NORTH CAROLINA Judicial COLLEGE

AGENDA

Incompetency & Adult Guardianship Hearings for Clerks of Superior Court

May 15-17, 2018
School of Government, Chapel Hill

Tuesday, May 15, 2018

12:15 **Welcome and Introductions**

12:30 **The Clerk's Role in Adult Guardianship Proceedings**
Meredith Smith, UNC School of Government

1:45 **Screening the Case**
Meredith Smith, UNC School of Government

3:00 **Break**

3:15 **Mental Health and Substance Abuse Conditions that Impair Capacity**
Jodi Flick, Clinical Associate Professor, UNC School of Social Work

5:15 **Adjourn**

Wednesday, May 16, 2018

8:45 **The Clerk's Authority to Order Access to Medical, Mental Health, and Substance Abuse Records**
Mark Botts, UNC School of Government

9:45 **The Role of the Guardian Ad Litem Attorney**
Angela Lassiter, NC Attorney and Guardian ad Litem

10:45 **Break**

11:00 **Multidisciplinary Evaluations**
Meredith Smith, UNC School of Government
Michelle Ball, CSC Johnston County

11:45 **Lunch**

12:30 **Analyzing Capacity and Appointing a Guardian**

Meredith Smith, UNC School of Government
Jamie Stanford, CSC Orange County

2:00 **Break**

2:05 **Autism and Guardianship**
Tamara Dawkins, Ph.D., Associate Clinical Director, UNC TEACHH

3:55 **Break**

4:05 **Accessing APS Records and Role of DSS**
Aimee Wall, UNC School of Government

5:00 **Adjourn**

Thursday, May 17, 2018

8:30 **Recap and Discussion**
Meredith Smith, UNC School of Government

8:45 **A View from a Guardian: Capabilities and Challenges**
Stacey Skradski, Empowering Lives Guardianship Services LLC

9:45 **Presiding Over Cases with Unrepresented Litigants**
Judge Beth Keever, NC District Court Judge, retired

10:30 **Break**

10:45 **Status Reports**
Meredith Smith, UNC School of Government
Evelyn Pitchford, Guardianship Consultant, NC DHHS Division of Aging and Adult Services

11:45 **Consent to Treatment**
Mark Botts, UNC School of Government

12:15 **Lunch**

1:00 **Restoration to Competency**
Meredith Smith, UNC School of Government
Chris Hodgson, Staff Attorney, Disability Rights NC

2:00 **Mock Hearing**
Meredith Smith, UNC School of Government

3:45 **Evaluations; Wrap-up**

4:00 **Adjourn**

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?
5. List three nouns that describe who you are.
6. List three decisions you made this morning.

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?

_____
_____
_____
_____
_____

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You Have a Right to Appeal My Incompetency?

Author : Meredith Smith

Categories : Guardianship

Tagged as : appeal, Clerk of Superior CourtIncompetency

Date : March 30, 2016

**** UPDATE: On October 4, 2016, the N.C. Court of Appeals published a decision, In re Dippel, in which the court applied G.S. 35A-1115 and G.S. 1-301.2 to hold that an aggrieved party has the right to appeal from the clerk's order dismissing an incompetency proceeding. In that 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 pertaining to the respondent's competency. The opinion therefore provides limited guidance going forward as to whether a person that is entitled to notice and is not the petitioner has a right to appeal the clerk's order dismissing the incompetency proceeding as an aggrieved party. ****

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) (holding the more specific G.S. 35A-1115 is the controlling statute regarding the appeal of an order adjudicating incompetency over the more general G.S. 1-301.2). 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.

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Protecting Against Elder Abuse

Author : Meredith Smith

Categories : Clerks of Superior Court, Guardianship

Tagged as : Clerk of Superior Court, department of social services, district court, elder abuseIncompetency

Date : June 14, 2017

The United Nations declared tomorrow as World Elder Abuse Awareness Day. In North Carolina, Governor Cooper declared the time period spanning from Mother's Day to Father's Day Vulnerable Adult and Elder Abuse Awareness Month. The Governor's proclamation recognizes NC's "vulnerable and older adults of all social, economic, racial, and ethnic backgrounds may be targets of abuse, neglect, or exploitation which can occur in families, long-term care settings, and communities."

What is elder abuse?

