legal counsel that representation of the respondent by two lawyers—the appointed guardian ad litem and retained counsel—was, or in at least some cases might be, unnecessary. Moreover, the specific responsibilities and authority of guardians ad litem under the 1987 statute were virtually identical to those of court-appointed attorneys under the 1977 amendments to former G.S. Ch. 35 and those of attorneys who were retained as legal counsel for respondents in guardianship proceedings.[17] And the provision of the 1987 legislation regarding payment of fees for guardians ad litem refers to the fees of the "court-appointed counsel or guardian ad litem," suggesting, perhaps, that lawyers who were appointed as guardians ad litem in guardianship proceedings under the 1987 statute act, at least in part, as attorneys for allegedly incompetent respondents.[18]

The role of court-appointed lawyers under the 1987 statute, therefore, was not entirely clear. Writing shortly after the enactment of the 1987 revision of North Carolina's guardianship statutes, Frank Johns, a nationally-recognized elder law attorney, suggested that lawyers who are appointed as guardians ad litem for allegedly incompetent respondents under G.S. 35A-1107 have a dual role—as attorney or legal counsel for the respondent *and* as an officer of the court to investigate, and assist the court in determining, the

[13] The provisions of G.S. 35A-1107 do not apply to proceedings seeking restoration of competency under G.S. 35A-1130. G.S. 35A-1130(c) requires the court to appoint a guardian ad litem to represent the ward in a proceeding seeking restoration of competency if the ward is indigent and is not represented by counsel. Unlike G.S. 35A-1107, however, G.S. 35A-1130(c) does not expressly require that the guardian ad litem be an attorney. A 2000 amendment to G.S. 35A-1130(c), though, provides that guardians ad litem appointed under that section must be appointed in accordance with rules adopted by the Office of Indigent Defense Services, thereby possibly suggesting that these guardians ad litem, like those appointed under G.S. 35A-1107, should or must be attorneys. Although the responsibilities of guardians ad litem under G.S. 35A-1130(c) may be similar to those of guardians ad litem under G.S. 35A-1107, this bulletin addresses only the latter.

[14] "The primary focus of the [1987] revision was to simplify and clarify a group of laws that had become unnecessarily complex and confusing." Janet Mason, "Highlights of North Carolina's New Laws Governing Incompetency and Guardianship," 53 Popular Government 4:50 (Spring 1988).

[15] Mason, 53 Popular Government at 4:50, 4:51; A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988), 20-21, 22.

[16] G.S. 35A-1107 (1987) (now G.S. 35A-1107(a)).

[17] *See* G.S. 35A-1109 (requiring that a copy of the guardianship petition be served on the guardian ad litem or retained counsel); G.S. 35A-1110 (allowing the guardian ad litem or retained counsel to request a jury trial on behalf of the respondent); G.S. 35A-1111(b) (requiring that a copy of a multidisciplinary evaluation of the respondent be provided to respondent's guardian ad litem or retained counsel); G.S. 35A-1112 (allowing the guardian ad litem or retained counsel to request that a guardianship hearing be closed to the public).

[18] G.S. 35A-1116(c).

respondent's best interest.[19] If Johns was correct, it may be accurate to say that the role of court-appointed lawyers under North Carolina's revised guardianship law was both similar to, and somewhat different from, the role of lawyers who were appointed as attorneys or guardians ad litem for respondents under the 1977 and 1979 amendments to North Carolina's guardianship statutes.

## The 2003 Amendments

In 2003, the General Assembly amended G.S. 35A-1107 to

1. require a lawyer who is appointed as the guardian ad litem in a guardianship proceeding to personally visit the respondent as soon as possible after being appointed;
2. require the guardian ad litem to make every reasonable effort to determine the respondent's wishes regarding the pending guardianship proceeding;
3. require the guardian ad litem to present to the court the respondent's expressed wishes at all relevant stages of the proceeding;
4. allow the guardian ad litem to make recommendations to the court concerning the respondent's best interest if the respondent's best interest differs from his express wishes; and
5. require the guardian ad litem to make recommendations to the court regarding the rights, powers, and privileges that the respondent should retain if a limited guardianship order is appropriate.[20]

It appears, though, that the 2003 amendments to G.S. 35A-1107 were intended to *clarify* the duties of court-appointed lawyers in guardianship proceedings rather than to *change* their role.[21]

[19] A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988), 20-21, 22.

[20] G.S. 35A-1107(b), as added by S.L. 2003-236, sec. 3. The amendment also made it clear that an attorney who is appointed as a guardian ad litem represents the respondent until the petition is dismissed or a guardian is appointed for the respondent. G.S. 35A-1107(b).

[21] The title of the 2003 legislation was "An Act … to Clarify the Duty of a Guardian ad Litem Appointed to Represent a Person in an Incompetency Adjudication … ." The legislation also reemphasized the court's authority to order a limited guardianship and provided that the guardianship provisions of G.S. Ch. 35A do not limit a court's authority under Rule 17 to appoint a guardian ad litem for a minor or incompetent party in a civil action.

# The Role and Responsibilities of Lawyers Appointed under G.S. 35A-1107

## Powers and Duties under G.S. Ch. 35A

G.S. 35A-1107 and other provisions of North Carolina's guardianship statute identify a number of specific powers and duties of lawyers who are appointed as guardians ad litem in guardianship proceedings. As noted above, G.S. 35A-1107 expressly requires a guardian ad litem to

1. represent the respondent until the petition is dismissed or a guardian is appointed for the respondent;
2. personally visit the respondent as soon as possible after being appointed;
3. make every reasonable effort to determine the respondent's wishes regarding the pending guardianship proceeding;
4. present to the court the respondent's expressed wishes at all relevant stages of the proceeding; and
5. make recommendations to the court regarding the rights, powers, and privileges that the respondent should retain if a limited guardianship order is appropriate.

North Carolina's guardianship statutes also expressly authorize guardians ad litem to

1. request, on behalf of the respondent, a jury trial on the issue of incompetency;
2. request, on behalf of the respondent, that the guardianship proceeding be closed to the public; and
3. make recommendations to the court concerning the respondent's best interest if the respondent's best interest differs from his express wishes.

North Carolina's guardianship statute expressly requires that a copy of the guardianship petition be served on the guardian ad litem and that the guardian ad litem be provided with a copy of any court-ordered multidisciplinary evaluation of the respondent.

In addition, guardians ad litem probably have the implied authority under G.S. Ch. 35A to

1. request a multidisciplinary evaluation of the respondent;[22]
2. subpoena witnesses and documents, present testimony and documentary evidence, and

[22] *See* G.S. 35A-1111(a) (authorizing a party to request a multidisciplinary evaluation of the respondent).

examine and cross-examine witnesses at the guardianship hearing;[23] and

3. give notice of appeal, on behalf of a respondent who has not retained counsel, from the court's orders adjudicating the respondent incompetent and appointing a guardian for the respondent.[24]

This listing of the express and implied authority and responsibilities of guardians ad litem under G.S. Ch. 35A, however, almost certainly fails to provide a comprehensive description of the role and responsibilities of court-appointed lawyers in guardianship proceedings.

## Role and Responsibilities Under Rule 17

As noted above, G.S. 35A-1107 identifies the role of a court-appointed lawyer as that of "guardian ad litem" for an allegedly incompetent respondent. And G.S. 35A-1101(6) and G.S. 35A-1202(8) define "guardian ad litem" as a guardian ad litem appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure. It therefore follows that the role and responsibilities of lawyers who are appointed as guardians ad litem under G.S. 35A-1107 must be defined by reference to, and limited or supplemented by, the provisions of Rule 17.

Rule 17 itself, however, says little about the role and responsibilities of guardians ad litem who are appointed to represent minor children or incompetent adults who are parties in civil actions or special proceedings. According to the rule, a guardian ad litem who is appointed to represent an incompetent respondent must "defend" the incompetent respondent in the pending litigation and "file and serve such pleadings as may be required."[25]

Case law, though, describes in somewhat greater detail the role and responsibilities of guardians ad litem appointed under Rule 17. North Carolina's appellate courts, for example, have stated that the role of a guardian ad litem appointed under Rule 17 is to protect an incompetent party's rights and interests in connection with the pending litigation.[26] Case law also states that a guardian ad litem appointed under Rule 17 has the authority and responsibility to

1. carefully investigate all facts relevant to the pending litigation;[27]
2. employ, if necessary, legal counsel to represent an incompetent party;[28]
3. secure or subpoena witnesses to testify on behalf of the incompetent party;[29]
4. exercise due diligence and act in the utmost good faith with respect to the pending litigation;[30] and
5. "do all things that are required" to protect the incompetent party's rights and interests in connection with the pending litigation.[31]

Although a guardian ad litem is required to protect the rights of the incompetent party she represents, she is not required to manufacture a defense if none exists.[32]

A guardian ad litem appointed under Rule 17 may waive a respondent's right to a jury trial, but has no authority to waive, compromise, or settle the respondent's substantive legal rights or consent to the entry of a judgment against the respondent without investigation and approval by the court.[33]

Unlike G.S. 35A-1107, Rule 17 does not require that the guardian ad litem appointed to represent an

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[23] *See* G.S. 35A-1112(b) (authorizing the respondent to present testimony and evidence, etc.).

[24] *See* G.S. 35A-1115 and G.S. 1-301.2 and 1-301.3 (regarding aggrieved party's right to appeal orders entered by the Clerk of Superior Court).

[25] G.S. 1A-1, Rule 17(b)(2) and 17(d).

[26] *See* Graham v. Floyd, 214 N.C. 77, 81, 197 S.E. 873, 876 (1938); Rutledge v. Rutledge, 10 N.C. App. 427, 431, 179 S.E.2d 163, 165 (1971).

[27] Travis v. Johnston, 244 N.C. 713, 722, 95 S.E.2d 94, 100 (1956); Franklin County v. Jones, 245 N.C. 272, 279, 95 S.E.2d 863, 868 (1957).

[28] In re Stone, 176 N.C. 336, 338, 97 S.E. 216, 217 (1918).

[29] Teele v. Kerr, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964).

[30] Travis v. Johnston, 244 N.C. at 722, 95 S.E.2d at 100; Franklin County v. Jones, 245 N.C. at 279, 95 S.E.2d at 868.

[31] Teele v. Kerr, 261 N.C. at 150, 134 S.E.2d at 128. *See also* Hagins v. Redevelopment Comm'n. of Greensboro, 275 N.C. 90, 104, 165 S.E.2d 490, 498 (1969).

[32] Franklin County v. Jones, 245 N.C. at 279, 95 S.E.2d at 868.

[33] Spence v. Goodwin, 128 N.C. 273, 276, 38 S.E. 859, 860-61 (1901); Narron v. Musgrave, 236 N.C. 388, 394, 73 S.E.2d 6, 10 (1952); Blades v. Spitzer, 252 N.C. 207, 213, 113 S.E.2d 315, 320 (1960); State ex rel. Hagins v. Phipps, 1 N.C. App. 63, 64, 159 S.E.2d 601, 603 (1968).

incompetent party be a lawyer.[34] But Rule 17 clearly allows the appointment of an attorney as the guardian ad litem for an incompetent party in a civil action or special proceeding.[35]

The questions, therefore, are (1) whether the role and responsibilities of a lawyer who is appointed as a guardian ad litem under Rule 17 are different from those of a nonlawyer who is appointed as a guardian ad litem, and (2) whether, or to what extent, a lawyer or nonlawyer who is appointed as a guardian ad litem under Rule 17 is required to act as a "zealous advocate" for the incompetent adult she "represents."

It seems clear that the responsibilities of a guardian ad litem described above are, at least when the guardian ad litem does not retain legal counsel to represent the minor or incompetent party, similar to those of an attorney retained to represent a party in a lawsuit. Like a retained attorney, a guardian ad litem who represents a minor or incompetent party must "prosecute" or "defend" the litigation on behalf of the party, file necessary pleadings on the party's behalf, subpoena witnesses and present testimony and evidence, manage the litigation, and protect the party's interest in the pending action.

Thus, in *Tart v. Register*, the court refused to reverse a judgment against a minor child when the trial court had failed to appoint a guardian ad litem for the child but the child's interest had been adequately protected by a lawyer who had been retained as the child's attorney.[36] And in *In re Clark*, the Supreme Court rejected an indigent minor parent's claim that she was denied the right to court-appointed counsel in a juvenile proceeding in which the juvenile court had appointed a lawyer as her guardian ad litem pursuant to Rule 17 and the attorney/guardian ad litem "vigorously represented her as attorney as well as guardian ad litem."[37] These cases, therefore, may suggest that the role and responsibilities of a guardian ad litem are similar to those of an attorney retained to represent a minor or incompetent party, especially if the guardian ad litem is an attorney.[38]

Thus, it seems that "the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but … is [also] somewhat different."[39]

So, how are the roles and responsibilities of attorneys and guardians ad litem alike and how are they different? The short answer may be that a lawyer who acts as the attorney for a competent adult in a civil action or special proceeding is required to zealously

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[34] North Carolina is one of eight states that expressly require the appointment of an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding. Five of these states (Idaho, Montana, New Mexico, North Dakota, and South Carolina) distinguish the guardian ad litem's role and responsibilities from those of the court-appointed visitor in a guardianship proceeding. The other two states (Tennessee and Wisconsin) distinguish the court-appointed lawyer's role and responsibilities as guardian ad litem from the role and responsibilities of the lawyer who is appointed as the respondent's attorney in the guardianship proceeding. At least two other North Carolina statutes expressly require that the guardian ad litem appointed in a legal proceeding be a lawyer. *See* G.S. 15-11.1; G.S. 51-2.1.

[35] *See* In re Clark, 303 N.C. 592, 598, 281 S.E.2d 47, 52 (1981) (noting the "traditional practice" in North Carolina of appointing licensed attorneys as guardians ad litem for minor children who are parties in civil actions or special proceedings).

[36] Tart v. Register, 257 N.C. 161, 170-71, 125 S.E.2d 754, 761 (1962). *Cf.* In re R.A.H., ___ N.C. App. ___, 614 S.E.2d 382 (2005) (reversing an order terminating parental rights when the juvenile court appointed an attorney-advocate for the minor child but failed to appoint a volunteer guardian ad litem for the child as required by G.S. 7B-1108).

[37] In re Clark, 303 N.C. at 599, 281 S.E.2d at 52.

[38] *But see* In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1 (2004). Under North Carolina's Juvenile Code (G.S. 7B-1101(1)) the court must appoint legal counsel *and* a guardian ad litem for an indigent parent in cases involving termination of parental rights based on parental "incapacity." In *Shepard*, the indigent "incapacitated" parent was represented by a court-appointed lawyer who acted as her attorney *and* by a second court-appointed lawyer who acted as her guardian ad litem. Under these circumstances, the court concluded that the lawyer who was appointed as the parent's guardian ad litem was *not* acting as the parent's attorney, that the lawyer/guardian ad litem was therefore free to testify against the parent, and that her testimony regarding her determination regarding the parent's "best interest" and capacity to act as a parent was admissible as evidence supporting termination of the respondent's parental rights. In re Shepard, 62 N.C. App. at 228-29, 591 S.E.2d at 10. It is not at all clear, however, that the *Shepard* case governs the role or responsibilities of a lawyer appointed as the guardian ad litem for an allegedly incompetent respondent who is not represented by retained or appointed counsel in a guardianship proceeding. Although the *Shepard* decision cites In re Farmer, 60 N.C. App. 241, 299 S.E.2d 262 (1983), it is clear from the appellate record in *Farmer* that the case involved a lawyer whose testimony was based on his experience as the temporary receiver or guardian for an incompetent respondent and *not* on his service as the respondent's guardian ad litem.

[39] Orr v. Knowles, 337 N.W.2d 699, 702 (Neb. 1983).

represent the expressed wishes of her client, while a lawyer who represents an incompetent adult or minor child in a civil action or special proceeding, regardless of whether the lawyer is acting as the party's attorney *or* guardian ad litem, must represent the party's "best interests" *if* and to the extent that the party lacks sufficient mental capacity to make decisions regarding his own best interests.[40]

## The Role of Court-Appointed Lawyers under the Guardianship Laws of Other States

How do the role and responsibilities of court-appointed lawyers under North Carolina's guardianship statute compare with those under the guardianship laws of other states?

### *Guardian ad Litem*

Approximately half of the states require or allow a court to appoint a guardian ad litem to represent an allegedly incompetent respondent in a guardianship proceeding.[41]

Some of these states allow or require the appointment of a guardian ad litem in addition to the appointment of an attorney to act as legal counsel for the respondent.[42] Some allow or require the appointment of a guardian ad litem in addition to a visitor, investigator, friend of the court, or similar officer.[43] And some provide for the appointment of a guardian ad litem, an attorney for the respondent, and a visitor, investigator, or friend of the court in guardianship proceedings involving allegedly incompetent adults.[44]

In some states, the role of a guardian ad litem in guardianship proceedings is distinguished, implicitly if not clearly, from that of the respondent's court-appointed attorney or court visitor. The Texas Probate Code, for example, requires the appointment of an "attorney ad litem" and visitor in guardianship proceedings, allows the appointment of a guardian ad litem, and specifies the roles and responsibilities of each.[45] Some state guardianship laws, however, combine (and, some would argue, confuse) the guardian ad litem's role with that of the respondent's attorney or court-appointed visitor.[46]

Eight states (including North Carolina) expressly require that the person appointed as the respondent's guardian ad litem be a lawyer or provide that a court-appointed lawyer in a guardianship proceeding acts as, or has the powers of, a guardian ad litem.[47] In the remaining states that allow or require the appointment of a guardian ad litem, state law does not expressly require that the person appointed be a lawyer, though, in practice, lawyers frequently are appointed as guardians ad litem in guardianship proceedings.[48]

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[40] *See* text accompanying notes 103 through 122.

[41] Elizabeth R. Calhoun and Suzanna L. Basinger, "Right to Counsel in Guardianship Proceedings," 33 Clearinghouse Rev. 316, 321 (Sept.-Oct. 1999) (data revised based on author's research).

[42] *See*, for example, Mich. Comp. Laws § 700.5303.

[43] *See*, for example, N.D. Cent. Code § 30.1-28-03. Approximately twenty states provide for the appointment of a visitor, investigator, or friend of the court in guardianship proceedings. In some instances, the visitor's responsibilities are similar to those of a guardian ad litem under the guardianship statutes of other states. For example, the Uniform Guardianship and Protective Proceedings Act requires a court-appointed visitor to interview the respondent, explain the nature of the guardianship proceeding and the respondent's legal rights to the respondent, ascertain the respondent's views regarding the guardianship proceeding, interview the petitioner and proposed guardian, and make recommendations to the court regarding additional evaluation of the respondent's condition, the appropriateness of guardianship, and the suitability of the proposed guardian. No state requires that the visitor in a guardianship proceeding be a lawyer, but some states allow the court to appoint a lawyer as the visitor. *See* Ariz. Rev. Stat. § 14-5308 (a court-appointed investigator must have a background in law, nursing, or social work).

[44] *See*, for example, Colo. Rev. Stat. §§ 15-14-115 and 15-14-305 (allowing the appointment of a guardian ad litem and requiring the appointment of a court visitor and an attorney for a respondent in a guardianship proceeding).

[45] *See*, for example, Texas Probate Code §§ 645, 646, 647, 648, 648A; Ga. Code § 29-5-6, Tenn. Code § 34-1-107; and D.C. Code § 21-2033.

[46] Calhoun, 33 Clearinghouse Rev. at 318-319.

[47] *See*, for example, N.C. Gen. Stat. § 35A-1107 (attorney appointed as guardian ad litem); S.C. Code § 62-5-303 (court-appointed attorney has powers of a guardian ad litem).

[48] For example, although Virginia's guardianship statute (Va. Code § 37.2-1003) does not expressly require that guardians ad litem appointed in guardianship proceedings be lawyers, it appears that the state's universal practice is to appoint only lawyers as guardians ad litem. Administrative rules adopted by the Judicial Council of Virginia require that all lawyers who are appointed as guardians ad litem in guardianship proceedings be certified

In some states, state law does not expressly define the powers and duties of a guardian ad litem in guardianship proceedings. South Carolina's guardianship statute, for example, simply states that the attorney appointed to represent an allegedly incompetent respondent "shall have the powers and duties of a guardian ad litem."[49] Other state guardianship statutes provide only a general description of the guardian ad litem's role. Wyoming's guardianship statute, for example, simply provides that the court must appoint a guardian ad litem "to represent the best interest" of a respondent in a pending guardianship proceeding.[50]

Several state guardianship statutes, however, provide more detailed lists of a guardian ad litem's responsibilities in guardianship proceedings. Tennessee's guardianship statute generally requires the court to appoint a lawyer as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding unless the respondent is represented by "adversary" counsel.[51] Under Tennessee law, the lawyer who is appointed as guardian ad litem is *not* an advocate for the respondent, but rather "owes a duty to the court to impartially investigate to determine the facts" of the case and to "determine what is best for the respondent's welfare."[52] Tennessee law specifically requires a lawyer who serves as guardian ad litem to

- verify that the respondent has been properly notified of the guardianship proceeding;
- explain the nature of the guardianship proceeding and the respondent's legal rights to the respondent in language easily understood by the respondent;
- investigate the respondent's physical and mental capabilities;
- recommend the appointment of adversary counsel if the respondent wants to contest the guardianship proceeding and has not retained counsel; and
- submit a report to the court indicating whether a guardian should be appointed, whether the proposed guardian should be appointed, or whether some other person should be appointed as guardian for the respondent.[53]

New Mexico's guardianship statute, like North Carolina law, requires the court to appoint an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding unless the respondent has retained an attorney of his own choice.[54] Under the New Mexico statute, lawyers appointed as guardians ad litem are required to

- interview the respondent in person before the hearing;
- present the respondent's declared position to the court;
- interview the proposed guardian, the visitor, and the health care professional who has evaluated the respondent;

and meet continuing legal education requirements to maintain their certification. *See* Virginia Judicial Council, Standards to Govern the Appointment of Guardians Ad Litem for Incapacitated Persons (Adults), January 1, 2002 (available on-line at http://www.courts.state.va.us/stdrds.htm.)

[49] S.C. Code § 62-5-303(a). South Carolina's guardianship statute, however, implicitly distinguishes the guardian ad litem's role from that of the court-appointed visitor. *See* S.C. Code § 62-5-308.

[50] Wyo. Stat. §§ 3-1-101(a)(vi), 3-1-205(a)(iv).

[51] Tenn. Code § 34-1-107(a), (c) (a nonlawyer may be appointed as guardian ad litem if there are insufficient lawyers within the court's jurisdiction for the appointment of a lawyer as guardian ad litem).

[52] Tenn. Code § 34-1-107(d)(1).

[53] Tenn. Code § 34-1-107(d)(2), (f). Unlike Tennessee, Michigan does not require that a lawyer be appointed as the guardian ad litem for an allegedly incompetent respondent. The provisions of Michigan's statute regarding the responsibilities of guardians ad litem in guardianship proceedings, however, are similar to those in Tennessee's statute. Michigan law also requires a guardian ad litem to advise the court regarding whether the respondent wants to be present at the hearing, wants to contest guardianship, objects to the appointment of a particular person as guardian, or wants to limit the guardian's powers, and to make recommendations to the court with respect to whether there are appropriate alternatives to guardianship, whether a limited guardianship is appropriate, and whether disputes regarding the guardianship proceeding might be resolved through court-ordered mediation. Mich. Comp. Laws § 700.5305. Under Virginia law, the guardian ad litem's report must address whether the respondent needs a guardian, whether the guardian's powers and duties should be limited, the suitability of the proposed guardian, the amount of the guardian's bond, and the proper residential placement of the respondent. Va. Code § 37.2-1003(C).

[54] N.M. Stat. § 45-5-303(C). Unlike North Carolina's guardianship law, New Mexico law also requires the appointment of a "visitor" who is required to evaluate the respondent's needs and make recommendations to the court regarding the scope of the guardianship and the appropriateness of the proposed guardian. N.M. Stat. § 45-5-303(E).

- review the reports submitted by the visitor and health care professional who have evaluated the respondent; and
- obtain independent medical or psychological assessments of the respondent, if necessary.[55]

Wisconsin's guardianship statute also requires that a lawyer be appointed as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding.[56] Under Wisconsin law, the guardian ad litem is "an advocate for the best interests" of the respondent, must "function independently, in the same manner as an attorney for a party to the action, and shall consider but shall not be bound by, the wishes of the [respondent] or the positions of others as to the best interests of the [respondent]."[57] The general duties of a guardian ad litem include

- interviewing the respondent;
- explaining the guardianship proceeding to the respondent;
- advising the respondent of his legal rights;
- requesting the court to order additional medical, psychological, or other evaluations if necessary;
- informing the court whether the respondent objects to a finding of incompetency or the guardian ad litem's recommendations regarding the respondent's best interests;
- presenting evidence concerning the respondent's best interest, if necessary; and
- reporting to the court on any other relevant matter upon request of the court.[58]

### *Attorney*

Traditionally, the role of court-appointed lawyers in guardianship proceedings was described as that of a guardian ad litem.[59] The more recent trend, however, has been to require court-appointed lawyers to act as attorneys and zealous advocates for allegedly incompetent respondents in guardianship proceedings.[60]

Thirty-three states and the District of Columbia require that a lawyer be appointed as the attorney for an allegedly incompetent respondent in a guardianship proceeding if the respondent does not retain, is unable to retain, requests, or needs legal counsel.[61]

In these states, the role and responsibilities of lawyers appointed to represent allegedly incompetent respondents in guardianship proceedings are generally the same as those of appointed or retained lawyers who represent parties in other civil proceedings. And at least two state appellate courts have ruled that a court-appointed lawyer's responsibilities to an allegedly incompetent respondent are the same as those involved in the "traditional" lawyer-client relationship.[62] So, in these states the legal and professional responsibilities of a lawyer appointed as the attorney for a respondent in a guardianship proceeding include

- treating the respondent as her client,

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[55] N.M. Stat. § 45-5-303.1(A).

[56] Wis. Stat. § 880.33(2)(a)(1).

[57] Wis. Stat. § 880.331(3).

[58] Wis. Stat. § 880.331(4). Wisconsin's guardianship statute requires the appointment of "full legal counsel" to represent an allegedly incompetent respondent if the respondent is unable to retain counsel and appointment of legal counsel is requested by the respondent, recommended by the guardian ad litem, or determined by the court to be in the respondent's best interest. Wis. Stat. § 880.33(2)(a)(1). Wisconsin's guardianship law does not provide for the appointment of a visitor, investigator, or friend of the court in a guardianship proceeding.

[59] Sally Balch Hurme, "Current Trends in Guardianship Reform," 7 Md. J. Contemp. L. Issues 143, 151 (1995-96).

[60] Hurme, 7 Md. J. Contemp. L. Issues at 151.

[61] Calhoun, 33 Clearinghouse Rev. at 321 (data revised based on author's legal research). *See*, for example, Ariz. Rev. Stat. § 14-5303 (court must appoint attorney to represent respondent unless respondent has retained legal counsel); Mich. Comp. Laws § 700.5303 (court must appoint attorney to represent respondent if respondent requests legal counsel, guardian ad litem recommends appointment of legal counsel, or court determines that respondent's best interest requires appointment of counsel); Wash. Rev. Code § 11.88.045 (court must appoint attorney for indigent respondent). Approximately seven states allow, but do not require, the court to appoint a lawyer to represent a respondent in a guardianship proceeding. Calhoun, 33 Clearinghouse Rev. at 321 (data revised based on author's research). *See*, for example, Wyo. Stat. § 3-1-205 (court has discretion to appoint attorney to represent respondent). Nine of the remaining states (including North Carolina) require or allow the appointment of a guardian ad litem to represent an allegedly incompetent respondent in a guardianship proceeding, and six of these states (including North Carolina) require that a guardian ad litem be an attorney. Only Delaware makes no provision for the appointment of an attorney or guardian ad litem to represent a respondent in a guardianship proceeding.

[62] *See* In re M.R., 638 A.2d 1274 (N.J. 1994); In re Lee, 754 A.2d 426, 438 (Md. Spec. App. 2000). *See also* Vicki Gottlich, "The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective," 7 Md. J. Contemp. L. Issues 191 (1995-96).

- advising the respondent regarding the respondent's legal rights,
- preserving the confidentiality of communications from and information about the respondent,
- advocating the respondent's position,
- protecting the respondent's interests, and
- complying with the applicable rules of professional conduct in the course of her representation of the respondent.[63]

Some state guardianship statutes expressly require a court-appointed lawyer to act as a "zealous advocate" for the respondent,[64] list some of the attorney's specific responsibilities to the respondent,[65] or explicitly differentiate the attorney's role from that of a guardian ad litem or visitor.[66]

Georgia's guardianship law, for example, expressly provides that a lawyer who is appointed as the respondent's attorney may not serve as the guardian ad litem in the pending guardianship proceeding and that a lawyer who is appointed as the guardian ad litem in a pending guardianship proceeding may not serve as the respondent's attorney.[67] And Washington's guardianship statute states that the role of a court-appointed attorney in a guardianship proceeding is "distinct from that of the guardian ad litem," requires a court-appointed attorney to "act as an advocate for the [respondent]," and prohibits a court-appointed attorney from substituting her "own judgment for that of the [respondent] on the subject of what may be in the [respondent's] best interests."[68]

West Virginia's guardianship statute goes even further, listing twenty specific responsibilities of attorneys who represent respondents in guardianship proceedings, including

- advising the respondent of the possible legal consequences of the guardianship proceeding and inquiring into the client's interests and desires with respect thereto;
- maintaining contact with the respondent throughout the proceeding;
- interviewing potential witnesses and contacting persons who may have relevant information concerning the respondent;
- pursuing discovery through formal and informal means;
- obtaining independent psychological examinations, medical examinations, and home studies as needed;
- reviewing all medical reports;
- subpoenaing witnesses to the hearing;
- communicating the respondent's wishes to the court;
- presenting evidence on all relevant issues;
- cross-examining witnesses, making objections to inadmissible testimony and evidence, and otherwise zealously representing the respondent's interests and desires;
- raising appropriate questions as to any person nominated or proposed as guardian;
- taking steps to limit the scope of the guardianship as appropriate; and
- informing the respondent of the respondent's right to appeal and filing an appeal on behalf of the respondent when appropriate.[69]

## "Zealous Advocate" or "Best Interest"?

Discussions regarding the role of court-appointed lawyers in guardianship proceedings often are couched in terms of two competing models or perspectives: the "zealous advocate" model and the "best interest" perspective.

### *"Best Interest"*

Under the "best interest" perspective, the role of a court-appointed lawyer in a guardianship proceeding

[63] In re Lee, 754 A.2d at 438-439. *See also* "Wingspan—The Second National Guardianship Conference, Recommendations," 31 Stetson L. Rev. 595, 601 (2002); Lu-in Wang, et al., "Trends in Guardianship Reform: Roles and Responsibilities of Legal Advocates," 24 Clearinghouse Review 561, 566-67 (Oct. 1990); Gottlich, 7 Md. J. Contemp. Legal Issues at 216-220; Joan L. O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," 31 Stetson L. Rev. 687, 727-733 (2001-02); American Bar Association Commission on the Mentally Disabled, *Involuntary Civil Commitment: A Manual for Lawyers and Judge*, 17-43 (1988) (discussing the responsibilities of respondents' attorneys in involuntary mental commitment hearings).

[64] D.C. Code § 21-2033.

[65] Tex. Probate Code § 647 (requiring a court-appointed lawyer to interview the respondent and explain the law).

[66] *See*, for example, Ariz. Rev. Stat. § 14-5303 (requiring the appointment of an attorney and a court investigator in guardianship proceedings and specifying the duties of the court investigator).

[67] Ga. Code § 29-5-6.

[68] Wash. Rev. Code § 11.88.045(1)(b).

[69] W.Va. Code § 44A-2-7.

should be to determine, represent, and protect the "best interest" of the allegedly incompetent respondent.[70] Under this model, a court-appointed lawyer acts primarily as an investigator or officer of the court rather than the respondent's attorney or a zealous advocate for the position voiced by the respondent.

> In this role, the attorney determines what is in the best interest of the person who is the subject of the guardianship [proceeding]. The attorney uses his or her own judgment to decide whether the person is competent, investigates the situation, and typically files a report with the court advocating what the attorney decides is in the best interest of the client.[71]

The responsibilities of a court-appointed lawyer under the "best interest" model therefore generally include

- conducting an independent and impartial investigation of the respondent's mental capacity, needs, and situation; and
- making recommendations to the court with respect to the respondent's need for a guardian, the nature and scope of the proposed guardianship, the suitability of the proposed guardian, and the respondent's best interests even if those recommendations conflict with the respondent's expressed desire or position with respect to the guardianship proceeding.[72]

### *"Zealous Advocate"*

By contrast, proponents of the "zealous advocate" model contend that

> [t]he role of the court-appointed attorney is … the traditional attorney role. … "[t]he representative attorney is a zealous advocate for the wishes of the client."[73]

The "zealous advocate" model, therefore, requires a court-appointed lawyer to represent the allegedly incompetent respondent in a guardianship proceeding in the same manner, insofar as it is possible to do so, she would represent any client in a pending legal proceeding. More specifically, the "zealous advocate" model requires a respondent's court-appointed lawyer to

> (a) advise the [respondent] of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of those options;
> (b) give that advice in the language, mode of communication and terms that the [respondent] is most likely to understand; and
> (c) zealously advocate the course of actions chosen by the [respondent].[74]

Proponents of the "zealous advocate" model, including the American Bar Association's Commission on Legal Problems of the Elderly, the ABA's Commission on the Mentally Disabled, the 1988 "Wingspread" Conference on Guardianship, and the 2001 "Wingspan" Guardianship Conference, argue that, despite their "therapeutic" or beneficent purpose, guardianship proceedings usually result in "significant and usually permanent loss of [the respondent's legal] … rights and liberties."[75]

> From its inception, [the state's exercise of] *parens patriae* authority [in guardianship proceedings] has been seen as benevolent in nature, rather than adversarial, because the state is acting to protect those who cannot protect themselves. … However, not every petitioner for guardianship is focused on doing good. [Moreover,] … the imposition of a guardianship may rob a [respondent] of his or her autonomy and his or her ability to manage affairs independently. * * * A respondent in a guardianship case can lose his or her right to vote, marry, contract, determine where he or she will live, choose the kind of health care he or she will receive, and decide how to manage his or her assets.[76]

Proponents of the "zealous advocate" model contend that the potential loss of the respondent's legal rights in a guardianship proceeding requires, as a matter of public policy if not due process, that a court-appointed lawyer act as the respondent's attorney and advocate in any case in which the respondent is unable,

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[70] *See* Frederick R. Franke, Jr., "Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships," 7 Md. J. Contemp. Legal Issues 223 (1996-96).

[71] O'Sullivan, 31 Stetson L. Rev. at 687.

[72] Calhoun, 33 Clearinghouse Rev. at 318; In re Lee, 754 A.2d at 439.

[73] In re Mason, 701 A.2d 979, 982 (N.J. Super. Ch. Div. 1997).

[74] "Wingspan—The Second National Guardianship Conference, Recommendations," 31 Stetson L. Rev. at 601.

[75] In re Lee, 754 A.2d at 439.

[76] O'Sullivan, 31 Stetson L. Rev. at 703 and 698-99. *See also* Gotttlich, 7 Md. J. Contemp. L. Issues at 197 ("Despite the seemingly benevolent nature of the guardianship system, the consequences of a guardianship are very harsh. When a court appoints a guardian, the ward loses all rights to determine anything about her life."); Calhoun, 33 Clearinghouse Rev. at 317 ("a petition for guardianship is an obvious threat to the [respondent's] rights and liberties").

due to indigency or incapacity, to retain legal counsel of his own choice or adequately communicate his own position regarding the guardianship proceeding to the court. They also contend that the "zealous advocate" model should apply even in cases in which the respondent's incompetency is clear or uncontested, since the respondent may need an advocate to contest other aspects of the guardianship proceeding, including the scope of the proposed guardianship, the suitability of the proposed guardian, or the residential placement or medical treatment of the respondent.[77]

And while proponents of the "zealous advocate" model generally recognize that a court-appointed attorney's role "does not extend to advocating [a respondent's] decisions [if they] are patently absurd or … pose an undue risk of harm" to the respondent, they also contend that "advocacy that is diluted by excessive concern for the [respondent's] best interests … raise[s] troubling questions for attorneys in an adversarial system."[78]

### *How Helpful Are the "Zealous Advocate" and "Best Interest" Models?*

Courts and commentators commonly use the "zealous advocate" and "best interest" models to describe and distinguish the role of court-appointed lawyers in guardianship proceedings, often equating the "best interest" model with a lawyer's role as guardian ad litem and the "zealous advocate" model with a lawyer's role as the respondent's attorney. One New Jersey court, for example, stated:

> The court-appointed attorney … acts as an "advocate" for the interests of his client [while] the [guardian ad litem] acts as the "eyes of the court" to further the "best interests" of the alleged incompetent. Court-appointed counsel is an independent legal advocate for the alleged incompetent and takes an active part in the hearings and proceedings, while the [guardian ad litem] is an independent fact finder and an investigator for the court. The court-appointed attorney … subjectively represents the [respondent's] intentions, while the [guardian ad litem] objectively evaluates the best interests of the alleged incompetent.[79]

It is far from clear, however, that the "best interest" model accurately and completely describes the role of a guardian ad litem in guardianship proceedings *or* that the "zealous advocate" model adequately describes the role of a court-appointed lawyer who acts as the attorney for an allegedly incompetent respondent.

As noted above, the "zealous advocate" model does not require that an attorney always advocate the positions or wishes of her client. A court-appointed attorney's role "does not extend to advocating [a respondent's] decisions [if they] are patently absurd or … pose an undue risk of harm"[80] And the rules of professional conduct governing lawyers allow a lawyer to make decisions on behalf of a client if the client's mental incapacity prevents him from making appropriate decisions in connection with a legal proceeding and the lawyer's actions are in the client's "best interest."[81]

Nor is there an exact correlation between the "best interest" model and the role and responsibilities of a guardian ad litem for an allegedly incompetent adult. Under Rule 17, a guardian ad litem is required to protect the interests of a party who, due to infancy or incapacity, is unable to protect his own interests in connection with a pending legal proceeding. And in doing so, the guardian ad litem acts, in some sense, as a diligent and "zealous advocate" for a minor or incompetent party and the party's expressed interests to the extent the party has sufficient capacity to make competent decisions regarding his own interests. And while a guardian ad litem, in some instances, may be called upon to act as the court's "eyes and ears" or serve an independent and impartial fact finder, those responsibilities more accurately describe the role of a visitor, investigator, or friend of the court than that of a guardian ad litem.

So while the "zealous advocate" and "best interest" models may provide a general context for discussing the role of court-appointed lawyers in guardianship proceedings, their usefulness is limited and they are not determinative.

## Ambiguity and Confusion Regarding the Role of Court-Appointed Lawyers in Guardianship Proceedings

Although most state guardianship statutes nominally provide that a court-appointed lawyer acts as either the respondent's attorney or guardian ad litem, the role and responsibilities of court-appointed lawyers in

[77] In re M.R., 638 A.2d at 1285.

[78] In re M.R., 638 A.2d at 1285.

[79] In re Mason, 701 A.2d at 983.

[80] In re M.R., 638 A.2d at 1285.

[81] *See* text accompanying notes 103 through 110.

guardianship proceedings are not always clearly defined or understood.[82]

For example, two 1994 studies of guardianship proceedings in Maryland found that "confusion reigns regarding what role the appointed attorney is to play."[83] And a subsequent decision by Maryland's Special Court of Appeals noted that the proper role of court-appointed lawyers in guardianship proceedings remains "shrouded in ambiguity."[84] Similarly, a 1994 study of guardianship cases in ten states by the University of Michigan's Center for Social Gerontology found that "attorneys may often be confused or uncertain of the role they are to play, i.e., whether they are advocating for the [respondent's] best interests or the [respondent's] stated desires."[85]

As a result of this ambiguity and confusion, some court-appointed lawyers apparently "choose whichever role [they] prefer[]"[86] and often will choose "the easier investigative function," acting in what they perceive to be the respondent's "best interests" rather than acting as "zealous advocates" for respondents.[87] Others choose to act as zealous advocates, opposing the appointment of a guardian for the allegedly incompetent respondent without regard to whether guardianship is in the respondent's "best interest."[88] In either case, "some important functions [that should be performed by an attorney or guardian ad litem] may never be performed by anyone [and] other functions may be performed by persons who do not have the training to perform them properly … ."[89]

Confronted with the dilemma of whether to act as the respondent's attorney or guardian ad litem, some court-appointed lawyers attempt to "wear both hats."[90] And while this is not a problem *if* and to the extent that the responsibilities of these two roles are consistent with each other and with state law, some courts and commentators believe that the roles of attorney and guardian ad litem are "materially different," are potentially, if not inherently, incompatible, and should not be performed simultaneously by one person.[91]

The solution to this ambiguity and confusion, of course, is the enactment of guardianship statutes that clearly define the role of court-appointed lawyers in guardianship proceedings and describe in detail their legal and professional responsibilities, coupled with high quality education and training programs for lawyers who are appointed to represent allegedly incompetent respondents.

## Do the Revised Rules of Professional Conduct Apply to Lawyers Who Are Appointed as Guardians ad Litem?

The North Carolina State Bar's ethics committee recently addressed this question in the context of lawyers who are appointed, pursuant to G.S. 7B-1101(1) and Rule 17, as guardians ad litem for "incapacitated" parents who are respondents in juvenile proceedings involving termination of parental rights.[92]

All lawyers who are licensed to practice in North Carolina are subject to the North Carolina State Bar's Revised Rules of Professional Conduct. However,

> … some of the Rules of Professional Conduct create duties that are owed only in the

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[82] Calhoun, 33 Clearinghouse Rev. at 318-19; O'Sullivan, 31 Stetson L. Rev. at 688; Joan L. O'Sullivan and Diane E. Hoffman, "The Guardianship Puzzle: Whatever Happened to Due Process?" 7 Md. J. Contemp. Legal Issues 11, 66 (1995-96); A. Frank Johns, "Three Rights Make Strong Advocacy for the Elderly: Right to Counsel, Right to Plan, and Right to Die," 45 S. Dak. L. Rev. 492, 494 (2000).

[83] O'Sullivan and Hoffman, 7 Md. J. Contemp. L. Issues at 66.

[84] In re Lee, 754 A.2d at 439.

[85] Lauren Barritt Lisi, et al., National Study of Guardianship Systems: Findings and Recommendations (Ann Arbor: The Center for Social Gerontology, 1994), cited in O'Sullivan, 7 Md. J. Contemp. Legal Issues at 44.

[86] O'Sullivan, 31 Stetson L. Rev. at 688.

[87] Gottlich, 7 Md. J. Contemp. Legal Issues at 194; O'Sullivan, 7 Md. J. Contemp. Legal Issues at 38-39, 66 (reporting findings that most lawyers appointed to represent respondents in guardianship proceedings in Maryland acted as guardians ad litem or investigators rather than as zealous advocates or attorneys for respondents).

[88] A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988).

[89] James M. Peden, "The Guardian Ad Litem Under the Guardianship Reform Act: A Profusion of Duties, a Confusion of Roles, 68 U. Det. L. Rev. 19, 29 (1990-91).

[90] A. Frank Johns, "Guardianship from 1978 to 1988 in View of Restructure" (N.C. Bar Foundation, 1988).

[91] *See* In re Lee, 754 A.2d at 438 ("the duties of an attorney may at times conflict with the duties of a guardian ad litem"); Gottlich, 7 Md. J. Contemp. L. Issues at 194; Hurme, 7 Md. J. Contemp. L. Issues at 151 (suggesting that in most cases, "the same person cannot, and should not, serve in both roles simultaneously"); Calhoun, 33 Clearinghouse Rev. at 319.

[92] 2004 Formal Ethics Opinion 11 (North Carolina State Bar, Jan. 21, 2005). *See also* In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1 (2004).

> professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[93]

The ethics committee therefore ruled that if another lawyer is appointed as the parent's attorney, the lawyer who is appointed as the parent's guardian ad litem "does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients."[94] Thus, a court-appointed lawyer who acts "purely as a guardian [ad litem] and not [as] an attorney" is *not* bound by the ethical rules governing confidentiality (Rule 1.6), zealous advocacy (Rule 1.3), loyalty (Rules 1.7 through 1.10), or evaluations for use by third persons (Rule 2.3), but is subject to the ethical rules governing candor toward the court (Rule 3.3), fairness to opposing party and counsel (Rule 3.4), ex parte communications with and unlawful influence of judicial officials (Rule 3.5), and dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4).

The committee, however, also ruled that if a court appoints a lawyer to act as a party's attorney *and* guardian ad litem, the lawyer must comply with the Rules of Professional Conduct that apply to client-lawyer relationships.

The nature and scope of a court-appointed lawyer's ethical and professional responsibilities in a guardianship proceeding therefore depend on whether the lawyer's appointment as the guardian ad litem for an allegedly incompetent respondent creates a "professional client-lawyer relationship." And, as discussed above, the answer to this question is not entirely clear.

An incapacitated parent in a termination of parental rights proceeding is represented by two court-appointed lawyers—one who acts as the parent's attorney and another who acts as the parent's guardian ad litem. So it is possible, though not necessarily easy, to distinguish between a court-appointed lawyer's role as the parent's attorney and a lawyer's role as the parent's guardian ad litem.

By contrast, in a guardianship proceeding there is only one court-appointed lawyer, not two, and an allegedly incompetent respondent usually is not represented by retained legal counsel. And while the court-appointed lawyer's role is nominally that of the respondent's guardian ad litem, her responsibilities bear at least some similarity to those of an attorney for the respondent.[95] So a lawyer who is appointed under G.S. 35A-1107 as guardian ad litem for an allegedly incompetent respondent who is *not* represented by appointed or retained counsel in a guardianship proceeding *may* be acting as the respondent's attorney *and* guardian ad litem. And if this is so, a lawyer who is appointed as the guardian ad litem for an unrepresented respondent in a guardianship proceeding may be subject to the Rules of Professional Conduct that govern client-lawyer relationships.[96]

These rules generally require a lawyer to act, within the bounds of law and insofar as possible, as a "zealous advocate" for her client. The official comments to Rule 1.3 of the North Carolina State Bar's Revised Rules of Professional Conduct require a lawyer to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." In representing a client, a lawyer is required to "abide by a client's decisions concerning the objectives of representation and … consult with the client as to the means by which they are to be pursued."[97]

A lawyer's professional obligation to act as a zealous advocate for her client "is not a license to raise frivolous defenses or to stand obdurately on procedural points."[98] It does, however, require a court-appointed lawyer to communicate with her client; to explain the potential legal consequences of and the legal options with respect to the pending litigation to the client; to ascertain the client's wishes with respect to pending litigation; to secure and present evidence and

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[93] 2004 FEO 11 (citations omitted).

[94] 2004 FEO 11.

[95] *See* notes 26 to 40 and accompanying text.

[96] *See* Restatement (Third) of the Law Governing Lawyers § 14(2) (a client-lawyer relationship is formed when a court appoints a lawyer to provide "legal services" to a party) and comment d (a court may appoint a lawyer to represent an incompetent party without the party's consent).

[97] N.C. State Bar Revised Rules of Professional Conduct, Rule 1.2. In representing a client, a lawyer may exercise her professional judgment to waive or fail to assert a right or position of the client and may exercise professional discretion in determining the means by which a matter should be pursued. Rule 1.2(a)(3); Rule 1.4 (Comment 1).

[98] O'Sullivan, 7 Md. J. Contemp. Legal Issues at 68. *See also* Rule 3.1; Rule 1.2(a)(2).

arguments on behalf of the client; and to take appropriate actions (such as objecting to inadmissible evidence and cross-examining adverse witnesses) necessary to protect the client's legal rights and interests in the litigation.[99]

At a minimum, the rule of "zealous advocacy" requires a lawyer who is appointed as the attorney and guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding to ensure that the respondent is not found to be incompetent in the face of insufficient evidence, that guardianship is not ordered if there are appropriate and less restrictive alternatives available to protect the respondent's interests, that the guardian appointed for an incompetent respondent is suitable and qualified, and that appropriate limits are placed on the guardianship when necessary to protect the respondent's rights and interests.

If a court-appointed lawyer acts as the attorney and guardian ad litem for a respondent in a guardianship proceeding, the lawyer has an ethical and professional obligation to protect the respondent's confidences and secrets and is prohibited from revealing information about the respondent acquired during the attorney-client relationship unless the respondent gives informed consent to the disclosure or disclosure is authorized under the Revised Rules of Professional Conduct.[100]

In addition, a lawyer who is appointed as the respondent's attorney and guardian ad litem is subject to the State Bar's rules governing

- communication with a client (Rule 1.4);[101]
- competent legal representation (Rule 1.1);
- loyalty to a client and conflicts of interest (Rules 1.7 through 1.10);
- terminating legal representation (Rule 1.16);
- undertaking evaluations for use by third parties (Rule 2.3);
- the assertion of nonmeritorious claims or defenses (Rule 3.1);
- dilatory practices and delaying litigation (Rule 3.2);
- candor toward the court (Rule 3.3);
- fairness to the opposing party and counsel (Rule 3.4);
- ex parte communications with judicial officials and unlawful attempts to influence judicial officials (Rule 3.5);
- testifying as a witness at trial (Rule 3.7);
- making false statements of law or fact to others (Rule 4.1);
- communication with persons represented by counsel (Rule 4.2);
- dealing with unrepresented persons (Rule 4.3);
- respect for the rights of others (Rule 4.4);
- dishonesty, fraud, deceit, misrepresentation and conduct prejudicial to the administration of justice (Rule 8.4); and
- representing clients with diminished mental capacity (Rule 1.14).[102]

## Rule 1.14: Representing Clients with Diminished Mental Capacity

If a lawyer who is appointed as the guardian ad litem for a respondent in a guardianship proceeding is subject to the ethical and professional rules governing

[99] O'Sullivan, 7 Md. J. Contemp. Legal Issues at 68; Anne K. Pecora, "Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities," 1 Elder L. J. 139, 148 (1993).

[100] 2004 FEO 11.

[101] In cases involving clients with diminished mental capacity, the lawyer's communication with a client must take into account the client's mental capacity. For example, clients who suffer from Alzheimer's disease may experience "sundowner syndrome," becoming more confused around dusk. A lawyer representing a client with Alzheimer's disease, therefore, should communicate with the client early in the morning or after a meal. Similarly, lawyers should use simple terms and concrete examples in explaining legal proceedings and the possible consequences of guardianship to clients with diminished mental capacity. *See* O'Sullivan, 31 Stetson L. Rev. at 715, 727-728. A client's physical condition, such as hearing loss, also should be taken into consideration in determining the attorney's obligations under Rule 1.4. Lawyers can attempt to enhance their communication with elderly or impaired clients by printing documents in large type, speaking in plain language and avoiding legalese, sending materials to clients for review before meetings, and minimizing background noise and distractions. Jan Ellen Rein, "Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say," 9 Stan. L. & Policy Rev. 241, 244 (1998). Another useful technique to test the client's understanding of advice or explanations provided by a lawyer is to ask the client to paraphrase (not merely repeat) what the lawyer said.

[102] Some of the professional and ethical obligations of lawyers who act as the attorneys for allegedly incompetent respondents in guardianship proceedings are discussed in greater detail in O'Sullivan, 31 Stetson L. Rev. at 713-719, and Gottlich, 7 Md. J. Contemp. Legal Issues at 201-207.

client-lawyer relationships, the lawyer's representation of the allegedly incompetent respondent may be affected by Rule 1.14 of the Revised Rules of Professional Conduct, which governs a lawyer's representation of a client with diminished mental capacity.[103] The rule states:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.
>
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Because an adult respondent in guardianship proceedings is alleged to be mentally incapacitated or incompetent, a court-appointed lawyer who acts as the attorney and guardian ad litem for an allegedly incompetent respondent must consider whether and to what extent Rule 1.14 applies with respect to her representation of the respondent.

> Representing a questionably competent client is always an enormous challenge …. The client may be confused about some things, but not about others. He or she may make bad decisions and insist that the lawyer advocate for him or her, or may demand that the lawyer defend a seemingly indefensible position.[104]

If a court-appointed lawyer representing an allegedly incompetent respondent in a guardianship proceeding determines that the respondent's capacity to make adequately considered decisions in connection with the pending proceeding is diminished due to a mental impairment, the lawyer must, as far as reasonably possible, maintain a normal attorney-client relationship with the respondent.

Comment 1 to Rule 1.14 reminds lawyers that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." Thus, the North Carolina State Bar's ethics committee has ruled that an attorney may represent an allegedly incompetent respondent in opposing adjudication of the respondent's incompetency and appointment of a guardian if (a) the respondent instructs the attorney to do so, (b) the attorney determines that the respondent has sufficient mental capacity to make an adequately considered decision to oppose the guardianship petition, and (c) opposing the petition does not require the attorney to present a frivolous claim or defense on behalf of the respondent or violate another rule of professional conduct.[105]

Rule 1.14, however, allows a lawyer to take "protective action" on behalf of a client (and presumably contrary to the client's expressed wishes) if the lawyer determines that the client's mental impairment is such that he cannot make adequately considered decisions that will adequately protect his interests in connection with a legal proceeding and is thereby at risk of substantial physical, financial, or other harm.[106] Similarly, comments 9 and 10 to Rule 1.14 allow a lawyer to take legal action on behalf of a person whose mental capacity is so severely diminished that he cannot establish a client-lawyer relationship with the attorney or make or express considered judgments about a legal matter *if* a person acting in good faith on behalf of the incapacitated person requests the lawyer to act on behalf of the incapacitated person and legal action is required to avoid imminent and irreparable harm to the health, safety, or financial interests of the incapacitated individual. And comment 7 to Rule 1.14 suggests that any protective action that a lawyer takes on behalf of a client with diminished capacity should be "guided by such factors as the wishes and values of the client to

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[103] Rule 1.14 is discussed in detail in Rein, 9 Stan. L. & Policy Rev. 241, and in Elizabeth Laffitte, "Model Rule 1.14: The Well-Intended Rule Still Leaves Some Questions Unanswered," 17 Georgetown J. of Legal Ethics 313 (2003). *See also* Restatement (Third) of the Law Governing Lawyers § 24.

[104] O'Sullivan, 31 Stetson L. Rev. at 725.

[105] 1998 Formal Ethics Opinion 16 (North Carolina State Bar, Jan. 15, 1999).

[106] Even in these instances, the lawyer may disclose confidential information about the client only to the extent reasonably necessary to protect the client's interests.

the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."

Similarly, the Restatement (Third) of the Law Governing Lawyers states that when a lawyer determines that a client is unable to make adequately considered decisions regarding the matter of legal representation, the lawyer may pursue her reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions—even if the client expresses no wishes or gives contrary instructions.[107]

> When a client's disability prevents maintaining a normal client-lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client. A lawyer should act only on a reasonable belief, based on appropriate investigation, that the client is unable to make an adequately considered decision rather than simply being confused or misguided.[108]

In some instances, ethical and professional rules may require a court-appointed lawyer to oppose adjudication of the respondent's incompetency, to oppose the appointment of a guardian or interim guardian, to oppose the appointment of a particular person as guardian or interim guardian, or to propose a limited, rather than plenary, guardianship. In other instances, though, the rules may justify the lawyer's conceding the respondent's incompetency or accepting the appointment of a guardian to manage the respondent's affairs. In the case of a comatose (or a severely delusional, demented, or cognitively impaired) respondent, Rule 1.14 clearly allows a court-appointed lawyer to take legal action on behalf of the respondent in a guardianship proceeding to the extent necessary to protect the respondent's health, safety, or financial interests from imminent and irreparable harm. Thus, a court-appointed lawyer may act, with little or no guidance from a severely incapacitated respondent, to ensure that

> (1) there is no less restrictive alternative to guardianship; (2) proper due-process procedure is followed; (3) the petitioner proves the allegations in the petition [as required by law] … ; (4) the proposed guardian is a suitable person to serve; and (5) if a guardian is appointed, the order leaves the client with as much autonomy as possible.[109]

On the other hand, though, a court-appointed lawyer who acts as the attorney and guardian ad litem for an allegedly incompetent adult in a guardianship proceeding may *not* disclose confidential information to the court without the respondent's consent and may *not* make recommendations to the court regarding the respondent's best interests if those interests differ from the respondent's express wishes *if* the respondent's mental impairment does not prevent his making adequately considered decisions that will adequately protect her interests in connection with the guardianship proceeding.[110]

## Determining Mental Capacity

What is the legal standard for determining whether a respondent is "incompetent" or lacks sufficient mental capacity to make decisions in connection with the pending guardianship proceeding? How can a court-appointed lawyer determine whether a respondent in a guardianship proceeding is incompetent or suffers from diminished mental capacity?

Under G.S. 35A-1101(7), an adult is "incompetent" if, due to mental illness, developmental disability, autism, inebriety, senility, or similar causes or conditions, he "lacks sufficient capacity to manage his own affairs or to make or communicate important decisions concerning his person, family, or property."[111]

Under this standard, a person is incompetent if his mental condition is such that he "is incapable of transacting the ordinary business involved in taking care of his property [or] is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, or his property and estate."[112] Conversely, a person is not incompetent if he "understands what is necessarily required for the management of his ordinary business affairs and is

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[107] Restatement (Third) of the Law Governing Lawyers § 24.

[108] Restatement (Third) of the Law Governing Lawyers § 24, Comment d.

[109] O'Sullivan, 31 Stetson L. Rev. at 726.

[110] In re Lee, 754 A.2d at 439-441.

[111] *See also* Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (Washington, DC: American Bar Association, 1990).

[112] Hagins v. Redevelopment Comm'n of Greensboro, 275 N.C. 90, 105-106, 165 S.E.2d 490, 500 (1969).

able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will."[113]

The incompetency standard established by G.S. 35A-1101(7) focuses primarily on an individual's *general* capacity to make important decisions regarding himself, his family, and his property. By contrast, the standard of capacity under Rule 1.14 focuses on a *specific* capacity: a person's capacity to make "adequately considered decisions" and "adequately act" in his own interest in connection with a pending lawsuit or other legal matter.

In both cases, though, incompetency or incapacity is "a flexible, elusive, and ultimately undefinable concept."[114] Although capacity "involves the ability to understand and process information so that a decision can be made and communicated,"[115] no single definition or test can succeed in pinpointing the boundary between capacity and incapacity because capacity is fluid—more a matter of degree than an "all or nothing" status and often changing or transitory rather than static or permanent.

> Not only is each individual at some point on a capacity continuum, but an individual's capacity can vary over time and with the task or decision in question. Individuals can be capable of handling some tasks but not others. They can be fine in the morning but fuzzy by late afternoon. … Furthermore, what looks like incapacity is often not mental incapacity at all, but simply a symptom of reversible or correctable medical and environmental interferences.[116]

In assessing a respondent's mental capacity, lawyers should remember that a person does not lack capacity merely because a guardianship proceeding has been brought against him or he

> does things that other people find disagreeable or difficult to understand. Indeed, a great danger in capacity assessment is that eccentricities, aberrant character traits, or risk-taking decisions will be confused with incapacity. A capacity assessment first asks what kind of person is being assessed and what sorts of things that person has generally held to be important.[117]

And because capacity may be "affected by countless variables: time, place, social setting, emotional, mental or physical states, etc.," capacity assessment should be approached in "two stages—first take reasonable steps to optimize capacity; and second, perform a preliminary assessment of capacity."[118]

Assessment of a respondent's cognitive capacity should focus on the respondent's decision-making *process* more than the decisional *output* of the respondent's reasoning. The issue is whether the respondent's reasoning process is significantly impaired, not whether the respondent's decisions are, in an objective sense, reasonable. In assessing a respondent's cognitive capacity, the issue is not whether the respondent's cognitive abilities are impaired, subaverage, or suboptimal, but rather whether the respondent's cognitive abilities are at least minimally sufficient to make important decisions.

A court-appointed lawyer, therefore, should consider several factors in assessing a respondent's cognitive capacity:

- awareness (extent of the respondent's capacity to perceive, concentrate, remember information);
- comprehension (ability to understand and assimilate information);
- reasoning (ability to integrate and rationally evaluate information);
- deliberation (ability to weigh facts and alternatives in light of personal values and potential consequences);

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[113] Hagins v. Redevelopment Comm'n of Greensboro, 275 N.C. at 106, 165 S.E.2d at 500.

[114] Rein, 9 Stanford L. & Policy Rev. at 242. *See also* Anderer, *Determining Competency in Guardianship Proceedings*; Charles P. Sabatino, "Competency: Refining Our Legal Fictions" in Michael Smyer, et al. (eds.), *Older Adults' Decision-Making and the Law* (New York: Springer Publishing Co., 1996).

[115] Baird B. Brown, "Determining Clients' Legal Capacity," 4 Elder L. Rep. 1 (Feb. 1993). Decisional capacity also may be defined as "(1) possession of a set of values and goals; (2) the ability to communicate and to understand information; and (3) the ability to reason and to deliberate about one's choices." Daniel L. Bray and Michael D. Ensley, "Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney," 33 Fam. L. Q. 329, 336 (1999).

[116] Rein, 9 Stanford L. & Policy Rev. at 242.

[117] Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 486.

[118] Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 486, 487-490, 490-499. *See also* American Bar Association Commission on Legal Problems of the Elderly and Legal Counsel for the Elderly, *Effective Counseling of Older Clients: The Attorney-Client Relationship*, 15 (1995) and Stephen J. Anderer, *Determining Competency in Guardianship Proceedings* (American Bar Association 1990).

- understanding (ability to appreciate the nature of the situation and the possible consequences of one's decisions);
- choice (ability to express in a sufficiently stable and consistent manner one's preference or decision).

Similarly, comment 6 to Rule 1.14 states:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with known long-term commitments and values of the client.[119]

Standard screening tests, such as the Mini-Mental Status Examination (MMSE) or the Short Portable Status Questionnaire (SPSQ), may be useful in making preliminary assessments of a respondent's mental capacity.[120] These tests, however, "provide only a crude global assessment of cognitive functioning" and do not establish or "rule out the ability to perform some decisionmaking tasks."[121] Thus, in appropriate circumstances a lawyer may, and should, seek guidance from an appropriate diagnostician regarding the nature and extent of a respondent's incapacity.[122]

## Civil Liability of Guardians ad Litem

May a court-appointed lawyer be held liable for failing to satisfactorily discharge her duties as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding?

In 1956, the North Carolina Supreme Court stated, in *dicta*, that:

> One who accepts appointment as guardian *ad litem* of a person under disability owes a high duty to his ward. He should carefully investigate the facts and must exercise diligence in the protection of the rights and estate of his ward. For failure to perform the solemn duty he has undertaken, he is liable in damages for any loss caused thereby.[123]

But in a more recent decision, *Dalenko v. Wake County Department of Human Services*, the North Carolina Court of Appeals held, without citing the Supreme Court's 1956 *Travis* decision, that an attorney who is appointed as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding is absolutely immune from civil liability for the performance of her duties as the respondent's guardian ad litem.[124]

Citing the Fourth Circuit's decision in *Fleming v. Asbill*,[125] the court of appeals held that a guardian ad

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[119] The factors listed in comment 6 are similar to those adopted by the Working Group on Client Capacity at the 1993 Conference on Ethical Issues in Representing Older Clients. 62 Fordham L. Rev. 1003 (1994). These factors are discussed in more detail in Charles P. Sabatino, "Representing a Client with Diminished Capacity: How Do You Know It *And* What Do You Do About It?" 16 J. Am. Acad. of Matrimonial Lawyers 481, 495-498 (2000).

[120] The MMSE, SPSQ, and other standard screening tests are described in Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 492-494. The primary advantages of these tests are that they can be administered by persons who are not trained mental health professionals, are short, and are simple to administer, score, and interpret. But they also have many weaknesses, including high false-positive and false-negative rates, ceiling and floor effects (failure to distinguish well among those who score at the higher and lower ends), confounding effects of age, education, gender, and ethnicity, etc. The MMSE is available on-line at http://www.fhma.com/mmse.htm. The SPSQ is available on-line at http://nncf.unl.edu/alz/manual/sec1/portable.html.

[121] Sabatino, 16 J. Am. Acad. of Matrimonial Lawyers at 493. *See also* Anderer, *Determining Competency in Guardianship Proceedings*; Thomas Grisso, *Evaluating Competencies: Forensic Assessments and Instruments* (New York: Plenum Press, 1986); Marshall B. Kapp and D. Mossman, "Measuring Decisional Capacity: Cautions on the Construction of a Capacimeter," *Psychology, Pubic Policy and Law* 2(1): 73-95 (1996); B. Nolan, "Functional Evaluation of the Elderly in Guardianship Proceedings," *Law, Medicine and Health Care* 12: 10 (1984); Mary Joy Quinn, "Everyday Competencies and Guardianship: Refinements and Realities" in Michael Smyer et al. (eds.), *Older Adults' Decision-Making and the Law* (New York: Springer Publishing Co., 1996); Timothy A. Salthouse, "A Cognitive Psychologist's Perspective on the Assessment of Cognitive Competency" in Smyer, *Older Adults' Decision-Making and the Law*; Sherry L. Willis, "Assessing Everyday Competency in the Cognitively Challenged Elderly" in Smyer, *Older Adults' Decision-Making and the Law*.

[122] North Carolina State Bar Revised Rules of Professional Conduct, Rule 1.14, Comment 6.

[123] Travis v. Johnston, 244 N.C. 713, 722, 95 S.E.2d 94, 100 (1956).

[124] Dalenko v. Wake County Department of Human Services, 157 N.C. App. 49, 56-58, 578 S.E.2d 599, 604-605 (2003).

[125] Fleming v. Asbill, 42 F.3d 886 (4th Cir. 1994).

litem, as an actor in the judicial process, is entitled to "quasi-judicial immunity." Under North Carolina law, quasi-judicial immunity protects individuals who are not judges from liability for "actions taken while exercising their judicial [or quasi-judicial] function[s]."[126] A "quasi-judicial" function generally involves a "discretionary act of a judicial nature" made by a public official who is empowered to investigate the facts of a particular case, weigh evidence, and apply "legislative or quasi-legislative requirements to individuals under particular sets of facts" as the basis for an official action.[127]

In *Dalenko*, the court of appeals concluded, without any analysis of the role or responsibilities of guardians ad litem in guardianship proceedings, that the duties of a guardian ad litem appointed under G.S. 35A-1107 are "quasi-judicial" in nature and that, as a matter of public policy, granting absolute immunity to guardians ad litem was necessary and appropriate.

> A guardian ad litem must … be able to function without the worry of possible later harassment and intimidation from dissatisfied [parties]. … A failure to grant immunity would hamper the duties of a guardian ad litem in his role as advocate … in judicial proceedings.[128]

It should be noted, however, that other courts have criticized the "blanket" extension of quasi-judicial immunity to *all* guardians ad litem. These courts, following the lead of the U.S. Supreme Court, have held that a "functional" analysis should be used to determine whether a guardian ad litem enjoys quasi-judicial immunity.[129]

> Under this approach, a guardian ad litem would be absolutely immune in exercising functions such as testifying in court, prosecuting custody or neglect petitions, and making reports and recommendations to the court in which the guardian acts as *an actual functionary or arm of the court, not only in status or denomination but in reality.*[130]

Conversely, though,

> a guardian ad litem who is *not* acting as a "friend of the court"—assisting the court in determining [the best interest of a minor or incompetent party]—is not entitled to immunity. Where the guardian ad litem is acting as an advocate for his client's position—representing the … interests of [the minor or incompetent party] instead of looking into the [party's best interest] on behalf of the *court*—the basic reason for conferring quasi-judicial immunity on the guardian does not exist. In that situation, he or she functions in the same way as does any other attorney for a client—advancing the interests of the client, not discharging (or assisting in the discharge of) the duties of the court. While the threat of civil liability may deter the guardian in various ways, the same can be said of the effects of the similar threat with which all attorneys appearing in lawsuits are faced. * * * Where the guardian's functions embrace primarily the rendition of professional services in the form of vigorous advocacy on behalf of [a minor or incompetent party], the reason for the protection of immunity—avoiding distortion of the investigative help or other assistance provided to the court—is lacking, and the attorney rendering professional service to [a minor or incompetent party] should be held to the same standard as are all other attorneys in their representation of clients.[131]

The problem, again, is determining the role, responsibilities, and function of attorneys who are appointed as guardians ad litem. And as discussed above, a guardian ad litem may play a dual role: assisting the court in carrying out its duty to protect the interests of a minor or incompetent party and acting as a zealous advocate to protect and represent the interest of a minor or incompetent party.

Thus, despite the holding in *Dalenko*, it may not be entirely clear whether an attorney who is appointed as a guardian ad litem under G.S. 35A-1107 is absolutely immune from civil liability in connection with the performance of her duties or whether a guardian ad litem's immunity depends on whether she

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[126] Northfield Development Co., Inc. v. Burlington, 136 N.C. App. 272, 282, 523 S.E.2d 743, 750 (2000).

[127] 2 Am.Jur.2d, Administrative Law § 28. *See* Sharp v. Gulley, 120 N.C. App. 878, 880, 463 S.E.2d 577, 578 (1995). *Cf.* Paige K.B. v. Molepske, 580 N.W.2d 289 (Wis. 1998) (quasi-judicial immunity extends to nonjudicial officers when they perform acts intimately related to the judicial process).

[128] Fleming v. Asbill, 42 F.3d at 889, citing Kurzawa v. Mueller, 732 F.2d 1456, 1458 (6th Cir. 1984).

[129] *See* Gardner v. Parson, 874 F.2d 131, 146 (3rd Cir. 1988); Collins v. Tabet, 806 P.2d 40, 45 (N.M. 1991); Fleming v. Asbill, 483 S.E.2d 751, 755 (S.C. 1997).

[130] Gardner v. Parson, 874 F.2d at 146.

[131] Collins v. Tabet, 806 P.2d at 48, 50. *See also* Reese v. Danforth, 406 A.2d 735 (Pa. 1979) (holding that a court-appointed public defender is not entitled to official immunity).

is acting as an "arm of the court" or an advocate for an allegedly incompetent respondent.

## Due Process and the Right to Counsel in Guardianship Proceedings

Does an allegedly incompetent respondent have a *constitutional* right to court-appointed counsel in a guardianship proceeding if he is indigent or unable to retain legal counsel?

As noted above, approximately thirty-three states and the District of Columbia have enacted *statutory* provisions requiring a court to appoint an attorney to represent a respondent in a guardianship proceeding if the respondent is unable to retain counsel, if the respondent requests counsel, or in other circumstances.[132]

Some advocates for elderly and disabled persons, however, argue that federal and state *constitutional* requirements regarding due process require

1. that an attorney be appointed to represent an allegedly incompetent respondent in a guardianship proceeding (at least in cases in which the respondent is unable, due to indigency or incapacity, to retain legal counsel or adequately defend himself or present his position regarding the proposed guardianship proceeding to the court); and
2. that a lawyer appointed to represent an allegedly incompetent respondent in a guardianship proceeding act as a zealous advocate for the respondent.[133]

[132] Calhoun, 33 Clearinghouse Rev. at 321 (data revised based on author's legal research). Seven states, including North Carolina, statutorily recognize a respondent's right to counsel in guardianship proceedings and seven states have enacted statutes allowing, but not requiring, the appointment of counsel for respondents in guardianship proceedings. In only three states—Massachusetts, Mississippi, and North Dakota—is state law completely silent regarding a respondent's right to counsel in guardianship proceedings.

[133] *See* Gottlich, 7 Md. J. Contemp. L. Issues at 198-200 (1995-96). *See also* Anne K. Pecora, "The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings," 43 Ark. L. Rev. 345 (1990). According to these advocates, allowing a court-appointed lawyer to act as the guardian ad litem for an allegedly incompetent respondent rather than as the respondent's attorney "undermines traditional notions of due process." Peden, 68 U. Det. L. Rev. at 29.

## Due Process and the Right to Retained Counsel in Guardianship Proceedings

The U.S. Constitution clearly prohibits a state court from depriving an allegedly incompetent person of his liberty or property through an adjudication that he is incompetent and the appointment of a guardian to manage his affairs unless he is afforded "due process of law."[134] And it is clear that due process requires, at a minimum, that a respondent be given adequate notice of a legal proceeding to appoint a guardian for him based on his alleged incompetency and provided a fair opportunity to be heard in the guardianship proceeding.[135]

It also is clear that an allegedly incompetent respondent in a guardianship proceeding has a constitutional right to legal counsel in the sense that he may retain a lawyer of his own choosing to represent him in the proceeding.[136] His "right" to counsel, however, is contingent on whether he can afford to pay an attorney to represent him in the proceeding (or whether a third party is willing to pay an attorney to represent him or an attorney is willing to represent him *pro bono*), whether an attorney is willing to represent him in the proceeding, whether he has sufficient capacity to enter into a client-lawyer relationship with the attorney, and whether, considering the nature and extent of his incapacity, the attorney can represent him in the proceeding within the limits imposed by rules of ethical and professional conduct for attorneys.

## Due Process and the Right to Court-Appointed Counsel in Guardianship Proceedings

It is less clear, though, that a respondent has a *constitutional* right to court-appointed counsel in a

[134] *See* Simon v. Craft, 182 U.S. 427 (1901); In re Deere, 708 P.2d 1123, 1125-26 (Okla. 1985); In re Evatt, 722 S.W.2d 851, 852 (Ark. 1987); West Virginia ex rel. Shamblin v. Collier, 445 S.E.2d 736, 739 (W.Va. 1994); In re Milstein, 955 P.2d 78, 81 (Colo. 1998). *See also* N.C. Const., Art. I, § 19; In re Smith, 82 N.C. App. 107, 345 S.E.2d 423 (1986) (North Carolina Constitution's "law of the land" clause is synonymous with "due process of law" under the U.S. Constitution); Comment: North Carolina Guardianship Laws—The Need for Change, 54 N.C. L. Rev. 389, 405-406 (1976).

[135] Simon v. Craft, 182 U.S. 427 (1901); In re Deere, 708 P.2d at 1125-1126.

[136] Simon v. Craft, 182 U.S. 427 (1901); In re Deere, 708 P.2d at 1126. *See also* In re Milstein, 955 P.2d at 82 (statutory right to counsel).

guardianship proceeding if he cannot afford to retain counsel or lacks the capacity to do so.

### *State Appellate Court Decisions*

Appellate courts in several states have held, or at least suggested, that an indigent respondent has a constitutional right to a court-appointed attorney in a guardianship proceeding.

A 1985 decision by a California appellate court, for example, held that due process requires the appointment of legal counsel for *indigent* respondents in guardianship proceedings.[137] But it is important to note that the guardianship statute at issue in that case not only allowed the appointment of a guardian for a person determined to be "gravely disabled" as the result of mental incapacity, but also provided for the involuntary commitment of a gravely disabled respondent for treatment in a mental institution for a period of up to one year. And it is clear that in determining what due process was required in the proceeding the court considered the proceeding to be a proceeding for civil commitment.[138] It is not clear that the court would have reached the same conclusion if the guardianship proceeding allowed the appointment of a guardian for the allegedly incompetent person but did not result in the respondent's involuntary commitment for treatment in a mental institution.

More recently, Florida's Fourth District Court of Appeals held that a "trial court's failure to appoint … counsel … to represent the [respondent in a guardianship proceeding] constituted error of *constitutional* proportion, because such failure deprived the [respondent] of her right to due process …."[139] The court, however, cited no authority for its conclusion that the respondent had a constitutional, rather than merely statutory, right to counsel and its actual *holding* in the case was that the trial court erred in failing to comply with the *statutory* requirements regarding appointment of counsel in guardianship proceedings.[140]

Similarly, Oklahoma's Supreme Court held that a trial court's failure to grant a continuance in a guardianship proceeding based on the absence of the respondent's attorney ignored the procedural safeguards of the state's guardianship statute and the due process "guarantees of the United States and Oklahoma constitutions."[141]

> When the state participates in the deprivation of a person's right to personal freedom [through the appointment of a guardian for the person] minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his own behalf [, … the] opportunity to confront and cross-examine adverse witnesses before a neutral decision maker, *representation by counsel*, findings by a preponderance of the evidence, and a record sufficient to permit meaningful appellate review …."[142]

Again, however, the court failed to cite any case directly on point in support of its conclusion that respondents have a constitutional right to counsel in guardianship proceedings, did not indicate whether due process requires the *appointment* of attorneys at state expense for respondents who are unable to retain legal counsel, and did not specify what role a court-appointed lawyer must play in representing an allegedly incompetent respondent in a guardianship proceeding.

### *Rud v. Dahl*

In contrast to these state appellate decisions, one federal appellate court has expressly held that the U.S. Constitution's due process clause does *not* require the appointment of legal counsel for indigent respondents in guardianship proceedings.[143]

While recognizing the "significant liberty interests implicated in an incompetency [and guardianship] proceeding" and conceding that due process may require the appointment of counsel for indigent respondents in involuntary mental commitment proceedings, the U.S. Court of Appeals for the Seventh Circuit concluded in *Rud v. Dahl* that "the presence of counsel is [not] an essential element of due process" in guardianship proceedings.[144]

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[137] In re Gilbuena, 209 Cal. Rptr. 556, 559-560 (Cal. Ct. App. 1985). *See also* In re Roulet, 590 P.2d 1 (1979).

[138] In North Carolina, guardianship proceedings and involuntary commitment proceedings are entirely separate. North Carolina's statute allowing the involuntary commitment of mentally ill persons who constitute a danger to themselves or others for treatment in a mental institution is codified in G.S. 122C-261 et seq. Respondents in these proceedings have a statutory right to court-appointed counsel. *See also* text accompanying note 146.

[139] In re Fey, 624 So.2d 770, 771 (Fla. Dist. Ct. App. 1993).

[140] In re Fey, 624 So.2d at 772.

[141] In re Deere, 708 P.2d at 1126.

[142] In re Deere, 708 P.2d at 1126.

[143] Rud v. Dahl, 578 F.2d 674 (7th Cir. 1978).

[144] Rud v. Dahl, 578 F.2d at 679.

> First of all, the nature of the intrusion on liberty interests resulting from an adjudication of incompetency is far less severe than the intrusion resulting from other types of proceedings in which the presence of counsel has been mandated. Involuntary incarceration, for example, does not result from an incompetency proceeding. Moreover, the technical skills of an attorney are less important, as the procedural and evidentiary rules of an incompetency proceeding are considerably less strict than those applicable in other types of civil and criminal proceedings. Finally, the costs associated with the mandatory appointment of counsel will undermine one of the essential purposes of the proceeding itself, protection of the limited resources of the incompetent's estate from dissipation, for few alleged incompetents will be able to effect a "knowing and intelligent" waiver of undesired counsel. Accordingly, for these reasons and because we doubt that the presence of counsel is essential to protect the accuracy of the fact-finding process at incompetency hearings, we decline to require the mandatory appointment of counsel as an essential element of due process.[145]

Thus, it is not at all clear whether a respondent who is unable to retain legal counsel has a *constitutional*, rather than merely statutory, right to a court-appointed lawyer in a guardianship proceeding.

### *Due Process and the Role of Court-Appointed Lawyers in Guardianship Proceedings*

Despite the absence of clear legal authority, some advocates argue that respondents have a constitutional right to court-appointed counsel in guardianship proceedings *and* that due process requires that the lawyer appointed to represent an allegedly incompetent respondent act as the respondent's *attorney and advocate* rather than a guardian ad litem.

In support of this argument, advocates sometimes cite the decision in *Lessard v. Schmidt*. In *Lessard*, the U.S. District Court for the Eastern District of Wisconsin held that, in the context of involuntary mental commitment (rather than guardianship) proceedings, the appointment of a lawyer to act as a guardian ad litem, rather than a zealous advocate, for a mentally ill respondent "cannot satisfy the constitutional requirement of representative counsel."[146]

The Seventh Circuit's subsequent decision in *Rud v. Dahl*, however, clearly undermines *Lessard's* applicability to legal proceedings involving the appointment of guardians for incompetent adults. As noted above, the appellate court in *Rud* expressly held that due process does not require the appointment of counsel for respondents in guardianship proceeding and, in determining the requirements of due process, distinguished the legal context and consequences of guardianship proceedings from those in legal proceedings for involuntary commitment and treatment of mentally ill persons who present a danger to themselves or others.

Apart from *Lessard*, only one other reported appellate decision, *In re Lee*, suggests that due process requires that a court-appointed lawyer act as the attorney, rather than guardian ad litem, for a respondent in a guardianship proceeding.[147] In *Lee*, Maryland's Court of Special Appeals reversed a lower court's appointment of a guardian for an allegedly incompetent adult because the respondent's court-appointed lawyer acted as a guardian ad litem or investigator for the court rather than as an attorney and advocate for the respondent's expressed interests. In doing so, the court stated that because guardianship proceedings result in "significant and usually permanent loss of [a respondent's] basic rights and liberties," "due process demands nothing less" than the appointment of a lawyer who will act as an *attorney* for the respondent and *not* as a guardian ad litem or court investigator.[148] A close reading of the court's decision in *Lee*, however, reveals that the court's determination regarding the proper role of court-appointed lawyers in guardianship proceedings was based primarily on the state's guardianship statute—*not* the due process requirements of the federal or state constitutions.

More importantly, though, the arguments of advocates and the decisions in *Lee* and *Lessard* seem

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[145] Rud v. Dahl, 578 F.2d at 679. The court, however, did not completely close the door on the argument that due process may require the appointment of counsel for indigent respondents in guardianship proceedings, noting that "we [are not] dealing with an indigent unable to afford counsel, who requests the State to appoint one on his behalf" but rather the claim that, absent waiver of the right to counsel, "the State is constitutionally compelled to appoint counsel, whether or not the alleged incompetent requests such an appointment." Rud v. Dahl, 578 F.2d at 678.

[146] Lessard v. Schmidt, 349 F.Supp. 1078, 1099 (E.D. Wis. 1972), *reinstated after remand*, 413 F.Supp. 1318 (E.D. Wis. 1976).

[147] In re Lee, 754 A.2d 426 (Md. Spec. App. 2000).

[148] In re Lee, 754 A.2d at 439.

to be based on a mistaken assumption regarding the role and responsibilities of guardians ad litem—the assumption that the guardian ad litem's role is to act as a neutral investigator or to make recommendations regarding an allegedly incompetent person's "best interest" and *not* to act as an advocate or attorney for an allegedly incompetent person.[149]

## Conclusion

North Carolina law states that court-appointed lawyers act as guardians ad litem for allegedly incompetent respondents in guardianship proceedings and identifies several specific responsibilities of lawyers who are appointed as guardians ad litem pursuant to G.S. 35A-1107.

North Carolina law, however, does not clearly define the *role* of these court-appointed lawyers. Are they required to act as the attorneys and zealous advocates for allegedly incompetent respondents in guardianship proceedings? Do they determine and represent the respondents' "best interests"? Are they investigators who act primarily as the "eyes and ears" of the court? Do they wear more than one "hat"?

Although North Carolina law does not provide clear answers to these questions, it may be argued that a lawyer appointed under G.S. 35A-1107 acts as the attorney *and* guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding (other than one in which a respondent retains legal counsel)—acting as an attorney and zealous advocate for the respondent's expressed interests to the extent that the respondent retains sufficient mental capacity to determine his own best interest and make decisions regarding the proceeding, but determining and representing the respondent's best interests to the extent that the respondent's mental incapacity prevents him from determining his own best interests or making decisions with respect to the proceeding.

In discharging their responsibilities, lawyers appointed under G.S. 35A-1107 must look first and foremost to the provisions of G.S. Ch. 35A, Rule 17, and North Carolina case law governing the duties of guardians ad litem. But the guardianship statutes of other states also may provide some guidance regarding the role and responsibilities of court-appointed lawyers in North Carolina guardianship proceedings.

Ultimately, of course, the solution to the ambiguity and confusion regarding the role of court-appointed lawyers in guardianship proceedings is the enactment of guardianship statutes that clearly define the role of court-appointed lawyers in guardianship proceedings and describe in detail their legal and professional responsibilities, coupled with high quality education and training programs for lawyers who are appointed to represent allegedly incompetent respondents.

The real issue regarding the role and responsibilities of court-appointed lawyers in guardianship proceedings, though, is not merely one of statutory construction but rather one of public policy. What roles—attorney, guardian ad litem, visitor or court investigator—must be performed in order to protect the rights and interests of allegedly incompetent respondents in guardianship proceedings? How should these roles be defined? Should these roles be combined or clearly separated? Should one person perform more than one of these roles? Which of these roles should be performed by court-appointed lawyers?

And, again, only the General Assembly can answer these questions definitively by enacting legislation to define and clarify the role and responsibilities of court-appointed lawyers in guardianship proceedings.

[149] *See* text accompanying notes 103 through 110.

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# NORTH CAROLINA PROCEEDINGS THAT INVOLVE GUARDIANS AD LITEM (GALS)

This chart summarizes the types of proceedings in which a GAL shall or may be appointed, as well as the agency or person responsible for payment.

| CASE TYPE | TYPE OF PROCEEDING | STATUTORY PAYMENT RESPONSIBILITY | GOVERNING STATUTES |
|---|---|---|---|
| **Adoptions** | Contested adoptions. | The GAL serves pro bono or the fees are taxed to the parties as part of the costs. There are no State funds to pay for these GALs. | 1A-1, Rule 17(b)(2); 48-2-201. |
| **Adoptions** | Where the parents, as defined by G.S. 48-3-601, are incompetent. | The GAL serves pro bono or the fees are taxed to the parties as part of the costs. There are no State funds to pay for these GALs. | 1A-1, Rule 17(b)(2); 48-3-602. |
| **Adult Protective Services** | Cases in which a disabled adult is alleged to be abused, neglected, or exploited, and lacks capacity to consent to protective services or waive the right to counsel. | Indigent Defense Services (IDS) if the client is indigent. The parties if the client is not indigent. | 108A-105(b); 1A-1, Rule 17(b)(2). |
| **Criminal** | Cases in which a court is disposing of the property of an unknown or unapprehended defendant, or a defendant who is willfully absent from the jurisdiction, and a GAL is appointed to represent the defendant's interests. | IDS. | 15-11.1(b). |
| **Criminal** | Cases involving a minor who is a victim of a crime or a potential witness to a crime, and an attorney is appointed to serve as the minor's GAL. | The GAL is appointed from a list of pro bono attorneys approved by the Chief District Court Judge, and serves pro bono. There are no State funds to pay for these GALs. | Rule 7.1 of the General Rules of Practice for the Superior and District Courts. |
| **Juvenile** | Abuse, neglect, or dependency proceedings, and DSS-initiated termination of parental rights proceedings, where a GAL is appointed to represent the child. | Administrative Office of the Courts (AOC) GAL program under the circumstances set forth in G.S. 7B-601(a) or (b). In all other cases, the respondent. | 7B-601; 7B-603(a), (a1); 7B-1200; 7B-1201; 7B-1202. |
| **Juvenile** | Abuse, neglect, or dependency proceedings where a GAL is appointed to represent the parent-respondent. | IDS under the circumstances set forth in G.S. 7B-602(b) or (c). In all other cases, the respondent. | 7B-602; 7B-603(b), (b1); 1A-1, Rule 17(b)(2). |
| **Guardianship** | Incompetency proceedings in which an attorney-GAL is appointed to represent the respondent. | 1) The respondent if adjudicated incompetent and not indigent; 2) the respondent if not adjudicated incompetent, there were reasonable grounds to bring the proceeding, and the respondent is not indigent; 3) the petitioner if not adjudicated incompetent and there were no reasonable grounds to bring the proceeding; or 4) IDS in all other cases. | 7A-451; 35A-1107(a); 35A-1116(c). |
| **Guardianship** | Restoration of competency proceedings in which an attorney or GAL is appointed to represent the ward. | 1) The ward if the ward is not indigent; 2) the movant if relief is not granted and there were no reasonable grounds to bring the proceeding; and 3) IDS in all other cases. | 35A-1116(c), (d); 35A-1130(c). |

| CASE TYPE | TYPE OF PROCEEDING | STATUTORY PAYMENT RESPONSIBILITY | GOVERNING STATUTES |
|---|---|---|---|
| **Guardianship** | Proceedings under Chapter 35A involving the modification of a guardianship order, removal of a guardian, resignation of a guardian, or appointment of a successor guardian. | 1) The respondent if the respondent is not indigent; 2) the movant if relief is not granted and there were no reasonable grounds to bring the proceeding; and 3) IDS in all other cases. | 35A-1116(c), (d);<br>35A-1207;<br>35A-1290;<br>35A-1292;<br>35A-1293. |
| **Guardianship** | Sterilization proceedings following an adjudication of incompetence when an attorney-GAL is appointed to represent the ward. | 1) The ward if the ward is not indigent; 2) the guardian if relief is not granted and there were no reasonable grounds to bring the proceeding; and 3) IDS in all other cases. | 35A-1107;<br>35A-1116(c), (d);<br>35A-1245(c). |
| **Guardianship** | Chapter 35A cases other than incompetency and sterilization where a GAL is appointed. | The GAL serves pro bono or the fees are taxed to the parties as part of the costs. There are no State funds to pay for these GALs. | 1A-1, Rule 17(b)(2);<br>35A-1116(c). |
| **Guardianship-Minors** | Estate (guardianship) or special proceedings where a GAL is appointed to assist the court in determining who should serve as general guardian, guardian of the estate, or guardian of the person for a minor. | The minor's estate if there are estate funds. Otherwise the GAL serves pro bono or the fees are taxed to the parties as part of the costs. There are no State funds to pay for these GALs. | 1A-1, Rule 17(b)(2). |
| **Minors** | Cases in which a minor is petitioning to marry and a GAL-attorney is appointed to represent the minor's best interests. | IDS. | 7A-451(f);<br>51-2.1(b), (d). |
| **Minors** | Cases in which a minor is seeking judicial consent for an abortion and a GAL-attorney is appointed for the minor. | IDS. | 90-21.8. |
| **Termination Parental Rights** | Termination of parental rights proceedings where a GAL is appointed to represent the parent-respondent. | IDS under the circumstances set forth in G.S. 7B-1101.1(b) or (c). In all other cases, the respondent. | 7B-1101.1;<br>1A-1, Rule 17(b)(2). |
| **Termination Parental Rights** | Private termination of parental rights proceedings where the petition is filed by an individual and not DSS, and the court appoints a GAL for the child. | AOC. | 7B-601;<br>7B-603(a), (a1);<br>7B-1103;<br>7B-1108(b). |
| **Other** | Civil, civil custody, estate, equitable distribution, Chapter 50B cases, certain SP proceedings, and other proceedings where a GAL is appointed under G.S. 1A-1, Rule 17. | The GAL serves pro bono or the fees are taxed to the parties as part of the costs. There are no State funds to pay for these GALs. | 1A-1, Rule 17(b)(2). |

# ROLE OF THE ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON

Joan L. O'Sullivan*

There has been considerable debate about the role of the appointed attorney for the alleged incapacitated person in a guardianship case. On one side are those who believe that the attorney should be an advocate for the alleged incapacitated person, argue zealously against the guardianship, and try to limit the extent of the powers of the guardian. According to the ABA Model Rules of Professional Conduct, the attorney must treat the subject of the guardianship as any other client.[1] The attorney must follow the dictates of the client, regardless of whether there is evidence enough to support those ideas, or whether the attorney agrees with what the client wants.

On the opposing side of this argument are those who believe the attorney should substitute his or her judgment for that of the incapacitated person and act as a guardian ad litem. In this role, the attorney determines what is in the best interest of the person who is the subject of the guardianship. The attorney uses his or her own judgment to decide whether the person is competent, investigates the situation, and typically files a report with the court advocating what the attorney decides is in the best interest of the client.

A New Jersey court defined the difference between an advocate and a guardian ad litem. Unlike a court-appointed

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 Associate Professor, University of Maryland School of Law. The Author wishes to thank Elizabeth A. Dye, B.A., J.D., for her research assistance. Professor O'Sullivan's salary is supported by the Geriatrics and Gerontology Education and Research Program at the University of Maryland.

1. ABA Model R. Prof. Conduct 1.14(a) (2000). On February 5, 2002, the ABA House of Delegates, at its Midyear Meeting in Philadelphia, Pennsylvania, completed its review of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (the ABA Ethics 2000 Commission), revising and amending the Model Rules. For a complete summary of the revisions, see *Report 401 as Passed by the House of Delegates February 5, 2002* <http://www.abanet.org/cpr/e2K-report_home.html> (Feb. 2002). Revised Model Rules 1.6 and 1.14 are reprinted at 31 Stetson L. Rev. 791, 856–866 (2002).

attorney, who is an advocate for the client, a guardian ad litem acts as the "'eyes of the court' to further the 'best interests' of the alleged incompetent."[2] A court-appointed attorney is an independent legal advocate who takes part in hearings and proceedings, while a guardian ad litem is an "independent fact finder and an investigator for the court."[3] Therefore, court-appointed attorneys "subjectively represent[ ] the client's intentions, while . . . [guardians ad litem] objectively evaluate[ ] the best interests of the alleged incompetent."[4]

The role the attorney is to play may be dictated by state law, or it may be so unclear that the attorney may choose whichever role he or she prefers. Often, state laws are modified by local custom and practice, which leaves the attorney with enough leeway to choose either role. In this Author's opinion, the attorney should protect the due-process rights of the alleged incapacitated individual and advocate strenuously for the client's wishes. If the attorney does not do this, the alleged incapacitated person has no voice in the proceedings. This is the ethical obligation of the attorney as an officer of the court, which also protects the proceedings from attack based on the due-process protections of the Fourteenth Amendment and local statutory law.

Section I of this Article discusses the history of guardianship law and how the King of England was seen as the protector of those who were established as lunatics or idiots. Section I also discusses the types of guardianship, the consequences for one under guardianship, and the role of the attorney in several states.

Section II discusses the due-process protections of the Fourteenth Amendment, the *parens patriae* authority, and the process due to the alleged incapacitated person. Section II continues with state and federal appellate cases, the right to notice, the standards of the guardian, and the standard for finding incapacity.

Section III deals with the ABA's Model Rules of Professional Conduct. It addresses the situation of a client under a disability, and the scope of representation, diligence, communication, confidentiality, and conflicts of interests.

Section IV presents other opinions of the role of the attorney in a guardianship case, including the American Bar Association's

2. *In re Mason*, 701 A.2d 979, 983 (N.J. Super. Ch. Div. 1997).
3. *Id.*
4. *Id.*

position, the Uniform Guardianship and Protective Proceedings Act, the National Symposium on Guardianship systems, and the reforms that other countries have made in their guardianship laws.

Section V addresses how an attorney may play the role of an advocate for the alleged incapacitated person, from the initial interview to negotiating for less restrictive measures as an alternative to a guardianship. It also addresses how an attorney can reflect the client's wishes in court when the client is unable to communicate.

The Conclusion calls for a reform of the guardianship system based on the advances that have occurred in other countries.

## *SECTION I*

### A. History of Guardianship

Over the years, society has struggled with what to do with the person and property of adults who are incapacitated. Modern guardianship laws have their basis in the *parens patriae* authority of the feudal kings of England.[5] Under the *parens patriae* doctrine, the King was literally the "parent of the country" and had a fiduciary duty to protect the property of those who were *non compos mentis*.[6] In 1324, during the reign of Edward II, the statute *De Praerogativa Regis* stated as follows:

> [T]he King shall provide, when any, that beforetime hath had his wit and memory happen to fail of his wit, as there are many [per lucida intervalla,] that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustenation shall be kept to their use, to be delivered unto them when they come to right mind, so that such lands and tenements shall in no wise be alienated; and the King shall take nothing to his own use. . . .[7]

The law differentiated between idiots, those who were

5. Sallyanne Payton, *The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons*, 17 J. Med. & Phil. 605, 618 (1992).

6. Symposium, *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1207–1208 (1974).

7. Payton, *supra* n. 5, at 618–619.

incompetent from birth,[8] and lunatics, those who had lost the use of reason.[9] A lunatic was defined as "one who ha[s] had under[s]tanding, but by di[s]ea[s]e, grief, or accident, ha[s] lo[s]t the u[s]e of his rea[s]on."[10] A lunatic might have lucid intervals and be expected to recover his reason.[11]

The King had custody of an idiot, and the profits of the idiot's lands were paid to the King during the idiot's lifetime.[12] At his death, the King returned the land to the heirs of the idiot.[13] In contrast, the King was merely a trustee for the lands of the lunatic.[14] The King's duty was to protect and safeguard the land until the person regained his faculties.[15] The profits not used for care of the lunatic and his family were safeguarded and were returned to the lunatic when he recovered.[16] The King had to account to the lunatic, or to his heirs after he died, for his management of the property during the period of the lunatic's period of incapacity.[17]

The King's *parens patriae* authority became effective only after a man was found to be *non compos mentis* in a proceeding by the Lord Chancellor.[18] The Lord Chancellor issued a *writ de lunatico inquirendo* or a *writ de idiota inquirendo.*[19] A jury of twelve men would inquire into the matter; and if they found that the man was a lunatic or an idiot, he would be committed into the care of a relative or friend, called his committee.[20] Although it fell to the King to protect the property of the lunatic, the care of the *non compos mentis* person was committed to his family or friends.[21] To prevent "sinister practices," the next heir who had an interest in the lunatic's property after his death was seldom

8. William Blackstone, *Commentaries on the Laws of England* vol. 1, ch. f, 271, 292 (1st ed., Clarendon Press 1976).

9. *Id*. at 294.

10. *Id*.

11. *Id*.

12. *Id*. at 292.

13. *Id*. at 293.

14. *Id*. at 294.

15. *Id*.

16. *Id*.

17. *Id*.; *see Hamilton v. Traber*, 27 A. 229, 230 (Md. 1893) (stating that "the King should provide that . . . lands and tenements . . . [of lunatics] . . . be kept without waste").

18. Blackstone, *supra* n. 8, at 293.

19. *Id*. at 294.

20. *Id*. at 294–295.

21. *Id*.

permitted to be the committee of his person.[22]

Formal proceedings were initiated only for those who owned land and were wealthy enough to pay for the proceedings, since the point of the inquiry was to protect the property of the subject.[23] Those who were poor were left to the care of their families.[24]

After the American Revolution, state legislatures assumed the *parens patriae* authority of the King.[25] Although courts did not want American democracy to retain the traditional powers of the King, *parens patriae* authority was seen as benevolent and consistent with the duty of the state to protect those who could not protect themselves.[26] A Maryland court in *Bliss v. Bliss*[27] quoted with approval *14 Ruling Case Law 544*, Section 4:

> In this country after the Revolution, the care and custody of persons of unsound mind, and the possession and control of their estates, which in England belonged to the King as a part of his prerogative, were deemed to be vested in the people, and the courts of equity of the various states have, either by inheritance from the English Courts of Chancery, or by express constitutional or statutory provisions, full and complete jurisdiction authority over the persons and property of idiots and lunatics.[28]

The court went on to hold as follows, again quoting *14 Ruling Case Law 556*, Section 7:

> In this country as has been seen, jurisdiction over the persons and property of the insane is exercised by the courts of equity of the various states as the representatives of the people of the state, and from this general jurisdiction in the absence of statute authorizing any particular court or officer to issue a commission of inquiry, the right to ascertain judicially whether or not a person is of unsound mind is deemed to be impaired.[29]

The Supreme Court, in the case *The Late Corporation of the*

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22. *Id*. at 295.

23. John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives*, 13 Wm. & Mary L. Rev. 569, 571 (1972).

24. *Id*.

25. Symposium, *supra* n. 6, at 208.

26. *Id*.

27. 104 A. 467 (Md. 1918).

28. *Id*. at 471.

29. *Id*.

*Church of Jesus Christ of the Latter-Day Saints v. United States*,[30] defined the *parens patriae* doctrine as follows:

> If it should be conceded that a case like the present transcends the ordinary jurisdiction of the court of chancery, and requires for its determination the interposition of the parens patrice of the State, it may then be contended that, in this country, there is no royal person to act as parens patrice, and to give direction for the application of charities which cannot be administered by the court. It is true we have no such chief magistrate. But, here, the legislature is the parens patrice, and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England. Chief Justice Marshall, in the Dartmouth College Case, said: "By the revolution, the duties, as powers, of government devolved on the people. . . . It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department." 4 Wheat. 651 [at 662].[31]

The duties of the King were thus devolved onto the state legislatures, who have the power to exercise the *parens patriae* authority. These powers are seen in the authority of the state to remove children from the custody of their parents for abuse or neglect, remove a vulnerable adult from an abusive caregiver, and appoint a guardian of the person or of the property after one has been found to be mentally or physically incapacitated.[32]

### B. Types of Guardianship

Guardianship may come in distinct packages.[33] Often, a petitioner sues for guardianship of the person and of the property.[34] This gives the guardian total control over the alleged incapacitated person and his or her property.[35] The guardian may have to file an annual fiduciary account with the court.[36] If the

30. 136 U.S. 1, 56–57 (1889).

31. *Id*.

32. Symposium, *supra* n. 6, at 1208–1209.

33. *See e.g.* Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide through the Maze*, 31 Stetson L. Rev. 757, 758–759 (2002) (describing four different types of guardianship available in California).

34. *Id*. at 759.

35. Regan, *supra* n. 23, at 608.

36. Blackstone, *supra* n. 8, at 451.

guardian does not do this, the guardian may be removed and the court will appoint someone who will file the fiduciary reports.[37]

If only health care is needed, a petitioner may sue only for guardianship of the person.[38] If only financial management is needed, one may sue for guardianship of the property.[39] In some states, guardianship of the property is called conservatorship.[40] Most often, however, petitioners sue for control of both person and property so that the guardian has maximum authority over the person.

### C. Consequences for the Person Placed under Guardianship

The effects of a judicial appointment of a guardian on the individual rights of the alleged incapacitated person are substantial. A previously competent adult may no longer have the right to decide where and how to live, how or whether to spend his or her funds, with whom to associate, or whether to accept or reject health care.

The person found to be incapacitated loses the right to vote in thirty-five states and the District of Columbia.[41] Of the fifteen states that do not have these statutes, some have guardianship laws that require a court to decide whether to remove the right to vote.[42] The New Hampshire law, for example, states that anyone a court finds to be incapacitated cannot be deprived of any legal rights without a specific finding of the court.[43] The court shall enumerate which legal rights the proposed ward is incapable of exercising.[44]

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37. *Id*.

38. Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147, 148 (1994).

39. *Id*.

40. Regan, *supra* n. 23, at 607.

41. Kay Schriner, Lisa A. Ochs & Todd G. Shields, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 Berkeley J. Empl. & Lab. L. 437, 455–456 (2000). The states are Alabama, Arkansas, Arizona, California, Delaware, Florida, Georgia, Hawaii, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id*.

42. *Id*.

43. N.H. Rev. Stat. Ann. § 464-A:9 (Supp. 2001).

44. *Id*. The statute reads as follows:

In other states, the statutes are silent on the matters of individual rights. However, in some jurisdictions, the ward is prohibited from marrying and loses the right to make contracts.[45]

In 1987, the Associated Press published a series of articles on guardianship abuses that caused Congress to form a committee to look into abusive guardianship practices.[46] The congressional committee concluded that the "[t]ypical[ ] ward[ ] ha[s] fewer rights than the typical [convicted felon]."[47] The committee found that, not only could the alleged incapacitated person "no longer receive money or pay [his or her] bills," but courts give guardians "the power to choose where [the alleged incapacitated person] will live, what medical treatment they will receive and, in rare cases, when they will die."[48] In sum, the congressional committee saw guardianship as "the most severe form of civil deprivation which can be imposed on a citizen of the United States."[49]

D. Role of the Attorney for the Alleged Incapacitated Person

The series of Associated Press articles caused many states to look at their guardianship proceedings and reform their guardianship laws.[50] Unfortunately, not every state gave the alleged incapacitated person the right to counsel. In many states, a guardian ad litem or visitor is appointed to investigate the situation and, based on his or her recommendation, the court may appoint an attorney for the alleged incapacitated person. For example, the New York Code states as follows:

> (a) At the time of the issuance of the order to show cause, the court shall appointment a court evaluator.