The term "elder abuse" is not specifically defined in NC statute and there is no universally accepted definition throughout the United States. It is somewhat of a catchall term and may be generally described as an intentional or negligent action that causes harm, serious risk of harm, or distress to vulnerable older persons. *See* Center for Elders and the Courts. This amorphous definition across jurisdictions and disciplines creates challenges in research and in establishing best practices to combat such abuse. *See* National Center on Elder Abuse. However, it is an issue that will not go away any time soon. Between the years of 2012 and 2050 the population of adults over 65 in the United States is expected to more than double. *Id.* With that growing population comes a growing opportunity for elder abuse. And, the effects of elder abuse can be deadly. Elders in one study who experienced abuse, even modest abuse, had a 300% higher risk of death when compared to those who had not been abused. *Id.*

The Court and Elder Abuse: Prosecution and Protection

The NC court system interfaces with elder abuse issues in two key ways: **prosecution and protection**. *Prosecution* is about punishing the perpetrator of the abuse. There are specific crimes pertaining to older adults set forth in G.S. 14-32.3 (domestic abuse, neglect, and exploitation of an adult 60 or older) and G.S. 14-112.2 (exploitation of a person 65 or older). However, prosecution could also fall under more general crimes such as assault, battery, rape, fraud, forgery, false pretenses, or robbery. (Note, this is one reason that tracking the number of "elder abuse" criminal cases can be so difficult.)

Protection, on the other hand, is about protecting the older adult from harm to themselves or their property. This typically occurs through an adult protective services (APS) report, evaluation, and court proceeding, if any, under G.S. 108A and/or a guardianship proceeding under G.S. Chapter 35A. G.S. 108A-100; G.S. 35A-1201(b). This post and my post next week focus on these protection-oriented proceedings and how they function to protect an adult from elder abuse.

The Court and Protection: APS and Guardianship

When thinking about protecting older adults from elder abuse, most people think about adult protective services and related proceedings filed before the district court in NC. However, APS is only one statutory tool that is available to protect older adults against such abuse. Guardianship is another tool, which when appropriately used in the least restrictive means, can be used to thwart perpetrators of such abuse involving older adults who lack capacity. However, guardianship can also be the source of such abuse and could potentially result in an APS report and action

against the guardian. Effective oversight and court responsiveness are important pieces to ensuring such abuse does not occur through a guardianship and if it does that it is quickly remedied.

Adult Protective Services

The court's role in an APS case is typically a limited one, both in time and scope. APS is a program administered by county departments of social services (DSS) and supervised by the North Carolina Department of Health and Human Services (DHHS). The director of each county DSS has the duty (i) to receive and evaluate reports of abuse, neglect, or exploitation of disabled adults, and (ii) to take protective action to protect those adults. G.S. 108A-14(a)(14) and (15). This process is set forth in Article 6 and 6A of G.S. Chapter 108A. Abuse, neglect, and exploitation are defined for purposes of APS as follows:

1. **Abuse** – the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation *by a caretaker* of services necessary to maintain mental and physical health. S. 108A-101(a). Note, "abuse" under G.S. 108A is limited to abuse by a caretaker. A "caretaker" is defined in G.S. 108A-101 and may include the disabled adult's guardian or power of attorney. *See* NC Department of Health and Human Services, APS Manual, pg. III-4. This could take the form of **physical, sexual, or emotional abuse**. Warning signs of such abuse include:
    - Wounds, bruises, broken bones, welts, dislocations, sprains, and burns
    - Signs of being restrained
    - Fear, emotional pain, or distress by the older adult
    - Willfully withholding medication or intentional failure to dispense medications in accordance with doctor's instructions
    - Actions intended to threaten, humiliate, ridicule, or change the behavior of the older adult
    - A caregiver's refusal to allow the adult to be seen alone

2. **Neglect** – refers to a disabled adult who is either living alone and not able to provide for himself the services necessary to maintain his mental or physical health or is not receiving services from his caretaker. S. 108A-101(m). This could take the form of **self-neglect or neglect by a caretaker** such as a guardian. Warning signs of neglect include:
    - Unexplained weight loss, malnutrition, or dehydration
    - Unsanitary living conditions, such as mold, bed bugs, or soiled bedding and dishes
    - Unsuitable clothing for weather
    - Untreated physical problems such as bed sores
    - Unsafe living environment such as lack of heat in the winter or air-conditioning in the summer, leaks or other plumbing problems, no running water
    - Failure to provide for medical needs

3. **Exploitation** – the illegal or improper use of a disabled adult or his resources for another's profit or advantage. S. 108A-101(j). This includes but is not limited to **financial exploitation**. Warning signs of financial exploitation may include:
    - Unexplained withdrawals from bank accounts or other financial activity
    - Sudden and unexplained changes to estate plans, such as a will or power of attorney or health care power of attorney
    - Unusual interest in the adult's assets
    - Disappearance of personal items from the adult's residence
    - Unusually large payments for services