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> IV. No person determined to be incapacitated thus requiring the appointment of a guardian of the person and estate, or the person, or the estate, shall be deprived of any legal rights, including the right to marry, to obtain a motor vehicle operator's license, to testify in any judicial or administrative proceedings, to make a will, to convey or hold property, or to contract, except upon specific findings of the court. The court shall enumerate in its findings which legal rights the proposed ward is incapable of exercising.

*Id*.

45. H.R. Rpt. 100-639, at 21 (Sept. 25, 1987).
46. *Id*. at 13.
47. *Id*. at 4.
48. *Id*.
49. *Id*. at 1.
50. Sally Balch Hurme, *Steps to Enhance Guardianship Monitoring* 7–9 (ABA 1991).

. . .

(c) The duties of the court evaluator shall include the following:

1. meeting, interviewing and consulting with the person alleged to be incapacitated regarding the proceeding.

2. explaining to the person alleged to be incapacitated, in a manner which the person reasonably be expected to understand, the nature and possible consequences of the proceeding, the general powers and duties of a guardian, available resources, and the rights to which the person is entitled, including the right to counsel.

3. determining whether the person alleged to be incapacitated wishes legal counsel to be appointed and otherwise evaluating whether legal counsel should be appointed in accordance with section 81.10 of this article.[51]

Article 81.10 of the New York Code states, in part, as follows:

(a) Any person for whom relief under this article is sought shall have the right to be represented by legal counsel of the person's choice.

(b) If the person alleged to be incapacitated is not represented by counsel at the time of the issuance of the order to show cause, the court evaluator shall assist the court . . . in determining whether counsel shall be appointed.

(c) The court shall appoint counsel in any of the following circumstances:

1. the person alleged to be incapacitated requests counsel;
2. the person alleged to be incapacitated wishes to contest the petition;
3. the person alleged to be incapacitated does not consent to the authority requested in the petition to move the person alleged to be incapacitated from where that person presently resides to a nursing home or other residential facility as those terms are defined . . .;
4. if the petition alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent;
5. the petition requests temporary powers pursuant to [provisions for a temporary guardian];
6. the court determines that a possible conflict may exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated;

51. N.Y. Mental Hygiene Laws § 81.09 (McKinney 1996).

> 7. if at any time the court determines that appointment of counsel would be helpful to the resolution of the matter.[52]

Other codes are more explicit in the role the attorney is to play. For example, in North Dakota the code states as follows:

> Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for a hearing. If, at any time in the proceeding, the court determines that the interests of the person to be protected are or may be inadequately represented, it may appoint an attorney to represent the person to be protected. An attorney appointed by the court to represent a protected person has the powers of a guardian ad litem . . . . The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer, employee, or special appointee of the court.[53]

In North Carolina,

> [t]he 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.[54]

In thirty-five states and the District of Columbia, the respondent has the right to an attorney to represent him or her.[55]

In the state of Washington, the code describes the actual role the attorney must play as follows:

> (1)(a) Alleged incapacitated individuals shall have the right to be represented by willing counsel of their choosing at any stage in guardianship proceedings. The court shall provide counsel to represent any alleged incapacitated person at public

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52. *Id*. § 81.10.

53. N.D. Cent. Code, § 30.1-29-07 (1996).

54. N.C. Gen. Stat. § 35A-1107 (2000).

55. H.R. Rpt. 100-639, at 8–9. The states are Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Kentucky, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id*.

> expense when either: (i) The individual is unable to afford counsel, or (ii) the expense of counsel would result in substantial hardship to the individual, or (iii) the individual does not have practical access to funds with which to pay counsel. . . .
>
> (b) Counsel for an alleged incapacitated individual shall act as an advocate for the client and shall not substitute counsel's own judgment for that of the client on the subject of what may be in the client's best interests. Counsel's role shall be distinct from that of a guardian ad litem, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences.
>
> (c) If an alleged incapacitated person is represented by counsel and does not communicate with counsel, counsel may ask the court for leave to withdraw for that reason. If satisfied, after affording the alleged incapacitated person an opportunity to a hearing, that the request is justified, the court may grant the request and allow the case to proceed with the alleged incapacitated person unrepresented.[56]

The presence of an attorney acting as an advocate for the alleged incapacitated person is always open to question. In some states, the alleged incapacitated person has no attorney and no one to speak for him or her in court.[57] In other states, despite the words of the statutes that require the attorney to advocate for the client, the attorney acts as a guardian ad litem.[58] In some jurisdictions, the courts require the attorney to file a report recommending whether the guardianship should go forward.[59]

It has been recommended that the alleged incapacitated individual have an attorney appointed in every case as a way to safeguard the individual's rights.[60] However, in a ten-state study of guardianship practices conducted in 1994 by the Center for

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56. Wash. Rev. Code Ann. § 11.88.045 (West 2001).

57. H.R. Rpt. 100-639, at 3.

58. *See* Lauren Barritt Lisi, Anne Burns & Kathleen Lussenden, *National Study of Guardianship Systems: Findings and Recommendations* 58–59 (The Ctr. for Soc. Gerontology 1994) (discussing how some court-appointed attorneys in guardianship cases "do not view their role as that of advocate for respondent's wishes").

59. *Contra* Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 Md. J. Contemp. L. Issues 191, 212 (1995) (explaining that the "representing attorney" should be an advocate, unlike a guardian ad litem who files reports of recommendation).

60. Lisi, Burns & Lussenden, *supra* n. 58, at 54.

Social Gerontology, the study found that the alleged incapacitated individual often was unrepresented by counsel in guardianship hearings.[61] Respondents were present at the hearings in thirty-six percent of the cases if they lived at home, in twenty-four percent of the cases if they lived in a nursing home, and in nineteen percent of the cases if they lived in other places. The presence of fourteen percent was not ascertained.[62]

Attorneys for the alleged incapacitated person were court appointed in twenty percent of cases, a private attorney appeared in nine percent of the cases, there was no evidence in the file in sixty-seven percent of cases, appointment was unknown in three percent of cases, and there was missing data in two percent of cases.[63] Attorneys for the alleged incapacitated person were present at the hearing in twenty-four percent of cases, were not present in thirty-five percent of cases, and in forty-one percent of cases the researcher did not know.[64] The attorney spoke at the hearing in eighty-seven percent of cases.[65]

## *II. DUE PROCESS PROTECTIONS*

### A. The Fourteenth Amendment

The Fourteenth Amendment to the U.S. Constitution requires that due-process protections be afforded to anyone who is threatened with loss of liberty or property.[66] This is the case in guardianship proceedings, in which a person who has some incompetencies may lose all of his or her rights and property.[67] A respondent in a guardianship case can lose his or her right to vote, marry, contract, determine where he or she will live, choose the kind of health care he or she will receive, and decide how to manage his or her assets.[68] Once a guardian is appointed, the guardian rarely consults with the ward before making a decision.[69] Especially for those with mental retardation or mental

61. *Id.*
62. *Id.* at 49.
63. *Id.* at 56.
64. *Id.*
65. *Id.* at 57.
66. U.S. Const. amend. XIV, § 1.
67. H.R. Rpt. 100-639, at 4.
68. *Id.* at 1.
69. *See* Michael D. Casasanto, Mitchell Simon & Judith Roman, *A Model Code of Ethics for Guardians*, 11 Whittier L. Rev. 543, 553 (1989) (making a case for a National

illness, the imposition of a guardianship may rob a person of his or her autonomy and his or her ability to manage affairs independently.[70]

In some cases, the imposition of a guardianship makes no difference to the ward because he or she is too incapacitated to understand the consequences of the appointment.[71] This may be true with regard to downward-spiraling diseases like chronic heart disease and Alzheimer's Disease.[72] However, the imposition of a guardianship in many cases does deprive the ward of the ability to make certain choices, or to express his or her opinion.[73] The imposition of a guardianship deprives the person of the right to liberty and to manage property.[74]

The U.S. Constitution, Fourteenth Amendment, Section I protects citizens of the United States from any state laws that "abridge the privileges or immunities of citizens of the United States[,] deprive any person of life, liberty or property without due process of law[,] [or] deny to any person within its jurisdiction the equal protection of the law."[75] The Supreme Court acknowledged that due process cannot be precisely defined, in *Lassiter v. Department of Social Services of Durham County*.[76] The concept of due process requires a determination of the "fundamental fairness" appropriate to the situation.[77] Fundamental fairness is discerned by considering relevant precedents and

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Model Code to be implemented that would require the guardian to consult with the ward to determine the ward's desires and preferences); Natl. Guardianship Assn., *Ethics for Guardians* <http://www.guardianship.org> (accessed July 24, 2001) (providing a discussion of guardianship ethics).

70. Windsor C. Schmidt, Jr., *Guardianship: The Court of Last Resort for the Elderly and Disabled*, 92 (Carolina Academic Press 1995).

71. *See* Casasanto, *supra* n. 69, at 545 (providing a description of a forty-nine-year-old with minimal mental ability). A guardian must make the best choice for the ward "as defined by objective socially shared criteria." *Id*. at 547.

72. *Id*. at 546. In this type of situation, guardians should look to past decisions of the ward when making current decisions. *Id*. at 549.

73. *Supra* n. 47 (stating that "[b]y appointing a guardian, the court entrusts to someone else the power to choose").

74. *Supra* n. 68. "An individual under guardianship typically is stripped of his or her basic personal rights such as the right to vote, the right to marry, the right to handle money, and so forth." *Id*.

75. U.S. Const. amend. XIV, § 1.

76. 452 U.S. 18, 24 (1981). *Lassiter* involved the termination of parental rights of a mother sentenced to prison for twenty-five to forty years after a conviction for second-degree murder. *Id*. at 25.

77. *Id*.

the various interests involved.[78] The Court concluded that an "indigent" has a right to appointed counsel when "the litigant may lose his physical liberty if he loses the litigation."[79]

This dictate applies in guardianship matters. Consider the person who does not want to leave her home to live in a nursing home; she is certain to lose her physical liberty if she loses the case.[80] The right to have an attorney appointed for her, to advocate for her, and to explain to the court how she manages her care at home is essential to the concept of "fundamental fairness."[81] This concept of fundamental fairness would take into account the fact that the potential ward had managed her care at home, was willing to take the risks involved in living at home, and refused to leave her home for a safer environment.[82] These interests would be balanced against the state's right to protect those who cannot protect themselves, which is the principle behind the *parens patriae* doctrine.[83] If the risk of living at home was too great, a guardian would be appointed to move the alleged incapacitated person from her home to a nursing home.[84] Alternatively, the court might order the guardian to arrange additional supportive services so the ward could remain at home.[85]

In another case, *Vitek v. Jones*,[86] the Supreme Court found that moving a prisoner from a jail to a mental hospital without notice, the right to a hearing, or appointed counsel deprived the prisoner of liberty in violation of the Due Process Clause of the Fourteenth Amendment.[87] The Supreme Court affirmed the decision of the district court, saying that incarceration did not include transfer to a mental institution without notice and right to counsel, because involuntary treatment in a mental hospital is

78. *Id*. at 24–25.

79. *Id*.

80. *See* H.R. Rpt. 100-639, at 1 (relating the story of an eighty-one-year-old woman whose guardian had unnecessarily placed her in a nursing home; it took weeks for the ward to get herself released).

81. Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium* 10 (ABA 1989) [hereinafter *Wingspread Recommendations*].

82. Casasanto, *supra* n. 69, at 553.

83. Payton, *supra* n. 5, at 606.

84. Casasanto, *supra* n. 69, at 554.

85. *Id*. at 560.

86. 445 U.S. 480 (1979).

87. *Vitek v. Jones*, 445 U.S. 480, 494 (1979).

not contemplated by those who serve time in jail.[88] The state's reliance on physicians and psychologists neither removes the prisoner's interest from due-process protection nor answers the question of what process is due under the Constitution.[89]

The Supreme Court cited the United States District Court for the District of Nebraska and its list of minimum procedures required to transfer a prisoner to a mental hospital.[90] The list of seven steps first requires that written notice be given to the prisoner about the possible transfer.[91] After the notice, the list of procedures calls for a hearing with enough advance notice for the prisoner to prepare.[92] At the proceeding, the prisoner is informed of the evidence used to support the transfer and is given the opportunity to speak and present evidence on his or her own behalf.[93] The third step demands that the prisoner be allowed to present testimony and to confront witnesses called by the state unless there is "good cause for not permitting such presentation, confrontation, or cross-examination."[94] Fourth, the procedures insist that an independent decision-maker be present.[95] Also, the fact-finder must make a written statement about the evidence and the reasons for the transfer.[96] Sixth, the state must appoint legal counsel if the prisoner is unable to afford his or her own.[97] Finally, the procedures require that a prisoner be provided "effective and timely notice of all the foregoing rights."[98]

Similarly, often the only evidence of the potential ward's incapacity in guardianship cases is two certificates from physicians or psychologists.[99] The court may weigh these certificates heavily as evidence of the person's incapacity, beyond what the alleged incapacitated person wishes to say to the

88. *Id*. at 493.
89. *Id*. at 495.
90. *Id*. at 494–495.
91. *Id*. at 494.
92. *Id*.
93. *Id*.
94. *Id*. at 494–495.
95. *Id*. at 495.
96. *Id*.
97. *Id*.
98. *Id*.
99. *E.g. Poteat v. Guardianship of Poteat*, 771 S.2d 569, 571 (Fla. Dist. App. 4th 2000) (affirming the trial court's finding that testimony from a neurologist and a psychiatrist "constituted substantial competent evidence to support . . . that a guardianship was necessary").

court.[100] Being found incapacitated places the same stigma on a person as being forced to reside in a mental hospital.[101] One no longer has the autonomy afforded to adults to contract, to determine what is done with his or her funds and property, or to make decisions about what is done with his or her person.[102] His or her autonomy is overruled and the authority to decide what is done with his or her life is given to another person.[103]

In some states, the list enumerated by the Supreme Court in the *Vitek* case is codified in statutes and court rules pertaining to guardianship.[104] Nevertheless, when a state-furnished attorney is appointed as the eyes and ears of the court, the enumerated procedures are not met and, therefore, fundamental principles of liberty and justice are violated.

If the attorney acts for the court in investigating the case, and if the attorney makes a recommendation that ignores the wishes of his or her client, it is an ethical breach of the ABA Model Rules of Professional Conduct, which all attorneys must follow.[105] If the attorney ignores what the client is saying, then the court does not hear from the client, since no one speaks for him or her other than his or her attorney, who offers evidence to the court based on the "best interest standard."[106] The attorney, rather than the judge, therefore becomes the decision-maker in such a case. When the attorney acts as a guardian ad litem, the due-process protections promised to the alleged incapacitated person are ignored. The client has no representation in court, and no one communicates his or her interests to the judge.

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100. *Id.*

101. *See generally Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 651 (2d Cir. 1999) (stating that "[a] litigant possesses liberty interests in avoiding the stigma of being found incompetent.").

102. *Supra* n. 68 and accompanying text.

103. *Supra* n. 70 and accompanying text.

104. *E.g.* Md. Est. & Trusts Code Ann. § 13-705 (2001) (exemplifying a statute that reflects the *Vitek* holding); Md. R. Code Ann. R. 10-201 to 10-205 (2001) (exemplifying a state's court rules that reflect the *Vitek* holding).

105. ABA Model R. Prof. Conduct preamble ¶ 17.

106. *See* Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 Issues L. & Med. 283, 283–284 (1991) (describing the "best interests standard" in the context of medical treatment for children and the incompetent).

### B. *Parens Patriae* Authority

From its inception, *parens patriae* authority has been seen as benevolent in nature, rather than adversarial, because the state is acting to protect those who cannot protect themselves.[107] The doctrine is focused on doing good for those who cannot protect themselves.[108] However, not every petitioner for guardianship is focused on doing good. At times the petitioner is seeking to protect property and funds that he or she will inherit when a relative or friend dies. At other times, relatives are warring amongst themselves, seeking control of an elder's person or property.

These are the cases in which having an advocate as legal counsel is most important. The *parens patriae* theory is enforced by public authority, sanctioned by age and custom, in furtherance of the general public good.[109] For it to be valid, the principles of liberty and justice must be applied, and due process for the alleged incapacitated person must be pursued. In the case of *In re Gault*,[110] one of the first cases in which due process was applied to juvenile court, the Supreme Court noted as follows:

> [I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being a boy does not justify a kangaroo court.[111]

Similarly, the condition of being elderly, mentally retarded, mentally ill, or drug or alcohol dependent does not justify a kangaroo court. For the *parens patriae* doctrine to apply to all equally, the attorney must advocate for the alleged incapacitated person. Only when the attorney serves as the advocate for the alleged incapacitated person is the due process guaranteed by the Constitution accorded to the alleged incapacitated person.

In a federal case from Wisconsin, the court relied heavily on the *Gault* case in finding that the plaintiff and the class of people she represented were not accorded due process of law before they

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107. *Id*. at 287–288.

108. Payton, *supra* n. 5, at 641. "The state acquired its power as part of a medieval bargain made in the ethical structure of feudalism, under which the King became the servant, not the master, of persons he brought under his protection." *Id*.

109. Griffith, *supra* n. 106, at 288–289.

110. 387 U.S. 1 (1967).

111. *In re Gault*, 387 U.S. 1, 27–28 (1967).

were involuntarily committed to a mental institution.[112] The court in *Lessard v. Schmidt*[113] found that the Wisconsin civil-commitment standard had violated the Constitution because, among other things, it did not include the right to counsel.[114] Although the statute called for the appointment of a guardian ad litem, the guardian ad litem did not assume the role of an advocate.[115] The court found that, undoubtedly, "a person detained on grounds of mental illness has a right to counsel, and to appointed counsel if the individual is indigent."[116] Quoting *Gault*, the *Lessard* court explained that counsel is needed "to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."[117]

Commitment to a mental institution and being found incompetent apply a similar stigma.[118] Both situations result in the same restraint of civil liberties, the imposition on autonomy, and the restraint on liberty and the right to protect their property. The search for less restrictive alternatives in an attempt to settle the case is always the duty of the advocate counsel. The holding of the United States District Court for the Eastern District of Wisconsin applies the rights of civil liberties to those who are alleged to be incapacitated as well.[119]

### C. Process Due to Alleged Incapacitated Persons

#### *1. Appellate Court Proceedings*

Both state and federal courts have found that due process of law entitles an alleged incapacitated person to counsel who advocates for him or her.[120] Three recent cases illustrate the courts' reasoning.[121]

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112. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972).
113. 349 F. Supp. 1078 (E.D. Wis. 1972).
114. *Id.* at 1103.
115. *Id.* at 1099.
116. *Id.* at 1097.
117. *Id.* at 1098 (quoting *In re Gault*, 387 U.S. at 36).
118. *Supra* n. 101.
119. *Lessard*, 349 F. Supp. at 1103.
120. *Gault*, 387 U.S. 1 (1967); *Conservatorship of Gilbuena v. Moore*, 209 Cal. Rptr. 556 (Cal. App. 5th Dist. 1985); *Est. of Thompson*, 542 N.E.2d 949 (Ill. App. 1st Dist. 1989).
121. *In re Guardianship of Deere*, 708 P.2d 1123 (Okla. 1985); *In re Fey*, 624 S.2d 770 (Fla. Dist. App. 4th 1993); *In re Lee*, 754 A.2d 426 (Md. Spec. App. 2000).

In the case of *In re Fey*,[122] Florida's Fourth District Court of Appeal decided that the trial court should have appointed independent counsel to represent the ward prior to the hearing and trial preparation.[123] The court held that the trial court's failure to appoint independent counsel to represent the ward constituted error of constitutional proportion because such failure deprived the ward of her right to due process and equal protection of the laws.[124] This act also violated a Florida statute that provides for a court-appointed "attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity."[125] However, "[t]he alleged incapacitated person may substitute his own attorney for the attorney appointed by the court."[126] Additionally, the statute prohibits the attorney of an alleged incapacitated person from serving as that person's guardian or as the attorney for the guardian or the petitioner.[127] The court held "that compliance with section 744.331 . . . is mandatory and that the trial court's failure to adhere to these requirements at bar constituted error of fundamental proportions."[128]

In *In re Guardianship of Deere*,[129] the Supreme Court of Oklahoma held that the refusal to grant a continuance to the ward so that he could confer with his attorney, whom he had retained the day before the trial, constituted an abuse of discretion and a denial of due process.[130] The court said due process protects "the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security" and is a "historic libert[y]."[131] Court-appointed guardians "result[ ] in a massive curtailment of liberty, and it may also engender adverse social consequences." [132] The court observed that, once a guardian is in place, he or she "becomes the custodian of the person, estate and

122. 624 S.2d 770 (Fla. Dist. App. 4th 1993).

123. *In re Fey*, 624 S.2d at 771. The ward had died, but the appellate court heard the case because it was a matter of great public interest, the issue was likely to recur, and the issue had not been previously addressed. *Id*.

124. *Id*.

125. *Id*. (quoting Fla. Stat. § 744.331(2)(a) (1990)).

126. *Id*. (quoting Fla. Stat. § 744.331(2)(a)).

127. *Id*. (citing Fla. Stat. § 744.331(2)(b)).

128. *Id*. at 772.

129. 708 P.2d 1123 (Okla. 1985).

130. *Id*. at 1124.

131. *Id*. at 1126.

132. *Id*.

business affairs of the ward."[133] As a result, the ward can no longer choose his or her residence and loses his or her freedom to travel.[134] Furthermore, the ward's legal relationship with other persons is limited and he or she suffers numerous statutory disabilities.[135] The right to "remain licensed to practice a profession[,] marry[,] refuse medical treatment[,] possess a driver's license[,] own or possess firearms[,] and remain registered to vote" are also taken away.[136]

Further, the Supreme Court of Oklahoma noted that, when the state takes away "a person's right to personal freedom, minimal due process requires proper written notice and a hearing at which the alleged incompetent may appear to present evidence in his/her own behalf."[137] Other factors such as

> [t]he opportunity to confront and cross-examine adverse witnesses before a neutral decision-maker, representation by counsel, findings by a preponderance of the evidence, and a record sufficient to permit meaningful appellate review are concomitant rights in this context

that are also required and "cannot be abridged without compliance with due process of law."[138] The court used these principles to support its "finding that guardianship proceedings must comport with constitutional notions of substantial justice and fair play."[139]

Finally, in the case of *In re Lee*,[140] the Maryland Court of Special Appeals held that the representation that was afforded a ward did not meet the requirements of the Maryland Rules and the Rules of Professional Conduct.[141] The court remanded the case to the trial court for a hearing on the issue of competency.[142] The court's decision contains a detailed analysis of why an attorney acting as an advocate is required.[143]

The attorney in *In re Lee*, who was appointed to represent the

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133. *Id.*
134. *Id.* at 1125–1126.
135. *Id.* at 1126.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. 754 A.2d 426 (Md. Spec. App. 2000).
141. *Id.* at 441.
142. *Id.*
143. *Id.* at 438–441.

proposed ward, acted as a guardian ad litem and waived the ward's right to be present at trial despite the ward's statutory right and desire to be there.[144] Then the attorney filed a report that directly contradicted the ward's desire that a non-family member serve as guardian, sought to prevent a hearing on the issue of his incapacity, and objected when any evidence of his disability was raised in the hearing.[145] The court said the attorney was "acting throughout this proceeding as an investigator for the court, or perhaps as a guardian ad litem, but not as his attorney."[146]

The court explained that the obligations of an attorney and those of a guardian ad litem sometimes "directly conflict."[147] An attorney is obligated "to explain the proceedings to his client and advise him of his rights, keep his confidences, advocate his position, and protect his interests."[148] This requirement of "due process" is especially important "when the alleged disabled person faces significant and usually permanent loss of his basic rights and liberties."[149] Guardianship proceedings, the court stated, when the alleged incapacitated person has an effective attorney,

> ensures that the proper procedures are followed by the court, that the guardianship is imposed only if the petitioner proves by 'clear and convincing evidence' that such a measure is necessary and there is no reasonable alternative, that the guardianship remains no more restrictive than is warranted, . . . that no collusion exists between the court appointed investigator and petitioner, and that the client's right to appeal is exercised, if appropriate.[150]

Quite different from the duties of an attorney, the court explained, a guardian ad litem must investigate the case from a neutral standpoint to determine whether a guardian is needed.[151] The guardian ad litem "may divulge the confidences of the alleged disabled person and make recommendations that may conflict

144. *Id*. at 438.
145. *Id*.
146. *Id*.
147. *Id*.
148. *Id*. at 438–439.
149. *Id*. at 439.
150. *Id*.
151. *Id*.

with his or her wishes."[152] Furthermore, "the guardian ad litem may serve as the principal witness against the alleged disabled person."[153]

The *In re Lee* court quoted the Rules of Professional Conduct for the State of Maryland, enumerating Rules 1.2(a), 1.3, 1.4(b), 1.6(a), and 1.14.[154] The court stated that the role of the attorney in Maryland had traditionally been "shrouded in ambiguity," but with a change in court rules, the rule was clarified to provide that the attorney should be an advocate for his or her client.[155] The court rules further provided that a court may "appoint an . . . investigator to discover the facts of the case."[156] The court reasoned that "'a normal client-lawyer relationship' precludes an attorney from acting solely as an arm of the court."[157] An attorney cannot substitute his or her "assessment of the 'best interests' of the client to justify waiving the client's rights without consultation, divulging the client's confidences, disregarding the client's wishes, and even presenting evidence against him or her."[158]

The court noted that the ward's attorney filed "recommend[ations] that he be found disabled, in need of a guardian, and that, contrary to [the ward's] wishes, [his daughter] be appointed his guardian."[159] These actions, the court concluded, made the attorney "virtually the principal witness against [the ward's] stated position."[160]

The court found the waiver of the ward's appearance by his counsel "a particularly troubling aspect of [the] proceedings."[161] The attorney stated that "it would be exceedingly harmful to [the ward's] current physical and mental health to be compelled to testify at this proceeding, due to the fact that he is, without doubt, an individual under a disability."[162] The Court of Special

152. *Id*.
153. *Id*.
154. *Id*. at 438–439.
155. *Id*. at 439.
156. *Id*. at 440.
157. *Id*. (quoting Md. R. Prof. Conduct 1.14(a)).
158. *Id*.
159. *Id*.
160. *Id*.
161. *Id*.
162. *Id*.

Appeals noted three problems with this statement.[163] First, the attorney's conclusion about his client's health "did not address his apparent waiver of his 'right to be present' at trial but only the desirability of his being compelled to testify."[164] Second, the attorney seemingly took for granted that the ward's "status as 'an individual under a disability' [was] conclusive evidence that his presence at such a proceeding would be a threat to his physical and mental health."[165] Third, the court accepted the waiver that the attorney filed without evaluating "'the basis of factual information supplied to the court by his counsel or a representative appointed by the court.'"[166] The ward did appear in court following his request, and this issue "bears reciting because it illustrates the extent to which [the ward] was without representation in even basic matters, such as the right to attend a proceeding where his fundamental rights and liberties were at stake."[167]

Next, the court discussed the fact that, when the ward took the stand, he received little help from counsel.[168] For example, counsel gave scant attention to the ward's proposal that the court appoint a guardian who was not a member of his own family.[169]

Finally, the court said that the behavior of the ward's counsel during trial was not only similar to that of an adverse witness, but at times resembled that of opposing counsel.[170] For example, the attorney made "repeated objections to the introduction of any testimony on the question of the nature and extent of [the ward's] disability, on the ground that this issue had already been decided."[171] Additionally, once the court decided to recommend a guardian, the ward had "no one to provide him with disinterested advice as to whether to appeal."[172] As a result, "from the inception of these proceedings to their conclusion," the ward was without "the legal representation contemplated by Maryland law or the

163. *Id*.
164. *Id*.
165. *Id*.
166. *Id*.
167. *Id*. at 441.
168. *Id*.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*.

Rules of Professional Conduct."[173]

Many state courts have long held that the role of the attorney for the alleged incapacitated person should be one of an advocate at the trial level. This is essential to due-process protections when the alleged incapacitated person stands to lose essentially all of his or her fundamental rights and liberty interests.

States also acknowledge that due process requires that an alleged incapacitated person have the right to adversary counsel so that his or her voice may be heard in court. For those states that do not appoint adversary counsel, the alleged incapacitated person's contentions about how and where to live his or her life may never be heard in the court. As shown by *In re Lee*, the guardian ad litem may not heed the proposed ward's concerns and may substitute his or her own judgment for that of the alleged incapacitated person.[174]

#### *2. Right to Notice*

Notice of the guardianship proceeding provides the alleged incapacitated person with the ability to prepare for the hearing and confer with counsel.[175] The element of notice is essential to the alleged incapacitated person so that he or she can find counsel who will play the role of an advocate and defend him or her against the stigma of being found incompetent by a court.[176] Absent any notice of the hearing, the decision of the lower court may be void.[177]

## *III. OTHER OPINIONS ON THE ROLE OF THE ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON*

### A. ABA Model Rules of Professional Conduct

The Preamble and Scope of the ABA Model Rules of Professional Conduct describe a lawyer's responsibilities.[178] The

173. *Id.*

174. *Id.* at 439.

175. *In re Guardianship of Deere*, 708 P.2d at 1125–1126.

176. *Id.*

177. *See Bliss v. Bliss*, 104 A. 467, 473 (Md. 1918) (holding that a person must have notice and an opportunity to contest an adjudication of insanity); *In re Guardianship of Deere*, 708 P.2d at 1125–1126 (finding that "minimal due process requires proper written notice and a hearing." Failure to comply with statutory requirements may invalidate an appointment.).

178. ABA Model R. Prof. Conduct preamble ¶¶ 1-21.

Preamble says that "a lawyer is a representative of clients."[179] As a representative, the lawyer is to explain to the client the client's legal rights and obligations.[180] He or she is to represent the client zealously and assert the client's position under the rules of the adversary system.[181] A lawyer acting as a negotiator should seek a result advantageous to the client but consistent with fairness to others.[182] "In all professional functions a lawyer should be competent, prompt[,] and diligent."[183] The lawyer should maintain open communication with the client concerning the representation.[184] Additionally, the lawyer should maintain the confidences of the client.[185] The Model Rules, his or her own conscience, and the approval of peers guide the lawyer.[186]

The Scope section of the Model Rules states that the rules are rules of reason.[187] The section goes on to say that the attorney-client privilege belongs to the client and not to the lawyer.[188] The client has the expectation that disclosures made to the lawyer will not be revealed unless the client agrees.[189] Judicially-ordered disclosures will be made only in accordance with recognized exceptions to the attorney-client and work-product privileges.[190]

### *1. Client under a Disability*

The Model Rules address the question of how an attorney is to act when a client is under a disability.[191] Model Rule 1.14 says that, when a client's decision-making ability is impaired due to "minority, mental disability[,] or some other reason," an attorney must, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[192] In addition, an attorney "may seek the appointment of a guardian or take other protective

179. *Id.* ¶ 1.
180. *Id.* ¶ 2.
181. *Id.*
182. *Id.*
183. *Id.* ¶ 3.
184. *Id.*
185. *Id.*
186. *Id.* ¶ 6.
187. *Id.* ¶ 13.
188. *Id.* ¶ 19.
189. *Id.*
190. *Id.*
191. ABA Model R. Prof. Conduct 1.14.
192. *Id.* R. 1.14(a).

action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[193]

The comment to Model Rule 1.14 says that the normal client-lawyer relationship is based on the fact that, when the client is advised about his or her rights and obligations, the client can make a decision about the course of the representation.[194] When the client suffers from a mental or physical disability, maintaining the ordinary client-attorney relationship may become difficult.[195] A client lacking legal competence, however, may be able "to understand, deliberate upon, and reach conclusions about" the client's own well-being.[196]

In a guardianship case, because a petitioner already has filed for guardianship, the attorney need not "take other protective action."[197] The role of the attorney is to maintain, to the greatest extent possible, the normal client-attorney relationship, keep the client's confidences, keep the client's behavior and utterances confidential, and treat the client with attention and respect.[198] Even if the client has a legal representative, the attorney should "accord the represented person the status of [a] client, particularly in maintaining communication."[199]

Furthermore, the comment to Model Rule 1.14 notes that disclosure of a client's condition "can adversely affect the client's interests."[200] For example, raising the client's disability may lead to an action to involuntarily commit the client to a mental institution.[201] The lawyer's role in this case is, unavoidably, a difficult one and the lawyer may seek help "from an appropriate diagnostician."[202]

The lawyer is permitted to take emergency action when the client is not capable of acting.[203] Such action should seek to maintain the status quo, and the attorney should not seek

193. *Id.* R. 1.14(b).
194. *Id.* R. 1.14 cmt. 1.
195. *Id.*
196. *Id.*
197. *Id.* R. 1.14(b).
198. *Id.* R. 1.14 cmt. 1–2.
199. *Id.* cmt. 2.
200. *Id.* cmt. 5.
201. *Id.*
202. *Id.*
203. *Id.* cmt. 6.

payment for taking such action.[204]

Thus, the primary role of the attorney for the alleged incapacitated person in a guardianship action is to treat the client as any other client, to try to maintain a normal client-attorney relationship, and to keep the client's confidences that would injure the client if disclosed.[205]

### *2. Rule 1.2: Scope of Representation*

Both the client and the attorney "have authority and responsibility in the objectives and means of representation."[206] "The client has [the] ultimate authority to determine the purposes to be served by legal representation."[207] This concept is supported in Model Rule 1.2, which says that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . , and shall consult with the client as to the means by which they are to be pursued."[208] However, the "lawyer may limit the objectives of the representation,"[209] may not assist a client in criminal or fraudulent behavior,[210] and when the lawyer knows the client expects behavior not permitted by the ethical rules, the lawyer shall consult with the client.[211] Furthermore, the "lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."[212]

Representation, "including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."[213] The comment to Model Rule 1.2 emphasizes that a lawyer's representation of a client does not signify that the lawyer agrees with what the client is saying.[214] Especially in guardianship cases, when the client alleges that he or she is able to handle business and his or her personal life, the lawyer who represents the client does not need

204. *Id*. cmt. 6–7.
205. *Id*. R. 1.14.
206. *Id*. R. 1.2 cmt. 1.
207. *Id*.
208. *Id*. R. 1.2(a).
209. *Id*. R. 1.2(c).
210. *Id*. R. 1.2(d).
211. *Id*. R. 1.2(e).
212. *Id*. R. 1.2(a).
213. *Id*. R. 1.2(b).
214. *Id*. R. 1.2 cmt. 3.

to agree with the client's position.[215] For the attorney to represent the client, the attorney must make the best case for the client, even if the only evidence of the client's ability is the client's own opinion.

When a client appears to be suffering from mental disability, the attorney's "duty to abide by the client's decision is to be guided by reference to Model Rule 1.14."[216] On the other hand, an agreement on representation must be in accord with the Model Rules of Professional Conduct and other laws.[217] "[T]he client may not be asked to agree to representation so limited in scope as to violate Rule 1.1 [Competence],"[218] or to settle a matter that the lawyer may wish to continue.[219]

### *3. Rule 1.3: Diligence*

The rule regarding diligence in representation requires that an attorney "shall act with reasonable diligence and promptness in representing a client."[220] The comment to Model Rule 1.3 says that "perhaps no professional shortcoming" is so widely resented as procrastination.[221] A client's interests can be adversely affected by a lawyer's delay in handling a case.[222] This is especially true in guardianship cases, when medical needs may be on the horizon, a move to a more secure location may be contemplated, or family assets need to be sold so that the alleged incapacitated person can remain in a nursing home. Unreasonable delay can undermine the client's confidence in the attorney or cause the client needless anxiety.[223]

### *4. Rule 1.4: Communication*

Communication with an alleged incapacitated person is

215. *Id.*
216. *Id.* cmt. 2.
217. *Id.* cmt. 1.
218. Model Rule 1.1 states that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." ABA Model R. Prof. Conduct 1.1.
219. ABA Model R. Prof. Conduct 1.2 cmt. 5.
220. *Id.* R. 1.3.
221. *Id.* cmt. 2.
222. *Id.*
223. *Id.*

essential in representing the client.[224] Communication may have to be in the simplest of terms and at a time of day when the client is most cogent. Model Rule 1.4 requires that the attorney "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."[225] Moreover, attorneys should "explain a matter to the extent reasonably necessary to permit the client to make informed choices regarding the representation."[226]

The comment to Model Rule 1.4 says that the information given to the client must be appropriate for the client to understand.[227] Fully informing the client may be difficult when the client has a mental disability.[228] The attorney should speak to those who care for the person and find the time of day when the person is most cogent. For example, a person with Alzheimer's Disease may experience a syndrome called sundowner syndrome.[229] When dusk falls, the person may become more confused than at other times of the day.[230] Therefore, the best time of day to speak to a person with Alzheimer's Disease may be early in the morning or after a meal.[231]

When the attorney explains the guardianship, this should be done in the simplest of terms to clearly communicate the possibility that another person could make decisions about the client's own life and property.[232] The client should have enough information so that he or she can participate fully in the representation.[233] When a lawyer receives an offer of settlement in a guardianship case, the lawyer should immediately communicate the offer to the client.[234] Even in cases in which the person has some mental incapacity, the lawyer should know how the client feels about the representation, whether he or she wants

224. Also, Model Rule 1.14 indicates that the lawyer should, as best as possible, maintain communication with the client. ABA Model R. Prof. Conduct 1.14.

225. ABA Model R. Prof. Conduct 1.4(a).

226. *Id*. R. 1.4(b).

227. *Id*. R. 1.4 cmt. 3.

228. *Id*.

229. *The Merck Manual of Geriatrics* 372 (Mark H. Beers & Robert Berklow eds., 3d ed., Merck Research Laboratories 2000).

230. *Id*.

231. *Id*.

232. *See* ABA Model R. Prof. Conduct 1.4 cmt. 2 (indicating that the communication should be "consistent with the duty to act in the client's best interest[ ]").

233. *Id*. cmt. 1.

234. *Id*.

to be in court for the hearing, and whether the client wants a jury trial.[235] Above all, the client should know about the hearing and should decide whether to appear and speak to the judge. Speaking to the judge gives the client his or her day in court, and allows the judge, rather than the lawyer, to assess the need for a guardianship.

### *5. Rule 1.6: Confidentiality of Information*

The rule on confidentiality of information often can trouble the attorney for the alleged incapacitated person.[236] In some instances, even disclosing the client's attitude and manner of dress can convey an impression to the decision-maker that may be detrimental to the client.[237] Pursuant to Model Rule 1.6, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," or are reasonably necessary to prevent a criminal act that "is likely to result in imminent death or substantial bodily harm."[238]

The ethical obligation of the attorney to keep the confidences of the client encourages clients to seek the services of a lawyer early in a case.[239] This enables the client to disclose everything to an attorney, which aids in the development of the case.[240] In guardianship cases, in which the attorney may be court appointed, the attorney should tell the client that the attorney is on his or her side and will defend the client against the guardianship if that is what the client wishes.[241] The attorney must make it clear that the client's confidences will be kept secret unless the client wishes to reveal them.[242] This encourages the client to reveal even embarrassing information about himself or herself, which can facilitate proper representation.[243]

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235. *See id*. R. 1.14 cmt. 1 (indicating that a client with decreased mental capacity may still possess the ability to make decisions affecting their own well-being).

236. *Id*. cmt. 5.

237. *Id*.

238. *Id*. R. 1.16(a)–(b)(1).

239. *Id*. R. 1.6 cmt. 2.

240. *Id*. cmt. 4.

241. *See id*. R. 1.14(a) (stating that, to the extent possible, the lawyer and the client should "maintain a normal client-lawyer relationship" when the client has a disability).

242. *Id*. R. 1.6 cmt. 3, 4.

243. *Id*. cmt. 2.

When the attorney serves as a guardian ad litem, the client has no protection against the disclosure of confidential information, for the attorney must file a report and recommendation with the court.[244] As in the case of *In re Lee*, the appellate court stated that the attorney became the opposing attorney during the hearing because she revealed the client's confidences, opposed the client's position on the merits of the case, and admitted that the client was disabled.[245]

The obligation to keep the client's confidences is essential to the client-attorney relationship.[246] To reveal those confidences is to betray the client when the client may have assumed that the attorney was acting as all other attorneys do.[247] To act as a guardian ad litem in a guardianship case is to deceive the client because the client may assume that the attorney is acting for the client, rather than as the ears and "eyes of the court."[248] To betray the client by revealing eccentric ways of behavior and dressing is to betray the client's confidences, and this may result in serious negative consequences to the client.[249]

### *6. Rule 1.7: Conflict of Interest: General Rule*

Model Rule 1.7 addresses conflicts of interest and requires that an attorney profess loyalty to his or her client.[250] This conflict-of-interest rule prohibits the attorney from representing an alleged incapacitated person who has a conflicting interest with another client.[251] This means that the attorney should not represent both the petitioner and the alleged incapacitated person. Additionally, if an attorney has represented the family of the alleged incapacitated person in the past, he or she should not represent the alleged incapacitated person in a guardianship proceeding. According to the language of Model Rule 1.7, an attorney must "not represent a client if the representation of that

244. *In re Lee*, 754 A.2d at 439.

245. *Id.* at 440–441.

246. ABA Model R. Prof. Conduct 1.6 cmt. 4.

247. *See id.* R. 1.14 cmt. 2 (indicating that a client's disability "does not diminish the lawyer's obligation[s]" to the client).

248. *See In re Mason*, 701 S.2d 979, 983 (N.J. Super. Ch. Div. 1997) (stating that while an attorney is an advocate for the client, a guardian ad litem "is an independent factfinder and an investigator for the court").

249. ABA Model R. Prof. Conduct 1.14 cmt. 5.

250. *Id.* R. 1.7.

251. *Id.* R. 1.7(a).

client will be directly adverse to another client."[252] However, an exception can be made when "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" as long as the lawyer obtains "each client['s] consent[ ] after consultation."[253]

Loyalty to a client is essential to the lawyer's representation of a client.[254] If an attorney has an impermissible conflict before he or she undertakes the representation, the attorney should refuse to represent the prospective client.[255] If a conflict arises after the representation is undertaken, the lawyer should resign from the case.[256] "Loyalty to a client prohibits" taking a case "directly adverse to" a client without the client's consent.[257] Loyalty to a client prohibits the attorney from taking a case that would limit the alternatives to the client "because of the lawyer's other responsibilities or interests."[258]

Loyalty to a client is a requisite element of due process. An attorney who takes a case with conflicting loyalties is doing an injustice to his or her client. All of the elements of the previous rules are encompassed in this duty of loyalty, which includes duties to abide by the client's decisions, keep the confidences of the client, act promptly and without delay, and treat a client under a disability the same as any other client.

The Model Rules of Professional Conduct are necessary to the practice of law. They are reasonable rules that guide the practitioner in his or her conduct in client-attorney relationships.[259] They are requisite to due process of law. For an attorney to act as a guardian ad litem is to violate several of these rules. Disclosing the confidences of the client, reporting to the court on the client's behavior and speech, and treating the client as an object to be surveyed, not a person to represent and for whom to advocate, are all violations of the Model Rules.

252. *Id.*
253. *Id.* R. 1.7.
254. *Id.* cmt. 1.
255. *Id.*
256. *Id.* cmt. 2.
257. *Id.* cmt. 3.
258. *Id.* cmt. 4.
259. *Id.* preamble ¶¶ 13, 14, 18.

### B. The American Bar Association and the Uniform Guardianship and Protective Proceedings Act

The American Bar Association has stated that the role of counsel for the alleged incapacitated person should be to act as an advocate.[260] A Report to the House of Delegates from the ABA's Commission on Legal Problems of the Elderly reflected this position, which the House of Delegates approved at the ABA's 1988 Annual Meeting.[261] Likewise, the National Conference of Commissions on Uniform State Laws, which published the Uniform Guardianship and Protective Proceedings Act (UGPPA) in 1982, already supports this right to an attorney who acts as an advocate.[262]

### C. The National Guardianship Symposium

In 1988, a National Guardianship Symposium, known as Wingspread,[263] was convened by the Commission on the Mentally Disabled and the Commission on the Legal Problems of the Elderly of the American Bar Association. The conference attendees recommended a "simplified but specific petition form," which describes the physical and mental state of the proposed ward, the specific reasons for the guardianship request, the steps taken prior to the petition to find less restrictive alternatives, and the qualifications of the proposed guardian.[264] The recommended minimum due-process safeguards to place upon every state were the following: 1) the right to notice; 2) mandatory counsel; and 3) hearing rights.[265]

Conference attendees recommended that a court officer, dressed in plain clothes and trained to communicate with disabled and elderly persons, should serve the respondent with the papers and explain to the respondent the consequences of guardianship.[266] The written notice should be in plain English

260. *Wingspread Recommendations, supra* n. 81, at 10.

261. *Id.* at 11. Part C-1 states that a "[c]ounsel as advocate should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers." *Id.*

262. *Id.* at 10.

263. The Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability.

264. *Wingspread Recommendations, supra* n. 81, at 9.

265. *Id.* at 9–10.

266. *Id.* at 9.

and large type.[267] It should indicate the time and place of the hearing, and a copy of the petition should be attached.[268] Additionally, the conference attendees recommended that the respondent should receive a hearing before an impartial decision-maker in which the respondent may be present, compel the attendance of witnesses, present evidence and confront and cross-examine witnesses, be entitled to a clear and convincing standard of proof, and appeal adverse orders or judgments.[269]

The majority of symposium attendees believed that mandatory appointment of an attorney for the alleged incapacitated person was essential.[270] However, a minority felt that a mandatory right went too far and might not be in the best interests of the alleged incapacitated person.[271] The minority believed that mandatory appointment of counsel would add a layer of cost that the estate of the alleged incapacitated person might not be able to pay and would make what otherwise would have been a family decision about the best interests of the person into an adversarial proceeding.[272] This minority position was defeated at the plenary session on the grounds that a need to describe the minority positions regarding interim proceedings, or leave out the reference when capacity is not in question, would deny the alleged incapacitated person too much due process.[273]

Thus, the Wingspread Recommendations, consistent with the ABA policy, requires counsel to advocate for the alleged incapacitated person in a full hearing in all guardianship cases.[274] The conferees recommended that counsel be appointed in every case, regardless of the alleged incapacitated person's ability to pay.[275] The conferees recognized that, in most cases, counsel would be needed to prepare the case and to look out for the proposed ward's interests during the pre-hearing stage.[276]

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267. *Id*.
268. *Id*. at 9–10.
269. *Id*. at 10.
270. *Id*. at 11.
271. *Id*.
272. *Id*.
273. *Id*.
274. *Id*.
275. *Id*.
276. *Id*.

### D. Other Countries

Other countries have done away with guardianship altogether and instituted new services that promote autonomy of alleged incapacitated persons and promote their independent decision-making.[277]

In Sweden, for example, the state has all but eliminated guardianship of adults and begun a project of mentoring.[278] The system in Sweden is highly decentralized.[279] Using a *God Man*, or mentor, is the predominant method of support service in Sweden.[280] The lack of voting rights for a person subject to guardianship, along with other stigmatizing, legally imposed requirements that heightened the alleged incapacitated person's sense of inferiority caused the change from guardianship to mentorship.[281] Swedes also have *forvaltares*, or administrators, for those for whom "other forms of assistance are insufficient."[282] The *forvaltares* also regulate less restrictive alternatives under the topic of parent-child laws.[283]

Statistics have shown that, "in 1992 some 28,000 Swedes had mentors and 4,000 had administrators."[284] Seven years later, the number of Swedes having mentors had grown to 40,000, and the number of *forvaltares* had dwindled to 3,500.[285] "The law requires that mentors be appointed instead of [*forvaltares*] whenever possible."[286] The mentor is paid by the state and has the same duties that an agent has under a power of attorney.[287] Many times, the state appoints and pays family members.[288] The usual fee is less than $1,000 per year.[289] The district court makes the

277. Stanley S. Herr, *Self-Determination, Autonomy and Alternatives to Guardianship* 2 (Natl. Program Off. for Self-Determ., Inst. on Disability, Univ. of N.H. 2001). Section III.D. of this Article summarizes portions of Herr, *supra*. The summary is included with the express permission of the University of New Hampshire's National Program Office for Self-Determination, Institute on Disability, which holds the copyright on Herr, *supra*.

278. *Id*. at 6.

279. *Id*. at 7.

280. *Id*. at 6, 8.

281. *Id*. at 8.

282. *Id*. at 6, 12.

283. *Id*. at 7.

284. *Id*. at 8.

285. *Id*.

286. *Id*.

287. *Id*. at 10.

288. *Id*.

289. *Id*.

appointments in Sweden, and the appointments may be flexible according to the needs of the individual.[290] "The law emphasizes acting in accordance with the person's volition."[291] Mentors are most useful for those with mental retardation, mental illness, or failing health, which creates a need for assistance with financial, legal, or personal interests.[292] "For persons with disabilities, most mentors are appointed by consent."[293] The court may appoint a *God Man* if the person lacks the capacity to consent and a medical certificate states that the person lacks the capacity to consent.[294]

The procedures for appointing a mentor are informal and cost nothing for the applicant.[295] In routine cases, the person does not have to appear for a hearing, and the court reviews the documents in the file and writes the order in about ten minutes.[296]

*Forvaltares* are appointed only when the person objects to the appointment of a mentor or when property or personal issues would make the appointment of a mentor problematic.[297] The *forvaltare* may substitute his or her judgment for that of the person with disabilities.[298]

Sweden has taken a step that deserves worldwide attention. It has removed the stigma of guardianship from most of its disabled citizens and has replaced the system with a more humane, personal system in which the disabled person's wishes are often respected.[299] Sweden's new law has taken a giant "step forward in the field of disability rights and policies."[300]

Germany has also reformed its guardianship system. The new law, passed in 1992, utilizes a more flexible measure than guardianship.[301] Instead, the guardian is called the *betreuer*.[302] With the German method, the law has added several procedural

290. *Id*. at 9.
291. *Id*.
292. *Id*.
293. *Id*.
294. *Id*.
295. *Id*.
296. *Id*.
297. *Id*. at 12.
298. *Id*.
299. *See id*. at 14–17 (discussing Sweden's use of personal assistants that a person with a disability hires and fires similar to an employer).
300. *Id*. at 17.
301. *Id*. at 23.
302. *Id*.

safeguards to protect the individual's liberties and interests.[303] First, the judge of the guardianship court conducts a personal interview, often at the incapacitated person's permanent residence.[304] A second safe-guard in place in Germany is the power of the person to appeal a guardianship proceeding and "participate fully in the proceedings, regardless of legal capacity."[305] Next, Germany requires a "certificate of an expert that describes the person's medical, social and psychological condition as well as makes recommendations regarding the tasks and duration of the [guardian's] role."[306] Fourth, German procedures require the appointment of "a supporting curator" to aid the person in the determination process.[307] Also, there is a final conversation between the judge and the person to explain the results of the investigation, the expert's findings, the guardian's identity, and the guardian's scope of authority.[308] A final safeguard in place is a "durational limit of no more than five years for the [guardian's] appointment."[309]

The German law seeks to limit the guardian's authority by preserving zones for the autonomy of the person with disabilities.[310] The appointment may restrict the guardian simply to impose his or her wishes on financial matters, rather than to impose plenary guardianship over all the affairs of the supported person.[311] In effect, "the appointment of a *betreuer* does not affect the legal capacity of the person to make decisions of a personal nature."[312] The German law allows the person with disabilities to retain many rights.[313] For example, the person may still reserve the right to consent to medical treatment unless the guardian has the right to substitute his or her judgment.[314] Only medical treatment that has a high risk of death or severe impairment

303. *Id*. at 24–25.
304. *Id*. at 24.
305. *Id*.
306. *Id*. at 25.
307. *Id*.
308. *Id*.
309. *Id*.
310. *Id*.
311. *Id*.
312. *Id*.
313. *Id*.
314. *Id*.

requires approval from a guardianship court.[315] Likewise, sterilization "requires the [c]ourt's additional declaration of consent, the appointment of a special *betreuer*, and compliance with strict criteria."[316] Additional safeguards against coercive measures, such as putting the person in a mental institution or subjecting him or her to mechanical measures or medication that will limit the individual's liberty or freedom, are also afforded to the disabled individual.[317]

Germany has taken steps to limit the power of the guardian and to increase the autonomy of the alleged incapacitated person.[318] Other industrialized nations have also taken steps to limit the authority of the guardian and to increase the self-determination of the alleged incapacitated person.[319]

In 1984, Austria took steps to introduce limited guardianships.[320] "Austrian law . . . has . . . been credited with influencing the new [laws] in Germany."[321] And the Netherlands, after a long deliberation, may be "on the verge of adopting a mentorship law."[322] For many years, activists criticized the laws regarding guardianship of property as being too formal, too impervious to the needs of the disabled person, and too expensive.[323] Spain, in 1983, revised its guardianship laws, and now the range of supports include temporary guardianships, "a guardianship limited to the representation in a specific legal proceeding . . . 'prolonged minority' . . . , guardianship of property . . . , and total or plenary guardianship."[324] New Zealand's guardianship law on this subject is also noteworthy for its least restrictive intrusion into the life of the person with disabilities and its comprehensiveness.[325]

As this discussion reveals, the United States may be behind the times in its view of guardianship laws.[326] For the United

315. *Id*.
316. *Id*.
317. *Id*. at 26.
318. *Id*. at 28.
319. *Id*.
320. *Id*. at 30.
321. *Id*.
322. *Id*.
323. *Id*.
324. *Id*. at 31.
325. *Id*.
326. *Id*. at 32.

States still to cling to the idea that those with disabilities need a *parens patriae*, a "parent of the country," denies the autonomy and liberty interests of those with disabilities.[327] Many of those with disabilities have competencies, but need assistance with some activities of daily living.[328]

In many other countries with different religions and political values, the citizens have realized the importance of according those with disabilities the full measure of potential participation in life. Autonomy in the United States is a recognized value.[329] We are a nation of many different races, religions, and cultures. For the most part, people are allowed to express themselves in many different ways. To impose on those with disabilities the stigma of guardianship is to deny them basic liberties or "fundamental fairness."[330] Surely there is a more humane way of assisting those who cannot help themselves to achieve all that they can for as long as they can.

## *IV. REPRESENTING THE ALLEGED INCAPACITATED PERSON*

Representing a questionably competent client is always an enormous challenge because determining the client's wishes is often difficult. The client may be confused about some things, but not about others. He or she may make bad decisions and insist that the lawyer advocate for him or her, or may demand that the lawyer defend a seemingly indefensible position.

It is important to remember that the attorney is playing one of a number of roles in this case. The attorney for the petitioner should explain the consequences of guardianship to his or her client and seek to achieve the desired result by the least-restrictive alternative.[331] If there is no alternative, the petitioner will file a guardianship suit. The judge is the ultimate decision-maker.[332]

Defending an alleged incapacitated person does not mean that all of an attorney's usual resources are not in play. The

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327. *Id*.

328. *Id*.

329. *Id*. at 33.

330. *Supra* nn. 77–78 and accompanying text (defining due process as requiring "fundamental fairness").

331. *See supra* n. 264 and accompanying text (describing the Wingspread Conference Recommendations).

332. H.R. Rpt. 100-639, at 2.

attorney may use any of the tools in his or her arsenal to achieve a favorable settlement for the client or to limit the guardianship to the least-restrictive alternative.

When the attorney has no doctor's reports, favorable testimony, or any other evidence to support the client's position, one of the best things to do is bring the client to the hearing so that the client may speak to the judge. Some clients want this opportunity to make his or her case, believing that if the judge heard the client, the judge would rule in his or her favor.

Although the attorney for the alleged incapacitated person may be inclined to judge the client's competency, the court must determine competency based on clear and convincing testimony.[333] The attorney's way becomes clearer if he or she treats this client and case as any other.[334] The attorney, even with little or no guidance from the client, can ensure that:

(1) there is no less restrictive alternative to guardianship;
(2) proper due-process procedure is followed;
(3) the petitioner proves the allegations in the petition by clear and convincing evidence, if that is the standard in the jurisdiction;
(4) the proposed guardian is a suitable person to serve; and
(5) if a guardian is appointed, the order leaves the client with as much autonomy as possible.

When the attorney assumes this role, the client receives the due-process protection promised him or her by the Constitution.[335] He or she has a zealous advocate who can speak knowledgeably for the client, put the client on the stand if the client is willing, cross-examine expert witnesses, ensure that the evidence proves incompetency by clear and convincing evidence, ensure that the guardian is fit to handle the tasks of being a guardian, and encourage the court to impose the least-restrictive guardianship possible, so that the autonomy of the person alleged to be incapacitated is left with all the powers he or she has previously managed.[336]

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333. *See supra* n. 264 and accompanying text (describing the Wingspread Conference Recommendations).

334. *See supra* nn. 178–192 and accompanying text (explaining the scope of an attorney's representation under the Model Rules).

335. *Supra* pt. II (discussing issues of due process in guardianships).

336. *See* Gottlich, *supra* n. 59, at 199 (stressing the importance of treating clients who

### A. The Initial Interview

The initial client interview with an alleged incapacitated person may be one of an attorney's most challenging. The client may be in a nursing home, in a mental institution, or at home in difficult conditions. However, as with any client, the lawyer should try to communicate with the alleged incapacitated person as fully as possible.[337]

This means that the attorney must try to explain the consequences of guardianship to the fullest extent possible, putting the explanation in simple terms so that the client can understand.[338] The attorney can explain the ways to defend against a guardianship and can explain the resources the client can use to counter the allegations. For example, a psychiatrist's testimony that the client was able to handle her financial affairs won the case in *In re Estate of Wood*.[339] Additional testimony from friends or other family members may persuade the court that the petitioner is not the best guardian. In the *In re Lee* case, the ward's son called his father to the stand, who testified that a family member was not the best person to be his guardian because of animosity in the family.[340]

If the person is confused, consider whether the confusion may be due to drugs that he or she is taking. Check medical records and speak to a doctor to evaluate this possibility. Consider also that confusion may be compounded by depression, a frequent and easily overlooked complication in the elderly.[341] Ask the physician if the client has been given the Geriatric Depression Scale.[342] Diet may also cause confusion, as when the client is not absorbing enough vitamin B-12.[343] Shots of this vitamin may clear up the confusion. Ask those caring for the person when the confusion started: is it of long standing, or did it occur rather recently? At

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are defendants in guardianship cases in the same manner as the Model Rules proscribe for a client under disability).

337. *Id*. at 201.

338. *Id*. at 206.

339. 533 A.2d 772 (Pa. Super. 1987).

340. *In re Lee*, 754 A.2d at 433.

341. *The Merck Manual of Geriatrics*, *supra* n. 229, at 362. "Depression affects up to 40% of patients with dementia . . . ." *Id*.

342. *See id*. (explaining that the Geriatric Depression scale is a standardized instrument used to evaluate an elderly person's mood).

343. Holistic-online.com, *Depression — Nutrition and Diet* <http://holisticonline.com/Remedies/Depression/dep_nutrition1.htm> (last updated Jan. 28, 2002).

times, when a person who is elderly has an extreme illness, delusions may set in after the illness has been treated. Waiting a week or so for the confusion to clear may be the best remedy against a guardianship.

Additional ways to counter the guardianship may be to inquire into home health services. One way to find out about these services is to call the local health department or local Area Agency on Aging to find out what services are offered. A client who can stay at home, with services in place, will be eternally grateful.

### B. Timing of the Initial Interview

Ask about the best time to interview the client.[344] Many elderly clients are most clear minded in the morning. Others have "good days and bad days." Talk to whomever is in close contact with the client before the visit to find the best time to visit. You may even ask the person to call you on a "good" day and arrange for the interview when the client is feeling well.

### C. Confidentiality

Create a confidential setting for the interview, away from roommates, nurses, and family members.[345] In a nursing home, there is usually a secluded room in which you and the client can talk privately, even if it is the social worker's office. A confidential setting is as necessary as with any other client, so the client is free to speak freely to you.[346] You may want to take the client out to lunch or for coffee to achieve a confidential setting. Turn off the television.

Allow enough time to explain matters fully to the person. Explain who you are and emphasize that you are on the client's side. Slowly discuss the nature and consequences of the guardianship.[347] Paraphrase each paragraph of the petition and try to elicit the client's position so that you can file your answer.[348] Explain the person's rights under the law.[349] Ask whether your

344. *See generally* Gottlich, *supra* n. 59, at 217–218 (listing techniques for improving communication with clients who are defendants in guardianship proceedings).

345. *Id*.

346. *Id*.

347. *Id*. at 216–217.

348. *Id*.

349. *Id*.

client wants a guardian. Ask his or her opinion of the proposed guardian and whether there is anyone else the client trusts more than that person. Make sure the client has no relatives other than those listed as interested persons. Ask the client if he or she wants to attend the hearing or talk to the judge.[350] Question the client about whether there are witnesses he or she wants to call.[351] Find out whether he or she wants a jury trial.[352]

### D. Less Restrictive Alternatives

#### *1. Personal Care*

Discuss with the client possible alternatives to guardianship. Consider whether your client has the capacity to grant a power of attorney for health care to a trusted relative or friend, thus alleviating the need for a guardian.[353] If your client does have capacity to grant a power of attorney, you should have a doctor certify that the person is competent to assent to such a document.[354] Be sure that the letter or document the doctor writes states that the client is capable of informed consent.[355] Because there may be two physicians' certificates filed with the court, it is especially important that you document the client's capacity.[356] You also may want to video tape or audio tape the interview when the client names the agent to document the fact that you asked the client non-leading questions.

Ask if your client would agree voluntarily to proposed medical treatment, to move voluntarily to a nursing home, or to other services that are proposed in the petition. When faced with guardianship, the client that has resisted a move in the past may prefer the move instead of losing his or her autonomy and right to make his or her own decisions.

If the person is unable to make medical decisions for himself or herself, research the surrogacy laws of your state. The person

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350. Under the Americans with Disabilities Act, if the client cannot come to court because of physical difficulties, the court may hold the trial at a location to which the client has access. 42 U.S.C. § 12132 (1994).

351. Gottlich, *supra* n. 59, at 217.

352. *Id*.

353. *Id*. at 219.

354. Scott K. Summers, *Guardianship & Conservatorship: A Handbook for Lawyers* 3, 25, 47 (ABA 1996).

355. *Id*. at 3.

356. *Id*. at 25, 47.

may not need a guardian of the person if the state statutes allow a relative or friend to make medical decisions for the person. It is important to mention to relatives or friends that, just because they are consenting to medical treatment for their loved one, they are not responsible for paying for the treatment.

For a person who has assets and who lives alone, there are geriatric-care managers who may oversee the services to which the person is entitled.[357] You can call National Association of Professional Geriatric Care Managers, 1604 N. Country Club Road, Tucson, AZ 85716-3102, at 520-881-8008, or contact them on the Internet at www.caremanager.org.[358] You may also inquire into which home health services may be covered under Medicare or Medicaid.

If your client needs attention during the day when relatives or friends are working, call your local Area Agency on Aging to ask about adult day care. These centers provide transportation, a caring environment, and some nursing needs while caretakers work.[359] There are also respite-care programs that will pay a trained person to stay with someone who needs attention while the caretaker leaves for a few hours.[360] Some nursing homes also will keep people for a short time while caretakers are away on vacation. Also, ask about the availability of meals on wheels, transportation to medical appointments, food and prescription deliveries, and telephone reassurance programs.

If the client needs supervision, you may inquire into assisted-living facilities, nursing homes, and continuing-care retirement communities. You should be aware that assisted-living facilities are not regulated by government agencies unlike nursing homes.[361] You should research the law in your state to determine

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357. *See* Natl. Assn. of Prof. Geriatric Care Managers, *The Professional Care Managers* <http://www.caremanager.org/gcm/ProfCareManagers1.htm> (accessed Jan. 13, 2002) (listing the types of services available to older people and their families).

358. *Id.*

359. *See* Natl. Assn. of Area Agencies on Aging, *n4a-Advocacy. Action. Answers on Aging* <http://www.n4a.org/> (accessed Feb. 12, 2002) (providing an Eldercare Locator and links to local chapters of Area Agencies on Aging).

360. *See* Administration on Aging, *Caregiver Resources on the AOA Web Site* <http://www.aoa.gov/caregivers/default.htm> (accessed Feb. 12, 2002) (giving resources for questions and contacts regarding elderly care).

361. Michelle Stowell, *Review of Selected 2000 California Legislation: Health and Welfare Chapter 434: Protecting Those with Alzheimer's Disease and Dementia by Increasing Educational Requirements for RCFE Staff*, 32 McGeorge L. Rev. 733, 734 (2001).

to what regulations assisted-living facilities must adhere.

*2. Money Matters*

It may be that your client has let financial matters slip. This may be an indication of lack of interest in financial affairs, depression, drugs that may affect the person's mind, or diet. In any event, you should address with your client why this has happened and what can be done to remedy the situation.

If your client has been sued for guardianship of the property or conservatorship, investigate whether your client is capable of writing a power of attorney for financial reasons.[362] Again, you should have a physician examine your client and insert a letter or document in the patient's chart stating that the client is capable of informed consent.[363] This is especially important because there may be two physicians' certificates in the court file alleging that your client is incapacitated.[364] You may also want to video tape or audio tape the conversation when your client names the agent he or she wants to appoint.

If the person is confused about money management, consider appointing a representative payee for his or her Social Security or other government benefit checks.[365] A representative payee is an alternative to guardianship.[366] The client gets notice that his or her check will be going to someone else who will pay his or her bills and give him or her spending money.[367] Many government-benefits and retirement systems also have representative payees.[368] Be sure that the person selected to be the representative payee is trustworthy and has the best interests of your client at heart.

Some utility companies will notify a third person if the utility bills of a person are not paid. This contingency will prevent the person's utilities from being turned off.

Many banks accept Social Security and other benefit checks as direct deposits. Some banks will pay bills that occur on a regular basis such as rent, nursing home bills, utility bills, and

362. Summers, *supra* n. 354, at 2, 7.

363. *Id*. at 3, 47.

364. *Id*. at 25, 47.

365. *Id*. at 6–7.

366. George H. Zimny & George T. Grossberg, *Guardianship of the Elderly — Psychiatric and Judicial Aspects* 7–8 (Springer Publg. Co. 1998).

367. *Id*.

368. *Id*.

mortgages. Your client would thus be relieved of remembering to write checks to each payee on a monthly basis.

Joint accounts may be a way to handle money matters.[369] The choice of a person to put on a joint account must be made very carefully, for this other person will have access to the whole account.[370] A joint account must be created when both parties are mentally competent.[371]

Setting up a trust may be a way to avoid guardianship.[372] The parents of an adult child with mental retardation may set up a trust so that, when they both die, the funds from their estates will go into the trust for the son or daughter. In this way, a financial institution will manage the money for the son or daughter and pay whatever needed expenses he or she has above and beyond what his or her government benefits might be.[373]

### E. Your Client's Wishes

It may be impossible to interview your client. The client may be comatose or totally uncomprehending. In this case, look for other evidence of what the client may have wanted when he or she was competent.

- Did the client ever execute an advance directive for health care?
- Ask medical providers whether an advance directive is in the client's file.
- Did the client ever speak to anyone about his or her wishes regarding health care?
- Interview the interested persons listed in the petition to find out how the client felt about the proposed guardian.
- If your client is in a nursing home, ask who visits and who is involved with his or her care. Discovering an interested person willing to take responsibility for your client may eliminate the need for a guardian altogether.

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369. Summers, *supra* n. 354, at 7.

370. *Id.*

371. *See Heldenbrand v. Stevenson*, 249 F.2d 424, 428 (10th Cir. 1957) (indicating competency as a factor in determining the validity of joint checking accounts); *Josephson v. Kuhner*, 139 S.2d 440, 444 (Fla. Dist. App. 1st 1962) (applying principles of law for inter vivos gifts to determine the validity of joint bank accounts).

372. Summers, *supra* n. 354, at 10.

373. *Id.*

## *CONCLUSION*

The need for reform of our country's guardianship laws cries out. The assumption that those with disabilities need the protection of the state, of the *parens patriae* doctrine, when they are able to work in the real world, manage public transportation, be reliable citizens, have political opinions, enjoy themselves, participate in sexual relations, vote, participate in activities, and participate in our democracy, demonstrates this need to reform the system.

In far too many instances, the role the attorney for the alleged incapacitated person plays is that of a guardian ad litem. This means that the attorney violates the Model Rules of Professional Conduct, turns on his or her client, and files a report in which the client's voice is not heard at all. The court does not hear the voice of the person with disabilities because the attorney is ignoring it.

The movement in other countries displays how our country's system should be reformed. Other countries have uncoupled the formalistic, court-ordered guardianship system and put in place a reform movement that accords to those with disabilities the right to enjoy their freedom while being assisted with their needs.[374] Sweden's system does not impose on the alleged incapacitated person a system of court-ordered, plenary guardianship.[375] Instead it assists the alleged incapacitated person with what they need the most.[376]

In the United States, one who has been found by a court to be incompetent cannot vote.[377] This is a basic disenfranchisement for one who may have the capacity to understand how, when, and where to vote. The coupling of incapacity to voting, the right to contract, marriage, creation of a will, and management of one's own property is a notion rooted in the past. With medication, many people who have in the past been *non compos mentis* are now able to function in the world.

Leading organizations have turned their backs on guardianship and encourage their members to protect the alleged

374. *Supra* pt. III(D) (discussing other countries' approaches to guardianship).
375. *Supra* nn. 278–300.
376. *Id.*
377. *Supra* nn. 41, 68.

incapacitated person's liberty and due-process rights with vigor.[378] A movement for self-determination for those with disabilities has reached worldwide proportions.[379] The American Association on Mental Retardation has taken on the position that all of its members are entitled to self-determination.[380] The 1999 position paper defined this right as "the right to act as the primary causal agent in one's life, to pursue self-defined goals and to participate fully in society."[381]

The time has come to reform the American guardianship system, not just in the area of the role of the attorney for the alleged incapacitated person, but a reform of the entire system. This can be done only on a national level, for all those with disabilities should be treated the same. This is the challenge of the new millennium, when the baby boomers will attain old age and those who are struggling with guardianship law will be looking for more efficient, more flexible systems than that of inviting the court into the life of the disabled person and his or her family. The movement to uncouple abuses of liberty interests and due-process protections must become a more flexible and efficient system for all those who suffer from disabilities.

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378. *Supra* pt. III(B).

379. *E.g.* Council of Europe Comm. of Ministers, *Recommendation No. R(99)4 on Principles Concerning the Legal Protection of Incapable Adults* <http://www.coe.fr/cm/ta/rec/1999/99r4.htm> (accessed Feb. 2, 2002); Inter-American Commn. on Human Rights, *Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities* <http://222.cidh.oas.org/BÃ¡sicos/disability.htm> (accessed Jan. 24, 2002).

380. Herr, *supra* n. 277, at 33.

381. *Id.*

# Representation of Client Resisting an Incompetency Petition

*Adopted: January 15, 1999*

*Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.*

## Inquiry #1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

Thereafter Attorney A filed a notice of appeal seeking a trial de novo in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

## Opinion #1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

## Inquiry #2:

Does it matter that Husband pays for the representation of Wife?

## Opinion #2:

No. 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.

## Inquiry #3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

## Opinion #3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so, Attorney A may not represent her on the appeal. See Rule 3.1 (prohibiting frivolous claims and defenses).

## Inquiry #4:

Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

## Opinion #4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

## Inquiry #5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

## Opinion #5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. See, e.g., RPC 206 (attorney for deceased client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal file to the guardian absent a court order. See Rule 1.6(d)(3).

# RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

## Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer

represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

*Taking Protective Action*

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

*Disclosure of the Client's Condition*

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative.

At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

*Emergency Legal Assistance*

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

## Ethics Opinion Notes

**CPR 314**. An attorney who believes his or her client is not competent to make a will may not prepare or preside over the execution of a will for that client.

**RPC 157**. Opinion rules that a lawyer may seek the appointment of a guardian for a client the lawyer believes to be incompetent over the client's objection.

**RPC 163**. Opinion rules that an attorney may seek the appointment of an independent guardian ad litem for a child whose guardian has an obvious conflict of interest in fulfilling his fiduciary duties to the child.

**98 Formal Ethics Opinion 16**. Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.

**98 Formal Ethics Opinion 18**. Opinion rules that a lawyer representing a minor owes the duty of confidentiality to the minor and may only disclose confidential information to the minor's parent, without the minor's consent, if the parent is the legal guardian of the minor and the

disclosure of the information is necessary to make a binding legal decision about the subject matter of the representation.

**2003 Formal Ethics Opinion 7**. Opinion rules that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

**2006 Formal Ethics Opinion 11**. Opinion rules that, outside of the commercial or business context, a lawyer may not, at the request of a third party, prepare documents, such as a will or trust instrument, that purport to speak solely for principal without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.

**2014 Formal Ethics Opinion 5**. Opinion rules a lawyer must advise a civil litigation client about the legal ramifications of the client's postings on social media as necessary to represent the client competently. The lawyer may advise the client to remove postings on social media if the removal is done in compliance with the rules and law on preservation and spoliation of evidence.

# Tab 04: Clerk's Authority to Order Access to Records

# Health, Mental Health, and Substance Abuse Records

Incompetency & Adult Guardianship
May 2017

Mark Botts

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

## Healthcare professional perspective on medical records

- Healthcare information is confidential
  - Protected under HIPAA
  - Privileged under state law
- Some information has additional protection
  - Mental illness
  - Intellectual or developmental disability
  - Substance use disorder
  - Communicable disease

## Healthcare professional perspective on medical records

To legally disclose information, they need either a
- Law
- Patient authorization, or
- Court order

that, under the particular circumstances,
permits or requires disclosure

| Law | Information covered |
|---|---|
| HIPAA privacy rule (federal)<br><br>45 C.F.R. 160 | **Protected health information (PHI)** – Information that identifies an individual and pertains to:<br>• Health status or condition, or<br>• Provision of health care, or<br>• Payment for provision of health care. |
| Privileges (state)<br><br>G.S. 8-53 thru 8-53.13. | **Privileged information –** Info tied to a professional treatment relationship recognized by statute. Physician-patient, nurse-patient, social worker-client, counselor-client, psychologist-client, etc. |
| Communicable disease (state) G.S. 130A-143 | **Confidential information –** Information that identifies someone who has or may have a reportable communicable disease |

| Law | Information covered |
|---|---|
| MH/DD/SA (state)<br><br>G.S. 122C-51 thru -56. | **Confidential information –** Information that identifies an individual as receiving services from a:<br>• Mental health,<br>• Developmental disabilities, or<br>• Substance abuse professional |
| Substance use disorder records (federal)<br><br>42 C.F.R. Part 2 | **Confidential information –**Information received by a substance abuse treatment program that identifies an individual as<br>• a recipient of alcohol or drug abuse services, or<br>• an indiivdual who abuses alcohol or drugs |

## Duty of Confidentiality

- Applies to the patient's treatment provider
- Under some laws, the duty extends to those who receive information from treatment providers
  - State mental health confidentiality law—G.S. 122C
  - Federal substance use act—42 C.F.R. 2
- Applies whether the information is recorded or not—whether conveyed in writing or verbally

## Three Ways to Get Information

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

## 1. Court Order

- All 5 laws discussed in this session authorize disclosure pursuant to a court order
- Most laws—HIPAA, state MH/DD/SA, communicable disease—do not set forth any criteria for determining whether to issue the order.
- Your must balance the public's interests in disclosure—truth, fairness, and the proper administration of justice—with the individual's interest in privacy

## Is the Information Relevant?

- Will it have probative value on a question before the court?
  - Can respondent manage her own affairs?
  - Can respondent make or communicate important decisions concerning his person, family, or property?
  - What is the nature or extent of the needed guardianship?
- Does it assist you in understanding an issue in the case?

## Is the Information Necessary?

- Is the information necessary for the truth to be known and justice to be done?
  - Do you need it to understand or decide an issue that is essential to adjudicating the case?
  - Does the information speak to a question that has already been answered?
  - Are there other ways of getting the information?

## The Public Interest Test

relevant
necessary

privacy interests

public interests

## Federal Substance Abuse Law

- Any judicial review of records—including any hearing or oral argument on the disclosure question—must be *in camera*
- Court must find "good cause" for disclosure
  - Other ways of obtaining the information are not available or would not be effective
  - The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient privilege, and the treatment services

## Federal Substance Abuse Law

Court must limit disclosure to:

- Those parts of the record that are essential to fulfilling the objective of the order
- Those persons whose need for the information forms the basis for the order

## Communicable Disease Info

- Applies to information about a person who has or *may have* a reportable communicable disease or condition
- Patient or personal representative may request in camera review
- Close hearing?
  - "In the trial, the trial judge may, during the taking of testimony concerning such information, exclude from the courtroom all persons except the officers of the court, the parties and those engaged in the trial…"

## Privileged information

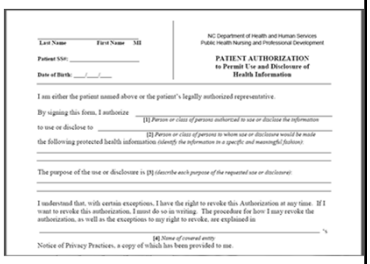
- A judge may compel disclosure of privileged information if, in the court's opinion, disclosure is "necessary to the proper administration of justice"
- What about the clerk?
  - "If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge."

## Court Order Checklist

- ✓ Basic requirements:
  - ✓ Who is being ordered to disclose?
  - ✓ What information?
  - ✓ To whom?
- ✓ Have you identified the applicable confidentiality laws?
- ✓ Do you make the findings required by law or otherwise apply a standard for disclosure?
- ✓ Do you limit your order to those parts of the record that are essential to fulfilling the order's objectives?
- ✓ Do you the limit disclosure to those persons whose need for the information forms the basis of the order?

## 2. Written Authorization

- **HIPAA:** Required elements and statements
- **Other laws:** Additional elements



Last Name First Name MI

Patient SS#: _____

Date of Birth: ___/___/___

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

**PATIENT AUTHORIZATION to Permit Use and Disclosure of Health Information**

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

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

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

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

_____

_____

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

_____

_____

I understand that, with certain exceptions, I have the right to revoke this Authorization at any time. If I want to revoke this authorization, I must do so in writing. The procedure for how I may revoke the authorization, as well as the exceptions to my right to revoke, are explained in _____ [4] *Name of covered entity*

Notice of Privacy Practices, a copy of which has been provided to me.

- **Form:** Providers create forms to meet the particular requirments that govern them.

## Who signs the form?

**General rule: Individual**

- Adult individual signs the form authorizing disclosure of his or her information

**Exception: Personal representative**

- If an adult is incapacitated or has been adjudicated incompetent, the adult's "personal representative" signs

## Personal Representative

- **Federal law (HIPAA and Substance Use Disorder) defers to state law**
  - a person who is authorized by state law to make health care decisions for another individual is generally considered the individual's personal representative—example, parent for a child.
- **NC law (including MH/DD/SA) recognizes**
  - General guardian or guardian of the person appointed by court
  - Health care agent named in a health care power of attorney

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## Other PRs

- State law also recognizes as personal representatives, in order indicated
  - Attorney-in-fact w/powers to make heatlh decisions
  - Spouse
  - Majority of parents *and* children ≥18 years of age
  - Majority of siblings ≥18
  - Person with established relationship, good faith, can communicate wishes
- List of other PRs does not apply to M/SA records (G.S. 122C)
  - *Unless amended by S 603*

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## 3. Patient-obtained Info




- Patient generally has right of access to own records/ information (rare exceptions)
- Confidentiality laws do not prohibit or otherwise regulate a patient's self-disclosures

## Questions?

Mark Botts
919.962.8204
botts@sog.unc.edu

# Tab 05: Mental Health & Substance Abuse

# Mental Health and Impaired Capacity

Jodi Flick, ACSW, LCSW
UNC School of Social Work
joflick@email.unc.edu
May 2017

## Diagnostic and Statistical Manual of Mental Disorders

- Defines and describes features of each mental illness, making diagnosis more uniform and reliable from one clinician to another.
- Clear that there is **not a distinction** between mental and physical disorders: medical problems involve psychosocial factors; mental disorders involve physical and biological factors
- Over 300 disorders in the DSM-5: Most do not cause incapacity or incompetence
- Some are considered "Severe and Persistent Mental Illnesses"
- Comorbidity - have more than one illness – very common
  - Complicates diagnosis, severity of symptoms, treatment

## What is a mental disorder or mental illness?

An brain illness that:

- Affects a person's thinking, emotions, and behavior
- Disrupts the person's ability to:
  - Work / learn
  - Carry out daily activities
  - Engage in satisfying relationships

## What are Substance Use Disorders?

- Dependence
- Abuse that leads to problems at home or work
- Abuse that causes damage to health

## Warning Signs

- Increased use over time
- Increased tolerance (need more to get same effect)
- Experience withdrawal if try to quit (dependence)
- Continue use even after negative consequences to life/health
- Give up important activities because of use
- Preoccupied with substance
- Difficulty controlling use

## Who is legally licensed to diagnose and treat mental disorder?

- Psychiatrists
- Clinical psychologists
- Licensed clinical social workers
- Licensed mental health counselors
- Primary care physicians (physician assistants, nurse practitioners)

## Capacity and Competency

Many doctors and mental health professionals are taught:
"Capacity is a medical issue. Competency is a legal issue."

- Capacity to make medical decisions / give informed consent is determined by medical and mental health professionals
- Competency, or total capacity, is determined by courts

## Incompetent adult

Lacks sufficient **capacity** to:

- manage their own affairs, or
- make or communicate important decisions concerning their person, family, or property

due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, senility, disease, injury, or similar cause

## Capacity

- Ability to make binding decisions about rights, duties and obligations (getting married, entering contracts, making gifts, writing will).
- Caused by condition which prevents them from carrying out activities expected from someone their age, or by illness that causes inability to care for themselves, or causes them to act in ways that are against their own interests.
- These individuals are vulnerable and require protection of the state against risk of abuse or exploitation. A court may declare that person a ward of the state and appoint a legal guardian.

## Incapacity

- Occurs when people suffer medical problem (unconsciousness, coma, delirium) from accident or illness such as stroke, or mental disability.
- Unable to consent to medical treatment or handle financial and personal matters. If they have advance directives (revocable living trust), then named legal guardian may take over affairs.
- If person owns property with spouse or other person, able person may take over many financial affairs. Otherwise, petition court that they lack legal capacity and allow legal guardian to take over affairs.

## Recovery from Mental Illness

We know that people **<u>can</u>** and **<u>do</u>** recover from many mental illnesses.

"Recovery is the process in which people are able to live, work, learn, and participate fully in their communities."

"For some, this is the ability to live a fulfilling and productive life despite a disability."

"For others, recovery implies the reduction or complete remission of symptoms."

*— President's New Freedom Commission on Mental Health*

## Continuum of severity of illness


- All illnesses occur on a continuum: flu, diabetes, arthritis, cancer
- Mental illnesses occur on a continuum, too.
- Just knowing person's diagnosis does not tell you how bad symptoms are or how much it interferes with their ability to function.

## The Impact of Mental Illness

"Disability" refers to the amount of disruption a health problem causes to a person's ability to:
- Work / Learn
- Carry out daily activities
- Engage in satisfying relationships

Mental illnesses can be more disabling than many chronic physical illnesses.

- The disability from moderate depression is similar to the impact from relapsing multiple sclerosis, severe asthma, or chronic hepatitis B.
- The disability from severe depression is comparable to the disability from quadriplegia.

## Common conditions that may cause incapacity

Dementia – impairs memory, language, motor skills, planning, decision-making

- **Alzheimer's** type: two-thirds of cases – amyloid plaques and tangles
- **Lewy body** type: 10-15% cases; hallucinations, fluctuating impairment
- **Frontotemporal** type: personality/behavior changes, language impaired
- **Vascular** type: loss of blood flow to part of brain, deficit in part affected

## Common conditions that may cause incapacity

- **Alcoholism**
  - **Wernicke's** – acute **Korsakoff's** – chronic
  - Caused by damage from thiamine deficiency
  - Long-term: Depression, anxiety, psychosis, memory lapses of days/weeks, executive functioning impairment
- **Substance Use Disorder**
  - Continued use despite negative consequences (health, financial, social, occupational)
  - Results differ with different substances, but damage to brain and other organs can result in persistent mental health effects including chronic depression and memory impairments.

## Common conditions that may cause incapacity

- Traumatic brain injury
- Renal failure
- Stroke
- AIDS
- Parkinson's
- Huntingdon's
- Cerebral palsy

## Common conditions that cause incapacity

- Psychotic disorders
  - **Schizophrenia:** delusions, hallucinations, thought disorganization, decreased emotional expression, motivation
  - **Schizoaffective:** symptoms of schizophrenia and bipolar
- Mood disorders
  - **Depression** (major, post-partum, seasonal)
  - **Bipolar** (previously manic-depressive)

Extremes of mood can lead to self-neglect, risk-taking, suicide

## Common conditions that cause incapacity

- **Developmental disorder:**
  - Intellectual disability (mental retardation)
    - IQ under 70 with problems in adaptive functioning
    - Includes Down Syndrome, Fragile X, Fetal Alcohol Exposure
  - **Autism spectrum disorders**
    - Previously known as Autistic, Asperger's and Pervasive Developmental Disorder

## Permanent vs. temporary

- Some mental disorders cause permanent incapacity (like dementia)
- Some disorders cause temporary incapacity (like schizophrenia, bipolar) for many individuals. Experiences symptoms that impair their reasoning ability to extent that decisions are made for them temporarily

  These are illnesses are typically recurring and remitting:
  Person has long periods of **wellness**
  (or significant reduction of symptoms)
  in between periods of incapacity (during episodes of the illness)

## Treatment effectiveness

Varies based on many factors, including:

- Specific disorder (progressive vs. stable; permanent vs remitting)
- Severity of illness (mild, moderate, severe)
- Resources available (financial, family/community support, access to care, quality of care)
- Co-occurring conditions and their treatments
- Psychoeducation (understanding causes, triggers, situations that worsen symptoms or reduce symptoms, how treatments work)

## Psychiatric Advanced Directives (PAD)

Legal document written by person who lives with mental illness while they are well. Allows them to be prepared if mental health crisis prevents them from being able to make decisions. Describes specific instructions for treatment and preferences, or names someone to make treatment decisions for them, should they be unable to make decisions because of psychiatric crisis.

## Inability to recognize severity of impairment

- In some illnesses, person becomes unable to recognize that they have impairment in their ability or reasoning.
- Anosognosia – deficit in awareness of disability; not same as denial
  - Results from damage to brain structures / functions

## In mental health reports or testimony, pay attention to bias re: paternalism or autonomy

- Think individual is incompetent if he doesn't make healthy decisions or do what the family or doctor recommends

OR

- Think people have the right to do "whatever they want" and suffer the consequences

## What should you ask?

- Ask person about their view of situation / what they want to happen
- Use open-ended questions:
  - Describe a typical day, from the time you get up in the morning until the end of the day.
  - Tell me about your understanding of why we are here today?
  - What would you like to happen?
  - If you needed someone to help you in making decisions, who would you like that person to be?

## Ask for specific examples: How does it interfere with functioning?

- People believe that certain diagnoses (dementia, intellectual disability, schizophrenia) automatically result in incompetence; this is not true.
- Ask how condition affect activities of daily living (money, shopping, meds, cooking)
- Ask for specific symptoms and a link between the symptom / impairment. Be wary of "symptoms" that are not due to any diagnoses (e.g. poor judgment)
- "Poor judgment" alone is NOT a reason for incapacity. Must be clear connection between the illness and inability to care for self / property
- Some patients may have severe symptoms that affect their functioning but do not cause incompetence.

## Less intrusive alternatives they may consider

- Guardian of person/estate
- Durable power of attorney
- Psychiatric advance directive
- Veteran's benefits fiduciary
- Representative payee

# Tab 06: Multidisciplinary Evaluations

# LME/MCOs and MDEs

**What is an LME/MCO?**

It often feels like the mental health, developmental disabilities, and substance abuse (MH/DD/SA) fields and acronyms go hand in hand. These acronyms can be confusing and intimidating to people who are not intimately familiar with this area of the law and practice. This confusion is exacerbated by the fact that over the last few decades, there have been a number of changes to the delivery of public MH/DD/SA services in North Carolina. One of the major changes was the creation of local management entities/managed care organizations (LME/MCOs).

The purpose of the LME/MCO is to deliver MH/DD/SA services by using primarily state and federal resources appropriated to them by state government **to authorize, pay for, manage, and monitor services provided by their network of private providers**. *See* Mark F. Botts, *Mental Health Services*, *in* County and Municipal Government in North Carolina Ch. 40, at 683 (Frayda S. Bluestein ed., 2014). As of today, there are **eight** LME/MCOs under contract with the NC Department of Health and Human Services (DHHS) to provide public MH/DD/SA services in North Carolina.

**What is an MDE?**

LME/MCOs overlap with the world of incompetency and adult guardianship proceedings filed before the clerk of superior court when it comes to the preparation and assembly of multidisciplinary evaluations (MDEs). An MDE is an important tool in an incompetency proceeding under G.S. Chapter 35A that is used to **assist the court** in determining:

- The nature and extent of a respondent's capacity, and
- What type of guardianship plan and program is appropriate.

G.S. 35A-1111(a). A well-prepared MDE can be critical to carrying out the purposes of G.S Chapter 35A particularly in those cases involving complicated mental health disorders, developmental disabilities, and substance abuse. Much of Chapter 35A is designed around the premise that a clerk has access to an MDE when other evidence is conflicting or otherwise deficient regarding a person's capacity and guardianship needs.

The statutory definition of an MDE contemplates a dynamic and multi-faceted evaluation that covers various areas of a person's cognitive and functional capacity. Specifically, the statute defines an MDE as 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. G.S. 35A-1101(14).

**The Overlap: Who prepares/assembles an MDE?**

If the clerk orders an MDE, G.S. 35A-1111(b) provides that the clerk ***shall*** order a **designated agency** to prepare, cause to be prepared, or assemble an MDE. A designated agency is defined in the statute as ***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. G.S. 35A-1101(4). 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. *Id.*

While a number of entities are listed as possible designated agencies, in practice, county departments of social services and LME/MCOs tend to be used to fulfill this role. LME/MCOs tend to be called on when complicated questions arise related to the respondent's mental health, developmental disabilities, or substance abuse. Private providers, including private psychologists, psychiatrists, and other private clinicians, do not clearly fall within the definition of "designated agency."

**How does the clerk order an MDE?**

To order the MDE, the clerk may use AOC form SP-901M, the Request and Order for Multidisciplinary Evaluation. In the order, the clerk **must order a designated agency** to prepare, cause to be prepared, or assemble an MDE. If the clerk identifies an LME/MCO as the designated agency in the order, the clerk should specifically name the LME/MCO that provides services to the clerk's particular county. Each of the eight LME/MCOs serves a defined group of counties. The most up to date coverage areas by county and contact information for each LME/MCO can be found on the DHHS website here. Certain state level staff members at DHHS are also assigned as liaisons to the LME/MCOs and can provide additional assistance to clerks if there is a need to develop communication channels with an LME/MCO. A list of those DHHS staff members and their contact information is found at the bottom of the map available here.

**Who pays for an MDE?**

Once an MDE is completed, the clerk has the authority to enter an order regarding who is required to pay the costs of an MDE. GS 35A-1116(b). The clerk must assess the costs as follows:

1. To the respondent if the respondent is adjudicated incompetent and is not indigent,
2. To the DHHS if the respondent is adjudicated incompetent and is indigent, and
3. To either party, apportioned among the parties, or to DHHS, in the clerk's discretion, if the respondent is not adjudicated incompetent.

*Id.*

If the clerk orders a person or entity other than a designated agency to prepare an MDE, it creates a tenuous position when it comes to paying for the costs of an MDE. The person ordered to pay for an MDE risks not being in compliance with an order of the court if they do not pay the cost; the clerk risks having the order assessing the costs of an MDE challenged and determined to be outside the court's authority because the clerk did not order the designated agency to prepare an MDE as is required by statute. It is not clear how an appellate court would come out on this issue if it was challenged. Therefore, to be safe, it is advisable for the clerk to name only a designated agency to prepare an MDE in order to comply with the statutory requirements. One possible option for the clerk is the LME/MCO serving the clerk's county.

# Tab 07: Analyzing Capacity & Appointing a Guardian

# 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]

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*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).

# APPENDIX II

## EXAMPLES OF LIMITED GUARDIANSHIPS

1. Letters of Appointment. The fiduciary named below is appointed guardian of the person solely for the purpose of performing duties relating to care, custody, and control of the ward with the further limitation that the fiduciary shall make decisions which relate only to medical and psychiatric issues. These letters are issued to attest to that authority and to certify that it is now in full force and effect.

2. Letters of Appointment. The fiduciary named below is being appointed guardian of the person solely for the purpose of performing duties relating to the care, custody and control of the ward with the further limitation that the fiduciary shall make decisions which relate only to (1) medical treatment, (2) program placement, and (3) physical placement. These letters are issued to attest to that authority and to certify that it is now in full force and effect.

3. Letters of Appointment. The fiduciary named below is hereby appointed guardian of the person with the limitation that the fiduciary shall make decisions which relate only to (1) medical treatment and (2) psychiatric treatment and placement as related to these conditions.

4. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is in the borderline range of intellectual functioning with memory dysfunction, impaired judgment and poor insight. She lacks socialization and communication skills and has maladaptive behaviors.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges. To help determine where and with whom she lives. To make, with the help of a vocational counselor, suitable career choices which should be reviewed annually. To be informed of all decisions and plans about her. To be allowed to make any and all personal choices she is capable of making on her own or with advice from her counselor.

   The statutory powers and duties of the guardian(s) are modified by adding the following special powers or duties or by imposing the following limits: To plan her care so that she is challenged to continue to develop her potential and to arrange on-going counseling for her and to review her progress with her counselor at least annually. CCMHC shall provide counseling, if necessary.

5. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is able to work at the Crest Program. She receives earnings based on her participation in the Program.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges. She shall retain the right to receive earnings up to $100 per week. She may endorse her own check, receive the money in cash and

spend the money. She also has the right to have a bank account in her own name and deposit and withdraw funds.

6. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is oriented to time, place, and person, but he lacks insight into his medical and health care needs.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges: Free to go and come within the rules of the home where he resides; to reside in a placement where he will receive 24-hour a day care. Can consent to medical care.

   The statutory powers and duties of the guardian(s) are modified by adding the following special powers or duties or by imposing the following limits: To monitor his placement for appropriateness. To work with respondent to be sure he gets proper medical care. Can allow respondent to consent to his own care, can consent to any needed medical care for respondent.

7. a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent is physically able to work. Receiving his wages is important to his learning about the responsibilities and rewards for his efforts.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges: the right to personally receive payment for any work he does up to $300 per month. He may endorse his own check. He may open and maintain a bank account. He shall pay for his care as required by law. The use of the other earnings shall be at his discretion.

   8.a. Order on Petition for Adjudication of Incompetency. The nature and extent of the respondent's incompetence are as follows: Respondent's diagnoses are Conduct Disorder, Post-Traumatic Stress Disorder (from chronic abuse as a young child), Borderline Personality Disorder, and Mild Mental Retardation. She has some compromise in cognitive function and badly compromised psychological development. Her most serious deficit is in socialization. She does not relate well to her peers or adults. She deliberately violates rules, takes no responsibility for her actions, and how her actions affect others. She is incredibly obscene in her language and hostile and defiant in her conduct. She has a long history of serious aggressive behavior, and takes out her anger on anyone within arm's length. She was jailed in March 1999 for assaulting a police officer. She is extremely difficult to deal with. Her insight and judgment are impaired. Motivation for treatment is minimal to nonexistent. Respondent is able to care for her personal hygiene needs. She can perform a variety of domestic chores. Improvement in her skills and abilities depend on her acknowledging a need for assistance and cooperating with others.

   b. Order on Application for Appointment of Guardian. The ward shall retain the following legal rights and privileges: The right to make social decisions. The right to go and come as she pleases as long as it does not interfere with the rights and safety of others. Responsibility for all her actions including self-destructive and illegal behavior and the results thereof even if it includes imprisonment. The right to receive

rehabilitative services, treatment for her disorders, and medical conditions when and if she cooperates.

The statutory powers and duties of the guardian(s) are modified by adding the following special powers or duties or by imposing the following limits: Guardian of the person shall arrange for X's basic survival needs: food, clothing and shelter. Guardian of the person shall make available to X at her request rehabilitative services and treatment for her disorders and medical conditions to the extent that X voluntarily requests or agrees to cooperate and follow up with the recommendations. The guardian of the person shall not be responsible for the decisions X makes nor for the results of those decisions.

# Tab 08: Accessing Public Funded Services & Consent to Treatment

# Coates' Canons Blog: UPDATED: Limitations on the Authority and Role of Adult Protective Services Programs

**By Aimee Wall**

**Article: https://canons.sog.unc.edu/limitations-authority-role-adult-protective-services-programs/**

**This entry was posted on August 22, 2016 and is filed under Adult Protective Services, Social Services**

Yesterday, August 21, was National Senior Citizens Day. When President Reagan issued the proclamation first recognizing this day, he explained:

> For all they have achieved throughout life and for all they continue to accomplish, we owe older citizens our thanks and a heartfelt salute. We can best demonstrate our gratitude and esteem by making sure that our communities are good places in which to mature and grow older – places in which older people can participate to the fullest and can find the encouragement, acceptance, assistance, and services they need to continue to lead lives of independence and dignity.

This sends a powerful message and it is one that I think about often. As I've been working with the adult protective services program for the past few years, one of the issues I have struggled with is the balance between providing protection and preserving "independence and dignity" of older adults and disabled adults. Once a county department of social services (DSS) receives a report of alleged abuse, neglect, or exploitation of an adult, it will take action quickly to screen the report and, if appropriate, conduct an evaluation. In some situations, DSS will not intervene to provide protective services to the adult who is the subject of the report. This post explores some of these circumstances and will discuss the reasons why DSS may not have the authority to provide protective services. Also, at the end of the post I've included details about some free training resources related to financial exploitation.

The core of the adult protective services law is found in G.S. Chapter 108A, Articles 6 and 6A. These laws require reporting, outline the scope of DSS's authority to take action, and provide some tools for the county to use when evaluating a report and providing services. Regulations governing the program are found in 10A NCAC Title 10A, Chapter 71, Subchapter A. Important guidance about the program and the scope of DSS's authority can also be found in the state's Adult Protective Services Manual (APS Manual).

In general, an APS case will follow this basic path:

1. Report received by DSS.
2. DSS screens the report to determine if it has authority to conduct an APS evaluation.
3. If DSS has authority, it will "screen in" the report and conduct an evaluation that will include meeting with the adult and possibly reviewing records and interviewing caretakers, family, and other contacts.
4. At the conclusion of the evaluation, DSS will decide whether to proceed with offering protective services to the adult or requesting a court order authorizing the agency to provide protective services.

If, at Step 2, DSS determines that it does not have the authority to provide protective services, the report will be "screened out," which means that the agency will not conduct an APS evaluation. The reporter will be notified of the agency's decision. Depending on the circumstances, DSS may reach out to the adult and offer other services provided by DSS or try to connect the adult with appropriate services available in the community.

What are some of the circumstances that would result in DSS either screening out a report at intake or determining that the disabled adult does not need protective services after an evaluation?

## Not a "Disabled Adult"

North Carolina's child protective services are available to every child in the state. Adult protective services, on the other hand, are more limited by law. DSS has the authority to take action if it receives a report related to a "disabled adult" who is in need of protective services. The term "disabled adult" is defined as:

> any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

Some older adults will meet this definition but many others will not. Social workers are encouraged to consider the adult's functioning: "Does the adult's non or reduced functioning necessitate reliance on others to meet their basic needs?" ( APS Manual, Sec. III-3). Age alone is not enough to allow DSS to screen in the report. For example, a 50 year old with dementia or significant physical limitations will be considered disabled but a person who is 80 years old and in good physical and mental health will not. Similarly, diagnosis alone is not sufficient to determine disability. As the APS Manual explains:

> A physical condition, disease, or diagnosis that limits one person may not limit another. For example, arthritis and heart disease in one person may not impair that individual's functioning while in another it keeps them confined to bed. Each person and situation is unique.

Finally, DSS must not rely only on a person's status or living conditions when deciding whether the adult is disabled. For example, an adult who is homeless but generally healthy and able would not meet the definition.

When DSS receives a report, it will gather as much information as possible from the reporter about the adult's situation and condition in order to determine whether the agency has the authority to follow up on the report. If DSS concludes that the adult is not disabled, the agency is not authorized to provide protective services. It may, however, provide other support services to the adult depending on his or her situation and needs.

## No Need for "Protective Services"

One of the initial questions DSS will explore with the reporter is whether the adult needs services to protect him or her from abuse, neglect, or exploitation. In order to move forward with the evaluation or provision of services, the agency must conclude:

- The adult is unable to perform or obtain essential services because of his or her physical or mental incapacity; and
- No able, responsible, and willing person is able to perform or obtain the essential services for the adult. S. 108A-101(e).

A service is considered "essential" if it is necessary to safeguard the adult's rights and resources and maintain his or her physical or mental well-being. Essential services could include medical care, food, clothing, shelter, protection from physical mistreatment, and protection from exploitation.

In some situations, DSS will determine that a person is in need of essential services but finds that there is a family member or friend who is willing to help obtain those services for the adult. DSS may transfer responsibility for providing those services if the agency concludes that the volunteer is not only *willing* to help but also *able* to provide the required assistance and *responsible* enough to provide the needed services. If DSS has concerns about the volunteer's ability to provide the services, it will likely remain involved to some extent to ensure that the disabled adult is protected.

## Abuse By Someone Other than a Caretaker

DSS's authority extends to abuse, neglect, and exploitation. For exploitation, the alleged perpetrator may be anyone. For abuse or neglect, however, DSS has authority to act only if the alleged perpetrator is the disabled adult's "caretaker" or in cases that may involve self-neglect. In order to understand how this all fits together, it's useful to review the key definitions found in G.S. 108A-101:

- A caretaker is "an individual who has the responsibility for the care of the disabled adult as a result of family relationship or who has assumed the responsibility for the care of the disabled adult voluntarily or by contract."
- Abuse is "the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation by a caretaker of services which are necessary to maintain mental and physical health."
- Neglect "refers to a disabled adult who is either living alone and not able to provide for himself or herself the services which are necessary to maintain the person's mental or physical health or is not receiving services from the person's caretaker.

Weaving these three definitions together with the scope of authority granted to DSS, it seems that one type of case that may fall outside DSS's authority is the willful infliction of pain, injury, anguish, or confinement by someone other than a caretaker. Depending on the circumstances, DSS may be able to screen in these types of cases if they rise to the level of self-neglect. In other words, the agency may determine that the disabled adult is not able to protect himself or herself from the abuse and is therefore proceed with the protective services evaluation.

Such cases could also fall within the scope of the generally applicable criminal laws. Offenses such as assault and battery may apply, but there are also specific laws tailored to disabled and older adults that could come into play. For example, a caretaker in a domestic setting may be charged with a felony if he or she abuses or neglects either (1) a disabled adult or (2) an adult who is over 60 years of age and is unable to provide necessary self-care (G.S. 14-32.3). A different law applies to abuse or neglect of any patient in a health care facility. (G.S. 14-32.2). Criminal laws also specifically address financial exploitation of disabled and older adults (G.S. 14-112.2; see also this bulletin).

## Refuse or Withdraw Consent

Once DSS has received a report and screened it in, a social worker will meet with the adult as soon as possible, consult with other people connected to the adult, and gather records from providers and/or financial institutions. The purpose of the evaluation is to determine whether the case should be "substantiated" – in other words, are protective services necessary and appropriate? If the case is substantiated, DSS must then determine whether the disabled adult has capacity to consent to those services. If the adult has capacity and ultimately refuses the offer to provide services, that is the end of the road for DSS. The agency does not have the authority to compel an adult with decisional capacity to accept services. Similarly, if the adult initially consents to the services and then later withdraws that consent, DSS must abide by that decision. The agency may still offer other services and conduct wellness checks consistent with policy and practice, but protective services may not be provided.