- Addition of names to the adult's bank signature card
- Unpaid bills despite the fact the adult has the money to pay them

Reporting Requirement. One of the most important things for all North Carolinians to keep in mind regarding elder abuse awareness is the universal reporting obligation established by APS law. **Everyone, without exception, who has reasonable cause to believe that a disabled adult is in need of protective services has a duty to report such information to the county department of social services.** My colleague, Aimee Wall, discussed this reporting obligation in detail in her blog post here.

From July 2015 through June 2016 there were 25,980 reports of abuse, neglect, or exploitation of adults to NC county departments and 13,980 were screened in for further evaluation. Of those reports, in 5,952 cases DSS confirmed mistreatment and DSS found the need for protective services in 3,406 cases. Aimee discussed the limitations on the authority and role DSS in response to an adult protective services (APS) report in her blog post here.

APS and the Court. The primary goal of APS through the county departments is to *mobilize services* to protect disabled adults from abuse, neglect, and exploitation in response to such reports. G.S. 108A-100. The role of the court, specifically the district court, in these cases is limited in scope to enable: (i) the evaluation in response to a report that is screened in by the department and (ii) the delivery of services, including:

- Enable an evaluation

1. **Access to financial and other records.** Aimee discussed the court proceedings that may be filed to gain access to an adult's financial records if there is financial exploitation investigation in connection with an APS case in this blog post. DSS may also petition the court to obtain access to other records pertaining to the care and treatment of the adult when necessary, such as a caretaker refuses to allow DSS access to such records. *See* DHHS APS Manual, pg. III-19.
2. **Access to the adult to conduct an evaluation.** I recently blogged here about the authority of DSS to petition the court for an administrative inspection warrant in response to a caretaker who refuses to allow DSS to conduct a private interview with the subject of the APS report.

- Enable the delivery of services

1. **Interference by a caretaker with services**. Where DSS determines it is appropriate to mobilize services in response to an APS report and evaluation, in many cases DSS does so through the consent of the disabled adult. S. 108A-104(a). If the caretaker of a disabled adult, such as a guardian, refuses to allow DSS to provide such services, DSS may petition district court to obtain an order enjoining the caretaker from such interference. G.S. 108A-104(b). If the caretaker is a guardian, DSS may also file a motion in the cause before the clerk of superior court in the guardianship proceeding to remove the guardian or for an order directing the guardian to stop interfering based on the best interests of the adult. G.S. 35A-1207 (allowing any interested person to file a motion in the cause to consider any matter pertaining to the guardianship).
2. **Lack of capacity to consent**. If the disabled adult lacks the capacity to consent to services, DSS may file a petition in district court for the issuance of a protective order to enable DSS to provide services. S. 108A-105(a) . DSS also has the authority to petition the court for the provision of **emergency services** if an emergency exists and no other authorized person is available and willing to arrange for emergency services. G.S. 108A-106(a).

The court's role is also limited in time. If the district court finds by clear, cogent and convincing evidence that the adult is need of protective services and lacks capacity, the court may enter a protective order, as described in section d above, for not more than 60 days to authorize DSS to provide such services. G.S. 108A-105(c). The order may be extended for an additional 60 days but no longer. At that point, the court must consider whether a petition for guardianship under G.S Chapter 35A should be initiated. *Id.*

Part two of this post will examine the distinction between APS and guardianship as well as the intersection of guardianship and elder abuse, including how guardianship may be used to stop such abuse and how the guardian may be the source of it. Finally, it will focus on how APS and guardianship proceedings may overlap – including that a district court's determination of incapacity through an APS proceeding "shall in no way affect" an incompetency proceeding under GS Chapter 35A, a precursor to adult guardianship. G.S. 108A-105(d).

So, stay tuned next week for more on this important topic. And, most of all, don't forget to wear purple tomorrow in support of elder abuse awareness and World Elder Abuse Awareness Day.

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More on Protecting Against Elder Abuse

Author : Meredith Smith

Categories : Clerks of Superior Court, Guardianship

Tagged as : Clerk of Superior Court, department of social serviceselder abuse

Date : June 23, 2017

In my previous post, I discussed elder abuse and the court's role in the protection of adults against such abuse through adult protective services (APS). An incompetency and guardianship proceeding filed before the clerk of superior court under G.S. Chapter 35A is another mechanism that can be used to protect an older adult from elder abuse when the adult is incompetent. Guardianship* is markedly different from APS, including the role the adult's capacity plays in the proceeding, the permanency of the court order, the nature of the authority granted by the court, and who may file for court protection. These distinctions can have a significant impact on the adult and are important to consider when deciding whether or not to file a guardianship proceeding before the clerk of superior court.