The APS Manual provides some guidance for DSS staff to follow when evaluating capacity. It states that the focus should be on the adult's ability to perceive and understand his situation, including his or her physical limitations, the resources and assistance that are available, and the consequences of not getting assistance. It also emphasizes a few other points:

- *Capacity is different than competency*: The former is determined by DSS for this limited purpose and competency is determined by a judicial official.
- *Capacity may be intermittent*: Someone with an acute illness, such as a urinary tract infection, may temporarily lack decisional capacity. Once treated, the person's capacity may be restored and DSS should recognize that change and adapt to it.
- *Professional evaluations may be helpful but they are not determinative*: If DSS is unsure about capacity, it may consult with a medical or mental health professional. The decision about capacity, however, rests with DSS.

By recognizing that an adult who has capacity must be allowed to refuse services, our law is clearly trying to find the appropriate balance between protecting individuals and preserving their independence and autonomy.

## Court Denies Petition

If DSS concludes that the adult needs protective services but lacks capacity to consent, it must file a petition in district court requesting permission to provide those services. G.S. 108A-105. If the court finds by clear, cogent, and convincing evidence that the disabled adult is (1) in need of protective services and (2) lacks capacity to consent, it will issue an order authorizing DSS to provide services. The law also allows for a more expedited ex parte petition in emergency situations. G.S. 108A-106. If the court denies DSS's petition, the agency may not proceed with the plan to provide protective services. Depending on the circumstances, the agency may still decide to offer some other services to the adult, such as referrals for nutrition programs or caregiver support, but it may not provide protective services.

### Other Reasons

The discussion above is certainly not comprehensive. There are other reasons that DSS will not provide protective services for an adult. For example, if the adult who is the subject of the report is located outside North Carolina, a county DSS does not have the authority to take action. If the adult resides in a county other than the one that received the report, things can get a little confusing but the bottom line is one or more counties will be involved in responding to the report (see this blog post).

### Just Can't Get Enough APS Information?

I'm excited to announce a new training resource that is available to the general public. Back in 2014, I was part of a multidisciplinary team that developed training related to the changes in the law related to financial exploitation, with a particular focus on the new authority to obtain subpoenas for financial records. More recently, Lori Cole, an instructional designer with the Administrative Office of the Courts adapted those training materials and developed a self-directed online training module. The module, along with a recorded version of one of the 2014 webinars, is available online for free. In the coming weeks, Judicial Branch officials and staff will also be able to access it through the LearningCenter to have it recorded on their transcript. Feel free to contact me if you have any questions about this topic.

*Note about update: The author made revisions to two sections ("Not a Disabled Adult" and "Abuse by a Person other than a Caretaker") based on discussions with representatives of the Division of Aging and Adult Services and counties. The feedback is much appreciated.*

## Links

- reaganlibrary.archives.gov/archives/speeches/1988/081988b.htm
- www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_108A/Article_6.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_108A/Article_6A.pdf
- reports.oah.state.nc.us/ncac/title%2010a%20-%20health%20and%20human%20services/chapter%2071%20-%20adult%20and%20family%20support/subchapter%20a/subchapter%20a%20rules.pdf
- www.ncdhhs.gov/document/aging-and-adult-services-protective-services-adults-policy-and-procedures-manual
- ncdhhs.s3.amazonaws.com/s3fs-public/documents/files/APS_Manual.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_108A/GS_108A-101.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_14/GS_14-32.3.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_14/GS_14-32.2.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_14/GS_14-112.2.pdf
- www.sog.unc.edu/publications/bulletins/financial-exploitation-older-adults-and-disabled-adults-overview-north-carolina-law
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_108A/GS_108A-105.pdf
- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_108A/GS_108A-106.pdf
- www.nccourts.org/Training/WebFinExp.asp
- mybeacon.its.state.nc.us/irj/portal

Article 6.

Protection of the Abused, Neglected or Exploited Disabled Adult Act.

**§ 108A-99. Short title.**

This Article may be cited as the "Protection of the Abused, Neglected, or Exploited Disabled Adult Act." (1973, c. 1378; s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-100. Legislative intent and purpose.**

Determined to protect the increasing number of disabled adults in North Carolina who are abused, neglected, or exploited, the General Assembly enacts this Article to provide protective services for such persons. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-101. Definitions.**

(a) The word "abuse" means the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation by a caretaker of services which are necessary to maintain mental and physical health.

(b) The word "caretaker" shall mean an individual who has the responsibility for the care of the disabled adult as a result of family relationship or who has assumed the responsibility for the care of the disabled adult voluntarily or by contract.

(c) The word "director" shall mean the director of the county department of social services in the county in which the person resides or is present, or his representative as authorized in G.S. 108A-14.

(d) The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

(e) A "disabled adult" shall be "in need of protective services" if that person, due to his physical or mental incapacity, is unable to perform or obtain for himself essential services and if that person is without able, responsible, and willing persons to perform or obtain for his essential services.

(f) The words "district court" shall mean the judge of that court.

(g) The word "emergency" refers to a situation where (i) the disabled adult is in substantial danger of death or irreparable harm if protective services are not provided immediately, (ii) the disabled adult is unable to consent to services, (iii) no responsible, able, or willing caretaker is available to consent to emergency services, and (iv) there is insufficient time to utilize procedure provided in G.S. 108A-105.

(h) The words "emergency services" refer to those services necessary to maintain the person's vital functions and without which there is reasonable belief that the person would suffer irreparable harm or death. This may include taking physical custody of the disabled person.

(i) The words "essential services" shall refer to those social, medical, psychiatric, psychological or legal services necessary to safeguard the disabled adult's rights and resources and to maintain the physical or mental well-being of the individual. These services shall include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment, and protection

from exploitation. The words "essential services" shall not include taking the person into physical custody without his consent except as provided for in G.S. 108A-106 and in Chapter 122C of the General Statutes.

(j) The word "exploitation" means the illegal or improper use of a disabled adult or his resources for another's profit or advantage.

(k) The word "indigent" shall mean indigent as defined in G.S. 7A-450.

(l) The words "lacks the capacity to consent" shall mean lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including but not limited to provisions for health or mental health care, food, clothing, or shelter, because of physical or mental incapacity. This may be reasonably determined by the director or he may seek a physician's or psychologist's assistance in making this determination.

(m) The word "neglect" refers to a disabled adult who is either living alone and not able to provide for himself or herself the services which are necessary to maintain the person's mental or physical health or is not receiving services from the person's caretaker. A person is not receiving services from his caretaker if, among other things and not by way of limitation, the person is a resident of one of the State-owned psychiatric hospitals listed in G.S. 122C-181(a)(1), the State-owned Developmental Centers listed in G.S. 122C-181(a)(2), or the State-owned Neuro-Medical Treatment Centers listed in G.S. 122C-181(a)(3), the person is, in the opinion of the professional staff of that State-owned facility, mentally incompetent to give consent to medical treatment, the person has no legal guardian appointed pursuant to Chapter 35A, or guardian as defined in G.S. 122C-3(15), and the person needs medical treatment.

(n) The words "protective services" shall mean services provided by the State or other government or private organizations or individuals which are necessary to protect the disabled adult from abuse, neglect, or exploitation. They shall consist of evaluation of the need for service and mobilization of essential services on behalf of the disabled adult. (1973, c. 1378, s. 1; 1975, c. 797; 1979, c. 1044, ss. 1-4; 1981, c. 275, s. 1; 1985, c. 589, s. 34; 1987, c. 550, s. 24; 1989, c. 770, s. 29; 1991, c. 258, s. 2; 2007-177, s. 4.)

**§ 108A-102. Duty to report; content of report; immunity.**

(a) Any person having reasonable cause to believe that a disabled adult is in need of protective services shall report such information to the director.

(b) The report may be made orally or in writing. The report shall include the name and address of the disabled adult; the name and address of the disabled adult's caretaker; the age of the disabled adult; the nature and extent of the disabled adult's injury or condition resulting from abuse or neglect; and other pertinent information.

(c) Anyone who makes a report pursuant to this statute, who testifies in any judicial proceeding arising from the report, or who participates in a required evaluation shall be immune from any civil or criminal liability on account of such report or testimony or participation, unless such person acted in bad faith or with a malicious purpose. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-103. Duty of director upon receiving report.**

(a) Any director receiving a report that a disabled adult is in need of protective services shall make a prompt and thorough evaluation to determine whether the disabled adult is in need of protective services and what services are needed. The evaluation shall include a visit to the person and consultation with others having knowledge of the facts of the particular case. When

necessary for a complete evaluation of the report, the director shall have the authority to review and copy any and all records, or any part of such records, related to the care and treatment of the disabled adult that have been maintained by any individual, facility or agency acting as a caretaker for the disabled adult. This shall include but not be limited to records maintained by facilities licensed by the North Carolina Department of Health and Human Services. Use of information so obtained shall be subject to and governed by the provisions of G.S. 108A-80 and Article 3 of Chapter 122C of the General Statutes. The director shall have the authority to conduct an interview with the disabled adult with no other persons present. After completing the evaluation the director shall make a written report of the case indicating whether he believes protective services are needed and shall notify the individual making the report of his determination as to whether the disabled adult needs protective services.

(b) The staff and physicians of local health departments, area mental health, developmental disabilities, and substance abuse authorities, and other public or private agencies shall cooperate fully with the director in the performance of his duties. These duties include immediate accessible evaluations and in-home evaluations where the director deems this necessary.

(c) The director may contract with an agency or private physician for the purpose of providing immediate accessible medical evaluations in the location that the director deems most appropriate.

(d) The director shall initiate the evaluation described in subsection (a) of this section as follows:

(1) Immediately upon receipt of the complaint if the complaint alleges a danger of death in an emergency as defined in G.S. 108A-101(g).

(2) Within 24 hours if the complaint alleges danger of irreparable harm in an emergency as defined by G.S. 108A-101(g).

(3) Within 72 hours if the complaint does not allege danger of death or irreparable harm in an emergency as defined by G.S. 108A-101(g).

(4) Repealed by Session Laws 2000, c. 131, s. 1.

The evaluation shall be completed within 30 days for allegations of abuse or neglect and within 45 days for allegations of exploitation. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1; 1985, c. 589, s. 35; c. 658, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 6; 1991, c. 636, s. 19(c); 1997-443, s. 11A.118(a); 1999-334, s. 1.10; 2000-131, s. 1.)

**§ 108A-104. Provision of protective services with the consent of the person; withdrawal of consent; caretaker refusal.**

(a) If the director determines that a disabled adult is in need of protective services, he shall immediately provide or arrange for the provision of protective services, provided that the disabled adult consents.

(b) When a caretaker of a disabled adult who consents to the receipt of protective services refuses to allow the provision of such services to the disabled adult, the director may petition the district court for an order enjoining the caretaker from interfering with the provision of protective services to the disabled adult. The petition must allege specific facts sufficient to show that the disabled adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services. If the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and consents to the receipt of protective services and that the caretaker

refuses to allow the provision of such services, he may issue an order enjoining the caretaker from interfering with the provision of protective services to the disabled adult.

(c) If a disabled adult does not consent to the receipt of protective services, or if he withdraws his consent, the services shall not be provided. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-105. Provision of protective services to disabled adults who lack the capacity to consent; hearing, findings, etc.**

(a) If the director reasonably determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to protective services, then the director may petition the district court for an order authorizing the provision of protective services. The petition must allege specific facts sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them.

(b) The court shall set the case for hearing within 14 days after the filing of the petition. The disabled adult must receive at least five days' notice of the hearing. He has the right to be present and represented by counsel at the hearing. If the person, in the determination of the judge, lacks the capacity to waive the right to counsel, then a guardian ad litem shall be appointed pursuant to G.S. 1A-1, Rule 17, and rules adopted by the Office of Indigent Defense Services. If the person is indigent, the cost of representation shall be borne by the State.

(c) If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the disabled adult or otherwise consenting to protective services in his behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with Chapter 35A; for good cause shown, the court may extend the 60 day period for an additional 60 days, at the end of which it shall conduct a review to determine if a petition should be initiated in accordance with Chapter 35A. No disabled adult may be committed to a mental health facility under this Article.

(d) A determination by the court that a person lacks the capacity to consent to protective services under the provisions of this Chapter shall in no way affect incompetency proceedings as set forth in Chapters 33, 35 or 122 of the General Statutes of North Carolina, or any other proceedings, and incompetency proceedings as set forth in Chapters 33, 35, or 122 shall have no conclusive effect upon the question of capacity to consent to protective services as set forth in this Chapter. (1973, c. 1378, s. 1; 1975, c. 797; 1977, c. 725, s. 3, 1979, c. 1044, s. 5; 1981, c. 275, s. 1; 1985, c. 658, s. 2; 1987, c. 550, s. 25; 2000-144, s. 36.)

**§ 108A-106. Emergency intervention; findings by court; limitations; contents of petition; notice of petition; court authorized entry of premises; immunity of petitioner.**

(a) Upon petition by the director, a court may order the provision of emergency services to a disabled adult after finding that there is reasonable cause to believe that:

(1) A disabled adult lacks capacity to consent and that he is in need of protective service;

(2) An emergency exists; and

(3) No other person authorized by law or order to give consent for the person is available and willing to arrange for emergency services.

(b) The court shall order only such emergency services as are necessary to remove the conditions creating the emergency. In the event that such services will be needed for more than 14 days, the director shall petition the court in accordance with G.S. 108A-105.

(c) The petition for emergency services shall set forth the name, address, and authority of the petitioner; the name, age and residence of the disabled adult; the nature of the emergency; the nature of the disability if determinable; the proposed emergency services; the petitioner's reasonable belief as to the existence of the conditions set forth in subsection (a) above; and facts showing petitioner's attempts to obtain the disabled adult's consent to the services.

(d) Notice of the filing of such petition and other relevant information, including the factual basis of the belief that emergency services are needed and a description of the exact services to be rendered shall be given to the person, to his spouse, or if none, to his adult children or next of kin, to his guardian, if any. Such notice shall be given at least 24 hours prior to the hearing of the petition for emergency intervention; provided, however, that the court may issue immediate emergency order ex parte upon finding as fact (i) that the conditions specified in G.S. 108A-106(a) exist; (ii) that there is likelihood that the disabled adult may suffer irreparable injury or death if such order be delayed; and (iii) that reasonable attempts have been made to locate interested parties and secure from them such services or their consent to petitioner's provision of such service; and such order shall contain a show-cause notice to each person upon whom served directing such person to appear immediately or at any time up to and including the time for the hearing of the petition for emergency services and show cause, if any exists, for the dissolution or modification of the said order. Copies of the said order together with such other appropriate notices as the court may direct shall be issued and served upon all of the interested parties designated in the first sentence of this subsection. Unless dissolved by the court for good cause shown, the emergency order ex parte shall be in effect until the hearing is held on the petition for emergency services. At such hearing, if the court determines that the emergency continues to exist, the court may order the provision of emergency services in accordance with subsections (a) and (b) of this section.

(e) Where it is necessary to enter a premises without the disabled adult's consent after obtaining a court order in compliance with subsection (a) above, the representative of the petitioner shall do so.

(f) (1) Upon petition by the director, a court may order that:

a. The disabled adult's financial records be made available at a certain day and time for inspection by the director or his designated agent; and

b. The disabled adult's financial assets be frozen and not withdrawn, spent or transferred without prior order of the court.

(2) Such an order shall not issue unless the court first finds that there is reasonable cause to believe that:

a. A disabled adult lacks the capacity to consent and that he is in need of protective services;

b. The disabled adult is being financially exploited by his caretaker; and

c. No other person is able or willing to arrange for protective services.

(3) Provided, before any such inspection is done, the caretaker and every financial institution involved shall be given notice and a reasonable opportunity to appear and show good cause why this inspection should not be done. And,

provided further, that any order freezing assets shall expire ten days after such inspection is completed, unless the court for good cause shown, extends it.

(g) No petitioner shall be held liable in any action brought by the disabled adult if the petitioner acted in good faith. (1975, c. 797; 1981, c. 275, s. 1; 1985, c. 658, s. 3.)

**§ 108A-107. Motion in the cause.**

Notwithstanding any finding by the court of lack of capacity of the disabled adult to consent, the disabled adult or the individual or organization designated to be responsible for the disabled adult shall have the right to bring a motion in the cause for review of any order issued pursuant to this Article. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-108. Payment for essential services.**

At the time the director, in accordance with the provisions of G.S. 108A-103 makes an evaluation of the case reported, then it shall be determined, according to regulations set by the Social Services Commission, whether the individual is financially capable of paying for the essential services. If he is, he shall make reimbursement for the costs of providing the needed essential services. If it is determined that he is not financially capable of paying for such essential services, they shall be provided at no cost to the recipient of the services. (1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-109. Reporting abuse.**

Upon finding evidence indicating that a person has abused, neglected, or exploited a disabled adult, the director shall notify the district attorney. (1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-110. Funding of protective services.**

Any funds appropriated by counties for home health care, boarding home, nursing home, emergency assistance, medical or psychiatric evaluations, and other protective services and for the development and improvement of a system of protective services, including additional staff, may be matched by State and federal funds. Such funds shall be utilized by the county department of social services for the benefit of disabled adults in need of protective services. (1975, c. 797; 1981, c. 275, s. 1.)

**§ 108A-111. Adoption of standards.**

The Department and the administrative office of the court shall adopt standards and other procedures and guidelines with forms to insure the effective implementation of the provisions of this Article. (1975, c. 797; 1981, c. 275, s. 1.)

On the Civil Side
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# The Guardian's Role in Health Care Decision-making

**Author :** Aimee Wall

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A county director of social services may be appointed to serve as guardian for an adult who has been adjudicated incompetent by a clerk of superior court. Making decisions about health care, particularly end of life care, is often one of the most challenging issues a guardian may face. Sometimes, prior to being adjudicated incompetent, the adult may have expressed his or her wishes regarding some of these critical decisions. The adult may have discussed his or her wishes with family, friends or a doctor or possibly executed a health care power of attorney or living will. After the DSS director has been appointed guardian, what happens to those legal documents? How do they impact the DSS director's authority and role as guardian?

Please note that this blog post is not intended to provide a comprehensive overview of end of life decision-making. Rather, the purpose is to help DSS directors who serve as guardians understand their responsibilities and the legal hierarchy of decision-making during these difficult times.

## What is the role of the guardian with respect to health care decisions?

A general guardian or a guardian of the person has broad authority to be involved with the adult's health care and to make decisions related to that care. The guardian "may give any consent or approval that may be necessary to enable the [adult] to receive medical, legal, psychological, or other professional care, counsel, treatment, or service…" G.S. 35A-1241(3). The guardian may *not,* however, consent to the sterilization of a mentally ill or mentally retarded adult without an order from the clerk of court.

It is possible for an adult to have a general guardian or guardian of the person and still retain the authority to make health care decisions. A clerk of court may order a "limited guardianship," which allows the clerk to allocate decision-making authority between the adult and the guardian. G.S. 35A-1212(a). For example, the clerk could order that the adult retain the authority to make health care decisions and the guardian has the authority to make all other decisions, such as those related to housing and employment.

While the general guardian or the guardian of the person has the legal authority to consent to health care independently (except for sterilization of the mentally ill or mentally retarded), the guardian may ask the clerk of court to "concur" in that consent. It's unusual for a guardian, including a DSS director, to make this type of request. The guardian has the responsibility and authority to make decisions regarding the adult's care and should have access to all of the necessary information to inform the decision. In addition, taking time to seek a concurrence could result in unnecessary delays in health care. It is unclear how a clerk's failure to concur impacts the guardian's authority to act, but it seems unlikely that a guardian would consent to the care, service, or treatment immediately following such a refusal. Further, the clerk always has the option of removing the guardian and appointing another guardian. G.S. 35A-1290.

## What happens if the adult has a health care power of attorney?

Prior to being declared incompetent, the adult may have executed a health care power of attorney. This legal document identifies someone to act as the adult's health care agent. G.S. Chapter 32A, Article 3. The adult may appoint any

competent adult to serve as the agent, as long as that person is not engaged in providing health care to the adult for compensation.

The agent has the authority to make health care decisions on behalf of the adult if there is a written determination by a provider or other appropriate person that the adult lacks sufficient understanding or capacity to make or communicate health care decisions. The legal document will define the scope of the agent's authority. It may allow the agent to have the same authority to make decisions that the adult would have had, including decisions related to end of life care, organ donation, and mental health treatment. The adult has the authority to modify or revoke the health care power of attorney as long as he or she is able to make and communicate health care decisions.

If an adult executed a valid health care power of attorney before the clerk declared the adult incompetent and appointed a guardian, there may be a question about whether the guardian or the health care agent has the authority to make health care decisions. ***The general rule is that the health care agent will retain the authority to make health care decisions after a general guardian or a guardian of the person is appointed.*** G.S. 32A-22(a) (health care power of attorney); G.S. 35A-1241(a)(3) (powers and duties of guardian); G.S. 35A-1208 (guardian may request suspension of health care agent); G.S. 90-21.13(c) (informed consent statute restating general rule).

This general rule will not apply if the guardian petitions the court to suspend the authority of the health care agent and the court agrees. The guardian must, however, provide notice of this petition to the health care agent. If the court suspends the health care agent's authority, it must direct "whether the guardian must act consistently with the health care power of attorney or whether and in what respect the guardian may deviate from it." G.S. 32A-22(a)

The adult may not have a health care power of attorney but rather a more expansive power of attorney that addresses not only health but also financial and property matters, such as a durable power of attorney or a statutory short-form power of attorney. G.S. 32A-2 (describing the potential powers and duties that may be assigned using the statutory short form for the power of attorney). The general rule described above granting superior authority to health care agents applies *only* to health care agents identified in health care powers of attorney executed pursuant to Article 3, of G.S. Chapter 32A. It does not apply to attorneys-in-fact identified in general powers of attorney executed pursuant to Article 1 or 2 of G.S. Chapter 32A. See, e.g., G.S. 32A-22; G.S. 90-21.13(c) (referring only to health care agents appointed pursuant to valid powers of attorney).

## How will end of life decisions be made for an adult who has a guardian?

In certain circumstances, a provider will need to make important decisions related to provision or continuation of life-prolonging measures. A life-prolonging measure is a medical procedure or intervention that "would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including medical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment." G.S. 32A-16(4).

With respect to an adult with an appointed general guardian or guardian of the person (and not subject to limited guardianship, as discussed above), there has already been a judicial determination that someone else should make health care decisions on the adult's behalf. But it is important to recognize that the adult may still have a role in making decisions at this stage – either through an advance directive or through the revocation of an advance directive. As a result, the provider's deliberations about end of life decisions will likely require consideration of the following two questions:

- Has the adult expressed wishes regarding end of life care?
- Who is the authorized health care decision-maker?

### *Has the adult expressed wishes regarding end of life care?*

Many adults have contemplated end of life care and expressed their wishes regarding their care and treatment. They may have done so informally, through conversations with family and friends, or formally through a legal document. The provider and the guardian will want to know about any of these wishes, regardless of when or how they were expressed or documented.

Prior to being declared incompetent, the adult may have expressed wishes regarding end of life care by executing a living will (also referred to as an "advance directive" or a "declaration of a desire for natural death"). The adult's attorney, prior medical providers, or family members may have a copy of any advance directive. It is also possible that a directive could be included in the state's registry of advance directives (but inclusion in the registry is not mandatory for the directive to be valid). If the adult did execute such a directive, the guardian does *not* have the authority to revoke it. G.S. 35A-1208(b); G.S. 90-321(e). A health care agent would have the authority to revoke it if the health care power of attorney *expressly* authorizes the agent to do so. The adult, however, may revoke it at any time *regardless of the adult's mental or physical condition*. G.S. 90-321(e).

A provider will look to an advance directive for guidance in the following three situations:

1. The adult has an incurable or irreversible condition that will result in the adult's death within a relatively short period of time;
2. The adult becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or
3. The adult suffers from advanced dementia or another condition resulting in the loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible.

Outside those three situations, the provider will look to the authorized health care decision-maker to make choices for an adult who has a guardian.

### *Who is the authorized health care decision-maker? Does the adult have a health care agent? Or is the guardian authorized to make health care decisions?*

As discussed above, the general rule is that a health care agent's authority is superior to that of the guardian. If the adult does not have an advance directive or the conditions triggering the directive are not satisfied, the provider will consult with the person who has authority to make decisions about the adult's health care. G.S. 90-322 (authorizing the provider to withhold or discontinue life-prolonging measures in some situations with concurrence from the legally recognized health care decision-maker). For example, a provider may consult with the authorized decision-maker about scope of treatment decisions – should antibiotics be provided if there is an infection? Should CPR be administered if the adult goes into cardiopulmonary arrest? Should intubation or mechanical ventilation be ordered if medically indicated but not expected to lead to an improved medical condition? The decision-maker (the agent or the guardian) may be asked to agree to a Medical Order for Scope of Treatment (MOST). A MOST is an order signed by a physician, physician's assistant, or nurse practitioner that details many of these decisions and plans for a person who is nearing the end of life. G.S. 90-322; sample MOST form.

If the provider has not consulted with the decision-maker about these critical issues, the decision-maker may initiate the conversations with the health care team. If the adult is hospitalized, the decision-maker may also want to consult with the hospital's ethics committee, as they are trained and experienced in navigating the complex issues confronted at the end of life.

Gathering information about the adult's wishes regarding end of life care and knowing who the authorized health care decision-maker is before any crisis unfolds is part of the DSS director's role in serving as guardian. This information is critically important, as it will empower the director to make informed decisions and will make this end of life journey easier on the adult, the providers, and the family. If you are interested in learning more about this topic, there are many helpful resources available through the medical and legal communities, including this collection of resources from the North Carolina Medical Society, this collection of resources from the Elder Law Clinic at Wake Forest University's

School of Law, and this brochure from the North Carolina Bar Association.

**Note, this post was also published on the School's Coates' Canons: NC Local Government blog on March 28th.*

# Tab 09: Autism & Limited Guardianship

# Alternative Testimony for Adults With Disabilities

Nine states provide statutorily for alternative testimony by adults with disabilities under certain circumstances. These nine states are: California, Colorado, Florida, Indiana, Louisiana, Michigan, Ohio, Oregon, and Vermont. Although there are some commonalities among the statutes, states have taken difference approaches to these laws. Some distinctions are noted below.

**Procedural Context for Allowing Alternative Testimony**

- *Only certain criminal cases (generally crimes related to sex, abuse, or violence):* Indiana, Louisiana, Michigan, Ohio,
- *All criminal cases:* Colorado
- *Certain criminal and civil cases (generally cases related to sex, abuse or violence):* California, Oregon, Vermont
- *All civil and criminal cases:* Florida

**Types of Alternative Testimony**

- *Closed Circuit television:* California, Colorado, Florida, Indiana, Louisiana, Michigan, Ohio, Oregon, and Vermont
- *Taped Deposition:* California, Florida, Indiana, Michigan, Ohio.
  - Taped depositions may have more limited purposes.
- *Rearranged Courtroom:* California, Michigan

**Consideration of Alternative Testimony:**

- *Prosecution's Motion* – Ohio
- *Judge or Prosecution's Motion* - California
- *Judge or Either Party's Motion* - Colorado, Oregon, Florida, Indiana, Louisiana, Michigan, Vermont

**Required Finding to Use Alternative Testimony**

- *Severe/Serious Emotional Harm* – Colorado, Oregon, Indiana, Louisiana, Ohio, Vermont
- *Moderate Harm* - Florida
- *Other Factors* - California, Michigan, Ohio

**Evidence Required to Make Finding**

- *Expert Testimony Required* – Oregon, Louisiana
- *Other Evidence Permissible* - California, Indiana, Florida, Colorado, Michigan, Ohio, Vermont

**Disability Definition**

- *Reference to Mental Health Statutes* – California, Colorado, Florida, Louisiana, Michigan, Ohio, Vermont
- *Defined within Alternative Testimony statute* – Indiana, Oregon

**North Carolina General Statutes**
**Chapter 122C – Mental Health**
**Definitions of Developmental Disability and Mental Retardation**

G.S. 122C-3(12) Definitions

(12a) "Developmental disability" means a severe, chronic disability of a person which:

a. Is attributable to a mental or physical impairment or combination of mental and physical impairments;

b. Is manifested before the person attains age 22, unless the disability is caused by a traumatic head injury and is manifested after age 22;

c. Is likely to continue indefinitely;

d. Results in substantial functional limitations in three or more of the following areas of major life activity: self-care, receptive and expressive language, capacity for independent living, learning, mobility, self-direction and economic self-sufficiency; and

e. Reflects the person's need for a combination and sequence of special interdisciplinary, or generic care, treatment, or other services which are of a lifelong or extended duration and are individually planned and coordinated; or

f. When applied to children from birth through four years of age, may be evidenced as a developmental delay.

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

# Autism in the Criminal Justice System

By Judge Kimberly Taylor (retired), Dr. Gary Mesibov and Dennis Debbaudt

2009

Autism Spectrum Disorder (ASD) diagnoses are increasing at an alarming rate in North Carolina, across the country, and around the world. This increase in the incidence of ASD suggests that the criminal justice system (CJS) will certainly see increased contact with individuals with autism as victims, witnesses, and/or offenders. All criminal justice professionals who have contact with individuals who have ASD need to establish clear and consistent communication methods, verify facts, make appropriate accommodations, and insure fair justice and consequences for all concerned. Communications, behaviors, intent, and ability levels of people with autism vary greatly and present challenges for even the most experienced criminal justice professionals. Attorneys and judges must avoid misinterpretation of behaviors and characteristics typical of those with autism since these behaviors and characteristics could be misinterpreted as evidence of guilt, indifference, or lack of remorse (1).

## What Is Autism?

Autism is defined as a neuro-developmental disability, meaning that it involves the brain and starts very early in life when the brain is still forming, still plastic, and still changeable. Autism involves differences and difficulties in several areas: social interaction; communication; the presence of narrow, repetitive behaviors; and difficulty adjusting to change. ASD occurs more frequently in males than females—usually a four-to-one ratio. Additionally, there is a wide range in intellectual ability for individuals with ASD where IQ's range from below 25 to above 150.

## Low functioning individuals

The term low functioning may be used to describe persons with lower IQs. These persons have difficulty with basic life skills such as safely crossing a street, negotiating a financial transaction, and making sense of social interactions. They typically have a caregiver with them at all times. Oftentimes, these low functioning individuals are also non verbal. Those who are non verbal may use alternative communication such as American or other Sign Language, Picture Exchange Communications Systems (PECS) or computers that can speak for them.

Although individuals with ASD could commit a criminal offense, their intent to do so could be difficult to determine, questionable in court, and their competency may not reach the level of responsibility for an offense. Also, in most circumstances, individuals would be greatly compromised in their ability to assist in their own defense.

up to seven times more contacts with law enforcement during their lifetimes, than members of the general population (3). While there is no evidence to suggest that they will commit crime at a higher rate than the general population, those that do and can be held responsible for their acts will typically be the more independent, so-called higher functioning person with autism or Asperger syndrome (4).

Persons with ASD often get into trouble without even realizing they have committed an offense. Offenses such as making threatening statements; personal, telephone, or internet stalking; inappropriate sexual advances; downloading child pornography; accomplice crime with false friends; and making physical outbursts at school or in the community, would certainly strike most of society as offenses which demand some sort of punishment. This assumption, though valid at face value, may not take into account the particular issues that challenge the ASD individual. Problems with sensory overload, poor social awareness, semantic misunderstandings, inability to deal with changes in routine or structure, and little to no understanding of non-verbal communications, are the very kinds of things that make more appropriate responses to society very difficult for someone with ASD. For example, what appears as anti-social behavior to the "regular" world is often simply the manifestation of the ASD person's social misunderstandings. While most would see too many phone calls in the middle of the night as aberrant phone stalking, the ASD person might well view the situation as one friend wanting to talk to another, no matter the time or frequency of calls. And a physical outburst at school might well be related to the ASD person's sensory dysfunction, inability to deal with interruptions in the daily routine or emotional lability. Emotional lability means to be susceptible to change, error, or instability and stems from its Latin roots meaning prone to slip. This often presents itself in individuals with ASD; their emotions can change very quickly. They can become upset, scared, or anxious very quickly. They may also be very anxious one minute and then calm the next or vice versa. So, while the individual with ASD might have committed the offense in question, the intent might well have been anything other than to do harm (5).

The offender may appear as normal, be more able academically and more independent than a person with classic or low-functioning autism. Yet, these strengths can mask social and communication deficits that go unseen or misunderstood by those with whom they have contact.

Their communication difficulties include hardships in making sense of the verbal and body language of others. Their difficulty in maintaining eye contact or insistence on changing the subject of conversation to a topic of their choice—all typical diagnostic behaviors of a person with autism—can mislead an investigator, attorney, or judge. They may see someone who seems to lack respect and observe a "rude, fidgety and belligerent" person who, by nature of his lack of eye contact and evasive conversation, appears to have something to hide. Standard interrogation techniques that utilize trickery and deceit can confuse the concrete thinking person who has autism or Asperger syndrome into producing a misleading statement or false confession. They can become overly influenced by the friendly interrogator. Isolated and in a never-

Criminal justice professionals should be aware that a person with autism has less ability to understand verbal communication and is more limited than their overall skills. The simplest thing professionals can do to be helpful is to speak slowly. Individuals with ASD process information much more slowly than typical people who have their same intelligence level and skills.

Another helpful tool is to always have a pen and paper available. If in doubt, write it down. If they are in doubt, let them write it down. Their visual skills are much stronger than their auditory skills.

Individuals with ASD are a concrete group; therefore, criminal justice professionals must not mistake their concreteness for making a wise-crack. One child with autism was given an intelligence test in which he had to take felt pieces and put them together to make a another child's face. The child made a face with a big smile. The child with autism was then asked, "How's the child feel?" And he said, "Soft." A teenager with autism was asked by a questioner who knew he had recently turned fifteen, "How old are you? The teen replied "Fifteen". The questioner then asked, "When was that?" "On my birthday", he replied. Somebody could take this type of response as a wise-crack because most people would understand what the questioner meant. However, very often people with autism have trouble with the context, connotation, and/or the meaning of the sentence. For this reason, professionals must be very direct and very concrete in their language choice when interacting with autistic individuals, and they must never rush to judgment concerning the responses of people with autism. Frequently, their responses seem to be disrespectful, "smart aleck" and off topic, but this behavior is normal for the autism spectrum.

Weak verbal abilities often mask much higher intelligence levels in people with autism. A lot of times when they go through life, particularly in school, they don't understand what the teacher is saying. That gets them in trouble because the teacher thinks they're not listening and they're not obeying. Very often to get out of this situation, they'll just agree. As a result the teacher keeps saying, "Do you hear me; do you understand me?" They don't understand but they can tell the teacher is getting annoyed. Finally they just say "yes". They have learned that an affirmative answer gets them out of the situation. Thus in interview settings the effects of pushing too hard or too intensely for answers will generate affirmative answers from individuals with autism which do not necessarily reflect any truth.

People with autism have reported that it is really hard for them to concentrate and understand what they are saying when they are looking directly at somebody. Many people in society see this as rude behavior. A judge or attorney who asks questions and then observes that the person with autism is looking off into the distance may assume this reflects a lack of respect. In reality, this is normal behavior for the individual. When interviewed, one young man with autism made the point. "I keep telling people 'I'm looking at you. I'm looking at you. I'm looking at you. I'm looking at you. I don't understand a word that you're saying, but I'm looking at you. I'm looking at you". And some people with autism have actually said, "You can have your choice

methods of communication will help the person with autism to answer in a way that can be understood and make sense to all involved parties.

## Environmental Accommodations

People with autism may have more difficulty in that they are over stimulated by the sensory environment—the sights and sounds that will distress them. Noises are louder for them. Normal background noise that may seem negligible to the average person can be completely overwhelming or overpowering to this population. When this occurs, not only can they not hear what people are asking them, but they can sometimes become very anxious and even terrorized by the situation or by the noise.

Additionally, lights are often brighter for those with ASD. For example, when a person with autism is outside on a sunny day—which in North Carolina most of us love—the light may be very over stimulating causing the person to become upset. For the person with ASD, it would be like somebody shining a very, very bright flashlight right in the eye. Therefore, in many environments, the lighting itself causes distress.

Intense sensitivity can extend to any of the senses and really interrupt functioning on many levels. Many very, very capable people with autism will score high on an IQ test but can have horrible school records. The common noise, disruption, and movement in a typical classroom in a typical school can be so disruptive, annoying, upsetting, distracting that they cannot focus on that one thing in the classroom on which they are supposed to focusing—which is the teacher or maybe an assignment. The same situation may exist in a courtroom or interview room.

As a result, adjustments in the environment can be crucial to a successful interview. Consider making accommodations to the sensory environment when interacting with victim, witness, or offender who has autism or Asperger syndrome. Keep lighting low; use subdued colors; limit distracting images or pictures; eliminate the presence of non-essential personnel; avoid using perfume, aftershave, or scented soaps; and avoid touching the person with autism.

## Sentencing Considerations

In those cases where it has become clear that the person has committed the crime and qualifies for a diversion or probation program, the offender may be further stymied by his autism. Traditional options might include group therapy with other offenders. Meeting with strangers, group discussions about personal feelings, sharing personal information or contributing comments about others will be difficult conditions for the person ASD to meet (9).

Corrections professionals can find success with the ASD population when they create diversion or probation programs that:

- Use language and terms the person will understand.

language the questioner is using. Each case will be different, each fact pattern is different, and the ability of people with ASD to form intent and to control actions certainly differs from one individual to the next. All concerned parties should consider choosing an expert who can both interpret and testify in court if needed . There are so many things in life that the person with autism can misunderstand even though they are trying hard and doing their best. The world is just complicated for them.

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Support Agencies:

TEACCH teacch.com 919-966-2174

Autism Society of North Carolina autismsociety-nc.org 800-442-2762

# Autism Principles for Prosecutors

1. Prosecutors should take the nature and effects of Autism Spectrum Disorder (ASD) into account in determining both whether to prosecute and how to resolve a criminal case involving a defendant affected by ASD. .

2. Because of the broad range of behaviors manifested in persons affected by ASD (as illustrated below), objective ASD resources and objective ASD experts should be sought out in local communities to assist law enforcement and prosecutors in understanding ASD and evaluating the appropriateness of such cases for prosecution.

3. In determining whether to charge or prosecute a case, prosecutors should be aware that some individuals affected by ASD may require little more than giving explicit instructions to prevent recurrence of the offensive behavior. Objective ASD experts may be of assistance to the prosecutor in determining the corrective action necessary to prevent future or recurrent behavior. As persons with ASD age, they may also become better adapted and present different behaviors than in their youth; therefore, both the age, and the aging, of a person affected by ASD should be considered by the prosecutor in resolving relevant criminal cases.

4. Prosecutors should consider deferring criminal prosecution in cases involving young persons affected by ASD who are first offenders.

5. When considering alternate dispositions of criminal matters, prosecutors and judges often look for expressions of remorse from the offender to gain reassurance of future compliance with the law. Prosecutors and judges should be aware that ASD may impair the ability of some offenders to respond with expressions of remorse.

6. Prosecutors should be aware that in an interrogation setting a person affected by ASD may appear deceptive because of deficits in communication skills, such as the inability to make normal eye contact. At the same time persons affected by ASD may be over compliant with suggestions made by police officers. Conversely, some persons affected by ASD may have learned to lie through experience and can become skillful liars. An objective ASD expert can aid interrogators in developing a pre-test to gauge the autistic person's ability for, and quality of, deception.

7. Prosecutors should encourage therapeutic intervention in cases of suspected child pornography use by persons affected by ASD and seriously consider probationary periods and deferred prosecutions to monitor compliance before actual prosecutions in such cases. Prosecutors should pay particular attention to whether the offender has ASD, whether there is any prior history of directly offending against children, having produced or distributed child pornography and whether there is a prior history involving child pornography.

8. Persons with ASD experience lifelong difficulties. While, many persons affected by ASD live independent, full lives; some persons affected by ASD are not able to live independently, and need to live with their families – their parents and/or siblings. Therefore sex offender registration and residency restrictions should be considered by prosecutors in sentencing negotiations based upon the offender's functioning level, individual circumstances and risk of recurrent behavior.

**NOTE: These principals were adapted for use in the State of North Carolina by District Attorney Michael D. Parker, elected District Attorney for Judicial District 22A.**

# Bullying And Autism: Study Finds Almost Half Of Adolescents With An Autism Spectrum Disorder Have Been Victimized

Posted: 09/06/2012 12:28 pm Updated: 09/06/2012 6:04 pm

All bullying is troubling -- no matter where, when or to whom it occurs.

But suggests that teenagers with autism spectrum disorders (ASDs) -- who "may be uniquely vulnerable to [bullying] given the social and relational problems that are hallmarks of their condition," the authors write -- are targeted much more often than their peers who don't have ASDs.

The study, which draws information from a decade-long examination of "adolescents receiving special education services" done on behalf of the U.S. Department of Education, shows that 46.3% -- or nearly half -- of young men and women with ASDs are victims of bullying, while 14.8% engage in "perpetration" themselves. Another 8.9% fall into both categories simultaneously ("victimization/perpetration").

The conclusions were based on interviews with more than 900 parents of children with ASDs; researchers also collected feedback from staff members at the students' schools and from school principals. This is the first nationally representative study to look at victimization as well as perpetration in this population, the authors write.

While the figures for perpetration and "victimization/perpetration" hew closely to estimates for non-spectrum teens (13% and 6.8%, respectively), the victimization statistic for adolescents on the spectrum is far higher than the 10.6% estimate for teens without ASDs.

Students with ADHD *as well* as an ASD were victimized more often than their non-ADHD peers on the spectrum (55.6% vs. 41.4%), the researchers found. They were also more likely to be perpetrators of bullying (20.9% vs. 11.5%) and to experience the "victimization/perpetration" mix.

The statistics also reveal that the integration of teens with ASDs into general education classes (vs. special) is not always a solution to the bullying problem; in fact, it may exacerbate it. This conclusion "contradicts previous research," according to the authors. While previous studies have shown that kids with ASDs would benefit from learning and working with the general student population at school, this research found that students on the spectrum who had more than three quarters of their classes in general education were more likely to be victimized (but less likely to be bullies themselves) than other students. In fact, more than 70% of students with 76-100% of their classes in general education were found to be victims of bullying.



The researchers acknowledged that the study was likely limited by a broad definition of "bullying" and by parental underreporting.

Still, they call for improved anti-bullying programs that are more sensitive to the specific experiences of students with ASDs and ADHD. , the study's lead author, Dr. Paul R. Sterzing, said the research documented "a profound public health problem."

Caroline Miller, editorial director at the Child Mind Institute, that the research "wasn't exactly a surprise" -- but held out hope that behaviors might already have changed in the more than ten years since the survey's data were collected in 2000 -1.

**Read more on HuffPost Parents:**

**§ 15A-1225.1. Child witnesses; remote testimony.**

(a) Definitions:

(1) Child. – For the purposes of this section, a minor who is under the age of 16 years old at the time of the testimony.

(2) Criminal proceeding. – Any hearing or trial in a prosecution of a person charged with violating a criminal law of this State, and any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult.

(3) Remote testimony. – A method by which a child witness testifies in a criminal proceeding outside of the physical presence of the defendant.

(b) Remote Testimony Authorized. – In a criminal proceeding, a child witness who has been found competent to testify may testify, under oath or affirmation, other than in an open forum when the court determines:

(1) That the child witness would suffer serious emotional distress, not by the open forum in general, but by testifying in the defendant's presence, and

(2) That the child's ability to communicate with the trier of fact would be impaired.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. Hearings in the superior court division, and hearings conducted under Subchapter II of Chapter 7B of the General Statutes, shall be recorded. The presence of the child witness is not required at the hearing unless ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings of fact and conclusions of law that support the court's determination. An order allowing the use of remote testimony shall do the following:

(1) State the method by which the child is to testify.

(2) List any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the child.

(4) State any condition or limitation upon the participation of individuals in the child's presence during his or her testimony.

(5) State any other condition necessary for taking or presenting the testimony.

(e) Testimony. – The method used for remote testimony shall allow the judge, jury, and defendant or juvenile respondent to observe the demeanor of the child as the child testifies in a similar manner as if the child were in the open forum. The court shall ensure that the defense counsel, except a pro se defendant, is physically present where the child testifies, has a full and fair opportunity for cross-examination of the child witness, and has the ability to communicate privately with the defendant or juvenile respondent during the remote testimony. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall:

(1) Prohibit the use or application of any other method or procedure authorized or required by statute, common law, or rule for the introduction into evidence of the statements or testimony of a child in a criminal or noncriminal proceeding.

(2) Be construed to require a court, in noncriminal proceedings, to apply the standard set forth in subsection (b) of this section, or to deviate from a standard or standards authorized by statute, common law, or rule, for allowing the use of remote testimony in noncriminal proceedings.

(g) This section does not apply if the defendant is an attorney pro se, unless the defendant has a

court-appointed attorney assisting the defendant in the defense, in which case only the court-appointed attorney shall be permitted in the room with the child during the child's testimony. (2009-356, s. 1.)

**Rule 616. Alternative testimony of witnesses with developmental disabilities or mental retardation in civil cases and special proceedings.**

(a) Definitions. – The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a civil proceeding or special proceeding if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of a named party or parties or from testifying in an open forum and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of a named party or parties or from testifying in an open forum.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. Except as provided in this section, the court shall ensure that the counsel for all parties is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. In a proceeding where a party is representing itself, the court may limit or deny the party from being physically present during testimony if the court finds that the witness would suffer serious emotional distress from testifying in the presence of the party. A party may waive the right to have counsel physically present where the witness testifies.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. (2009-514, 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.)

**§ 15A-1225.2. Witnesses with developmental disabilities or mental retardation; remote testimony.**

(a) Definitions. – The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a prosecution of a person charged with violating a criminal law of this State and in any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of the defendant and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of the defendant.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. The court shall ensure that the counsel for all parties, except a pro se defendant, is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. The court shall ensure that the defendant or juvenile respondent has the ability to communicate privately with defense counsel during the remote testimony. A party may waive the right to have counsel physically present where the witness testifies. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. (2009-514, s. 2.)

**GENERAL ASSEMBLY OF NORTH CAROLINA**
**SESSION 2009**

# SESSION LAW 2009-270
# HOUSE BILL 1438

AN ACT TO PROVIDE FOR A PILOT PROGRAM TO DETERMINE THE EFFECTIVENESS OF USING VIDEOCONFERENCE TECHNOLOGY TO CONDUCT COURT PROCEEDINGS, OTHER THAN TRIALS, INVOLVING PERSONS IN THE CUSTODY OF THE DEPARTMENT OF CORRECTION AND IN LOCAL CONFINEMENT FACILITIES.

The General Assembly of North Carolina enacts:

**SECTION 1.** The Administrative Office of the Courts, in consultation with the Department of Correction, shall conduct a pilot program to test the feasibility of using videoconference or similar technology to conduct court proceedings involving defendants in the custody of the Department of Correction, instead of requiring live appearances in court for those defendants. The Administrative Office of the Courts shall designate two counties to participate in the pilot, and the Department of Correction shall designate one prison facility. The Administrative Office of the Courts may also designate one or more counties to participate in a pilot program involving persons in the custody of local confinement facilities to test the feasibility of using videoconferencing equipment to conduct proceedings authorized by this act but not otherwise authorized by law.

**SECTION 2.** Notwithstanding any other provision of law, the courts participating in the pilot program authorized by this act may conduct proceedings required under G.S. 15A-511, Article 26 of Chapter 15A of the General Statutes, G.S. 15A-601, and G.S. 15A-941 by videoconference without the consent of the defendant. If a defendant voluntarily and knowingly waives his or her right to appear in person, the court may also accept guilty pleas and impose sentences in cases in which the plea is taken by videoconference, conduct hearings on motions, and conduct probation modification or revocation proceedings. The waiver may be taken by videoconference. In the jurisdictions participating in the pilot programs, no proceeding in which a person is charged with a capital felony may be conducted using videoconferencing equipment, but nothing in this act shall be construed to limit the use of testimony at a trial taken by videoconferencing equipment when the testimony is otherwise allowed by law to be taken in that manner.

**SECTION 3.** The equipment used in conducting the videoconference proceedings authorized by this act shall be used in a manner that ensures that the judicial official conducting the proceeding and the defendant can see and hear each other and that ensures that the defendant and his or her attorney may communicate during the proceeding in a manner that preserves the defendant's right to confidential communication with counsel.

**SECTION 4.** The North Carolina Rural Courts Commission, in cooperation with the Department of Correction, shall study the effectiveness of the use of videoconferences for these proceedings and report its findings and recommendations for expansion or modification to the Chief Justice, the Secretary of Correction, the Chairs of the Senate and House Appropriations Subcommittees on Justice and Public Safety, and the Chairs of the Senate and House Appropriations Committees. The study shall address the costs of implementing videoconferencing on a statewide basis for these purposes, as well as the cost savings obtained through the use of such equipment, the quality of the transmissions, the frequency of use, and any other relevant information the Commission deems appropriate. The report shall be submitted no later than May 1, 2010. The Administrative Office of the Courts and the Department of Correction may seek grant funds to offset any costs associated with the study that cannot be provided by appropriations to those agencies.

**SECTION 5.** This act is effective when it becomes law.
In the General Assembly read three times and ratified this the 1st day of July, 2009.

s/ Walter H. Dalton
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 10:38 a.m. this 10th day of July, 2009

**GENERAL ASSEMBLY OF NORTH CAROLINA**
**SESSION 2009**

**SESSION LAW 2009-514**
**HOUSE BILL 775**

AN ACT TO PROVIDE FOR ALTERNATIVE MEANS OF TESTIMONY FOR PERSONS WITH DEVELOPMENTAL DISABILITIES AND PERSONS WITH MENTAL RETARDATION, AS RECOMMENDED BY THE JOINT STUDY COMMITTEE ON AUTISM SPECTRUM DISORDER AND PUBLIC SAFETY.

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 6 of Chapter 8C of the General Statutes is amended by adding a new section to read:

"**Rule 616. Alternative testimony of witnesses with developmental disabilities or mental retardation in civil cases and special proceedings.**

(a) Definitions. – The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a civil proceeding or special proceeding if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of a named party or parties or from testifying in an open forum and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of a named party or parties or from testifying in an open forum.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. Except as provided in this section, the court shall ensure that the counsel for all parties is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. In a proceeding where a party is representing itself, the court may limit or deny the party from being physically present during testimony if the court finds that the witness would suffer serious emotional distress from testifying in the presence of the party. A party may waive the right to have counsel physically present where the witness testifies.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation."

**SECTION 2.** Article 73 of Chapter 15A of the General Statutes is amended by adding a new section to read:

"**§ 15A-1225.2. Witnesses with developmental disabilities or mental retardation; remote testimony.**

(a) Definitions. – The following definitions apply to this section:

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) Remote Testimony Authorized. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a prosecution of a person charged with violating a criminal law of this State and in any hearing or proceeding conducted under Subchapter II of Chapter 7B of the General Statutes where a juvenile is alleged to have committed an offense that would be a criminal offense if committed by an adult if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of the defendant and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of the defendant.

(c) Hearing Procedure. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) Order. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.

(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.

(3) State any special conditions necessary to facilitate the cross-examination of the witness.

(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.

(5) State any other conditions necessary for taking or presenting testimony.

(e) Testimony. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. The court shall ensure that the counsel for all parties, except a pro se defendant, is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. The court shall ensure that the defendant or juvenile respondent has the ability to communicate privately with defense counsel during the remote testimony. A party may waive the right to have counsel physically present where the witness testifies. Nothing in this section shall be construed to limit the provisions of G.S. 15A-1225.

(f) Nonexclusive Procedure and Standard. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation."

**SECTION 3.** This act becomes effective December 1, 2009, and applies to any hearings or trials held on or after that date. Nothing in this act shall be construed to abrogate any judicial rulings or decisions prior to the effective date of this act that allowed or disallowed witness testimony in any criminal proceeding or abrogate any judicial rulings that prohibit a psychological evaluation of an unwilling witness.

In the General Assembly read three times and ratified this the 7th day of August, 2009.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 3:27 p.m. this 26th day of August, 2009

# Tab мл:
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# County Departments of DSS

On the Civil Side
A UNC School of Government Blog
http://civil.sog.unc.edu

# The Guardian of Last Resort

**Author :** Meredith Smith

**Categories :** Guardianship

**Tagged as :** Clerk of Superior Court, department of social services, Incompetencypublic agent guardian

**Date :** February 3, 2016

After receiving a report and finding a need for protective services, the county department of social services (DSS) requests the DSS attorney file a petition with the court to adjudicate Jane Doe an incompetent adult under G.S Chapter 35A. The matter is heard by the clerk of superior court. DSS, as the petitioner, has the burden of proof. Through the presentation of testimony and other evidence at the hearing, including a multidisciplinary evaluation ordered by the clerk and prepared by DSS, the clerk determines that there is clear, cogent and convincing evidence that Jane is incompetent and that her best interests will be served by appointing DSS as her guardian of the person.

**What analysis must the clerk apply before appointing DSS as guardian of the person?**

In North Carolina, DSS is often referred to as the "guardian of last resort." This is because our statutes direct the clerk to consider appointing a guardian in a certain order of priority. G.S. 35A-1214.

1. First, the clerk must consider **an individual recommended by a will or other writing**. Any parent may recommend the appointment of a guardian by will for an unmarried child adjudicated incompetent. G.S. 35A-1212.1. The clerk is not bound by the writing, but the recommendation is a strong guide for the clerk in appointing a guardian. *Id.*
2. Next, the clerk must consider an **individual**, such as a family member of the ward or other person qualified to serve. G.S. 35A-1214.
3. If there is no qualified individual, the clerk must then consider appointing a **corporation**.
4. Finally, ***once diligent efforts have failed*** to produce an appropriate individual or corporation to serve, the clerk may appoint the **disinterested public agent** as guardian, which is the director or assistant director of a county DSS. G.S. 35A-1202(4).

Notwithstanding the priority set forth in the statute, the clerk is **always** charged with basing the appointment of the guardian on the best interests of the ward. *Id.*

In practice, DSS is typically appointed as a **guardian of the person (GOP)** (i) when there is no family member or other qualified individual available to serve as GOP, or (ii) when there is significant family conflict such that the appointment of any family member as GOP could have detrimental effects on the ward. A GOP is a guardian appointed solely for the purpose of performing duties related to the care, custody, and control of the ward. G.S. 35A-1202(10). This is opposed to a guardian of the estate who is appointed to manage property and business affairs of the ward and a general guardian who is appointed to do both. G.S. 35A-1202(7) and (9). Infrequently, DSS may be appointed as a general guardian or guardian of the estate. This post focuses on an appointment of DSS as GOP as that is the most common appointment for DSS.

**Is DSS the only available public option?**

Presently in NC, the director or assistant director of DSS is the only official authorized to serve as the "disinterested public agent" guardian. G.S. 35A-1202(4). Prior to 2012, the statutory definition of disinterested public agent included not only DSS but also other state and local human services agencies such as public health departments and area

mental health authorities (now known as local management entities/managed care organizations (LME/MCOs)). The General Assembly enacted legislation eliminating these other agencies from the list of potential guardians, leaving DSS as the only option. A previous blog post by my colleague, Aimee Wall, discusses the reasons behind these changes.

At the time that legislation was enacted, over 1,000 people had to be transitioned from one guardian to another. To accommodate this influx, the Division of Aging and Adult Services (DAAS) of NC Department of Health and Human Services (DHHS), which oversees the county DSS guardianship programs, entered into contracts with corporations to provide public guardianship services for some of these wards. Today, nine corporations serve over 1,300 wards using public dollars under the DHHS contract in addition to the wards served by DSS.

Note that a disinterested public agent guardian is different than a public guardian. Article 11 of G.S. Chapter 35A authorizes the clerk to appoint a public guardian to serve in the county for a term of eight years. G.S. 35A-1270. A public guardian is typically appointed as guardian of the estate when a ward needs assistance managing or disposing of assets and no one else is available or qualified to serve. Not every clerk appoints a public guardian because there is generally no separate source of funds to pay bond premiums. In addition, commissions from the ward's estate are typically negligible. In practice, some clerks appoint private attorneys on a case by case basis as a guardian of the estate to handle low asset cases. *See* 2 Joan G. Brannon & Ann M. Anderson, North Carolina Clerk of Superior Court Procedures Manual 86.59 (2012).

As mentioned above, DSS is most frequently appointed to serve as GOP and is the only available option as the disinterested public agent guardian. The GOP is not entitled to receive a fee for services and time carrying out his or her duties, but he or she is entitled to reimbursement for reasonable expenses incurred. G.S. 35A-1241(b). Therefore, when a family member or other individual is unwilling or unqualified to serve, DSS (or a corporation through a DHHS or county contract) is often the only viable option for appointment as GOP.

**Does DSS have to accept the appointment by the clerk?**

If a person is adjudicated incompetent in NC and the clerk appoints DSS as the guardian, DSS is required to serve and may not decline the appointment. G.S. 35A-1213(d). If DSS believes that there is a conflict of interest or service as guardian may not be in the ward's best interest, DSS may bring the matter to the attention of the clerk by filing a motion in the cause and seek the appointment of a different guardian. *Id.* However, with limited exception set forth 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. G.S. 35A-1202(4).

In some states, such as Florida, public agent guardians may only serve a fixed number of wards and waitlists are common for public guardianship services. *See* Pamela B Teastor, et. al., Wards of the State: A National Study of Public Guaridanship, pg. 115 (March 31, 2005). NC has not imposed such a cap on the number of wards DSS may serve. This policy has the benefit of ensuring that wards are not left in limbo waiting for guardianship services. However, it can also result in overburdening the available public agent guardians where resources are not allocated to keep up with demand. A 2012 report published at the request of the NC DSS Director's Association Adult Service Committee recommended a ratio of one full-time DSS staff member for every 22 wards served. A later December 2013 DAAS report concluded that an additional 33 full-time employees are needed across the state to meet current needs at the recommended ratio.

**Does DSS have to post a bond?**

In the guardianship context, a bond is typically required when a guardian of the estate or general guardian is appointed. G.S. 35A-1230. The purpose of the bond is to protect the ward against financial loss in the event the guardian fails to properly exercise his or her duties. However, a bond is not required when a clerk appoints someone as guardian of the person that is a resident of NC. *Id.*

An exception to this rule is when DSS is appointed as guardian of the person. DHHS must require or purchase bonds for all disinterested public agent guardians, regardless of whether they serve as general guardian, guardian of the estate, or guardian of the person. G.S. 35A-1239. In practice, DHHS has purchased a blanket bond covering all disinterested public agent guardians. *See* DAAS Guardianship Services Manual, Sec. 6640, 3(c).

The clerk does not have a role in setting a bond amount or confirming bond coverage where DSS serves as guardian of the person. *Id.* The duty falls on DHHS and the DSS as the guardian to ensure each appointment is covered by the blanket bond. Per the DAAS Guardianship Manual, after DSS is appointed as guardian of the person by the clerk, DSS is required to send notice of appointment and request for bond coverage to DHHS using form DHHS-7016.

**Is DSS subject to liability for actions as guardian of the person on a ward's behalf?**

In addition to prescribing the powers and duties of the guardian of the person, Chapter 35A also sets forth limits on the liability of any individual, corporation, or public agent serving as guardian of the person. G.S. 35A-1241. If a guardian of the person acts within the limits imposed by (a) **Article 8 of Chapter 35A**, and (b) **the clerk's order** appointing the guardian, the statute provides that the guardian will not be held liable for damages to the ward or the ward's estate that result from the following:

1. The authorization, consent, or approval of legal, psychological, or other professional care, counsel, treatment, or service for the ward, if damages result from negligence or other acts of a third person; and
2. The authorization of medical treatment or surgery for the ward, if the guardian acts in good faith and is not negligent.

Note, included within Article 8 of Chapter 35A is the **duty of DSS to file status reports with the clerk that comply with G.S. 35A-1242** within six months after being appointed and annually thereafter.

Notwithstanding the protections afforded to the guardian of the person under G.S. 35A-1241, the GOP ***may petition the clerk for the clerk's concurrence*** in any consent or approval given by the guardian on the ward's behalf that may be required or in the ward's best interests. G.S. 35A-1241(a)(3). This includes any consent or approval for the purpose of enabling the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. *Id.* However, the guardian may not consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk. *Id.*

If the clerk does not concur in the consent or approval, the clerk could remove guardian and appoint a new guardian. G.S. 35A-1290 (giving the clerk authority to remove the guardian and to enter orders for the better care and maintenance of wards); In re Guardianship of Thomas, 183 NC App 480 (2007) (rejecting the argument that a clerk may only remove a guardian for cause and holding that the clerk has the permissive authority to remove a guardian and enter orders to ensure the better care and maintenance of the ward under G.S. 35A-1290(a)).

**The Bigger Picture: The Role of DSS throughout the Proceeding and after Appointment**

DSS serves an important role in the NC guardianship system as the disinterested public agent guardian. Service as guardian of the person is a role that many DSS directors and staff see as an important part of their mission. As was the case with fictional Jane at the start of this post, DSS may conduct an adult protective serves investigation if they receive a report regarding an abused or exploited disabled or older adult. *See* Aimee Wall, Financial Exploitation of Older Adults and Disabled Adults: An Overview of North Carolina Law (Oct. 2014) . After finding a need for protective services, DSS may then file a petition for the person to be adjudicated incompetent. G.S. 35A-1105. DSS may be ordered by the clerk to prepare a multidisciplinary evaluation (MDE) as a designated agency, which is a key tool used to assess competency during the competency adjudication hearing. G.S. 35A-1101(4) and (14). As described herein, DSS may then be appointed as guardian for the ward.

It is clear that the clerk is directed to consider DSS as a guardian of last resort in all cases. However, because DSS is the only remaining option as the public agent guardian, it is important to recognize the complex and dynamic role DSS may play prior to, during, and after an incompetency and guardianship proceeding before the clerk. Feel free to contribute your thoughts and feedback below.

# Tab 11: Status Reports

STATE OF NORTH CAROLINA ► File No.

_____ _____

County

IN THE MATTER OF:

# STATUS REPORT

G.S.35A-1242

| Name and Address of Ward | **Type of Guardianship** |
|---|---|
| | ☐ **Guardianship of Person** |
| | ☐ **General Guardianship** |
| | ☐ **Limited Guardianship** |
| | |
| | |
| Date of birth | |
| Name and Address of Guardian | ☐ **Initial Status Report** |
| | ☐ **Annual Status Report** |
| | |
| | |
| | |
| | |

The undersigned guardian, being duly sworn, says that insofar as he/she is informed and can determine, the following is a complete and accurate status report and is submitted in compliance with North Carolina General Statute 35A-1242.

This status report covers the period of time _____ (day) of _____ (month), _____ (yyyy)

extending from the _____ (day) day of _____ (month), _____ (yyyy)

**Report or summary of ward's medical, dental & mental health examinations**

**A. Medical examination (including hospitalizations)**

1. Date of examination(s)

2. Name and address of examining physician(s)

(Physician Name)

3. Place of examination(s)

4. Report of examinations(s) (Guardian may attach copy of additional examination reports)

**B. Dental**

1. Date of examination(s)

2. Name and address of examining dentist(s)/physician(s)

(Dentist/Physician Name)

3. Place of examination(s)

4. Report of examination(s) (Guardian may attach copy of additional examination reports)

**C. Mental health treatment (including hospitalizations)**

1. Date of examination(s)

2. Name and address of treating clinician(s)

3. Place of examination(s)

4. Report of examination(s) (Guardian may attach copy of additional examination reports)

**D. Report of guardian on performance of duties**

**E. Report of the ward's residence, education, employment, and rehabilitation or habilitation**

**F. Report of guardian's efforts to seek least restrictive alternatives including**

1. Restoration

2. Transfer

3. Limited

4. Alternatives

**G.** Other Reports

Affirmation of Report

(Guardian's Signature)

(Agency)

(Street Address)

(City) (State) (Zip Code)

(Telephone Number)

I, _____ (Guardian), first being duly sworn, affirm that the foregoing status report is complete and accurate to the extent that I can determine and am informed as to the status of _____ (Ward)

(Guardian's Signature)

Sworn to and subscribed before me

This _____ day of _____ _____

(Notary Public)

My commission expires: _____

submitted to: _____
Clerk

_____
Other

Date: _____

# Guardianship Status Report Instructions

## Statutory Requirements

NC G.S. 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 clerk and submit a copy of the initial status report to the designated agency, if there is one. Such guardian shall file a second status report with 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 the clerk and submit a copy of the status report to the designated agency.

(a1) Each status report shall include all the following:

1) A report or summary of recent medical and dental examinations of the ward by one or more physicians and dentists. In instances when the guardian has made diligent but unsuccessful attempts to secure this information, the guardian shall include in the status report an explanation and documentation of all actions taken to attempt to secure this information.
2) A report on the guardian's performance of the duties set forth in this Chapter and in the clerk's order appointing the guardian.
3) A report on the ward's residence, education, employment, and rehabilitation or habilitation.
4) A report of the guardian's efforts to restore competency.
5) A report of the guardian's efforts to seek alternatives to guardianship.
6) If the guardian is a disinterested public agent or corporation, a report of the effort to identify alternative guardians.
7) The guardian's recommendations for implementing a more limited guardianship, preserving for the ward the opportunity to exercise rights that are within the ward's comprehension and judgment.
8) Any additional reports or information required by the clerk.

(a2) The guardian may include in each status report additional information pertaining to the ward's best interests.

b) Each status report shall be filed (i) under the guardian's oath or affirmation that the report is complete and accurate so far as the guardian is informed and can determine or (ii) with the signature of a disinterested, competent witness to a statement by the guardian that the report is complete and accurate so far as the guardian is informed and can determine. Status reports filed with the signature of a disinterested competent witness shall include the full name, address, and telephone number of the witness.

(b1) The clerk shall make status reports submitted by corporations or disinterested public agents available to the Director, or the Director's designee, of the Division of Aging and Adult Services within the Department of Health and Human Services. The Director, or the Director's designee shall review the status reports in connection with the Department's regular program of oversight for these categories of guardians.

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 services agencies providing services to the ward.

d) The clerk, on the clerk's own motion, or any interested party, may file a motion in the cause pursuant to G.S. 35A-1207 with the clerk in the county where the guardianship is filed to request modification of the order appointing the guardian or guardians for consideration of any matters contained in the status report.

## Contents of Status Reports

Complete name and address of ward and guardian

| | |
|---|---|
| **Type of Guardianship** | Check appropriate box as the Order of Appointment |
| **Initial Status** | Check if six months from the date of appointment |
| **Annual Status** | Check if twelve months from the date of appointment; or subsequent year from the date of appointment |
| **Status report period** | Enter the month, day and year the status report covers.<br>(Ex: date of appointment 02/15/2014, initial status due on or before 08/15/2014: Period covered 02/15/2014 to 08/15/2014; Annual due on or before 02/15/2015) |

**A. Medical Examination**

1. Date of exam - indicate all dates within the period covered, including dates of hospitalizations
2. Name and address of examining physician(s) for all dates within the period covered
3. Place of examination - physical location of medical visit for all dates within the period covered
4. A report or summary of recent medical examinations or treatments of the ward by one or more physicians. (Guardian may attach a copy of examination report or summarize each visit).

**B. Dental Examination**

1. Date of exam - indicate all dates within the period covered
2. Name and address of examining dentist(s) for all dates within the period covered
3. Place of examination - physical location of the dental visit for all dates within the period covered
4. A report or summary of recent dental examinations or treatments of the ward by one or more dentist(s). (Guardian may attach a copy of examination report or summarize each visit)

**Note**: If a ward refuses to see a dentist for any reason it is not acceptable to write N/A. The Guardian must document efforts or attempts and/or request medical physician to do an oral (mouth/gum) exam. Document the medical physician findings.

**In instances when the guardian has made diligent but unsuccessful attempts to secure medical and dental information, the guardian shall include in the status report an explanation and documentation of all actions taken to attempt to secure this information.**

**C. Mental Health Examination**

1. Date of exam - indicate all dates within the period covered, including dates of hospitalizations
2. Name and address of examining mental health professionals for all dates within the period covered
3. Place of examination - the physical location of the visit for all dates within the period covered
4. A report or summary of recent mental health examinations or treatments of the ward by one or more physicians. (Guardian may attach a copy of examination report or summarize each visit).

**Note:** The status report does not define "recent" but a report is usually considered recent if it has been done during the period the status reports covers.

D. **Report of Guardian on Performance of Duties**

This is the guardian's summary of how well you have been able to fulfill the duties outlined in the Order of Appointment or the difficulties and or obstacles the guardian has experienced in fulfilling these duties.

**E. Report of ward's residence, education, employment, rehabilitation, or habilitation.**

This is the guardian's summary of your assessment, goals and plan of care; how the ward's needs have been met. Includes documentation of ward's progress and any difficulties or obstacles the guardian has experienced in fulfilling their role as surrogate decision- maker. This report should include information on the ward's residence, education, employment (if applicable) and rehabilitation or habilitation services

**F. Report of guardian's efforts to seek least restrictive alternatives**

1. Restoration - document any and all efforts to restore competency
2. Transfer - document efforts to identify alternative guardians. If the ward has involved family or friends, document all efforts to transfer guardianship. If transfer is not appropriate for the ward, document the reasons family and /or friends are not suitable to serve as guardian
3. Limited - document the guardian's recommendation for implementing a more limited guardianship, preserving for the ward the opportunity to exercise rights that are within the ward's comprehension and judgment
4. Alternatives - document the guardian's efforts to seek alternatives to guardianship

**G. Other reports**

Any additional reports or information required by the clerk. This area is to address any other reports or activities or additional information pertaining to the ward's best interests. Report may contain information from mental health treatment, group home staff, staff from treatment facilities or other professionals. Use this area to document any unusual circumstance that the clerk may need to be aware of.

## Affirmation of reports

Each status report shall be filed under the guardian's oath or affirmation that the report is complete and accurate so far as the guardian is informed and can determine. A complete report should include the guardian's notarized signature and be forwarded to the clerk's office and any others as ordered.

# Tab 12: Failure to File & Enforcement of Orders

# Tab 13: Presiding Over Cases with Unrepresented Litigants

## Pro Se Litigants

Cheryl Howell
February 2015
With Additions
A. Elizabeth Keever, May 5, 2017

## Pro Se Litigants

- Nationwide numbers
  - 80% family cases have one
  - 50% family cases have two
- No North Carolina numbers
- Many reasons for high numbers

## N.C. Response

- Forms and Self-Help Centers
- Guidelines for court staff
- Bar Association Task Force Recommendations
  - Unbundled legal services
  - Forms with instructions
  - Self-serve centers
  - Increased pro bono services

## Judicial Guidance

- Not Much and Nothing Specific
- Code of Conduct
  - Promote public confidence in integrity and impartiality of court system
  - Be patient, dignified and courteous
  - Accord every person the full right to be heard

## Case Law

- US Supreme Court
  - Pro se pleadings must be held to "less stringent standards than formal pleadings drafted by lawyers"
    - *Haines v. Kerner,* 404 US 519 (1972)
  - "No constitutional right to receive personal instruction from trial judge on courtroom procedure."
    - *McKaskle v. Wiggins,* 465 US 168 (1984)

## *Turner v. Rogers,* 564 US (2011)

- Indicates that federal Due Process requires "procedural safeguards" for self-represented litigants
- Approved use of court forms
- Approved – and seemed to require under some circumstances – engaged judicial questioning

## N.C. Case Law

- "Pro se defendant cannot expect the trial judge to relinquish his role as impartial arbiter in exchange for the dual capacity of judge and guardian angel of the defendant."
  - *State v. Lashley*, 21 NC App 83 (1974)
- "The North Carolina Rules of Civil Procedure must be applied equally to all parties, without regard to representation by counsel."
  - *Goins v. Puleo*, 350 NC 277 (1999)
  - *Cf. Shwe v. Jaber,* 147 NC App 148 (2001)

## N.C. Case Law

- *Coleman,* 182 NC App 25 (2007)
  - Pro se pleadings same as others
- *Cf. Cordell v. Doyle,* 185 NC App 158 (2007)(unpublished)
  - Ok to consider "*pro se* nature of proceeding"
- *McIntosh v. McIntosh,* 184 NC App 697 (2007)
  - Failure to hire attorney is not "excusable neglect"

## Judicial Responsibility (?)

- Provide meaningful opportunity for all to be heard
- Maintain impartiality and appearance of impartiality
- Protect against unfair advantage
- Meet statutory fact-finding requirements
- Determine best interest of children

## Guidance for Judges

- "Judicial Techniques" article
  - The Judges' Journal Winter 2003
- Protocols
  - Minnesota, Idaho, Charlotte
- National Center for State Courts Best Practices

## Suggestions from "Experts"

- Impartiality doesn't equal passivity
- Should question to obtain necessary general information
- Should explain:
  - The process
  - Elements of claims
  - Burdens of proof
  - Limitations on types of evidence

## Interrogation by Court
### NCGS 8C - 1, Rule 614

- b. Interrogation by court - The court may interrogate witnesses, whether called by itself or by a party.

## Guardianships

- Determination of Competency
- Appointment of Guardian

## Determination of Competency GS 35A – 1112

- 1. Petitioner/Respondent Evidence
- 2. Specific Findings

## Appointment of Guardian GS 35A – 1212

- Evidence deemed necessary by Clerk
- Clerk's Discretion – person who will best serve ward

# Judicial Techniques for Cases Involving Self-Represented Litigants

Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough, and Richard Zorza

This article is an attempt to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-represented litigants. The four authors of this article have worked with and written extensively about the judiciary's response to self-represented litigants—persons choosing to appear in court without a lawyer.[1] The numbers of such persons have increased significantly during the past decade. In most states the majority of family law matters now include at least one unrepresented party. Although the situation in Maricopa County, Arizona (where one of us presides), may be extreme, it is instructive: in recent years, roughly 60 percent of all domestic relations cases involve two unrepresented parties, 30 percent of the cases have a lawyer representing one side, and only 10 percent of the cases have lawyers on both sides.

Some laypersons are able to prepare court documents and present their positions effectively in court, but many others are not. Their lack of knowledge of the law and its rules imposes burdens on the judges and court staff. Courts throughout the country have responded by providing assistance such as easy-to-use forms; simplified instructions; printed and online information about substantive and procedural law; and direct assistance from court staff, often referred to as courthouse or family law facilitators. Much has been written about these programs, and many of them have been evaluated and found to be valuable to both litigants and the courts.[2]

However, one issue of particular concern to trial court judges, and about which little has yet been written, stands out: how a judge can deal with self-represented litigants in the courtroom without departing from the judicial role as a neutral, impartial decision maker. When a party is unable to present its case to the court, how can the judge facilitate the resolution of the matter without in effect becoming the party's lawyer? When there is an imbalance of knowledge in the courtroom, particularly if one party is represented by counsel and the other is not, how can the judge manage the trial or hearing impartially? The judge appears to be caught in a dilemma. If the judge does *not* intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.

We have been involved in many discussions of these issues with trial and appellate judges. Trial judges have no common understanding of the applicable ethical standards, case law, or practical techniques to use to ensure that justice is done in their courtrooms—and to guarantee that they have not violated or bent the rules by "leaning over the bench" to assist a floundering unrepresented party. This article examines the applicable code of ethics and case law and suggests options for trial judges seeking helpful techniques.

This is not the first article to address this issue. In 2002 Dr. Jona Goldschmidt published an article entitled "The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance" in *Family Court Review*.[3] He views judicial reluctance to assist self-represented litigants as arising from the traditional passive role of the judge in the adversary process and judges' basic antipathy, as lawyers, to self-representation. We discuss Dr. Goldschmidt's approach and recommendations later in this article. We hope that these two discussions will serve as the foundation of a rich written literature on this difficult topic—and that trial judges will participate actively in building this body of work.

As will become clear in the discussion of the case law, many judicial statements say that self-represented litigants should be held to the same rules as attorneys. For example, in promulgating a new set of forms for use in uncontested divorce and paternity cases in New Mexico, the New Mexico Supreme Court recently included the following statement: "A self-represented person must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action."[4] Taken literally, this

requirement would bring to a grinding halt every domestic relations case involving a self-represented litigant in New Mexico. Trial judges would wait for unrepresented litigants to present their cases as lawyers—with opening statements, qualified witnesses, direct and cross-examinations of witnesses using classic question and answer techniques, properly introduced and identified documents, and completely proven cases—before ordering relief. In fact, this standard is widely ignored by trial judges, who need to hear litigants' testimony, resolve disputed issues, enter appropriate orders, and remove the cases from their court calendars. The alternative is to routinely dismiss every case filed without a lawyer.

In fact, trial judges do not even apply this approach to cases involving attorneys. Several years ago, former Florida Chief Justice Major Harding recounted the following story in convening a statewide conference on self-represented litigants. A trial judge was hearing a divorce petition in which the respondent had defaulted. The wife presented the matter without counsel and failed to offer any evidence bearing on the court's jurisdiction to hear the matter. The judge told the wife that he could not grant her a divorce because she had failed to establish her entitlement to one, advising her to consult a lawyer. The woman left the courtroom in tears. In the next case, a lawyer for a wife in a defaulted divorce failed to elicit any evidence of the court's jurisdiction. The judge noted that counsel had failed to do so, and the attorney immediately recalled the client to the stand and asked her how long she had lived in the county. The judge granted the requested divorce. Suddenly aware of his double standard, the judge called his bailiff and asked him to quickly search the courthouse to find the woman whose case he had just dismissed. The bailiff succeeded. The judge reopened the case on the record, placed the woman under oath, asked how long she had lived in the county, and, after receiving an acceptable response, granted her divorce.

**One issue of particular concern to trial court judges, and about which little has yet been written, stands out: how a judge can deal with self-represented litigants in the courtroom without departing from the judicial role as a neutral, impartial decision maker.**

Why would this common-sense approach to dispensing justice leave judges feeling as though they have departed from their proper judicial role? Let us review the Canons of Judicial Ethics and the decided cases to shed light on the problem.

**The Canons of Judicial Ethics**

Canon 3 of the American Bar Association's Model Code of Judicial Conduct (2000)[5] reads: "A judge shall perform the duties of judicial office impartially and diligently." Subsection 3B sets forth the following Adjudicative Responsibilities:

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. [Commentary: A judge must perform judicial duties

# Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants

**Editor's Note:** *The following text is the product of the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges.*

**Judicial officers should use the following protocol during hearings involving pro se litigants:**

1. Verify that the party is not an attorney, understands that he or she is entitled to be represented by an attorney and chooses to proceed pro se without an attorney.

2. Explain the process. "I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question."

3. Explain the elements. For example, in Order for Protection (OFP) cases: "Petitioner is requesting an Order for Protection. An Order for Protection will be issued if Petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm or that she was reasonably in fear of physical harm as a result of the conduct or statements of the Respondent. Petitioner is requesting a Harassment Restraining Order. A Harassment Restraining Order will be issued if Petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the Respondent that are intended to adversely affect the safety, security, or the privacy of the Petitioner."

4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in OFP cases: "Because the Petitioner has requested this order, she has to present evidence to sho that a court order is needed. I will not consider any of statements in the Petition that has been filed in this m can only consider evidence that is presented in court t If Petitioner is unable to present evidence that an orde needed, then I must dismiss this action."

5. Explain the kind of evidence that may be prese "Evidence can be in the form of testimony from the ties, testimony from witnesses, or exhibits. Everyone testifies will be placed under oath and will be subject questioning by the other party. All exhibits must first given an exhibit number by the court reporter and the must be briefly described by the witness who is testify and who can identify the exhibit. The exhibit is then to the other party who can look at the exhibit and let know any reason why I should not consider that exhib when I decide the case. I will then let you know whet the exhibit can be used as evidence."

6. Explain the limits on the kind of evidence that can b considered. "I have to make my decision based upon the e dence that is admissible under the Rules of Evidence for courts in Minnesota. If either party starts to present evide that is not admissible, I may stop you and tell you that I c not consider that type of evidence. Some examples of in missible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as witness: hearsay could be an oral statement that was over heard or a written statement such as a letter or an affidavi Irrelevant evidence is testimony or exhibits that do not he me understand or decide issues that are involved in this c

7. Ask both parties whether they understand the pro and the procedure.

8. Non-attorney advocates will be permitted to sit a counsel table with either party and provide support bu not be permitted to argue on behalf of a party or to qu witnesses.

9. Questioning by the judge should be directed at ob ing general information to avoid the appearance of an cy. For example, in OFP cases: "Tell me why you bel you need an order for protection. If you have specific dents you want to tell me about, start with the most re incident first and tell me when it happened, where it pened, who was present, and what happened."

10. Whenever possible the matter should be decide the order prepared immediately upon the conclusion o hearing so it may be served on the parties.

**Note: Idaho has developed a draft protocol for its judges derived from the Minnesota protocol.**

impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.]

(6) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

Canon 2A also mentions impartiality: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Nothing in the text of or commentary to these Code sections bears directly on the issues that concern us. Unrepresented persons are not mentioned, except by implication in Subsection 3A(7), which enjoins judges to "accord every [unrepresented] person . . . the right to be heard according to the law." In particular, the Code says nothing about requiring self-represented litigants to abide by the same rules and standards that apply to lawyers. We are aware of only three ethics decisions or advisories bearing on our issue. Each of them emphasizes a judge's obligation to accommodate the needs of self-represented parties. We found no instance in which a judge was disciplined or criticized for relieving a self-represented litigant of the strict requirements of procedural or evidentiary rules.

In a 1999 Decision and Order Imposing Public Censure,[6] the California Commission on Judicial Performance reprimanded a San Bernadino County Superior Court judge for nine instances of failure to respect the rights of unrepresented individuals. All but one of the incidents arose in the context of criminal matters; the exception concerned a juror who was incarcerated for being late to court without being informed of his rights in a contempt hearing.

In a 1997 Advisory Opinion, the Indiana Commission on Judicial Qualifications[7] concluded, "a judge's ethical obligation to treat all litigants fairly obligates the judge to ensure that a pro se litigant in a non-adversarial setting is not denied the relief sought only on the basis of a minor or easily established deficiency in the litigant's presentation or pleadings." The opinion, limited to non-adversarial matters, addressed situations such as a litigant's failure to aver that a name change was not sought for a fraudulent purpose, or a married couple's inadvertent failure to plead their county of residence. The commission stressed that a judge has no obligation to "cater to a disrespectful or *unprepared pro se* litigant" or to "make any effort on behalf of any citizen which might put another at a disadvantage." It also stated that a judge should not "normally 'try a case' for a litigant who is wholly failing to accomplish the task."

The Minnesota Conference of Chief Judges Pro Se Implementation Committee has issued the Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants. (See text on page 18.) Far from requiring self-represented litigants to follow the same rules as lawyers, it explains how judges should set up *different* procedures for them. However, these procedures preserve the core of the rules of procedure and evidence, requiring sworn testimony, allowing for cross-examination, requiring identification of exhibits, and excluding inadmissible evidence.

In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court. Two states have established guidelines for judges dealing with unrepresented parties. Both recognize that fairness and impartiality require the judge to treat unrepresented litigants differently than represented litigants. To our knowledge, no judge has been disciplined for doing so, and one has been disciplined for failing to respect the rights of unrepresented persons.

Social science sheds some interesting light on this issue. In a 1988 study of what causes a litigant to view a proceeding as fair, Tom Tyler found that the ability to present one's case was much more important to the litigant than his or her perception of the judge's impartiality.[8]

### Case Law

In *Faretta v. California*,[9] the U.S. Supreme Court recognized a Sixth Amendment right, made applicable to the states through the Fourteenth Amendment, of self-representation in a criminal matter. The Court limited that ruling in 2000 by holding, in *Martinez v. Court of Appeal of California*,[10] that a convicted person has no similar right to self-representation in a direct criminal appeal.

In a speech to the Massachusetts

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**Rebecca A. Albrecht**
is a judge of the Maricopa County Superior Court in Phoenix, Arizona. During her term as deputy presiding judge of the court, she was instrumental in creating its nationally acclaimed Self Service Center. She frequently speaks to judges about their handling of cases involving self-represented litigants.

**John M. Greacen**
is a former court administrator who is currently a principal in Greacen Associates, LLC, a consulting group focused on court improvement, court use of technology, performance measurement, and leadership development.

**Bonnie Rose Hough**
is supervising attorney for the Center for Families, Children and the Courts within the California Administrative Office of the Courts. Her unit encourages, guides, and funds the self-help centers in California's trial courts and has developed the state's 900-page self-help website of legal information and forms.

**Richard Zorza**
is an attorney and technology consultant who developed the judicial decision support system application for the Midtown Community Court in Manhattan. He has advised the Washington State Access to Justice Board on a technology bill of rights and has written and spoken widely on the courts' responses to self-represented litigants.

**All federal and virtually all state courts have precedents that papers submitted by pro se litigants will face a different standard of judicial review than those submitted by lawyers.**

Conference on Pro Se Litigants on March 15, 2001, Chief Justice Marshall of the Supreme Judicial Court of Massachusetts reviewed the deep historical roots of the right to self-representation in this country. In the early colonies, the right to have a lawyer was often limited, but never the right to represent oneself.[11]

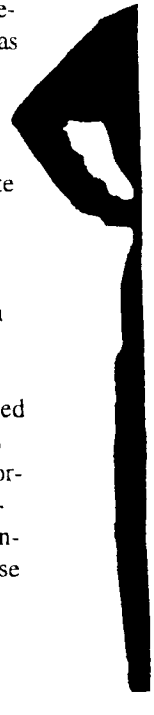
All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers. The courts will construe them as liberally as possible in favor of the litigant, searching them for any statement that could constitute a meritorious claim or defense.[12] On the other hand, appellate courts will not relieve a self-represented litigant of the consequences of a default, such as failure to object to an instruction or ruling by the trial court.[13] In reviewing many of the reported appellate cases, we found a rich set of judicial views on the general issue of how trial court judges should deal with self-represented litigants. Most of the cases are consistent in outcome even though they may differ in the reasoning used by the appellate court. We found only one case—from the Illinois intermediate appellate court—directly addressing this article's central issue. Here we present short summaries of some of the cases.

***Newsome v. Farer*, 708 P.2d 327 (1985).** This case led the New Mexico Supreme Court to establish the standard contained in the instructions for the new domestic relations forms quoted earlier.[14] The court upheld the trial judge's dismissal of the plaintiff's case for Newsome's failure to attend a meeting at which the defendant was to produce documents requested by Newsome. The court dismissed Newsome's contention that he did not understand that he was required to follow the judge's directions.

> Finally, Newsome asserts his belief that he was not required to attend production of documents because the court did not affirmatively order him to do so. We view this argument as a disingenuous attempt to invoke special privilege because of his pro se status. He did not claim ignorance or misunderstanding in the trial court, and the assertion here conveniently overlooks the rule that a pro se litigant must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel. Although pro se pleadings are viewed with tolerance, a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar. Production of documents was ordered upon Newsome's request. Even though one may not be legally trained, common sense dictates that when a party petitions the court to enforce a right to inspect public records, and the court responds by ordering that requested documents be produced, the petitioner is not then free to disregard the arrangements made to comply with the relief ordered, simply because the court did not affirmatively direct the petitioner to attend. Certainly it does not require legal training or even any great degree of intelligence to understand that documents are not ordered to be produced in a vacuum. Production necessarily implies inspection. Newsome's pro se status does not require us or the trial court to assume he must be led by the hand through every step of the proceeding he initiated. We reject his claims of compliance or excuse therefrom because of his layman's ignorance.

At the trial court, the trial judge clearly did not hold Newsome to the same standards as those for an attorney. He gave special attention to Newsome's discovery requests, fashioning an order for production of documents very close to that requested. He gave Newsome three separate hearings to attempt to explain his failure to attend the document disclosure session. The supreme court nowhere criticized the trial judge for the special accommodations given to this self-represented litigant; it merely held that he was not entitled to any more.

***Bates v. Jean*, 745 F.2d 1146 (8th Cir. 1984).** The Federal Court of Appeals reversed a dismissal of a state prisoner's civil rights suit against a prison guard for cruel and unusual punishment on the grounds of inconsistency of special jury verdicts, even though the prisoner—representing himself—did not object to the inconsistent verdicts at trial. The court stated it "usually accord[ed] pro se litigants somewhat greater flexibility than attorneys" with regard to waiver of objections, noting that "the question of consistency of special verdicts in this case



requires a greater degree of legal sophistication than we ordinarily demand of pro se prisoner litigants." The court noted that the trial judge merely asked the prisoner, "Do you have anything at this time, Mr. Bates?" and compared the generality of the judge's question to the specificity of another judge's question in a previous case involving special verdicts. There, the trial judge, addressing counsel, stated, "Gentlemen, there seems to be a discrepancy between the answer to the interrogatory and the verdict. Do either of you desire that I explain this matter to the jury and to ask them to return to the jury room for further deliberation?" In a footnote, the *Bates* court stated:

> We do not, of course, imply that the district court has a duty to point out possible inconsistencies in special jury verdicts to all pro se parties. However, the amount of guidance given by a district court judge is a factor to be considered in deciding whether a pro se litigant is barred from asserting an issue for the first time on appeal.

***Traguth v. Zuck*, 710 F.2d 90 (2d Cir. 1983).** In this federal case from the Second Circuit, the appellate court reversed the trial judge's denial of a self-represented litigant's motion to vacate the entry of default against her. Holding that the trial judge had abused his discretion, the court stated:

> Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training. While the right "does not exempt a party from compliance with relevant rules of procedural and substantive law," it should not be impaired by harsh application of technical rules. Trial courts have been directed to read *pro se* papers liberally and to allow amendment of *pro se* complaints "fairly freely." The court's duty is even broader in the case of a *pro se* defendant who finds herself in court against h[illegible] with little time to learn th[illegible] cies of civil procedure. [illegible] reason to know, upon service of the complaint, that she faced default if she did not answer within twenty days. She searched in good faith for a lawyer to represent her and, failing in that, she responded within that period diligently, if unskillfully, to every pronouncement of the court.

***Ortiz v. Cornetta*, 867 F.2d 146 (2d Cir. 1989).** Six years later, the same court reinforced the same principle in an even broader rule. The court stated:

> At the outset, we note the general standards—some of which have only recently emerged from both Supreme Court and second circuit decisions—which hold a pro se litigant to less stringent standards than those governing lawyers. Such has long been the case with rules governing pro se complaints (pro se complaint held "to less stringent standards than formal pleadings drafted by lawyers) (pro se complaint held to "less stringent standards of pleading"), but it has only been in the past year that courts have extended this principle to form a general standard. Once a pro se litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel (incarcerated pro se petitioner's notice of appeal considered "filed" at moment of delivery to prison authorities because at that point, petitioner has done all within his power to abide by filing requirements) (if *in forma pauperis* relief is subsequently granted, pro se complaint deemed "filed" when received by pro se office).

The court of appeals held that a complaint would be deemed filed when first received by the clerk's office, even though it was returned to the self-represented filer for correction of a defect. The corrected filing was not received until after the running of the statute of limitations.

***Bowman v. Pat's Auto Parts*, 504 So. 2d 736 (Ala. Civ. App. 1987).** Alabama's rules of [illegible]dure require [illegible]filed within fourteen [illegible]lerk's entry of judgment in [illegible] docket, whether or not a party receives actual notice of the entry of the judgment. The court ruled that a self-represented litigant is held to that rule.

Alaska has an interesting series of cases on these issues.

***Breck v. Ulmer*, 745 P.2d 66 (1987).** In *Breck* the Alaska Supreme Court held that a trial judge has an "explicit" duty "to advise a pro se litigant of his or her right under the summary judgment rule to file opposing affidavits to defeat a motion for summary judgment" and that "[a] judge should inform a pro se litigant of the proper procedure for the action he or she is obviously attempting to accomplish. . . ." The court concluded that the trial judge's failure to do so in the instant case was not prejudicial.

***Keating v. Traynor*, 833 P.2d 695 (1992).** The Alaska Supreme Court applied the same principle to a trial court's handling of a letter seeking permission to intervene. The trial court had a duty to notify the litigant of the proper procedure for seeking permission to intervene.

***Bauman v. DFYS*, 768 P.2d 1097 (1989).** The court set an outside limit on the trial court's duty in *Bauman*, holding that the trial judge had no duty to warn a litigant of the consequences of failure to respond to a motion for summary judgment. "To require a judge to instruct a pro se litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side."

In two recent cases, the Alaska court added to these precedents.

***Sopko v. Dowell Schlumberger, Inc.*, 21 P.3d 1265 (2001).** The court characterized its prior cases as imposing a "limited" duty on the trial judge to assist a self-represented litigant. "We have imposed some limited duties on courts to advise pro se litigants of proper procedure, [including] . . . the duty to inform . . . (1) of specific procedural defects, . . . and (2) of the necessity of opposing a summary judgment motion

with affidavits or by amending the complaint." In *Sopko* the court found the court's advice proper.

***Collins v. Arctic Builders*, 957 P.2d 980 (1998).** Here, the court overturned a trial court's dismissal of a notice of appeal for a procedural defect in a pro se's second attempt to comply with the appellate rules. The court stated, "We are not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court's impartiality."

***Wright v. Black*, 856 P.2d 477 (1993).** The trial judge expressed his intention to take evidence at a child support hearing on the paternity issue raised by the father in an earlier pleading. Neither party objected. On appeal the father claimed that his failure to object should be excused because of his lack of familiarity with court proceedings. The court held that if the litigant had "attempted to object, or even hinted that he was unprepared to handle the paternity issue, then *Breck* might apply. While we may relax formal requirements for pro se litigants, even a pro se litigant must make some attempt to assert his or her rights." (This latter point was also emphasized in *Noey v. Bledsoe*, 978 P.2d 1264 (1999), in which the court stated that pro se litigants are not excused from "making good faith efforts to assert their rights.")

***Rappleyea v. Campbell*, 884 P.2d 126 (1994).** The California Supreme Court, in an opinion written by Justice Mosk, held that a self-represented couple from Arizona would be relieved of a default judgment entered against them even though they had not sought relief within the six-month period allowed by statute to vacate a default judgment. The court reasoned that their default had been caused by the court clerk's error in quoting the filing fee for an answer—thereby causing their timely answer to be rejected for failure to enclose the proper filing fee. Justice Mosk stated:

> [M]ere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.

***Gamet v. Blanchard*, 91 Cal. App. 4d 1276 ( 2001).** The appellate court reversed the trial judge's dismissal of the plaintiff's case, citing lack of service of the court's order allowing her counsel to withdraw the "confusing, indeed misleading, nature of the various orders and communications" from the court to the plaintiff, and the plaintiff's involuntary pro per status. The majority stated:

> We further note that pro per litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. (*Rappelyea v. Campbell, supra.*) They are, however, entitled to treatment equal to that of a represented party. Trial judges must acknowledge that pro per litigants often do not have an attorney's level of knowledge about the legal system and are more prone to misunderstanding the court's requirements. When all parties are represented, the judge can depend on the adversary system to keep everyone on the straight and narrow. When one party is represented and the other is not, the lawyer, in his or her own client's interests, does not wish to educate the pro per. The judge should monitor to ensure the pro per is not inadvertently misled, either by the represented party or by the court. While attorneys and judges commonly speak (and often write) in legal shorthand, when a pro per is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.
>
> The confusing, indeed misleading, nature of the various orders and communications that Gamet received from the trial court is particularly important in light of Gamet's (involuntary) pro per status. As noted above, pro per litigants are not entitled to any special treatment from the courts. But that doesn't mean trial judges should be wholly indifferent to their lack of formal legal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?
>
> There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges are charged with ascertaining the truth, not just playing the referee. A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. (citations omitted)

Judge Bedsford, in dissent, lamented the inconsistent message being sent to the trial judges:

> My colleagues recognize in one sentence the hoary but still vigorous rule that "pro per litigants are not entitled to any special treatment from the courts," but devote several paragraphs to setting out the kinds of special treatment trial judges will be obliged to accord them under this opinion.
>
> Pro per litigants have become more common in recent years and seem destined to become a much larger portion of the trial court docket than they have been in the past. It may be time to reassess our case law regarding them. And while I agree with much that is said in the majority opinion, and might be prepared to

> give a second look to our rules regarding pro per litigants, I think an ad hoc reversal which tells trial judges to treat pro pers the same as they treat represented litigants—only different—accomplishes little in the way of addressing the problem and does a disservice to the people who must deal with pro pers every day.

***Cersosimo v. Cersosimo*, 449 A.2d 1026 (1982).** Connecticut articulated a standard similar to that used in the federal courts. In *Cersosimo* the supreme court stated:

> It is "our established policy to allow great latitude to a litigant who, either by choice or necessity, represents himself in legal proceedings, so far as such latitude is consistent with the just rights of any adverse party. . . ." This does not, however, mean that we will entirely disregard the established rules of procedure, adherence to which is necessary so that the parties may know their rights and the real issues in controversy may be presented and determined (internal citations omitted).

The case involved a petition for a change in child support and alimony payments; the former wife represented herself. The supreme court held that the trial court had erred in refusing to let the former wife have physical possession of the tax returns of the former husband solely on the grounds that she was representing herself. The trial court had appointed an accountant to review the former husband's financial affairs and report his annual income. The supreme court then found that the error was harmless.

***Pavilon v. Kaferly*, 561 N.E.2d 1245 (1990).** In this interesting case the Appellate Court of Illinois, First District, Fifth Division, overturned a jury verdict against a self-represented litigant because of a series of remarks by the trial judge that demonstrated hostility towards the pro se defendant.

***Kasson State Bank v. Haugen*, 410 N.W.2d 392 (Minn. App. 1987).** The Minnesota Court of Appeals reversed a trial judge's grant of summary judgment to a bank despite the defendant's testimony at the hearing that the loan in question was induced by the bank's own fraud. The court also found that the trial judge had abused his discretion in failing to grant the defendant a continuance to obtain counsel. The court's articulation of the standard to be followed by the trial judge is similar to that used in Connecticut: "[a] trial court has a duty to ensure fairness to a pro se litigant by allowing reasonable accommodation so long as there is no prejudice to the adverse party."

***Bullard v. Morris*, 547 So. 2d 789 (1989).** The Mississippi Supreme Court held that the chancery court had abused its discretion in requiring one of the litigants in a divorce case arising from irreconcilable differences to appear personally before a decree would be issued. The litigants were not represented by counsel. One was in state prison, and the other lived in California.

***Brown v. City of St. Louis*, 842 S.W.2d 163 (1992).** The Missouri Court of Appeals, Eastern Division, reviewed a trial court's affirmance of a Labor and Industrial Relations Commission dismissal of a claim for workers' compensation. After noting that the appellant filed a "nonsensical" brief with "no discernible relationship to the orders from which appellant purports to appeal,"[15] the court noted in typical language that "[a]lthough an appellant has the right to act pro se on appeal, he or she is bound by the same rules of procedure as attorneys and is entitled to no indulgence that would not have been given if the appellant were represented by counsel," and that the appeal was subject to dismissal for failure to comply with the appellate rules. The court nonetheless proceeded to dispose of the appeal on the merits: it affirmed the trial court. The court also noted that the appellant had been notified that his original brief did not comply with the appellate rules and was given an opportunity to file an amended brief. In sum, while stating the opposite principle, the court in actuality accorded the self-represented litigant different treatment than he would have received had he been represented by counsel (the opportunity to amend his brief and not dismissing the appeal for failure to file an acceptable brief and record).

***Boyer v. Fisk*, 623 S.W.2d 28 (1981).** The same court reversed a trial court's vacating of a default judgment entered against a self-represented couple. The couple had partially filled in a form at the courthouse that stated "(no) cause of action" but did not sign it as an answer to a civil complaint, relying on assurance from the clerk's office that the filing was sufficient and they would be notified of a trial date. The court of appeals reinstated the default judgment, finding that the self-represented litigants did not exercise reasonable diligence in relying on the statements of the clerk and in failing to send a copy of their "answer" to plaintiff's counsel as required on the face of the summons.

***Brown v. Texas Employment Commission*, 801 S.W.2d 5 (Tex. App.—Hous. 1990).** The appellant sought to be relieved of procedural requirements to timely file an appeal of an administrative determination within the administrative process, to timely file an appeal in court, and to join an indispensable party. The court refused, stating that a self-represented litigant is held to the same procedural rules as one represented by counsel.

***Plummer v. Reeves*, 93 S.W. 3d 930 (2003).** The Texas Court of Appeals, Amarillo, dismissed an appeal because the pro se appellant, given several opportunities, failed to file a brief with citations to legal authority supporting her position. The court wrote, "Finally, as judges, we are to be neutral and unbiased adjudicators of the dispute before us. Our being placed in the position of conducting research to find authority supporting legal propositions uttered by a litigant when the litigant has opted not to search for same runs afoul of that ideal, however. Under that circumstance, we are no longer unbiased, but rather become an advocate for the party."

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## Judicial Techniques

*(continued from page 23)*

***Kelley v. Secretary, U.S. Department of Labor*, 812 F.2d 1378 (Fed. Cir. 1987).** The U.S. Court of Appeals for the Federal Circuit similarly held that a plaintiff's failure to file a court action within sixty days of notice of the government's publication of notice in the Federal Register deprived the trial court of jurisdiction to hear the case, despite the plaintiff's status as a pro se litigant.

***Waushara County v. Graf*, 480 N.W.2d 16 (1992).** Wisconsin courts limit the rule for lenient treatment of self-represented litigants to prisoners. In a case involving the appellate court's consideration of issues not raised on appeal, the Wisconsin Supreme Court wrote:

> While pro se litigants in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to *pro se* prisoners. . . . We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court. These concerns have not been extended to persons who are not incarcerated (internal citations omitted).

***Meyers v. First National Bank of Cincinnati*, 444 N.E.2d 412 (Ohio App. 1981).** An Ohio intermediate appellate court decision rests on the same distinction as above. The court upheld a municipal court's dismissal of plaintiff's case pursuant to its local rule requiring the submission of a memorandum in opposition to a motion to dismiss. The court wrote:

> Appellants' argument that as *pro se* civil litigants they should receive special consideration and not be bound by the same rules as civil litigants represented by counsel is against the weight of Ohio as well as national authority. *Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. Appellants' argument that prisoners in *pro se habeas corpus* proceedings do not have to meet the same procedural standards as those with counsel is inapplicable to the case sub judice (internal citations omitted).

***Hodgins v. State*, 1 P.3d 1259 (2000).** The courts of Wyoming apply a standard of leniency to self-represented litigants. The Wyoming Supreme Court set forth this standard: "The litigant acting pro se is entitled to 'a certain leniency' from the more stringent standards accorded formal pleadings drafted by lawyers; however, the administration of justice requires reasonable adherence to procedural rules and requirements of the court." In this case the court imposed the sanction of costs on the litigant for filing a frivolous appeal, noting that he was familiar with the rules of appellate procedure and should be held to account for violating them by filing an appeal utterly lacking in legal justification.

***Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984).** This is the only case we found that is directly on point for the issue addressed in this article. The plaintiff, represented by counsel, sued the defendant doctor, who represented himself, for medical malpractice. The jury returned a verdict for the doctor. The plaintiff appealed, claiming among other things that the trial judge denied her a fair trial by giving assistance to the defendant in presenting his case. Because both the facts and the legal analysis in this case are important, we include lengthy quotes from both the majority and dissenting opinions:

> **Majority:** Although the defendant on numerous occasions departed from the rules of trial court practice, his excursions were usually cut short by objections which were sustained and repeated until the defendant conformed to proper procedures. The defendant was not permitted to do as he pleased. Furthermore, the trial court took steps to make sure that the defendant's unorthodox questions did not confuse the jury. Whenever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters.
>
> Considerable latitude must be allowed a judge in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury. We find that the judge remained within his proper provinces in the present case. The judge gave due consideration to the defendant's pro se status but was never reluctant to sustain the plaintiff's objections when necessary. Although the judge would carefully explain to the defendant why certain objections were being sustained, there is no evidence that he conducted the defendant's case for him or failed to remain impartial.
>
> As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides. We believe that Judge Cerri adequately faced up to that high responsibility in this case (footnote and citation omitted).
>
> **Dissent:** At the conclusion of her examination of defendant, the trial court explained to defendant the tactical alternatives available to him—

i.e., that he could wait and testify as a part of his own case or he could give direct testimony at the conclusion of plaintiff's examination of him. Defendant indicated that he wanted to testify right then, and the trial judge proceeded to question defendant at length about his post-operative treatment of plaintiff and about her progress under that treatment. Thus the court conducted the direct examination of defendant. Later, while defendant was attempting to cross-examine plaintiff's expert medical witness, defendant started to read from an article that had not been introduced into evidence. After sustaining plaintiff's objection to defendant's questions, the court told defendant, "Ask him if he read it and is familiar with the article, Doctor, the operation procedure." During subsequent cross-examination of the same witness, defendant attempted several times to ask the witness whether his responsibility to his patient did not end when she terminated her relationship with him. After several versions of the question were objected to by plaintiff and the objections sustained by the court, defendant asked, "Is there any way I can accomplish that?" and the court advised defendant, "Ask him what is customary." Following plaintiff's redirect examination of the witness, defendant had no recross, but the trial court asked several questions to clarify certain details of surgical procedure which had been mentioned by the witness on redirect. In effect, the court conducted the recross examination for defendant.

During another occasion, while defendant was questioning his own expert witness, Dr. McSweeney, the court overruled an objection by plaintiff to the form of a question asked by defendant relating to the surgical procedures the witness would use, and then the court provided defendant with the correct form by adding, "Based on the standards of our local community." At the close of Dr. McSweeney's testimony, plaintiff moved that the testimony be stricken as not relevant to the issue of the prevailing standard of care for a reasonably well-qualified surgeon. The court stated: "Well, normally if I had a lawyer sitting there, I would—you might be technically correct. You might be correct. With Dr. Rogers, who at least in his artful questioning, I think the concept is sufficiently established in the record to allow that testimony to stand." It is apparent to us that the trial court did not hold defendant to the same rules of procedure as he would have an attorney in determining the relevancy and admissibility of this evidence. To condone such actions of the trial court here is to invite pro se representation in difficult trials which would make a mockery of the judicial process, even though to fully inform a jury is a commendable purpose. Defendant was entitled to a fair opportunity to present his evidence, but nothing more. If he was insufficiently versed in legal procedure to place his evidence before the jury pursuant to the ordinary rules of procedure, then he was not entitled to have the court assist him by phrasing questions, by conducting the examination of witnesses, or by special rulings in his favor.

Without unnecessarily lengthening this opinion with additional examples, it is my firm belief the trial court overstepped the bounds of judicial discretion in assisting defendant with the trial of this cause, and accordingly, that plaintiff is entitled to have the judgment reversed and a new trial granted.

## A Suggested Synthesis

What does all this mean? In reviewing the case law, we were struck with the large number of instances in which appellate courts reversed trial judges who were short or summary in their rejection of the causes of unrepresented litigants. Trial courts are expected to lean over backward (if not "lean over the bench") to identify meritorious issues hidden in the presentations of an unrepresented litigant. This comports well with the ethical requirement in Canon 3A(7) that the judge "shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law."

The courts appear to espouse three different standards for limiting the judge's duty to actively seek out the merit of an unrepresented litigant's case. The majority position is that self-represented litigants will be treated the same as attorneys. The minority position, taken by the federal courts, Alaska, Connecticut, and Minnesota (as articulated by Minnesota), is that "[a] trial court has a duty to ensure fairness to a pro se litigant by allowing reasonable accommodation so long as there is no prejudice to the adverse party." The very minority view is taken by Ohio and Wisconsin: standards applied to prisoners and other unrepresented litigants differ (more flexible and less flexible, respectively). We do not believe this third position can withstand careful analysis. Prisoners operate under a number of factors not imposed on other citizens, and courts should be solicitous of their right to access to the courts to present grievances, but other citizens should have equal access to judicial remedies.

The first two positions differ quite a bit from each other. The first takes the view that it is best when a judge accords the self-represented litigant no "special treatment." Exceptions exist, but they are limited. The emotional message that seems embedded in the majority view is that self-representation is a voluntary choice, it is moreover a foolish choice, and litigants who put themselves in this position "deserve" the consequences of that choice. The minority view is the opposite: a judge has a duty to accommodate the special circumstances of the unrepresented litigant up to the point that such accommodation infringes on the rights of the other side. The emotional message in minority view opinions is that a person's lack of counsel likely is not voluntary and is instead the result of a lack of means—but that even if voluntary, self-representation is a choice vouchsafed by the Constitution. The court has an obligation to provide as fair a process for the uninformed and unsophisticated citizen as for the one who can afford the most accomplished and aggressive attorney.

These contrasting standards give very different messages to the trial judge attempting to cope with an

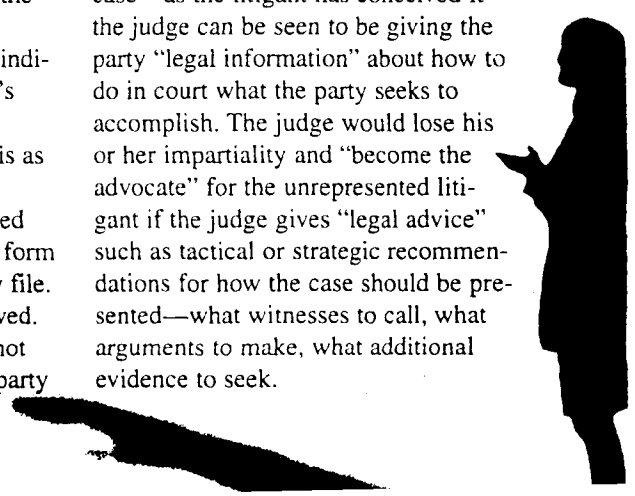
unrepresented litigant in the courtroom. The first posits a basically passive role for the judge, with the litigant bearing the burden of becoming sufficiently familiar with the law, rules of procedure, and rules of evidence to function as a lawyer. The second instructs the judge to aid the unrepresented litigant, who cannot be expected to perform as a trained lawyer would, in every way short of prejudicing the opponent. It is no accident that Minnesota is the only state to generate a protocol for judges dealing with self-represented litigants; its protocol follows from the standard articulated in its appellate case law.

In fact we think that these different standards have even less impact in the appellate court holdings than the above review suggests. In every case summarized above, the "majority rule" appears to be dictum. It is a formula intoned *after* the court announces its decision. The analysis in the court's ruling does not focus on the standard to which attorneys will be held. The statement that self-represented litigants will be held to the standard of an attorney seems, instead, to be merely a shorthand phrase for stating that the court will not let the unrepresented litigant use his or her status as a reason to avoid application of a particular procedural rule. The holdings of the cases summarized here can be synthesized into the following six basic propositions:

- The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case. The real message behind the statement that self-represented litigants must follow the same rules as attorneys is the fundamental idea that an unrepresented litigant cannot obtain relief from the court in cases in which a party represented by an attorney would not prevail. The outcome of the matter should be directly related to the merits of a party's case. An unrepresented party must meet the same legal standards for obtaining a judicial remedy as a party represented by counsel and should receive no sympathy or other advantage because of choosing to proceed without a lawyer.
- The "hard" procedural bars—pertaining to statutes of limitations, availability of administrative remedies, and time limits for filing an appeal—apply equally to unrepresented and represented litigants. Some of the cases do not support this principle, but the majority do. These procedural bars are fundamental rules governing the legal process. For the most part, appellate courts are uncomfortable applying them differently to different parties for any reason—and particularly not because they are or are not represented by counsel.
- "Soft" procedural bars—pertaining to contemporaneous objection, raising issues on appeal, or vacating a default judgment—can be mitigated for unrepresented litigants. The issue becomes murkier when it involves failure to preserve error by stating an objection on the record in the trial court, or in applying the standard for relief from a default judgment. Whether or not to apply these matters falls within the equitable discretion of the trial court. An appellate court can always decide an issue not raised by a party when it discovers "fundamental error." It can waive the contemporaneous objection rule for the same reason. Relief from a default judgment does not create the same degree of prejudice to the other party as overturning a decision on the merits. So, in exercising inherently equitable principles, judges are more likely to consider the ignorance and inexperience of an unrepresented party. If the unrepresented party did all that a reasonable person in the situation could do, that factor will weigh in the person's favor. If the individual appeared to scorn the court's rules and directives, the facts will weigh in the other direction. This is as it should be.
- Courts will grant unrepresented litigants enormous leeway in both form and content of the documents they file. This standard is universally observed. Of course courts cannot and will not assert a claim for a party that the party has not raised. This is the point of the Alaska cases, imposing the duty to assert individual rights on the self represented litigant.
- Judges will help assure that a litigant has an opportunity to present evidence in court, so long as the judge does not prejudice the other side in doing so. The only reported case we discovered is *Oko v. Rogers.* We repeat the majority's analysis in that case:

> As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.

- Judicial efforts to enable unrepresented litigants to present their cases should be limited to assistance to the party in accomplishing the party's own strategy, not in suggesting a different or better strategy. So long as the judge is merely facilitating the unrepresented litigant's presentation of his or her own case—as the litigant has conceived it—the judge can be seen to be giving the party "legal information" about how to do in court what the party seeks to accomplish. The judge would lose his or her impartiality and "become the advocate" for the unrepresented litigant if the judge gives "legal advice" such as tactical or strategic recommendations for how the case should be presented—what witnesses to call, what arguments to make, what additional evidence to seek.



As the majority in *Oko v. Rogers* pointed out, the trial judge can ensure the self-represented litigant's right to be heard without departing from the judge's duty to remain impartial. The duty of ensuring both parties' right to be heard is not inherently in conflict with the duty to remain impartial. We believe this position will be adopted by other appellate courts when and if they address the practical problems facing the trial judge in similar cases. We also believe that trial judges can use a number of practical techniques to reduce the appearance of such a conflict.

### Judicial Techniques

As noted earlier, our analysis of issues facing the trial judge is somewhat different from that of Dr. Goldschmidt in his *Family Court Review* article. Although we agree that trial judges cannot maintain a passive role, we do not necessarily espouse all of his specific recommendations for a more active role for judges and court staff.[16] We address some of his recommendations in the following discussion, which is divided into three areas: general principles, specific approaches to cases involving two unrepresented litigants, and cases involving the more difficult situation where one party is represented and the other is not.

### General Principles

• Prepare. Pro se cases require a much more active role on the part of the trial judge—who must master the substantive law applicable to the case. When handling a case with two well-prepared lawyers, the trial judge can depend on counsel to identify the legal issues involved, but this is not so with cases in which no lawyers appear. The judge has the full responsibility for knowing and explaining the law. Most self-represented litigants appear in a few types of cases: family law (including divorce, paternity, child custody, child and spousal support, and domestic violence); traffic and misdemeanors; landlord/tenant; and small claims. In most urban areas, judges handle these calendars as regular assignments and consequently are steeped in the law and process related to each case type. However, a judge called to cover for a sick or absent judge in one of these assignments may be in an awkward situation unless the judge has reviewed the legal elements and standards governing the matters likely to arise.

• Provide the parties with guidelines. In pro se cases it is helpful for the judge to explain the applicable substantive and procedural principles. When both parties are represented by counsel, this is not necessary; each attorney is aware of the requirements and can be expected to address them. Unrepresented litigants may need more. By presenting background at the beginning of the hearing, the judge neutrally aids both parties. Much of this information can be given to the parties in writing before the hearing or trial. The following items are particularly helpful:

* A basic primer on courtroom protocol, addressing who sits where in the courtroom, how to behave (rising when the judge enters and leaves the courtroom; not interrupting another person who is speaking), order of events (the moving party presents first), how to state objections, attire, and other matters the judge considers important (for example, gum chewing).

* Basic rules for evidence presentation, including the burden on the moving party to prove entitlement to relief. Many litigants literally expect the trial judge to be omniscient—to "know" the truth behind all matters without needing evidence. They should be instructed that the judge will rule based only on the evidence presented. The judge may explain the different types of evidence—testimony, documents, exhibits—and how each is presented to the court. (Item 6 in the Minnesota protocol briefly describes the more important rules of evidence.)

* A list of elements that must be proved in order to obtain relief. This section should be short and clear, with no explication of legal nuances. For example, a motion to modify child support must establish a change in the noncustodial parent's financial situation and show why the custodial parent should receive increased support. Where possible, the list should explain what evidence can prove the elements, such as a pay stub, tax return, and the like.

Judge Albrecht combines the latter information with a minute entry notifying litigants of the date and time of the hearing or trial. She uses standard word processing templates for recurring situations, so her staff can easily include the pertinent information in any printed communication. Providing the materials in advance greatly increases the likelihood that the parties will be prepared to proceed when the case is called. Some courts provide these materials on a website, and others make them available at a "self-help center" in the courthouse. Whatever the form, it is helpful either to provide the information in writing or to give the parties written notice of the location of the material, their duty to review it before the hearing or trial, and where additional copies or information are available.

Even if materials have been provided in advance, the hearing or trial should begin with the judge's review of all three topics—explaining how the proceeding will be conducted, the legal elements of the matter, and types and forms of acceptable evidence. Judge Albrecht explains that each party will have an opportunity to present its position (or tell its story), that she will ask questions as needed to obtain additional information, and that she will apply the rules of evidence in deciding what weight to give the evidence presented.[17] She also explains that she may interrupt either party—if she believes she does not understand the point being made, has heard enough on the point, or if she believes the party is going into an area that is not legally relevant—and ask that the individual move to the next point.

To the extent judges give general instructions in advance to both parties, they minimize the likelihood that their

instructions can be perceived as favoring one party. The Minnesota Protocol on page 18 provides an excellent outline for these preliminary instructions.

• Conduct the proceeding in a structured fashion based on the required legal elements. We suggest that the judge provide the parties with an outline of the decision-making process and follow it explicitly during the proceeding. To continue with our child support example: The judge would state that the first determination is whether the court has jurisdiction to decide the case, then whether financial circumstances of the non-custodial parent have changed, and finally, if so, what change in monthly child support would be appropriate. After taking testimony on the first issue, the judge would clearly state, "Let the record show that the court has jurisdiction in this case." After hearing testimony on the non-custodial parent's changed income, the judge would conclude that phase of the proceeding with, "I find that Mr. Jones's income has increased from $X per month when child support was first established in this case in 1999 to $Y per month today." Then the judge would announce the guideline child support amount and invite the parties to give reasons, if any, for departing from them. At the end, the judge would announce the final result: "The child support guidelines call for monthly support of $Z in these circumstances. I find no reason to deviate from the guidelines. I order an increase in Mr. Jones's monthly child support from $Q to $Z."

Attorneys of course are already familiar with this outline and address all of the topics in the course of presenting the case. Using this approach will enable the judge to structure the proceeding for both parties and set clear boundaries for arguments and presentations; it will help them focus on the specific topic being addressed. Any extra time required for the judge to establish this agenda will be more than offset by the reduced time needed for the parties to present evidence and arguments.

Judges may want to use visual aids to assist the parties in understanding and following the issue outline. Richard Zorza discusses the options of flipcharts and more highly automated alternatives in his book.[18]

• Create an informal atmosphere for the acceptance of evidence and testimony. Dr. Goldschmidt recommends that the formal rules of procedure and evidence be relaxed for cases involving self-represented litigants. We agree and suggest that the judge can easily accomplish this by using informal language. By stating, "I will give each of you a chance to tell me what you think I need to know to decide each of the issues in this case," the judge can create an informal environment for accepting evidence. Any party can object at this point and insist on following the rules of evidence, but this is unlikely. In the absence of objection, the parties can waive the rules of evidence regarding following the traditional question and answer format, establishing a foundation for introducing documents and exhibits, qualifying an expert, and the like.

Generally, such an introductory statement will suffice because issues of privilege rarely arise in most matters in which litigants typically self-represent. However, judges may need to deal more explicitly with hearsay. Hearsay will be excluded if a party objects, but it is otherwise probative—if a party does not object, a judge or jury may consider hearsay evidence. Does the judge have a duty to inform the parties of this rule? The Minnesota protocol suggests that a judge do so but does not require specific notice. We suggest the judge's initial advice to the parties include such language but not that the court bring it to the attention of the parties. The initial instruction should suffice.

• Ask questions. Judges should freely ask questions of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired. The Minnesota protocol suggests that the judge pose questions in the most general form to avoid the appearance of leading a party or witness to a particular conclusion.

• Provide written notice of further hearings, referrals, or other obligations of the parties. Optimally, the parties will leave the courtroom with an order or minute entry documenting the next court date, the court's referral to another service or resource (such as the court's self-represented litigants support office, a courthouse facilitator program, or an alternative dispute resolution program), and any other obligations the parties may have (such as preparing and serving further papers or proposed orders).

Dr. Goldschmidt suggests that judges call witnesses and conduct "limited independent investigations" if they believe either process is necessary to discover the truth of a matter. We do not endorse this suggestion. A judge should feel free to ask questions of a witness already in the courtroom and should be prepared, in special circumstances, to continue a matter to allow a party to secure the presence of an additional witness. But we do not believe it proper for a judge to decide an additional witness is needed and to subpoena or call that witness. Nor do we think it possible for the judge to conduct an independent investigation without losing the appearance of impartiality.

### Cases Involving Two Unrepresented Parties

We suggest these additional procedures for cases involving two unrepresented parties.

• Swear both parties at the beginning of the proceeding. When both parties are sworn, distinctions between their arguments and their testimony are not necessary. All statements made by the parties can now be considered as evidence. The judge should explain that the parties must remember they are

under oath throughout the hearing or trial and that anything they say—as a question, statement, or argument—must be truthful.

- Maintain strict control over the proceedings. Most self-represented litigants are respectful of the court and will conduct themselves in a dignified manner. However, especially in family law matters, emotions often flare, and the judge should quickly terminate arguments and calm anger. Recessing for a moment may be necessary to give the parties a chance to regain their composure. The judge must be alert and set and enforce clear ground rules, especially that the parties may not interrupt each other and that each will have an opportunity to be heard. The judge may need to use the contempt power or authority to dismiss the lawsuit for abuse of the legal process as a threat to restrain inappropriate behavior.
- Remain alert to imbalances of power in the courtroom. The judge must ensure that both sides have a full opportunity to present their points of view, especially where it is clear that one of the parties has more power (relationships involving domestic abuse, disputes in which one party is far more sophisticated than the other, or situations in which one of the parties has a limited knowledge of English). Judges should make a special effort here to ask the less powerful party its views on each issue or even to draw out those views with follow-up questions. The judge should not rely on the party's ability to take the initiative or to speak proactively. In extreme cases, the judge should continue the matter and seek pro bono legal representation for one or both parties.

### Cases Involving Represented and Unrepresented Parties

Most trial judges find cases with unequal resources most difficult, as illustrated in *Oko v. Rogers*. Problems arise when counsel advocate for their clients to prevent unrepresented litigants from adducing testimony or other evidence to support their cases. Judges can use a number of different approaches to ensure that unrepresented litigants fully present their case without negating altogether the value of counsel for represented parties. Counsel must fully represent the client, leading in presentation of testimony, documents, and exhibits; cross-examining testimony presented by the unrepresented party; and arguing the legal and factual merits of the client's case. In terms of the minority standard, the judge accommodates the special needs of the self-represented party but does not prejudice the case of the represented party. The represented party is not prejudiced, in the legal sense of that term, by the introduction of the other side's evidence. That is what the hearing and trial are for. The represented party retains an unfettered opportunity to object to the admissibility of all evidence offered.

We recommend as a first principle, as the Minnesota protocol provides, that all cases involving self-represented litigants be handled in the same fashion, whether or not the other party retains counsel. The most serious problems arise when judges conduct the case as if both sides are represented by attorneys but find, as in the *Oko* case, they must intervene repeatedly in order to enable the non-lawyer to function in the proceeding. When this occurs, the lawyer must accommodate to the informal setting established by the judge. The lawyer may lead the client and witnesses through testimony, cross-examine the opposing party and its witnesses, make objections to testimony or documents, and argue the merits of the client's case. Most attorneys recognize the need for the judge to proceed informally, but a few will insist that the proceeding be conducted in strict compliance with the rules of evidence. The judge has several options in dealing with this objection.

- Convince the attorney of the benefits of proceeding informally. The judge can call the attorney to the bench, explain the reasons for the informal structure, and convince the lawyer to withdraw the objection. The judge can point out that going through the question and answer process will take much more time—for the judge, the attorney, and the attorney's client—and could be much more difficult and frustrating for everyone concerned.
- Overrule. The judge can overrule the objection on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence.
- Set special ground rules for the conduct of the proceeding under the rules of evidence. The judge can inform counsel that if the matter proceeds under the formal rules of evidence, the lawyer will be required to explain to the unrepresented litigant the basis for any objection the attorney makes, with enough detail so that the unrepresented litigant can take whatever corrective steps are needed to proceed. For example, if the attorney objects to a leading question, the attorney would need to explain the objection sufficiently so the self-represented party would be able to pose an appropriate non-leading question.

This is not the same as requiring counsel to assist the unrepresented litigant by formulating that party's questions. It merely makes counsel responsible for explaining, in whatever depth necessary, the nature of counsel's objection. The judge, as well, will help assure that the unrepresented litigant is equipped with the tools needed to get all evidence before the judge for a fair determination of the matter. The judge should explain to counsel that counsel may decide at any time during the proceeding to abandon the objection and proceed informally from that point.

- Refuse to uphold objections to the form of questions or testimony. The judge can decide not to entertain objections to the form of questions or testimony and limit such objections to only the admissibility of the evidence itself. For instance, if the attorney objects to the manner in which the self-represented litigant attempts to introduce a document, the judge can cut to the ultimate question: "Counsel, does your client contend

that this document is either inadmissible or something other than what it purports to be?" The lawyer thus can protect the client's interests without prolonging the process or requiring the judge to provide additional assistance to the litigant.

- Use leading questions or prompts as often as necessary to remind the unrepresented litigant to present evidence in a manner consistent with the rules of evidence. This should be a last resort but, as *Oko* illustrates, is proper. Judges should try all other approaches first because these generally produce less cumbersome, less frustrating, and less contentious hearings and trials. But if counsel refuses to cooperate with the other approaches introduced by the judge, the judge will have established on the record the need for measures to ensure the unrepresented litigant's right to be heard.

- Offer the unrepresented litigant the option of a continuance if necessary. This could mean reconvening later the same day or returning to court another day. If, for example, an unrepresented litigant does not have the witnesses present to authenticate a document or photograph and counsel insists on the need for such authentication, the judge can offer to continue the matter long enough for the litigant to contact and summon the necessary witnesses. This approach puts additional pressure on counsel to be reasonable in voicing objections and enables the judge to demonstrate doing whatever is necessary in order to maintain a level playing field within the courtroom. Counsel will have to weigh the delay and expenditure of additional time and money to return to court against the possibility of discovering weaknesses in the documents or exhibits introduced.

- Allow or help obtain assistance for the unrepresented litigant. The Minnesota protocol recognizes the potential benefit of a friend or counselor who can sit with the litigant at counsel table. The assister is not allowed to ask questions or argue on behalf of the litigant but may provide advice on the form of questions and the procedures for introducing evidence as the case proceeds. Assisters do not necessarily need court experience to provide help. If the litigant has language difficulty or is otherwise limited in literacy or comprehension of the process, a friend who is able to read and understand the materials and accurately interpret the information provided by the judge and opposing counsel would be helpful to the litigant. In extreme cases, the judge may need to adjourn the matter sua sponte and seek pro bono counsel for the unrepresented party. This is particularly appropriate when the litigant speaks a different language or is a person with mental or comprehension handicaps.

## Conclusion

The challenge for the trial judge dealing with unrepresented litigants is to ensure they have a full opportunity to present their cases for resolution on the merits. The duty of impartiality requires the judge to consider all competent evidence in the possession of the unrepresented litigant. We have suggested a number of techniques to help judges accomplish that result. We believe that they are fully acceptable under both the majority and minority views of the judge's role in these types of proceedings. We invite responses to this analysis and hope it will encourage trial judges to contribute additional techniques they have found useful and effective in these situations.[19]

## Notes

1. *See* John M. Greacen, *No Legal Advice from Court Personnel: What Does That Mean*, JUDGES' J., Winter 1995, at 10; J. Greacen, *Legal Information vs. Legal Advice: Developments during the Last Five Years*, JUDICATURE 84 (2001), at 198; Richard Zorza, *Reconceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*; 67 FORDHAM L. REV. 2659 (1999); R. ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (National Center for State Courts 2002).

2. John M. Greacen, *What We Know and Do Not Know about Self-Represented Litigants* (California Administrative Office of the Courts, Center for Children and Families).

3. FAM. CT. REV., vol. 40, no. 1 (Jan. 2002). *See also* Russell Engler, *And Justice for All–Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* (1988).

4. Form 4A-201 B, District Court Rules of Procedure for Domestic Relations Matters, Responsibility of Self-Represented Party.

5. *Available at* www.abanet.org/cpr/mcjc/toc.html. Although the ABA Code of Judicial Conduct applies to judges only as it was adopted in the state in which the judge presides, and states often modify ABA codes in the course of adopting them, we are not aware of any state that has modified these sections in any way that would affect our analysis.

6. State of California, Commission on Judicial Performance, Inquiry Concerning Judge Fred L. Heene, Jr., No. 153 (Oct. 13, 1999).

7. ABA MODEL CODE OF JUDICIAL CONDUCT, 1-97.

8. Tom Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW AND SOCIETY REVIEW 1 (1988), at 103. On page 126, Tyler reports separately the data for uncontested and contested matters. We rely on the data for contested matters. The study found overall that the most important factor in litigants' assessments was the perception of the judge's effort to be fair.

9. 422 U.S. 806 (1975).

10. 528 U.S. 152 (2000).

11. Margaret H. Marshall, Massachusetts Conference on Pro Se Litigants (Mar. 15, 2001) (unpublished speech) (on file with author).

12. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). *But see* Mmoe v. Commonwealth, 473 N.E.2d 169 (Mass. 1985) (Mass. Supreme Judicial Court reversed trial judge's denial of motion to dismiss pro se complaint following three-day hearing at which pro se litigant was allowed to supplement and clarify 35-page complaint orally).

13. Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503 (1st Cir. 1994); Malik v. Coughlin, 506 N.Y.S.2d 844 (N.Y. Sup. 1986); Conn. Light & Power Co. v. Kluczinsky, 370 A.2d 1306 (Conn. 1976).

14. *See supra*, note 4

15. The court surmised that the appellant merely copied a brief from another case and changed a few words in an attempt to make it relevant to his case.

16. For instance, Dr. Goldschmidt urges that court staff be trained to advise litigants concerning "the elements of common causes of action, defenses, statutes of limitations, service of process, execution of judgment, and other procedural requirements," taking issue with limitations one of the authors advocated in other articles. (*See supra*, note 1.) We choose not to address those issues here because the article focuses on the role of the trial judge, not staff.

17. Dr. Goldschmidt recommends the formal rules of procedure and evidence be relaxed for cases involving self-represented litigants. We know of no state that has formally adopted this principle in its rules. However, the trial judge can choose to conduct a hearing or trial in an informal manner and signal this to the parties by stating that they will be given an opportunity to tell the judge whatever they think the judge needs to know about the matter.

18. ZORZA, THE SELF-HELP FRIENDLY COURT, *supra* note 1, at 75.

19. John M. Greacen writes a regular column in *The Judges' Journal* and will include all suggestions and comments received in response to this article in a future column. He can be reached at john@greacen.net.

Supreme Court
State of North Carolina
Raleigh

CHAMBERS OF
I. BEVERLY LAKE, JR.
CHIEF JUSTICE

BOX 1841
ZIP CODE 27602
TEL. (919) 733-3711

# Memorandum

**To:** **All Employees of the Administrative Office of the Courts**

**From:** **Chief Justice I. Beverly Lake, Jr.** IBL

**Re:** **Guidelines for Providing Legal Information to the Public**

**Date:** **September 1, 2004**

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In August 2003, I appointed an ad hoc committee of the State Judicial Council to review guidelines for court staff who provide legal information to the public. The Committee consisted of Judge Beth Keever, Clerk of Superior Court Tim Spear, Magistrate Jean Massengill, and Public Defender Angus Thompson. This Committee reviewed information from the Institute of Government, articles by a court consultant, and court rules from other states. After dedicated efforts, which are sincerely appreciated, the Committee recommended the following guidelines, which the Supreme Court adopted in late June of this year.

These guidelines are being sent to all employees of the Administrative Office of the Courts, and you are asked to use them as a guide in working with the public. The Judicial Branch is blessed with dedicated and public service minded employees, and these guidelines were developed to assist you as you go about your daily work.

I again thank the members of the ad hoc committee who worked diligently to offer the Court these well-researched guidelines.

# IN THE SUPREME COURT OF NORTH CAROLINA

## Order

## Adopting Guidelines for Court Staff Providing Legal Information to the Public

Pursuant to the recommendations of a subcommittee of the North Carolina Judicial Council, the following guidelines are issued for the benefit of all court staff who provide legal information to the public.

I. **Purpose:** The purpose of these guidelines is to assist court staff in communicating with individual court users without practicing law. The guidelines are intended to enable court staff to provide the best service possible to individuals within the limits of the individual staff member's responsibility. The guidelines are not intended to restrict powers of court staff otherwise provided by statute or rule. The guidelines are not intended to list all assistance that can be provided. The guidelines recognize that the best service the court staff may provide in many proceedings is advising an individual to seek the assistance of an attorney.

II. **Impartiality:** Court staff shall remain impartial and may not provide or withhold assistance for the purpose of giving one party an advantage over another.

III. **Authorized Information and Assistance:** Court staff may do all of the following:

A. Provide public information contained in any of the following:

1. Dockets or Calendars
2. Case files
3. Indexes

B. Provide a copy of, or recite, any of the following:

1. State and local court rules
2. Court procedures
3. Applicable fees and costs

C. Inform an individual where to find statutes and rules without advising whether a particular statute or rule is applicable.

D. Identify and provide applicable forms and written instructions without providing recommendations as to any specific course of action.

E. Answer questions about how to complete forms, such as where to write in particular types of information, but not questions about how the individual should phrase his or her responses on the forms.

F. Define terms commonly used in court processes.

G. Provide phone numbers for lawyer referral services, local attorney rosters, or other assistance services, such as the AOC website and other attorney association websites, known to the court staff.

H. Provide appropriate aids and services for individuals with disabilities to the extent required by the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq*.

IV. **Unauthorized Information and Assistance:** Court staff may not do any of the following:

A. Provide legal advice or recommend a specific course of action for an individual.

B. Apply the law to the facts of a given case, or give directions regarding how an individual should respond or behave in any aspect of the legal process.

C. Recommend whether to file a complaint or other pleading.

D. Recommend phrasing for or specific content of pleadings.

E. Fill in a form, unless required by the Americans With Disabilities Act of 1990.

F. Recommend specific persons against whom to file complaints or other pleadings.

G. Recommend specific types of claims or arguments to assert in pleadings or at trial.

H. Recommend what types or amounts of damages to seek or the specific individuals from whom to seek damages.

I. Recommend specific questions to ask witnesses or parties.

J. Recommend specific techniques for presenting evidence in pleadings or at trial.

K. Recommend which objections to raise regarding an opponent's pleadings or motions at trial or when and how to raise them.

L. Recommend when or whether an individual should request or oppose a continuance.

M. Recommend when or whether an individual should settle a dispute.

N. Recommend whether an individual should appeal a judge's decision.

O. Interpret the meaning or implications of statutes or appellate court decisions as they might apply to an individual case.

P. Perform legal research.

Q. Predict the outcome of a particular case, strategy, or action.

Adopted by the Court in Conference this the 24th day of June 2004. These guidelines shall be delivered to each employee of the Administrative Office of the Courts at the earliest practical and economical mailing by the Administrative Office of the Courts.

Brady, J.
For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 1st day of September 2004.

Christie Speir Cameron
Clerk of the Supreme Court

# Tab 14: Restoration to Competency

UNC SCHOOL OF GOVERNMENT

SOCIAL SERVICES LAW BULLETIN NO. 45 | OCTOBER 2015

# Restoration to Competency under G.S. 35A-1130: Common Issues and Questions

**Meredith Smith**

Guardianship is the legal relationship under which a person or entity is appointed by a court to make decisions and act on behalf of another person (the ward) with respect to the ward's personal affairs, financial affairs, or both.[1] This proceeding is governed by Chapter 35A of the North Carolina General Statutes (hereinafter G.S.) and presided over by the clerk of superior court, who has original and exclusive jurisdiction in the areas of incompetency and adult guardianship. Once the clerk[2] enters an order adjudicating a ward to be incompetent and appoints a guardian, that guardianship can be terminated in only two ways: upon death of the ward[3] or upon entry of an order by the clerk restoring the ward's competency pursuant to G.S. 35A-1130.[4] This bulletin analyzes ten common questions that arise in the context of a restoration proceeding under G.S. 35A-1130; these are as follows:

1. How is a restoration proceeding initiated?
2. What happens if a motion for restoration is filed and it does not contain the required elements to initiate an action?
3. Is a medical report or doctor's note required to file for restoration? If the guardian, the guardian ad litem, or the clerk wants to obtain medical records or other medical evidence regarding the ward's condition, how does he or she go about obtaining them?
4. Does the petitioner have to have an attorney to file a motion for restoration?
5. To file a motion for restoration, does the ward have to be able to write or read the motion?

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This bulletin is an update to *Social Services Law Bulletin* No. 44, published in March 2015.

Meredith Smith is a School of Government faculty member specializing in public law and government.

1. John L. Saxon, North Carolina Guardianship Manual § 1.4-A, at 7 (2008).

2. The majority of restoration cases are presided over and decided by the clerk. However, the ward has a right to trial by jury in a restoration proceeding under G.S.35A-1130(d). A trial by jury may be requested by the ward, his or her attorney, or the guardian ad litem. *See* G.S. 35A-1130(c). Failure to request a trial by jury constitutes a waiver of that right. *Id.* The clerk, on his or her own motion, may require a trial by jury in accordance with G.S. 1A-1, Rule 39(b). *Id.* The right of the clerk to enter an order for a trial by jury is notwithstanding any request or failure to request a trial by jury by the ward, his or her counsel, or his or her guardian ad litem. *Id.* This bulletin focuses on non-jury restoration proceedings, but similar principals described herein apply to cases involving a jury.

3. *See* G.S. 35A-1295(a)(3).

4. *See* G.S. 35A-1295(a)(2).

6. Once a motion or other document is filed initiating the proceeding, when is the hearing held, what is the process for service, and who receives notice of the filing?
7. May the clerk appoint a guardian ad litem in the restoration proceeding? If so, who is responsible for payment of the guardian ad litem fees?
8. What is the burden of proof that the petitioner must meet at the hearing for restoration, and what may the clerk consider in making his or her ruling?
9. What rights are restored when the motion for restoration is granted by the clerk?
10. What is the applicable appeal period when the clerk denies the petitioner's request for restoration? What is the standard of review on appeal?

## 1. How is a restoration proceeding initiated?

Any interested person, including a ward, a member of the ward's family, or a guardian, may file papers with the clerk of superior court to initiate a restoration proceeding.[5] There is no single document or form that must be filed. As set forth below, a document presented for filing with the clerk of superior court is sufficient to initiate the action as long as it is evident from the document itself that the filing party is seeking restoration for an identifiable ward and the document is properly verified and contains facts tending to show competence.

Article 3 of G.S. Chapter 35A governs the process of restoring competency after an adult[6] has been adjudicated incompetent under Article 1 of Chapter 35A. Article 3 of that chapter provides, in part, that the guardian,[7] the ward,[8] or any other interested person[9] "may petition for restoration of the ward to competency by filing a motion in the cause."[10] The use throughout the statute of the words "petition" and "petitioner" along with "motion in the cause" and "motion" often elicits confusion about what a person or entity must file to initiate the restoration process before the clerk of superior court.[11] This confusion is exacerbated by the fact that although what

5. *See* G.S. 35A-1130(a).

6. This bulletin focuses specifically on restoration of competency of an adult. Minors, defined as persons under the age of 18, are legally incompetent to transact business or give consent for most things until they reach the age of 18 unless they are legally emancipated. *See* G.S.35A-1201(a)(6); G.S. 48A-2. At the age of 18, a minor attains competency and must be adjudicated incompetent under G.S. Chapter 35A in order for the statute and any subsequent restoration proceeding to apply. A verified petition for adjudication of incompetence of a minor may be filed when the minor is 17.5 years old. *See* G.S. 35A-1105.

7. *See* G.S. 35A-1130(a). The guardian has an ethical duty to petition for restoration of the ward's competency if the guardian believes that the ward may no longer be legally incompetent. *See* John L. Saxon, Guardianship of Incapacitated Adults: A Summary of North Carolina Law 18 (Nov. 2004) (on file with author). A 2014 amendment to the North Carolina General Statutes provides that status reports filed by guardians must include a report of the guardian's efforts to restore competency. *See* G.S. 35A-1242(a1)(4).

8. One of the rights retained by the ward, despite an adjudication of incompetency, is the right to petition for restoration. *See* G.S. 35A-1130(a).

9. *Id.* If not the ward or the ward's guardian, the filing party must be an interested person. "Interested person" likely includes, but is not limited to, the ward's next of kin, a government entity or agency, such as a department of social services, a medical provider or other treatment provider of the ward, and any of the original parties to the incompetency/guardianship action.

10. *See* G.S. 35A-1130(a).

11. *See generally* G.S. 35A-1130.

is filed is treated as a motion in the cause, it has characteristics of both a motion and a petition.[12] It is like a traditional motion in that it is filed in the existing incompetency proceeding and a new special proceeding file is not opened for the restoration action.[13] It is like a petition in that a written filing is required,[14] it must be served by the petitioner in accordance with Rule 4 of the North Carolina Rules of Civil Procedure,[15] the document initiates the restoration proceeding, and the proceeding has a separate burden of proof that, if met, resolves the case upon the merits.[16]

While this language understandably creates some confusion, it is helpful to understand that it does not matter whether the document presented for filing is called a motion or a petition. A person may file *any* written document, whether handwritten or typed, to petition for restoration as long as the document contains:

(a) a statement that indicates that the filing party is seeking restoration of competency for an identifiable ward previously adjudicated incompetent under G.S. Chapter 35A,[17]
(b) facts tending to show that the ward is competent,[18] and
(c) a verification.[19]

Once a document that includes all three elements is filed, the clerk will treat it as a motion in the cause.[20] Below is a more detailed discussion of these three required elements. Reflecting the language used in the statute, this bulletin will refer to the document to be filed as a motion and the person filing the motion as the petitioner.

### 1.a. A Statement Seeking Restoration for an Identifiable Ward

The first requirement of a restoration motion is relatively easy to satisfy. If the clerk understands from reading the document that the filing party would like the clerk to consider restoring a ward's competency, it is likely that the first requirement has been met. Generally, under North Carolina law, pleadings and motions are interpreted liberally for purposes of initiating an action or raising an issue before the court, particularly when an unrepresented litigant is the

12. A historical underpinning for this confusion may be the fact that, prior to 1987, initiating a restoration action required the filing of a petition for restoration. *See* G.S. 35-4 (1986) ("When any insane person or inebriate becomes of sound mind and memory or becomes competent to manage his property . . . a petition on behalf of such person may be filed before the clerk . . . "); G.S. 35-1.39(a) (1986) ("The guardian, ward or any other interested person may file a petition with the clerk who appointed the guardian for the restoration of the ward to competency.").

13. *See* G.S. 35A-1130(a).

14. *Id.* Unlike motions, which sometimes may be made orally to a court, a written filing is required by statute to petition for restoration. *Id.* A request for restoration may not be made to the court informally by oral motion during a hearing. *Id.*

15. *See* G.S. 35A-1130(b).

16. *See* G.S. 35A-1130(d).

17. *See generally* G.S. 35A-1130. *See also* G.S. 1A-1, Rule 8 (requiring pleadings to contain a short and plain statement of the claim for relief); *id.*, Rule 7(b)(1) (requiring motions to state with particularity the grounds therefor).

18. *See* G.S. 35A-1130(a).

19. *Id.* (stating that "the motion shall be verified").

20. *Id.*

filing party.[21] Therefore, when determining whether a filing is sufficient to initiate an action, a considerable amount of leeway should be afforded to the filing party.[22] This is to allow the party the opportunity to prove his or her case at the hearing rather than restrict his or her access to restoration based on the technicalities of the documents filed.[23]

### 1.b. Facts Tending to Show Competency

The motion initiating the restoration proceeding must contain facts tending to show competency.[24] These facts may include, but are not limited to, a description through anecdotes or statements of the ward's ability to manage his or her affairs or to make and communicate decisions regarding the ward's finances, nutrition, personal hygiene, health care, personal safety, employment, and residence.[25] Examples of various statements tending to show competency can be found on the Administrative Office of the Courts Form AOC-SP-208, Guardianship Capacity Questionnaire.[26]

The motion does not have to contain all of the facts and evidence necessary to meet the burden of proof required for a restoration order.[27] There is a significant gap between what a party must include in a motion for the purpose of initiating a restoration action and what a petitioner must prove at a hearing on restoration to obtain a restoration order. The petitioner is afforded the opportunity to fill that gap and meet the burden of proof at the hearing through the presentation of evidence, including oral testimony and written exhibits. Thus, the motion for restoration does not have to contain enough facts and evidence in and of itself to prove the ward's competency. It simply must include some facts *tending* to show competency.[28]

### 1.c. Verification

Any document filed for the purpose of initiating a restoration proceeding must be verified.[29] Verification serves two key purposes. First, it binds the person filing the document under oath to his or her statement of facts, subject to the penalty of perjury for any falsity.[30] As one court noted, a verification is a reasonable method of assuring that the court exercises power only when an identifiable person "vouches for the validity of the allegations."[31] Second, and equally important, a proper verification is necessary in certain actions to invoke the subject matter jurisdiction of the court over the matter.[32]

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21. *See generally* 1 G. Gray Wilson, North Carolina Civil Procedure § 7-4 (motions), § 8-1 (pleadings) (3d ed. 2007).
22. *See id.*
23. *See id.*
24. *See* G.S. 35A-1130(a).
25. *See generally* Administrative Office of the Courts, Form AOC-SP-208, Guardianship Capacity Questionnaire, www.nccourts.org/Forms/Documents/846.pdf.
26. *See id.*
27. To obtain restoration of competency for the ward, the petitioner must prove by a preponderance of the evidence that the ward is competent. *See* G.S. 35A-1130(d). This burden of proof is discussed in greater detail in question 8, below.
28. *See* G.S. 35A-1130(a).
29. *See id.*
30. *See* G.S. 1A-1, Rule 11(b). *See also* 1 Wilson, *supra* note 21, § 11-5.
31. *See In re* T.R.P., 360 N.C. 588, 592 (2006).
32. *See id.* at 590–91 (noting that for certain actions created by statute, the requirement that pleadings be signed and verified is not a matter of form but of substance and that a defect therein is jurisdictional).

To properly verify the motion, the petitioner must follow three steps. First, the motion must contain a statement that is substantially similar to the following:

> The contents of the [document] verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he or she believes them to be true.[33]

Second, the person filing the motion for restoration must swear to this or a similar statement under oath before a notary public or other officer of the court authorized to administer oaths, such as a magistrate, judge, or clerk of superior court.[34] To properly administer the oath, the notary or other authorized officer must be able to certify that at a single time and place the petitioner:

1. appeared in person before the notary,
2. was personally known to the notary or identified by the notary through satisfactory evidence, such as a driver's license, and
3. made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear."[35]

For the third and final step, the notary then notarizes the motion. The notary certification must contain at least the following information:[36]

1. the name of the petitioner who appeared in person before the notary unless the name of the petitioner is otherwise clear from the record itself,
2. an indication that the petitioner signed the document and certified to the notary under oath or affirmation the truth of the matters stated in the document,
3. the date of the oath or affirmation,
4. the signature and seal or stamp of the notary who took the oath or affirmation,
5. the notary's commission expiration date.

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A restoration proceeding is statutory in nature, and the requirements for verification are governed by the restoration statute. G.S. 35A-1130(a). A more detailed discussion of whether questions of subject matter jurisdiction are triggered by the restoration motion is set forth in question 2, below.

33. *See* G.S. 1A-1, Rule 11(b); *id.,* Rule 7(b)(2) (stating that the rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules). *See also In re* the Triscari Children, 109 N.C. App. 285, 287 (1993) (holding that, in the context of a termination of parental rights proceeding, where a chapter requires a verified petition, and verification is not defined in the chapter, "the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified"); State v. Johnson, 198 N.C. App. 138, 140–41 (2009) (adopting the holding of *Triscari Children* and stating that in the absence of specific requirements for a verified petition in a child custody case under G.S. Chapter 52C, the requirements for verification established by N.C. Rule of Civil Procedure 11(b) apply).

34. *See* G.S. 1A-1, Rule 11(b); G.S. 1-148. *See also* 1 Wilson, *supra* note 21, § 11-7.

35. G.S. 10B-3(14).

36. *See* G.S. 10B-40(d). Pursuant to G.S. 10B-40(d), the notary certification is acceptable also if it is in the form set forth in G.S. 10B-43, which contains all of the information required under G.S. 10B-40(d) as well as some additional information, such as the county and state where the notary notarized the document.

**Figure 1. Form of Proper Verification (from page 2 of Form AOC-SP-200)**

| VERIFICATION | | |
|---|---|---|
| I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true. | | |
| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | | *Date* |
| *Date* | *Signature Of Person Authorized To Administer Oaths* | *Signature Of Petitioner* |
| ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* | | |
| ☐ *Notary* | *Date My Commission Expires* | |
| **SEAL** | *County Where Notarized* | |

AOC-SP-200, Page Two, Rev. 6/14
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An example of a valid verification can be found on page 3 of Form AOC-SP-200, the Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian and Interim Guardian.[37] A copy of this verification is set forth in Figure 1, above.

In contrast, Form AOC-E-415, the Motion in the Cause to Modify Guardianship, does not contain a valid verification because the signature block requires only the signature of the petitioner and a notary.[38] This form is regularly relied upon in guardianship cases to modify an existing guardianship. Although the form is not drafted to specifically address a motion for restoration, the petitioner can adapt the form to satisfy the requirements of a restoration motion. First, the petitioner could check the "Other/Comment" box on page 1 of the Form AOC-E-415 and write "enter an order for restoration to competency" to identify the relief requested. Second, the petitioner could notify the court that he or she is seeking to prove that the ward is competent by checking off the relevant competencies listed on page 2. Third, the petitioner could include any additional facts showing competency on page 3. Finally, the petitioner should attach a separate verification to the form to properly verify the document before filing it similar to Form AOC-SP-200, discussed above.

## 2. What happens if a motion for restoration is filed and it does not contain the required elements to initiate an action?

The hearing clerk[39] should analyze a motion for restoration after it is filed and before the hearing to ensure it complies with the requirements set forth in question 1, above. If the hearing clerk determines it is not clear that the petitioner is seeking restoration for an identifiable ward, or if

37. *See* Administrative Office of the Courts, Form AOC-SP-200, Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian and Interim Guardian, www.nccourts.org/Forms/Documents/707.pdf.

38. *See* Martin v. Martin, 130 N.C. 27, 28 (1902) (holding that the phrase "sworn and subscribed to" is defective as a verification); *In re* the Triscari Children, 109 N.C. App. 285, 287 (holding that petitions with only a signature and notary notarizing the signature were not in compliance with the statute requiring them to be verified).

39. The clerk at the counter who accepts filings does not review the motion to determine whether it meets the legal standard to initiate a restoration action. The clerk at the counter accepts the motion

the motion does not contain facts tending to show competency, the hearing clerk may give the petitioner an opportunity to file an amendment to the motion to fix the deficiency in the filing prior to the hearing.[40] However, if the motion filed is missing or lacks a proper verification, it is less clear whether the hearing clerk may give the petitioner an opportunity to amend the motion to correct or add the verification without potentially voiding any subsequent order entered in the proceeding. Where a motion lacks a proper verification, the best practice, as evidenced by the discussion below, is for the clerk to dismiss the motion without prejudice and for the petitioner to re-file a new motion with a proper verification.

As noted above, a proper verification is necessary to invoke the subject matter jurisdiction of the court if an action is statutory in nature and the statute requires a verification.[41] If a motion for restoration is missing a verification or contains an invalid verification and the clerk subsequently enters an order in that proceeding, the order may be void and could later be vacated on appeal.[42] It is advisable for the clerk to review the verification to ensure that the motion is

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and clocks it in even if there appear to be deficiencies in the motion. The motion is then reviewed by the elected clerk or assistant clerk with the judicial authority to preside over the hearing on restoration. This is because the determination of whether the motion or other document filed meets the legal standard for initiating the restoration action is a judicial decision. It is not a decision to be made by a clerk accepting filings at the counter and acting in an administrative capacity.

40 *See In re* T.B., 177 N.C. App. 790, 793 (2006) (holding that where a statute required the petition to terminate parental rights to include a copy of the custody order, the omission of the order need not have been fatal to subject matter jurisdiction if the petitioner had remedied the defect by amendment or later production of the order). *See also In re* T.M.H., 186 N.C. App. 451, 455 (2007) (noting in a termination of parental rights case that a violation of the statutory verification requirement was a jurisdictional defect *per se* and that other requirements, such as the petition or motion not including facts sufficient to warrant a determination, are not a defect *per se*). Because the motion must be in writing, it is advisable that the amendment also be in writing, particularly if the purpose of the amendment is to address defects related to the statutory requirements of the restoration motion.

41. *See* Boyd v. Boyd, 61 N.C. App. 334, 336 (1983) (holding that a proper verification at the time of filing is mandatory for jurisdiction when required by statute); Fansler v. Honeycutt, 221 N.C. App. 226, 228, 728 S.E.2d 6, 8 (2012) (stating that "[i]f an action is statutory in nature, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional"). Subject matter jurisdiction is the court's or the clerk's authority to hear and enter orders in a case. *See* Haker-Volkening v. Haker, 143 N.C. App. 688, 693 (2001). The clerk has original jurisdiction over restoration proceedings pursuant to G.S. 35A-1103(a).

42. *See In re* the Triscari Children, 109 N.C. App. 285 (vacating a termination of parental rights order for lack of subject matter jurisdiction because the petition was not verified); *In re* Green, 67 N.C. App. 501 (vacating and dismissing a juvenile abuse and neglect case for want of subject matter jurisdiction because the department of social services representative failed to verify the petition). *See also* State *ex rel.* Hanson v. Yandle, 235 N.C. 532, 535 (1952) (citations omitted) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted").

properly verified,[43] even if the parties do not raise the issue to the court.[44] Furthermore, the North Carolina Supreme Court has held that an invalid or missing verification may not be cured by consent of the parties.[45]

Although there are no North Carolina cases that address the requirement that a restoration motion under G.S. Chapter 35A be verified, there are a number of cases in the juvenile arena where the court vacated orders for abuse, neglect, dependency, and the termination of parental rights when the petitions or motions[46] in those cases were not properly verified.[47] These juvenile cases are similar to an action for restoration in that the relative underlying statutes each require verification of the petition or motion initiating the proceeding.[48] In *In re T.R.P.*, the North Carolina Supreme Court held that a challenge to subject matter jurisdiction could not be waived and quoted other court decisions that held that defects in jurisdiction such as an invalid or missing verification may not be "cured by waiver, consent, amendment, or otherwise."[49]

However, in the case of *Estate of Livesay*, the North Carolina Court of Appeals upheld an amendment to a complaint in a civil action where the sole purpose of the amendment was to add a signature and verification by the petitioner, which was lacking in the originally filed complaint.[50] The court in *Livesay* stated that the amended complaint, which was identical to the original complaint except that it added a signature and proper verification, was an effective remedy to give the court subject matter jurisdiction.[51] In its holding, the court stated that Rule 11 of the N.C. Rules of Civil Procedure allows prompt remedial measures to fix the lack of a signature and/or verification in the original pleading, thereby rectifying the omission and restoring the subject matter jurisdiction of the court.[52] Although the underlying facts of the case related to a signature by an attorney or a party under Rule 11(a), which specifically allows for remedial

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43. The court has an inherent power to inquire into and determine whether it has subject matter jurisdiction. *See In re* McKinney, 158 N.C. App. 441, 448 (2003). In at least one other case where verification of the petition is required by statute, the North Carolina Court of Appeals suggested that the trial judge check the petition to make sure it is both signed and verified before proceeding with a hearing. *See In re* D.D.F., 187 N.C. App. 388, 397 (2007).