Guardianship and Protection against Elder Abuse

While the primary goal of APS through DSS is to *mobilize essential services* for disabled adults to remedy abuse, neglect, and exploitation, guardianship is much more comprehensive in scope. G.S. 108A-100. The purpose of guardianship is to replace an incompetent individual's authority to make decisions, in whole or in part, with the guardian's authority when the individual does not have adequate mental capacity to make such decisions. G.S. 35A-1201(a).

A legally appointed guardian may be responsible for all aspects of the welfare, safety, finances, and protection of the incompetent adult, part of which includes taking action to protect the adult from or ending any existing abuse, neglect, or exploitation. G.S. 35A-1201(b)(3). The guardian may have the authority, depending on the type of guardian appointed such as a guardian of the estate (authority over property), guardian of the person (care, custody, and control over the adult), or general guardian (both estate and person) and the type of guardianship (whether plenary or limited), to do the following to protect the adult from abuse, neglect, or exploitation through the guardianship:

- Revoke a durable power of attorney or petition the court for the authority to revoke a health care power of attorney. *See* S. 32A-10 (standard for revocation of durable power of attorney; G.S. 32A-30 (process for revocation of health care power of attorney).
- Access and review the adult's financial accounts and mail to determine if the adult has been the subject of a scam.
- Have the adult's bills sent directly to the guardian and pay them on time.
- Recover possession of any of the adult's property and any damages for injury done to the property, which may include suing on the adult's behalf.
- Make a financial plan, collect debts, employ advisors to assist in the performance of the guardian's financial duties, and invest carefully and with scrutiny.
- Take control over the adult's personal property and place valuable items in safe deposit box or in storage unit.
- Put the adult's number on the National Do Not Call Registry (donotcall.gov or call 1-888-382-1222).
- Change passwords to the adult's accounts.
- Place cash in separate bank accounts and review bank statements regularly and promptly.
- Report violations of laws or regulations by a long-term care or other facility.
- Review medical records and authorize medical treatment.

- Determine if living conditions are safe and install guard rails, smoke detectors, ramps, and other accommodations to help the adult stay in his or her home and consider alternative living arrangements to the extent that it is not feasible for the adult to stay at home.
- Remove the adult from a setting where abuse, neglect or exploitation may be taking place.

G.S. 35A-1202 (definitions); G.S. 35A-1241 (powers and duties of guardian of the person); G.S. 35A-1251 and G.S. 35A-1252 (powers and duties of guardian of the estate). *See also* Managing Someone Else's Money, Help for court-appointed guardians of property and conservators, Consumer Financial Protection Bureau, pg. 10-12, 20; APS Manual, pg. III-7.

APS and Guardianship: Not Equal Alternatives

While a guardianship appointment may empower a guardian to take action to stop or protect against abuse, neglect, or exploitation, it is not necessary in every case. Both APS and guardianship are fundamentally about protection, but they are not equal alternatives and have very different consequences for the adult. Some key distinctions between the two proceedings include:

Role of Capacity. The role capacity of the adult plays in the two proceedings is very different. First, services may be provided through APS to a disabled adult with mental capacity to consent. S. 108A-104. For example, the adult may be physically disabled and thus in need of protective services because she is unable to protect herself against physical abuse by a caretaker and has no one willing to help obtain those services for the adult. Although the adult is physically disabled, she may have the mental capacity to consent to protective services, which DSS could then provide based on the adult's consent. In contrast, a guardian may be appointed and take action only if the adult is first adjudicated incompetent by a court.

In addition, the scope of the capacity analysis is not the same. In an APS case, if DSS determines the disabled adult is in need of protective services, DSS must determine whether the disabled adult has the *specific* capacity to consent to services. This is a narrow analysis. The lack of capacity may be temporary or intermittent and may be limited to the adult's ability to *perceive and understand* a *specific situation*. *See* APS Manual, pg. III-29.

This is unlike a guardianship proceeding where the court is charged with determining competency, which is a much more global analysis of all aspects of an individual's life. An incompetent adult is someone who lacks sufficient capacity (i) to manage his or her affairs or (ii) 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).

A judicial determination of incapacity requires proof that a respondent's decision-making capacity is *significantly* impaired. John L. Saxon, NC Guardianship Manual, sec. 6.4 (2008). Proof that an adult's decision-making ability is not optimal or perfect is not sufficient to support a judicial determination of incompetence. *Id.* As noted in the APS Manual, an adult who has been adjudicated incompetent probably lacks the capacity to consent to services, but an adult who lacks the capacity to consent may not be incompetent. *See* APS Manual, pg. III-29.

Permanency of the Court Order. APS proceedings and related protective orders are temporary in nature. They extend only so long as the adult needs assistance mobilizing services. If an adult lacks capacity to consent to services, DSS may seek a protective order from district court that enables DSS to provide services notwithstanding the adult's inability to consent. In the event a protective order is put in place, it may be initially imposed for 60 days and extended for another 60 days for good cause shown. S. 108A-105(c).

In contrast, guardianship is a more permanent mechanism to provide protection. After an adult is adjudicated incompetent and a guardian is appointed on his or her behalf, the only two ways the guardianship ends are by a restoration proceeding if the person regains capacity or if the person dies. G.S. 35A-1295(a).

Nature of the Authority Granted by the Court. As I described in my earlier post, the authority of the court is limited in APS proceedings. Where an adult lacks capacity and is in need of protective services, DSS may seek a protective order, including an ex parte order authorizing emergency services, from district court. The order gives DSS the authority to authorize the provision of services. S. 108A-105. It does not empower DSS to use or manage the adult's money or other property to pay for those services even though the adult may be responsible for the payment of such services. APS Manual, pg. III-38. This is unlike guardianship where the court has the power to authorize the guardian to take control of and manage the adult's entire estate on the adult's behalf.

In addition, a protective order and other APS procedures do not empower DSS to revoke a power of attorney or health care power of attorney, something that a guardian may and likely will do when the agent under either of those documents is the one who is the perpetrator. This limits the ability of DSS through APS to permanently stop an agent under a POA or HCPOA from continuing to exploit the adult.

Who May File. Any person may initiate an incompetency proceeding before the clerk that may lead to the appointment of a guardian. S. 35A-1105. This includes DSS. In contrast, while anyone may make an APS report, only DSS may file for a protective order when the director reasonably determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to services. G.S. 108A-105(a).

Given these distinctions, it is possible when a report is made to APS about an adult who lacks capacity, the underlying abuse, neglect, or exploitation may be resolved by DSS entirely through a protective order. This is true in particular for those cases where the adult may have a medical condition that is not likely to recur or is of a short duration. In those cases, the adult may need only short-term assistance to mobilize services to protect against a specific crisis rather than a long-term, more permanent decision-maker in the form of a guardian. However, in many cases given the limitations of APS and APS protective orders, guardianship may be necessary to protect an adult who lacks capacity against abuse, neglect, or exploitation.

While guardianship may be an appropriate remedy in some circumstances to end ongoing elder abuse, the guardian may also be the perpetrator of such abuse. My third and final post in this elder abuse series will examine the guardian as the perpetrator of elder abuse and how that may intersect with APS. Stayed tuned for the final installment in this elder abuse series.

* For purposes of this post, the term "guardianship" includes both the incompetency and guardianship proceedings.

On the Civil Side
A UNC School of Government Blog
https://civil.sog.unc.edu

The Final Installment: Protecting Against Elder Abuse, Part Three

Author : Meredith Smith

Categories : Guardianship

Tagged as : Clerk of Superior Court, department of social services, elder abuseIncompetency

Date : August 4, 2017

Faith and Julie have been neighbors and friends for over twenty years. They are both 75 years old and take daily walks together. Julie was recently diagnosed with dementia. Her daughter, Abby, lives a few hours away and is her general guardian, but rarely visits her mother. Abby hired an in-home aide to assist Julie around the house. When Faith tries to visit Julie during the day, the aide tells Faith that Julie is no longer up for visits from her or anyone else. Faith noticed the aide often leaves for hours at a time during the day and locks Julie in the house while she is gone. A mutual friend told Faith she recently saw Julie and the aide at an estate lawyer's office and Julie mentioned she was changing her will. Faith grows worried about Julie and calls Abby to express her concerns. Abby is overwhelmed with stress in her own life and states that she trusts the aide, but will check in on her mother soon. Faith doesn't see Abby visit or any changes to the aide or the aide's behavior.