44. *See* Feldman v. Feldman, 236 N.C. 731, 734 (1953) (stating that "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties").

45. *See In re* Sauls, 270 N.C. 180, 186 (1967) (citations omitted) (holding that subject matter jurisdiction "cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial"). *See also* Anderson v. Atkinson, 235 N.C. 300, 301 (1952).

46 A termination of parental rights proceeding may be initiated by petition or motion (G.S. 7B-1104), but an abuse, neglect, and dependency action may only be initiated by a petition (G.S. 7B-401, -405).

47. *See generally In re* T.R.P., 360 N.C. 588 (2006).

48. *See* G.S. 7B-403(a) (requiring that to initiate a case for the abuse, neglect, or dependency of a juvenile, "the petition shall be drawn by the director, *verified* before an official authorized to administer oaths, and filed by the clerk, recording the date of filing" (emphasis added)); G.S. 7B-1104 (requiring that to initiate a termination of parental rights proceeding the "petition or motion . . . shall be *verified* by the petitioner or movant" (emphasis added)). *See also In re* C.M.H., 187 N.C. App. 807, 808 (2007) (holding that an unverified motion to terminate parental rights violated the verification requirement of G.S. 7B-1104 and left the trial court without subject matter jurisdiction).

49. 360 N.C. 588, 595 (2006) (quoting Anderson v. Atkinson, 235 N.C. 300, 301 (1952)).

50. 219 N.C. App. 183, 190 (2012).

51. *Id.* at 187.

52. *Id.* at 186.

measures, the court's holding seemed to discuss Rule 11 more generally, including actions such as restoration, where a statute requires verification of a pleading by a party under Rule 11(b).[53]

There is at least one other case, *Alford v. Shaw*, where the North Carolina Supreme Court held that a party could amend the initial pleading to add the missing the verification.[54] In that case, Rule 23(b) of the N.C. Rules of Civil Procedure required the petition to be verified.[55] The court in *Alford* limited its holding, noting that Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit and, therefore, the plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect.[56]

In contrast to the decisions in *Livesay* and *Alford*, the North Carolina Court of Appeals, in the context of the divorce proceeding *Boyd v. Boyd*, upheld the decision of a trial court to dismiss the proceeding without prejudice where the plaintiff filed an unverified complaint and a few days later verified the complaint.[57] The court looked to the governing divorce statute for guidance, and it required verification of a divorce complaint.[58] Given the statutory language, the court held that where a statute requires verification for a complaint to be valid, the complaint must be verified at the time it is filed in accordance with Rule 11 of the N.C. Rules of Civil Procedure.[59] If it is not, then the complaint is not valid and the court never obtained jurisdiction over the case.[60] The court further stated that "[t]he want of a proper verification is a fatal defect, and is a cause for dismissal of the action."[61] The court advised that the plaintiff would have been better off taking a voluntary dismissal without prejudice and re-filing the action at the point in time when the issue with the verification arose.[62] The court did not expressly address whether the plaintiff could have amended the original complaint to fix the mistake.[63]

One distinction between *In re T.R.P.* and *Boyd* on one side and *Livesay* and *Alford* on the other is that *Livesay* and *Alford* both dealt with civil actions where there was no specific requirement, outside of the N.C. Rules of Civil Procedure, that the motion or petition be verified. In *T.R.P.* and *Boyd*, the statutes that served as the basis for the actions required the respective filings initiating the actions to be verified.[64] An action for restoration is more akin to these types of proceedings because the underlying statute in a restoration proceeding, G.S. 35A-1130(a), requires that the motion initiating the action be verified. Therefore, *Livesay* and *Alford* serve as some authority for the clerk to allow a party that filed a motion for restoration with a missing or invalid verification to remedy the error by amending the motion to include a valid verifica-

53. The court in *Livesay* referenced the North Carolina Supreme Court's decision in *In re T.R.P* and interpreted language in *T.R.P.* to suggest that later filings may be sufficient to invoke the subject matter jurisdiction of the court and remedy the failure of the petitioner to initially verify the petition. *See id.* at 190.

54. 327 N.C. 526, 533 (1990).

55. *Id.*

56. *See* 327 N.C. 526, 531 (1990).

57. 61 N.C. App. 334, 336 (1983).

58. *Id.* at 335.

59. *Id.* at 335–36.

60. *Id.* at 336.

61. *Id.* (citation omitted).

62. *Id.*

63. *See generally id.*

64. *Id.* at 335. *See also supra* note 48.

tion. However, because orders entered by a court that lacks subject matter jurisdiction are void, the safest practice where a motion lacks a proper verification in light of *T.R.P.* and *Boyd* may be for the clerk or the petitioner to dismiss the motion without prejudice and for the petitioner to re-file the action with a properly verified motion.[65] If the matter is dismissed, the petitioner will have to pay another filing fee once the petitioner re-files the motion for restoration.

### 3. Is a medical report or doctor's note required to file for restoration? If the guardian, the guardian ad litem, or the clerk wants to obtain medical records or other medical evidence regarding the ward's condition, how does he or she go about obtaining them?

A medical report, doctor's note indicating the ward is competent, or other statement or documentation from a medical or mental health professional is *not* required to file a motion for restoration.[66] As long as the motion meets the requirements set forth in question 1 above, it is sufficient to initiate a restoration proceeding.

When the ward will not or does not produce his or her own medical records as evidence, there are three primary ways to obtain medical records and other medical evidence in a restoration proceeding; these include (a) from the guardian, (b) from the guardian ad litem, and (c) pursuant to a multidisciplinary evaluation (MDE) ordered by the clerk.

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65. *See Boyd*, 61 N.C. App. at 336 (affirming the trial court's dismissal of the plaintiff's divorce action because the complaint was not properly verified but noting that nothing prevented the plaintiff from re-filing the action). Furthermore, Rule 15 of the N.C. Rules of Civil Procedure governs amendment of a pleading. G.S. 1A-1, Rule 15. Because it is not clear that a motion filed to restore competency is a pleading, Rule 15 may not apply to the amendment of the restoration motion. G.S. 35A-1130. Rule 15 allows a pleading to be amended once any time before a responsive pleading is served without leave of the court or by written consent of the adverse party. G.S. 1A-1, Rule 15(a). A claim asserted in an amended pleading relates back to the time of filing. *Id.*, Rule 15(c). If Rule 15 does not apply, then it cannot provide the basis for relating the amended motion back to the time of the filing and thus remedying the jurisdictional issue. If Rule 15 does apply, it is questionable whether the verification in the amended motion relates back to the time of filing, as the relation-back mechanism under Rule 15(c) applies to a new "claim" asserted in an amended pleading. *Id.*, Rule 15(c). Because incompetency and restoration proceedings are special proceedings, it is not clear whether Rule 15 applies. Pursuant to G.S. 1-393, the Rules of Civil Procedure are applicable to special proceedings, except as otherwise provided. G.S. 35A-1102 provides that Article 1 of G.S. Chapter 35A establishes the exclusive procedure for adjudicating a person to be an incompetent adult. In one case, the North Carolina Court of Appeals interpreted this language to mean that any adjudication of incompetency must take place within the "perimeters" of Chapter 35A. *See* Culton v. Culton, 96 N.C. App. 620, 622 (1989). The General Assembly later amended the statute to make clear that this does not interfere with the authority of a judge to appoint a guardian ad litem for a party under Rule 17(b) of the N.C. Rules of Civil Procedure. G.S. 35A-1102. Therefore, there is some argument that the language of G.S. 35A-1102 does not preclude the applicability of the Rules of Civil Procedure to incompetency proceedings where Chapter 35A does not otherwise set forth a specific procedural requirement.

66. *See generally* G.S. 35A-1130.

### 3.a. Guardian Obtains Medical Records

The guardian of the person and the general guardian[67] generally have the authority to obtain medical records of the ward without a subpoena or any other court process, unless the order appointing the guardian provides otherwise.[68] It is advisable and helpful to the clerk for the guardian to appear with these records at the restoration hearing if they are relevant to the ward's competency.[69]

### 3.b. Guardian Ad Litem Obtains Medical Records

In contrast, the guardian ad litem appointed by the clerk for purposes of the restoration proceeding does not have a right to obtain the ward's medical records without the guardian's written authorization, provided the guardian is authorized to make health care decisions for the ward. However, the guardian ad litem can seek an order from the court to obtain them.[70] Although these types of medical records typically contain privileged information, such as information protected by a physician-patient privilege or psychologist-patient privilege,[71] the court can enter an order compelling the disclosure of privileged information *provided* the court finds that the records are necessary for the proper administration of justice.[72] The statute dealing with the disclosure of records subject to privilege states that if the case is in district court, the judge compelling the disclosure shall be a district court judge and that if the case is in superior court, the judge compelling the disclosure shall be a superior court judge.[73] The statute does not address who can compel disclosure if the case is before the clerk. Because clerks have original

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67. A health care agent appointed pursuant to a valid power of attorney that has not been suspended likely has the authority to obtain medical records on behalf of the ward, provided the health care power of attorney provides such authority to the agent. A guardian of the person or general guardian must file a separate proceeding to suspend a health care power of attorney after the appointment of the guardian of the person or general guardian. *See* G.S. 32A-22.

68. *See* G.S. 35A-1241. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) gives individuals the right of access to their medical records in most circumstances. 45 C.F.R. § 164.524. The right of access may be exercised by an individual's personal representative if the individual is incompetent. 45 C.F.R. § 164.502(g). A guardian of the person or general guardian who has been authorized to make health care decisions for a ward is a personal representative for HIPAA purposes.

69. The guardian has a duty to seek restoration and to provide for the ward's best interests. *See supra* note 7.

70. It is advisable for the guardian ad litem to locate and identify any relevant medical records or other health information prior to the hearing. Once the information is located, the guardian ad litem may file a motion requesting that the clerk enter an order compelling the disclosure of the records. Most federal and state confidentiality laws permit the disclosure of information pursuant to a court order. In order to avoid the additional restrictions and regulations imposed by HIPAA, it is advisable not to seek a subpoena of the records but instead to seek directly an order from the court compelling the disclosure of the records. 45 C.F.R. § 164.512(e). HIPAA expressly permits disclosure of protected health information for court proceedings pursuant to a court order. *Id.* There is one exception to this general rule. If the court order is for information maintained by a substance abuse program and the program is required to comply with the federal substance abuse confidentiality regulations in 42 C.F.R. part 2, the court order must be accompanied by a subpoena. *See* 42 C.F.R. pt. 2.

71. *See* G.S. 8-53, -53.3.

72. *Id.* Typically, the court is granted wide discretion in determining what is necessary for the proper administration of justice for the purpose of compelling the disclosure of medical records subject to privilege. *See* State v. Westbrook, 175 N.C. App. 128, 131 (2005).

73. *See* G.S. 8-53, -53.3.

and exclusive jurisdiction in all matters related to incompetency of an adult under G.S. Chapter 35A, it is likely that the clerk does have the authority to compel the disclosure of these records, but, as noted, the statute on disclosure does not make that clear.

### 3.c. The Clerk Orders an MDE

If the clerk determines that evidence related to the ward's medical condition is necessary to his or her decision, the clerk may order an MDE on the clerk's own motion or on the motion of any party to the proceeding.[74] An MDE is an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and may include evaluations of other professionals in other disciplines, such as occupational therapy, psychiatry, and vocational therapy.[75] The MDE is current if it was conducted "not more than one year from the date on which it is presented to or considered by the court."[76] The MDE must set forth the nature and extent of the ward's disability and recommend a guardianship plan or program.[77] This may include a treatment plan, steps for attaining restoration, and assessments by professionals of whether or not restoration is appropriate given the ward's condition.[78] An MDE may be helpful in those restoration cases where there is insufficient or conflicting evidence regarding the ward's capacity, when it appears that limited guardianship may be appropriate instead of restoration, or when additional information is needed to modify or develop an appropriate guardianship plan.

G.S. 35A-1130 regarding restoration does not specifically set out details related to the ordering, completion, and maintenance of the MDE in the court records.[79] The clerk or any party requesting an MDE may do so by using Form AOC-SP-901M, the Request and Order for Multidisciplinary Evaluation, developed to request an MDE in the original incompetency proceeding.[80] Because the statute on restoration is silent as to the details of the MDE, the clerk should include in the MDE order the following information, even in the absence of a request by a party:

74. *See* G.S. 35A-1130(c).

75. *See* G.S. 35A-1101(14).

76. *See id.* A new or updated MDE should be ordered by the clerk if (i) the motion for restoration is filed within one year of an adjudication of incompetency, (ii) an MDE was obtained during the course of the proceeding to adjudicate a ward incompetent, and (iii) an MDE is requested in connection with the restoration proceeding.

77. *See* G.S. 35A-1101(14).

78. *Id.*

79. A party's request for an MDE in the original incompetency proceeding must be filed with the clerk within ten days after service of the incompetency petition. *See* G.S. 35A-1111(a). This may provide some guidance to the clerk when considering the timeliness of a request for an MDE by a party to the restoration proceeding. Although there is no hard-and-fast rule in the restoration statute, the clerk may decide that a request is not timely if it was made at the hearing on restoration, immediately preceding the hearing on restoration, or substantially outside of ten days from the filing of the motion for restoration. There is no time limit on the clerk's authority to order an MDE. *See* G.S. 35A-1130. It is always within the clerk's discretion whether or not to order an MDE. *See* G.S. 35A-1130(c) ("the clerk may order a multidisciplinary evaluation").

80. *See* Administrative Office of the Courts, Form AOC-SP-901M, Request and Order for Multidisciplinary Evaluation, www.nccourts.org/Forms/Documents/668.pdf .

1. the state or local human services agency ordered to prepare the report,
2. the deadline for filing the MDE with the court if different from the thirty days set forth in the form,
3. the parties entitled to receive copies of the MDE,
4. a statement that the contents should be revealed only as directed by the clerk and that the MDE will not be a public record,
5. a request that the agency identify whether and to what extent restoration is appropriate and whether a limited guardianship may be appropriate instead, and
6. the party or entity charged with paying the costs of the MDE (see below).[81]

While the law does not specify where the clerk should file the MDE, it would be logical to file it in the incompetency file upon receipt from the agency that prepared it.[82] The Administrative Office of the Courts suggests that the copy of the MDE that is filed with the clerk be placed in a sealed envelope marked "Multidisciplinary Evaluation: Do Not Open."[83]

As noted above, the statute on restoration also does not specify who pays the costs of an MDE.[84] In the clerk's order on restoration, the clerk should include how the costs of the MDE are to be paid. If the clerk follows a pattern similar to how the costs are taxed in the original incompetency proceeding, the costs of the MDE would be taxed as follows in the restoration proceeding:

- If the clerk enters an order in favor of the petitioner and the ward is not indigent, the ward pays the costs of the fees.
- If the clerk enters an order in favor of the petitioner and the ward is indigent, the Department of Health and Human Services (DHHS) pays the fees.
- If the clerk denies the motion but finds there were reasonable grounds to bring it, the costs may be taxed against the petitioner, the ward if not the petitioner, or DHHS, in the clerk's discretion.
- If the clerk denies the motion and finds that there were no reasonable grounds to bring the motion, the costs are taxed against the petitioner.[85]

81. *See* G.S. 35A-1111(a) and (b) (related to an MDE ordered in the original incompetency and guardianship proceeding before the clerk).

82. *See* G.S. 35A-1130 (a motion for restoration proceedings is filed in the original incompetency special proceeding file).

83. *See* Saxon, *supra* note 1, § 5.9-D, at 62.

84. *See* G.S. 35A-1130.

85. *See* G.S. 35A-1116(b). G.S. 35A-1116(b) sets forth how the costs of an MDE ordered pursuant to G.S. 35A-1111 in the original incompetency proceeding shall be assessed; it does not clearly extend to an MDE ordered pursuant to G.S. 35A-1130 in the restoration proceeding. Except as otherwise set forth in G.S. 35A-1116, costs under G.S. Chapter 35A are assessed as in special proceedings. G.S. 35A-1116(a) and (d). Under G.S. 7A-306(c), certain costs in special proceedings, such as witness fees and court appointees, are assessable as provided by law; there is no express provision for a court-ordered MDE.

### 4. Does the petitioner have to have an attorney to file a motion for restoration?

The guardian, the ward, or any other interested person who petitions for restoration does *not* need to have any attorney to file the motion or appear at the hearing on restoration. There is one exception to this rule. If the petitioner is a corporation, including nonprofit corporations, or a limited liability company, the petitioner must be represented by a duly-admitted and licensed attorney.[86] An officer, shareholder, or other agent of the corporation or limited liability company that is not a lawyer may not file or appear in court proceedings on the entity's behalf.[87] Therefore, if a corporate guardian desires to file for restoration, it may do so only through an attorney. In the event a corporation or other entity files for restoration without an attorney, the party may be able to cure the defect. The North Carolina Court of Appeals seemed to indicate in at least one case that the defect of filing by a non-attorney party on an entity's behalf could later be cured if an attorney appeared at the hearing on behalf of the petitioning entity.[88]

### 5. To file a motion for restoration, does the ward have to be able to write or read the motion?

No. There is no literacy prerequisite to petitioning for restoration, and the ward may receive assistance in preparing and filing the motion and presenting his or her case at the hearing before the clerk. Whether a ward can read and/or write is not determinative of legal competency under G.S. Chapter 35A.

### 6. Once a motion or other document is filed initiating the proceeding, when is the hearing held, what is the process for service, and who receives notice of the filing?

Once the motion for restoration is filed, the clerk schedules the matter for hearing. The hearing date should not be less than ten days nor more than thirty days from the date that the motion and notice of hearing are served on the ward and the guardian. The clerk may alter this timeline

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86. *See* Lexis-Nexis v. Travishan Corp., 155 N.C. App. 205, 209 (2002) (holding that a corporation must be represented by an attorney and cannot be represented by an agent of the corporation, such as an officer or shareholder); Bodie Island Beach Club Ass'n, Inc. v. Wrap, 215 N.C. App. 283, 290 (2011) (extending the application of *Lexis-Nexis* to limited liability corporations); Willow Bend Homeowners Ass'n, Inc. v. Robinson, 192 N.C. App. 405, 414 (2008) (acknowledging that nonprofit corporations also must be represented by an attorney).

87. *See* G.S. 84-5 ("It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . "); *Lexis-Nexis*, 155 N.C. App. at 209. There are some exceptions to this general rule. For example, a corporation may prepare legal documents. *See* State v. Pledger, 257 N.C. 634, 637–38 (1962). In addition, a corporation may process litigation without an attorney in a small claims action. *See* Duke Power Co. v. Daniels, 86 N.C. App. 469, 472 (1987). Finally, a corporation may make an appearance in court through its vice president to avoid default. *See* Roland v. W & L Motor Lines, Inc., 32 N.C. App. 288, 290 (1977).

88. *See* Reid v. Cole, 187 N.C. App. 261, 265 (2007) (affirming the ruling of a trial court which allowed the plaintiff estate administrator to file a pleading on behalf of the estate without an attorney given that the plaintiff later retained counsel and appeared by counsel in subsequent proceedings).

for good cause.[89] For example, if the clerk orders an MDE and the professionals completing the MDE need additional time, the clerk may find good cause to extend the hearing date to a time outside of thirty days from the service of the motion.

It is the petitioner's obligation under the statute to serve the motion for restoration. The petitioner must serve notice of the hearing and a copy of the motion for restoration on:

1. the guardian, if the guardian is not the petitioner;
2. the ward, if the ward is not the petitioner; and
3. any other party to the original incompetency proceeding.[90]

The petitioner is required to serve the notice of hearing and motion for restoration on these parties pursuant to Rule 4 of the N.C. Rules of Civil Procedure.[91] If the ward is not the petitioner, the ward must be served with the notice of hearing and motion in the same manner as a person not under a disability is served.[92] This includes service by any one of following methods:

- personal delivery to the ward by someone authorized to serve process;
- leaving copies at the ward's home or usual place of abode with some person of suitable age and discretion residing there;
- delivering copies to an agent authorized to accept service of process on behalf of the ward;
- mailing copies via registered or certified mail, return receipt requested, addressed to the ward, and delivering to the ward;
- mailing copies by U.S. Postal Service with signature confirmation, addressed to the ward, and delivering to the ward; or
- depositing with a designated delivery service, addressed to the ward, delivering to the ward, and obtaining a delivery receipt.[93]

89. *See* G.S. 35A-1130(b).

90. *See id.* Parties to the original incompetency proceeding include the original petitioner and the respondent/ward. The ward's next of kin and any other interested party who received notice of the original incompetency proceeding also may be entitled to notice. *See In re* Ward, 337 N.C. 443, 447 (1994) (holding that where a determination of the incompetency of a party to a lawsuit effects the tolling of an otherwise expired statute of limitations, the interest of the opposing party to the lawsuit entitles that party to notice of the incompetency proceeding); *In re* Winstead, 189 N.C. App. 145, 149–50 (2008) (holding that a next of kin who received notice of the original incompetency proceeding was entitled to appeal the incompetency determination as an aggrieved party). The question raised by these decisions is whether next of kin and interested persons are entitled to notice of the restoration proceeding and whether they must be served with the restoration motion pursuant to Rule 4 of the N.C. Rules of Civil Procedure, which is required for parties to the original incompetency proceeding under G.S. 35A-1130(b), or by first-class mail, which is the same manner they are served in the original incompetency proceeding under G.S. 35A-1109. It is likely that a clerk may conclude that next of kin and interested parties are not parties to the original incompetency proceeding, even though they may be entitled to notice of the original action and have standing to appeal an incompetency proceeding, because they are not entitled to present evidence under G.S. 35A-1112(b) and require service by first-class mail in the restoration proceeding.

91. *See* G.S. 35A-1130(b).

92. *See* G.S. 1A-1, Rule 4(j)(2).

93. *See id.*, Rule 4(j)(1). The requirements of service of process under Rule 4 of the N.C. Rules of Civil Procedure are technical; refer to Rule 4 and related case law for additional analysis and details.

In addition, because at the time of the filing it is known that the ward is under a guardianship, the rule requires that the ward's guardian be served by one of the methods listed above in order to effectuate proper service on the ward.[94] The guardian is also required to be served pursuant to G.S. 35A-1130(b). If the guardian is served with the notice of hearing and the motion by one of the means listed above, that is sufficient to satisfy the requirements of serving the ward under Rule 4 and the guardian under G.S. 35A-1130(b). The guardian does not have to be served twice.

## 7. May the clerk appoint a guardian ad litem in the restoration proceeding? If so, who is responsible for payment of the guardian ad litem fees?

The clerk may appoint a guardian ad litem to represent the ward at the restoration hearing.[95] The clerk will likely appoint the same guardian ad litem from the original incompetency proceeding, if that attorney is available. However, the clerk is not required to appoint the same guardian ad litem. During the original incompetency proceeding, the guardian ad litem is charged with presenting the respondent's express wishes to the court as well as making any recommendations to the court regarding the respondent's best interests.[96] The statute on restoration does not specify a role for the guardian ad litem during the restoration hearing that is different from the original incompetency proceeding. Therefore, the guardian ad litem appointed for a restoration proceeding should likely provide a similar detailed report to the court. It is advisable that the guardian ad litem deliver the report to the clerk in writing prior to the hearing and provide copies of the report to each of the parties to the proceeding. As a basis for the report, the guardian ad litem should (i) meet with the ward in person where the ward lives prior to the hearing, (ii) diligently work to obtain medical records and other evidence of the ward's capacity, and (iii) meet with and interview the ward's guardian and other family members and interested persons. The report of the guardian ad litem should also include recommendations to the court regarding limited guardianship when restoration may not be appropriate.

The ward is entitled to be represented by counsel at the hearing on restoration and may elect to retain his or her own attorney in addition to any guardian ad litem appointed by the clerk.[97] If the ward retains his or her own attorney, the role of the guardian ad litem becomes less clear. The guardian ad litem should still provide a report to the court that is based on the diligence described above and include recommendations regarding the ward's best interests and, if appropriate, limited guardianship. The counsel hired by the ward will be charged with zealously representing his or her client and presenting the ward's express interests to the court.[98]

94. *See id.*, Rule 4(j)(2)(b).

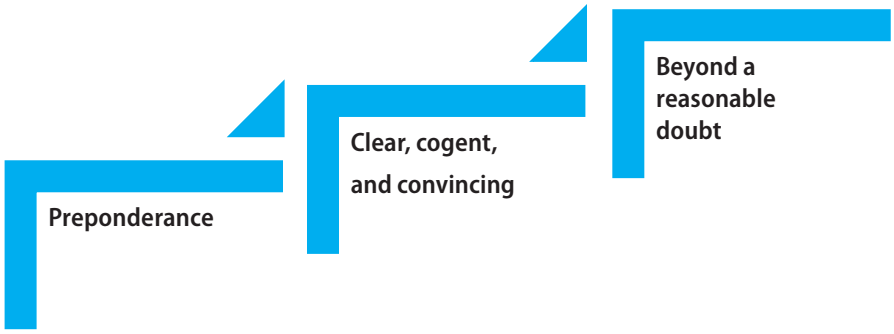
95. *See* G.S. 35A-1130(c).

96. *See* G.S. 35A-1107(b).

97. *See id.*

98. For a more in-depth discussion of the role of the guardian ad litem, refer to the North Carolina Guardianship Manual, which provides a lengthy discussion of the dual role of the guardian ad litem and how that may conflict with retained counsel by the ward. Saxon, *supra* note 1, chapter 2, at 20–37.

**Figure 2. Burdens of Proof to Adjudicate Someone Incompetent under Chapter 35A**




If the clerk appoints a guardian ad litem, the fees of the guardian ad litem are paid as follows:

- by the ward, if the ward is not indigent;
- by the petitioner if relief is not granted and there were no reasonable grounds to bring the proceeding; and
- in all other cases, by the Office of Indigent Defense Services.[99]

## 8. What is the burden of proof that the petitioner must meet at the hearing for restoration, and what may the clerk consider in making his or her ruling?

To enter an order restoring competency of the ward, the clerk must find that the ward is competent by a preponderance of the evidence.[100] This means that the clerk must find that the greater weight of the evidence shows that the ward is competent.[101] In other words, the clerk must find that it is more likely than not that the ward is competent. Preponderance of the evidence is a lower standard than what is required to adjudicate someone incompetent under G.S. Chapter 35A, which may occur only if there is clear, cogent, and convincing evidence that the ward is incompetent (see Figure 2, above).[102]

In considering whether or not the ward is competent, the clerk may consider admissible[103] oral testimony and written evidence presented at the hearing. If the evidence submitted by the

99. *See* North Carolina Office of Indigent Defense Services and Administrative Office of the Courts, North Carolina Proceedings That Involve Guardians Ad Litem (GALs) (Oct. 2014), www.ncids.org/Rules%20&%20Procedures/GAL_Chart.pdf.

100. *See* G.S. 35A-1130(d).

101. *See* 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 41 (7th ed. 2011).

102. *See* G.S. 35A-1112(d). *See also In re* D.R.B., 182 N.C. App. 733, 735 (2007) (discussing the various standards of proof and stating that clear, cogent, and convincing evidence is stricter than preponderance of the evidence but less stringent than beyond a reasonable doubt).

103. A discussion of admissibility of evidence is beyond the scope of this bulletin. In general, the clerk should not consider inadmissible evidence in making his or her decision regarding restoration. Rules of

parties at the hearing includes affidavits, including affidavits from doctors and other medical professionals, the clerk should be cautious in relying on them in rendering a final decision.[104] The North Carolina Court of Appeals has stated that an affidavit is "inherently weak as a method of proof."[105] The court noted that affidavits are made without notice to the other party and under circumstances that afford ample opportunity to lead the person making the affidavit.[106] Furthermore, the affidavit may include only matters that are deemed helpful to the party who submits the affidavit and may exclude anything negative, contain half-truths, and omit important matters.[107] Most importantly to the court, the statements in the affidavit are not able to be subjected to the "searching light" of cross-examination, which allows the court the best opportunity to assess the value of testimony.[108] However, the court has also recognized that affidavits may be properly admitted as evidence "in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure."[109] The clerk may find it necessary to consider affidavits in making his or her decision on restoration, particularly given that many wards may lack the resources to pay for medical experts to appear in person to testify. If the clerk elects to consider affidavits, the clerk should keep in mind that the affidavit may lack credibility, that a party has the right to dispute the truthfulness of the affidavit, and that an affidavit is not determinative or controlling of the clerk's decision. Despite the potential weaknesses or risks related to using affidavits, a clerk may find them to be useful evidence, particularly where there are no objections disputing their truth or authenticity and the credentials of the person making the affidavit are verifiable, relevant to the restoration proceeding, and not called into question.

Whether evidence is submitted through affidavits, oral testimony, or other documents, the clerk must ultimately determine whether the ward is competent. A ward is competent if he or she has the capacity to manage his or her own affairs and to make or communicate important decisions concerning his or her family and property.[110] Evidence that may be helpful to the clerk

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evidence, including rules on hearsay, apply. For a more in-depth discussion of hearsay and other rules of evidence, see "Evidence," N.C. Superior Court Judges' Benchbook, http://benchbook.sog.unc.edu/benchbook_section/5.

104. The incompetency and guardianship proceedings are two separate proceedings under G.S. Chapter 35A. Pursuant to G.S. 35A-1223, affidavits are expressly permitted as a form of evidence regarding the appointment of the original guardian. However, no such similar exception exists in the statutes under G.S. Chapter 35A related to an incompetency or restoration proceeding. *See* G.S. 35A-1223 (providing that, with regard to the appointment of a guardian "[t]he 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"); *see also generally* G.S. Ch. 35A, Article 1 and Article 3.

105. *See In re* Custody of Griffin, 6 N.C. App. 375, 378 (1969).

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.*

110. "Incompetent adult" is defined under G.S. 35A-1101(7) 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, disease, injury, or similar cause or condition.

in rendering a decision, particularly in those cases where the ward suffers from mental health issues or substance abuse, includes but is not limited to whether:

- the ward has a treatment/therapy plan in place;
- the ward has adhered to a treatment/therapy plan over an extended number of months;
- the ward acknowledges and understands the condition or cause that led to the order adjudicating the ward to be incompetent;
- the ward acknowledges the risk of relapse and has an emergency plan in place in the event of a relapse along with a support network of people to contact in the event of relapse;
- the ward is able to manage his or her daily affairs without assistance from his or her guardian, such as making decisions about where to live, paying rent, maintaining employment, providing for food, and living safely without being a threat to himself or herself or others;
- the guardian and/or the guardian ad litem support the motion for restoration;
- the clerk finds any other information persuasive in making the decision to restore competency.

If the burden of proof required for the clerk to enter an order granting restoration is not met, the clerk may hear evidence at the hearing that indicates that a limited guardianship may be appropriate if there is a change in the ward's capacity.[111] A limited guardianship is one where the guardian's authority is limited by the court and the ward obtains or retains certain legal rights and the ability to make decisions in certain aspects of his or her life.[112] The clerk may enter an order denying restoration but modifying the guardianship to allow the ward, for example, to manage small amounts of money or decide where he or she wants to live, go to church, work, or spend time. Limited guardianship can be used as a stepping stone to restoration when a full restoration may not be appropriate.

## 9. What rights are restored when the motion for restoration is granted by the clerk?

Once a ward's competency has been restored, he or she may exercise all rights as if he or she had never been adjudicated incompetent, with one exception.[113] The rights restored upon entry of the clerk's order include, but are not limited to, the following:

- executing advance directives and powers of attorney;
- controlling and selling real and personal property;
- giving any consent or approval that may be necessary to enable the former ward to receive medical, legal, psychological, or other professional care, counseling, treatment, or service;
- determining where he or she will live; and
- otherwise managing his or her financial affairs and taking care of himself or herself.[114]

111. *See* G.S. 35A-1207(a) and (b); 35A-1212(a).

112. *See* Saxon, *supra* note 7, at 12.

113. *See* G.S. 35A-1130(d). The right to carry a firearm is not automatically restored upon entry of the clerk's order. The individual (former ward) is prohibited from purchasing a firearm through the National Instant Criminal Background Check System (NICS) until the individual obtains a separate order from a district court judge to remove the individual's disability designation under NICS. *See* G.S. 122C-54.1; 18 U.S.C. § 922(g).

114. *See* G.S. 35A-1130(d).

In addition, effective October 1, 2015, the clerk is required to send a certified copy of the order of restoration to the N.C. Division of Motor Vehicles (DMV).[115] The DMV must restore the driver's license of the ward if it determines that the person is otherwise eligible for a driver's license under G.S. 20-7 and other applicable statutes.[116]

At the time the order of restoration is entered by the clerk, the guardian no longer has authority over the ward or his or her financial affairs.[117] However, the guardian does have continuing duties to the court. The general guardian and the guardian of the estate must file, and the clerk must enter, an order approving a final accounting before the guardian is discharged from his or her duties.[118]

In preparing for a restoration hearing, the guardian may want to consider assisting the ward in drafting advance directives, such as a durable power of attorney or health care power of attorney. The ward could then execute them after the restoration order is entered and possibly avoid a future guardianship proceeding in the event the ward relapsed or encountered some other issue that results in a lack of competency. A durable power of attorney and health care power of attorney may serve to replace the need for any future guardianship through the courts.

## 10. What is the applicable appeal period when the clerk denies the petitioner's request for restoration? What is the standard of review on appeal?

In the event the clerk determines that the petitioner failed to show by a preponderance of the evidence that the ward is competent, the clerk will then enter an order denying the restoration of the ward to competency.[119] The ward or the ward's attorney may appeal from the clerk's order to the superior court for a trial *de novo*.[120] At a trial *de novo*, the evidence regarding the ward's competency and suitability for restoration will be presented and heard again by the superior court judge.[121]

The time period for appeal is the same as for special proceedings generally, which is ten days from the entry of the order denying the restoration motion.[122] The order is entered, and thus the ten days starts tolling, when it is reduced to writing, signed by the clerk, and filed with the clerk's office.[123] The clerk is not required by statute to serve the order on the parties, and therefore the parties may not receive notice of the entry of the order and thus the commencement of the ten-day tolling period.[124] Notice of appeal must be in writing and is filed with the clerk.[125]

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115 *See* S.L. 2015-165, amending G.S. Ch. 20, Art. 2 to add a new section, G.S. 20-17.1A.

116 *Id*.

117. *See id*.

118. *See* G.S. 35A-1130(e) and G.S. Ch. 35A, Subch. II.

119. *See* G.S. 35A-1130(f).

120. *Id.*

121. *See* Caswell Cty. v. Hanks, 120 N.C. App. 489, 491 (1995) ("A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.").

122. *See* G.S. 1-301.2(e).

123. *See* G.S. 1A-1, Rule 58.

124. *See* G.S. 35A-1130(d); G.S. 1-301.2(f).

125. *See* G.S. 1-301.2(e).

The notice of appeal should be served by the appealing party on the guardian, the ward, and any other parties to the incompetency and restoration proceeding in accordance with the provisions of Rule 5 of the N.C. Rules of Civil Procedure.[126] The order of the clerk denying the restoration motion remains in effect until it is modified or replaced by an order of the superior court judge.[127] As a result, the guardianship remains in place pending the appeal.

126. *See* G.S. 35A-1130(b) (stating that service of the original motion for restoration shall be on the guardian, the ward, and any other parties to the incompetency proceeding). *See also* G.S. 1A-1, Rule 5. Because G.S. 35A-1130 does not specifically state that Rule 4 service is required for a notice of appeal, it is likely that only Rule 5 service is required.

127. *See* G.S. 1-301.2(e).

# Tab 15: Mock Hearing

# Tab 16: NC Guardianship Law

**Incompetency and Guardianship**
NC Court of Appeals and NC Supreme Court
Meredith Smith, UNC School of Government
January 1, 2015 – January 13, 2017

***Rule 11***

**In re Cranor** (COA15-541; May 17, 2016) (with dissent).
In this interesting but very fact-specific case, the trial court disciplined an attorney (the appellant) in its inherent authority and under Rule 11 and ordered her to pay substantial attorney fees to the opposing party and his attorney. The issues relate to the appellant's conduct in representing the respondent in an incompetency proceeding. The Court of Appeals reversed, with the majority holding that the record did not support the trial court's findings of fact regarding the bases for Rule 11 sanctions or sanctions imposed in its inherent authority. The dissenting judge opined in detail that, under the proper review standards for Rule 11 and disciplinary orders, the Court of Appeals should have affirmed the trial court's orders imposing discipline and awarding fees. (I will await a disposition by the Supreme Court, if there is one, to provide a more detailed summary of this case.) *(Summary by Ann Anderson).*

***Appeal of Dismissal of Incompetency Proceeding***

**In re Dippel** (COA16-54; Sept. 20, 2016).
Petitioner filed incompetency proceeding against his father, the respondent. The assistant clerk of court found there was not clear, cogent, and convincing evidence of the respondent's incompetency and entered an order dismissing the proceeding. The petitioner appealed the clerk's order. The superior court held that the petitioner lacked standing to appeal the order of the clerk as GS 35A-1115 did not provide a right of appeal from an order dismissing an incompetency proceeding. The NC Court of Appeals, applying GS 35A-1115 and GS 1-301.2, reversed the order of the superior court and held that an aggrieved party has the right to appeal from the clerk's order dismissing an incompetency proceeding. In this case, the court determined that the petitioner was an aggrieved party and could appeal from the clerk's order. However, the court did not provide any analysis as to how the petitioner is aggrieved by the clerk's order dismissing the incompetency proceeding against the respondent.

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

**Corbett v. Lynch (COA16-221; Dec. 20, 2016).**
Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.

Procedural History:

- August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court
- August 5, 2015, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.
- August 7, 2015, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, 2015, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

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

# APPENDIX A:
# Incompetency and Guardianship Procedures

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

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

# APPENDIX J:
## Statutes Index by Topic for Incompetency Proceedings

| TOPIC | GENERAL STATUTE |
|---|---|
| Abuse or neglect of elderly adults or persons with disabilities | 14-32.3 |
| Adjudication hearing and order adjudicating incompetence | 35A-1112 |
| Adjudication order (out-of-state) | 35A-1113 |
| Ancillary guardians | 35A-1280 |
| Appeals | 35A-1115 |
| Application for appointment of guardian | 35A-1210 |
| Appointment of a guardian | 35A-1120 |
| Appointment of a successor guardian | 35A-1293; 1294 |
| Bond | 35A-1230-1239 |
| Change of venue | 35A-1104 |
| Criminal failure to support parents | 14-326.1 |
| Costs and fees | 35A-1116 |
| Definitions | 35A-1101; 1202 |
| Durable power of attorney | 32A-8 |
| Duty to report the need for protective services to DSS APS | 108A-102 |
| Exploitation of elder or disabled adults | 14-112.2 |
| General power of attorney | 32A-1, 32A-2 |
| Guardian ad litem | 35A-1107; 1217 |
| Guardian (general, of the estate, of the person) | 35A-1202(7),(9),(10) |
| Health care power of attorney (statutory form) | 32A-25.1 |
| Health care power of attorney & guardian petition to suspend | 35A-1208 |
| Hearing to appoint guardian | 35A-1212 |
| Incompetence (incompetent adult) | 35A-1101(7) |
| Interim guardian | 35A-1114 |
| Jurisdiction & venue | 35A-1103; 1203; 1204 |
| Jury trial | 35A-1110 |

| TOPIC | GENERAL STATUTE |
|---|---|
| Letters of appointment | 35A-1206; 1215 |
| Modification of guardianship | 35A-1207 |
| Multidisciplinary evaluation | 35A-1111 |
| Non-resident ward /removal of property from N.C. | 35A-1281 |
| Notice of proceeding | 35A-1108 |
| Patient abuse and neglect | 14-32.2 |
| Petition | 35A-1105; 1106 |
| Powers & duties of guardian of the estate (and general guardian) | 35A-1251; 1253 |
| Powers & duties of guardian of the person (and general guardian) | 35A-1241 |
| Priorities of appointment of guardians | 35A-1214 |
| Protection of Abused, Neglected or Exploited Disabled Adults Act | 108A, Article 6 |
| Qualifications of guardians | 35A-1213 |
| Removal of guardian by clerk/emergency removal | 35A-1290; 1291 |
| Resignation of guardian | 35A-1292 |
| Respondent | 35A-1101(15) |
| Restoration of competency | 35A-1130 |
| Sale, mortgage, exchange, or lease of ward's estate (real property) | 35A-1301-1314 |
| Service of notice | 35A-1109; 1211 |
| Status reports for incompetent wards | 35A-1242-1244 |
| Sterilization of mentally ill proceedings | 35A-1245 |
| Termination of guardianship | 35A-1295 |
| Transfer | 35A-1205 |
| Venue | 35A-1103; 1204 |
| Ward | 35A-1101(17) |
| POA Accounting | 32A-11 |

Westlaw.
657 S.E.2d 411
657 S.E.2d 411
(Cite as: 657 S.E.2d 411)



C
In re **Winstead**
N.C.App.,2008.

Court of Appeals of North Carolina.
In the Matter of Ruth Bunn **WINSTEAD**.
**No. COA07-342.**

March 4, 2008.

**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

**[1] Statutes 361 ⇨223.1**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.1 k. In General. Most Cited Cases

**Statutes 361 ⇨223.4**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.4 k. General and Special Statutes. Most Cited Cases

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 257A ⇨151**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak148 Review
257Ak151 k. Right of Review; Parties. Most Cited Cases
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 257A ⇨151**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak148 Review
257Ak151 k. Right of Review; Parties. Most Cited Cases
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 30 ⇨151(2)**

30 Appeal and Error
30IV Right of Review
30IV(A) Persons Entitled
30k151 Parties or Persons Injured or Aggrieved
30k151(2) k. Who Are "Aggrieved" in General. Most Cited Cases
"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.

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.

*412 McGEE, Judge.

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 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.

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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 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 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 ***414**N.C. Gen.Stat. § 35A-1109 (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 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 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.

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.

Westlaw.
644 S.E.2d 608
644 S.E.2d 608
**(Cite as: 644 S.E.2d 608)**



**C**
In re Guardianship of **Thomas**
N.C.App.,2007.

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.

**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

**[1] Guardian and Ward 196 ⇐8**

196 Guardian and Ward
196II Appointment, Qualification, and Tenure of Guardian
196k8 k. Jurisdiction of Courts. Most Cited Cases
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 196 ⇐25**

196 Guardian and Ward
196II Appointment, Qualification, and Tenure of Guardian
196k25 k. Removal. Most Cited Cases
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.

*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.
ELMORE, Judge.
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.

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:

(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.

"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.[FN1] 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.

> FN1. 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.

Affirmed.

Judges TYSON and GEER concur.
N.C.App.,2007.
In re Guardianship of Thomas

160 N.C.App. 704, 587 S.E.2d 77
(Cite as: 160 N.C.App. 704, 587 S.E.2d 77)

C
In re HigginsN.C.App.,2003.
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
**Abatement and Revival 2 ⇐58(.5)**

2 Abatement and Revival
2V Death of Party and Revival of Action
2V(A) Abatement or Survival of Action
2k58 Actions and Proceedings Which Abate
2k58(.5) k. In General. Most Cited Cases
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).

**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.

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

Donny J. Laws, Burnsville, for respondent-appellee.
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.
N.C.App.,2003.
In re Higgins
160 N.C.App. 704, 587 S.E.2d 77

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Westlaw.
584 S.E.2d 807
160 N.C.App. 85, 584 S.E.2d 807
(Cite as: 160 N.C.App. 85, 584 S.E.2d 807)



In re Moore
N.C.App.,2003.

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

**[1] Guardian and Ward 196 ⇐144**

196 Guardian and Ward
196VI Accounting and Settlement
196k144 k. Jurisdiction of Courts. Most Cited Cases
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 196 ⇐161**

196 Guardian and Ward
196VI Accounting and Settlement
196k161 k. Review. Most Cited Cases
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 196 ⇐161**

196 Guardian and Ward
196VI Accounting and Settlement
196k161 k. Review. Most Cited Cases
In guardianship matters, Court of Appeals' standard of review is the same as the Superior Court's.

**[4] Guardian and Ward 196 ⇐151**

196 Guardian and Ward
196VI Accounting and Settlement
196k149 Compensation
196k151 k. Commissions. Most Cited Cases
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 361 ⇐188**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
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.

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.
***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.
N.C.App.,2003.
In re Moore
160 N.C.App. 85, 584 S.E.2d 807

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538 S.E.2d 626
140 N.C.App. 767, 538 S.E.2d 626
**(Cite as: 140 N.C.App. 767, 538 S.E.2d 626)**



**C**
In re Caddell
N.C.App.,2000.

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

**[1] Mental Health 257A ⇨211**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak211 k. In General. Most Cited Cases
The clerk of superior court has original jurisdiction over matters involving the management by a guardian of her ward's estate.

**[2] Clerks of Courts 79 ⇨66**

79 Clerks of Courts
79k64 Powers and Proceedings in General
79k66 k. Judicial Functions and Proceedings. Most Cited Cases
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 79 ⇨66**

79 Clerks of Courts
79k64 Powers and Proceedings in General
79k66 k. Judicial Functions and Proceedings. Most Cited Cases
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 30 ⇨1082(1)**

30 Appeal and Error
30XVI Review
30XVI(L) Decisions of Intermediate Courts
30k1081 Questions Considered
30k1082 Scope of Inquiry in General
30k1082(1) k. In General. Most Cited Cases
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 257A ⇨211**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak211 k. In General. Most Cited Cases

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 257A ⇐179**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak179 k. Authority, Duties, and Liability of Guardians in General. Most Cited Cases
The guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest.

**[7] Mental Health 257A ⇐217**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak217 k. Duties and Liabilities of Guardian or Committee in General. Most Cited Cases
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.

**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.

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.
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 per- suaded.

[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.
N.C.App.,2000.
In re Caddell
140 N.C.App. 767, 538 S.E.2d 626

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536 S.E.2d 324
140 N.C.App. 225, 536 S.E.2d 324
**(Cite as: 140 N.C.App. 225, 536 S.E.2d 324)**



**C**
In re Flowers
N.C.App.,2000.

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

**[1] Mental Health 257A ⇐149**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak148 Review
257Ak149 k. Nature and Form of Remedy and Jurisdiction. Most Cited Cases

**Mental Health 257A ⇐153**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak148 Review
257Ak153 k. Scope of Review in General and Trial De Novo. Most Cited Cases
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.

**[2] Courts 106 ⇐202(5)**

106 Courts
106V Courts of Probate Jurisdiction
106k202 Procedure in General
106k202(5) k. Review and Vacation of Proceedings. Most Cited Cases
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.

**[3] Mental Health 257A ⇐135**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak135 k. Evidence. Most Cited Cases
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 257A ⇐135**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak135 k. Evidence. Most Cited Cases
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 in-

validity 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.

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.

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 ob-

tained 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,[FN1] 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.

> FN1. 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.

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 caretaking 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.
N.C.App.,2000.
In re Flowers
140 N.C.App. 225, 536 S.E.2d 324

END OF DOCUMENT

Westlaw.
442 S.E.2d 381
114 N.C.App. 638, 442 S.E.2d 381
**(Cite as: 114 N.C.App. 638, 442 S.E.2d 381)**



**C**
Matter of Efird
N.C.App.,1994.

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

**Mental Health 257A ⇐121.1**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak121 Nature and Form of Proceedings
257Ak121.1 k. In General. Most Cited Cases
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.

Eugene C. Hicks, III, Charlotte, for appellants Ruby Lee Efird Almond and Mary Elizabeth Efird Tucker.
No brief filed, for appellee.
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.
N.C.App.,1994.

337 N.C. 443, 446 S.E.2d 40
**(Cite as: 337 N.C. 443, 446 S.E.2d 40)**

**H**

Matter of WardN.C.,1994.
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

**[1] Mental Health 257A ⇐147**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak146 Order or Decree
257Ak147 k. Setting Aside or Vacating. Most Cited Cases

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.

**[2] Mental Health 257A ⇐129**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak127 Notice
257Ak129 k. Persons Entitled to Notice. Most Cited Cases

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.

**[3] Mental Health 257A ⇐147**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak146 Order or Decree
257Ak147 k. Setting Aside or Vacating. Most Cited Cases

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).

**[4] Mental Health 257A ⇐147**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak146 Order or Decree
257Ak147 k. Setting Aside or Vacating. Most Cited Cases

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.

**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, **41112 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.

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.

*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.

N.C.,1994.
Matter of Ward
337 N.C. 443, 446 S.E.2d 40

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Westlaw.
147 S.E.2d 231
266 N.C. 702, 147 S.E.2d 231
(Cite as: 266 N.C. 702, 147 S.E.2d 231)



C
In re **Simmons**,
N.C. 1966.

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

**[1] Mental Health 257A ⇐176**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak174 Removal of **Guardian**
257Ak176 k. Proceedings in General. Most Cited Cases
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] Clerks of Courts 79 ⇐66**

79 Clerks of Courts
79k64 Powers and Proceedings in General
79k66 k. Judicial Functions and Proceedings. Most Cited Cases

**Mental Health 257A ⇐177**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak174 Removal of **Guardian**
257Ak177 k. Review. Most Cited Cases
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.

**[3] Mental Health 257A ⇐177**

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak174 Removal of **Guardian**
257Ak177 k. Review. Most Cited Cases
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.

*703 **231 The incompetent, Ernie Algernon Sim-

mons, 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.

***706** J. Russell Kirby, Wilson, Warren & Fowler, by Miles B. Fowler, Clinton, for **guardian**- appellant.
Joseph B. Chambliss, Clinton, for incompetent ward, appellee.
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 vis-

ited Al once during that time and R.A., not at all.

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

[1][2][3] The records and summary of the evidence warrant the clerk's findings which are sufficient to support the order of removal. The defendant contends that G.S. s 1-276 applies and that the appeal required*707 the judge to hear the controversy De novo, hear evidence, or remand to the clerk for further findings. These contentions are not sustained. Appeals under G.S. s 1-276 are confined to civil actions and special proceedings. The decisions are plenary that the removal of a **guardian** is neither. The distinction is this: In civil actions and special proceedings the clerk acts as a part of the Superior Court, subject to general review by the judge. In appointment and removal of a **guardian** the clerk performs 'duties formerly pertaining to judges of probate.'In the appointment and removal of **guardians**, the appellate jurisdiction of the Superior Court is derivative and appeals present for review only errors of law committed by the clerk.In re Will of Hine, 228 N.C. 405, 45 S.E.2d 526;Moses v. Moses, supra;Edwards v. Cobb, 95 N.C. 4, 5. In exercising the power of review, the judge is confined to the correction of errors of law. The hearing is on the record rather than De novo. In re Sams' Estate, 236 N.C. 228, 72 S.E.2d 421, citing many cases. In Sams the judge heard the appeal, apparently De novo, and affirmed the clerk. This Court affirmed upon the ground 'there was no objection or exception to the De novo hearing in the Superior Court, and upon the record as presented no prejudicial error has been made to appear.'In the cases in which this Court has held the judge may review the appeals from the clerk De novo, these cases involved other matters which are not exclusively of a probate nature. The other matters convert the controversy into a civil action or a special proceeding reviewable under G.S. s 1-276.Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365;Windsor v. McVay, 206 N.C. 730, 175 S.E. 83;Wright v. Ball, 200 N.C. 620, 158 S.E. 192.

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

Affirmed.

MOORE, J., not sitting.
N.C. 1966.
In re Simmons
266 N.C. 702, 147 S.E.2d 231

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