In my previous posts, available here and here, I described elder abuse generally and how adult protective services (APS) through the county departments of social services and guardianship proceedings before the clerk of superior court can be tools to protect against elder abuse, neglect, and exploitation (hereinafter, referred to as "abuse"). However, just because someone has a guardian, it does not mean the risks of such abuse are eliminated. In fact, guardians, such as Abby, often create circumstances for such abuse by leaving the adult in vulnerable positions and failing to monitor the adult's care. In addition, guardians may be the source of such abuse by taking advantage of and exploiting the authority they are given. One recent report commissioned by the U.S. Senate Special Committee on Aging examined such abuse by guardians after growing concern of abusive practices by guardians. The study concluded the extent of such abuse is unknown nationally due to limited data but there is some evidence that financial exploitation by a guardian is one of the most common types of elder abuse, which frequently includes the guardian overcharging for services that were either not necessary or never performed or misusing the adult's money by incurring excessive dining and vehicle expenses. *See* Elder Abuse Report, pg. 11 and 14.

The risk of the abuse of an adult under guardianship may be mitigated by (i) court screening of potential guardians through criminal and financial background checks and guardian training or certification requirements, and (ii) court oversight after a guardian is appointed through the filing with the court of status reports, which are reports on the care, comfort, and maintenance of the adult, and accountings, which are reports on the financial affairs of the adult. Even with effective screening and oversight, abuse may still occur when someone has a guardian.

So, what steps may someone, like Faith, who is concerned about abuse of someone under guardianship either by the guardian or a third-party take to protect the adult?

1. **Make an Adult Protective Services Report**

First, Faith should make an APS report. The universal reporting requirement in North Carolina does not change because an adult has a guardian. Any person who has reasonable cause to believe that a disabled adult is in need of protective services must make a report to the county department of social services (DSS) or consolidated human services agency in the county where the disabled adult lives. G.S. 108A-102(a).

Once DSS receives a report, DSS will apply the three APS screening criteria to determine whether the adult is (i) a

disabled adult, (ii) the subject of abuse, neglect, or exploitation, and (iii) in need of protective services. G.S. 108A-101; APS Manual, pg. III-7. Upon receipt of a report, DSS applies this criteria regardless of whether the adult already has a guardian.

DSS is the Guardian and Not the Alleged Perpetrator of the Abuse. It is possible that DSS may "screen out" the case and not conduct a formal APS evaluation if, unlike in Julie's case where her daughter is her guardian, DSS is the adult's guardian and not the alleged perpetrator of the abuse. This is true even if there is evidence of abuse, neglect, or exploitation as defined in G.S. 108A-101. DSS will screen the case out because DSS as the guardian is able to act in an able, willing, and responsible manner to perform or obtain essential services for the adult. Therefore, the adult does not need protective services and fails to meet the third criteria to be screened in as an APS report.

Where DSS as the guardian and the alleged abuse is by a third party, such as a family member or other caregiver, DSS has the obligation as the ward's guardian to take necessary actions to protect the ward. As noted in the APS Manual, this may include making reports to the district attorney, state Adult Home Specialists, or other agencies regarding violations of laws or regulations, reviewing financial and/or medical records, authorizing and facilitating health care or mental health treatment, assisting the adult with personal hygiene, removing health and safety hazards, implementing more effective monitoring tools, and, if necessary, removing the adult from a setting where abuse may be taking place. APS Manual, pg. III-7.

DSS is the Guardian and Alleged Perpetrator of the Abuse. In some instances, DSS receives a report that meets all three screening criteria but DSS is the guardian and the director or a member of the director's staff or other county personnel is the alleged perpetrator of the abuse. *Id.* This may occur, for example, when there are allegations that DSS as the guardian has allowed the adult to live in an unsafe environment or failed to authorize medical treatment. *Id.* In these cases, the allegations are to be screened in as an APS report. *Id.* However, the DSS who is appointed as guardian has a conflict of interest and may not conduct the evaluation. *Id.* Another county is then engaged to conduct the evaluation in accordance with the APS Reciprocal Protocol. *See* APS Manual, Appendix U, pg. 91-92. APS evaluations by another county must include an assessment of the director's performance of his or her duties as a guardian. *Id.*

DSS is Not the Guardian. If DSS is not the guardian, as is the case with Julie described at the beginning of this post, the actions that DSS takes in response to the APS report will depend in part on whether the guardian is the alleged perpetrator of the abuse.

- The Guardian is Not the Alleged Perpetrator. In Julie's case, her guardian is her daughter Abby and not the alleged perpetrator of the abuse. DSS may screen in the case as an APS report if it is determined that Julie is a disabled adult in need of protective services because there are concerns that there is not an able, responsible, and willing person to perform or obtain essential services for Julie and thus protect her from such abuse. The APS Manual offers definitions and guidance on what it means to be an able, willing, and responsible person. APS Manual, pg. III-18-19.

In Julie's case, it may be that Abby is willing and able, but not responsible in that she has poor judgment, is unreliable or does not demonstrate adequate oversight in making sure Julie's needs are met. By continuing to allow Julie to live in a possibly neglectful or exploitative situation and not taking the steps to remedy it, Abby is not an "able, responsible, and willing person." G.S. 108A-101(e).

If DSS screens in Faith's report and substantiates an evaluation, the protective services provided to Julie may include working with Abby to become an able, willing, and responsible person if Abby expresses a desire to do so and consents to protective services on Julie's behalf. This could include providing planning and counseling to Abby to assist her in identifying, remedying, and preventing circumstances which result in abuse. APS Manual, pg. IV-1. It is also possible that DSS may seek to remove Abby as the guardian and to be appointed as Julie's guardian. During the time period of DSS's appointment, DSS could work with Abby to improve her ability to serve as Julie's guardian and

enable her to later file a motion to request the court to re-appoint her as guardian if she becomes qualified to serve at a later date.

However, in the event Abby does not consent to protective services on Julie's behalf and does not demonstrate a desire to become responsible, willing, and able, DSS may elect file a motion to remove Abby as the guardian before the clerk of superior court due to her failure to protect Julie from abuse and suitably exercise her duties to care for Julie. *See* G.S. 35A-1290.

- **The Guardian is the Alleged Perpetrator**. If Abby as Julie's guardian is the alleged perpetrator of the abuse and the report is screened in and an evaluation conducted by APS, the protective action taken by DSS may include filing a motion to remove Abby as guardian. *See* G.S. 35A-1290. This may be done on an emergency basis without a hearing if the clerk finds reasonable cause to believe an emergency exists that (a) threatens the well-being of the ward, or (b) constitutes a risk of substantial injury to the ward's estate. G.S. 35A-1291. If the clerk's revokes a guardian's authority based on this emergency jurisdiction, the clerk may enter orders as the clerk finds necessary to protect the adult, which may include appointing DSS as the guardian until such time another individual is determined to be appropriate to serve as Julie's guardian. *Id.*

2. **File a Motion in the Cause to Modify the Guardianship or Remove the Guardian**

It is important to note that while one of Faith's first steps in response to abuse of someone under guardianship should be to report the potential abuse to DSS, it is not the only course of action she could take. Faith could also file a motion in the cause in Julie's guardianship proceeding before the clerk of superior court to ask the court to consider any matter pertaining to the guardianship, such as the aide's actions that seem to isolate Julie, or a motion to remove Abby as guardian. G.S. 35A-1207; G.S. 35A-1290. Any interested person may file such a motion before the clerk in the existing guardianship proceeding and such a motion is appropriate, in particular, if the person believes the guardian is not effectively protecting the adult against abuse or is a perpetrator of such abuse. *Id.*

In Faith's case, it may be difficult and costly for her to gather evidence and present a case in court, as she does not have the same authority to conduct an evaluation of Julie's circumstances as an APS social worker would have in response to an APS report. However, it is an option available to Faith if the APS report is screened out because it does not meet the criteria for an APS report but Faith believes it is appropriate to remove Abby as a guardian or modify the guardianship to provide greater support and protection for Julie. For example, one response the court could take would be to order Abby to begin to file regular status reports with the court to document the care, comfort, and maintenance she is providing to Julie or anything else specifically requested by the court to be included in the report. *See* G.S. 35A-1241(a)(1); G.S. 35A-1242(a1)(8). This could potentially result in Abby taking more diligent steps to oversee her mother's care.

In sum, the risks of elder abuse exist even after a guardian is appointed. APS involvement in response to an APS report may be necessary to facilitate the investigation, removal, and/or rehabilitation of the guardian depending on the circumstances of each case. However, even without APS involvement, any interested person who has knowledge of potential abuse may file a motion to bring the issue to the court's attention overseeing the guardianship. The court can then enters orders removing the guardian or modifying the guardianship to ensure that the guardian or a successor guardian carries one of their most fundamental duties –protecting the adult against abuse.

A Reporter at Large
October 9, 2017 Issue

How the Elderly Lose Their Rights

Guardians can sell the assets and control the lives of senior citizens without their consent—and reap a profit from it.

By Rachel Aviv

After a stranger became their guardian, Rudy and Rennie North were moved to a nursing home and their property was sold. Illustration by Anna Parini

For years, Rudy North woke up at 9 *A.M.* and read the Las Vegas *Review-Journal* while eating a piece of toast. Then he read a novel—he liked James Patterson and Clive Cussler—or, if he was feeling more ambitious, Freud. On scraps of paper and legal notepads, he jotted down thoughts sparked by his reading. “Deep below the rational part of our brain is an underground ocean where strange things swim,” he wrote on one notepad. On another, “Life: the longer it cooks, the better it tastes.”

Rennie, his wife of fifty-seven years, was slower to rise. She was recovering from lymphoma and suffered from neuropathy so severe that her legs felt like sausages. Each morning, she spent nearly an hour in the bathroom applying makeup and lotions, the same brands she’d used for forty years. She always emerged wearing pale-pink lipstick. Rudy, who was prone to grandiosity, liked to refer to her as “my amour.”

On the Friday before Labor Day, 2013, the Norths had just finished their toast when a nurse, who visited five times a week to help Rennie bathe and dress, came to their house, in Sun City Aliante, an “active adult” community in Las Vegas. They had moved there in 2005, when Rudy, a retired consultant for broadcasters, was sixty-eight and Rennie was sixty-six. They took pride in their view of the golf course, though neither of them played golf.

Rudy chatted with the nurse in the kitchen for twenty minutes, joking about marriage and laundry, until there was a knock at the door. A stocky woman with shiny black hair introduced herself as April Parks, the owner of the company A Private Professional Guardian. She was accompanied by three colleagues, who didn't give their names. Parks told the Norths that she had an order from the Clark County Family Court to "remove" them from their home. She would be taking them to an assisted-living facility. "Go and gather your things," she said.

Rennie began crying. "This is my home," she said.

One of Parks's colleagues said that if the Norths didn't comply he would call the police. Rudy remembers thinking, You're going to put my wife and me in jail for this? But he felt too confused to argue.

Parks drove a Pontiac G-6 convertible with a license plate that read "*CRTGRDN*," for "court guardian." In the past twelve years, she had been a guardian for some four hundred wards of the court. Owing to age or disability, they had been deemed incompetent, a legal term that describes those who are unable to make reasoned choices about their lives or their property. As their guardian, Parks had the authority to manage their assets, and to choose where they lived, whom they associated with, and what medical treatment they received. They lost nearly all their civil rights.

Without realizing it, the Norths had become temporary wards of the court. Parks had filed an emergency ex-parte petition, which provides an exception to the rule that both parties must be notified of any argument before a judge. She had alleged that the Norths posed a "substantial risk for mismanagement of medications, financial loss and physical harm." She submitted a brief letter from a physician's assistant, whom Rennie had seen once, stating that "the patient's husband can no longer effectively take care of the patient at home as his dementia is progressing." She also submitted a letter from one of Rudy's doctors, who described him as "confused and agitated."

Rudy and Rennie had not undergone any cognitive assessments. They had never received a diagnosis of dementia. In addition to Freud, Rudy was working his way through Nietzsche and Plato. Rennie read romance novels.

Parks told the Norths that if they didn't come willingly an ambulance would take them to the facility, a place she described as a "respite." Still crying, Rennie put cosmetics and some clothes into a suitcase. She packed so quickly that she forgot her cell phone and Rudy's hearing aid. After thirty-five minutes, Parks's assistant led the Norths to her car. When a neighbor asked what was happening, Rudy told him, "We'll just be gone for a little bit." He was too proud to draw attention to their predicament. "Just think of it as a mini-vacation," he told Rennie.

After the Norths left, Parks walked through the house with Cindy Breck, the owner of Caring Transitions, a company that relocates seniors and sells their belongings at estate sales. Breck and Parks had a routine. "We open drawers," Parks said at a deposition. "We look in closets. We pull out boxes, anything that would store—that would keep paperwork, would keep valuables." She took a pocket watch, birth certificates, insurance policies, and several collectible coins.

The Norths' daughter, Julie Belshe, came to visit later that afternoon. A fifty-three-year-old mother of three sons, she and her husband run a small business designing and constructing pools. She lived ten miles away and visited her parents nearly every day, often taking them to her youngest son's football games. She was her parents' only living child; her brother and sister had died.

She knocked on the front door several times and then tried to push the door open, but it was locked. She was surprised to see the kitchen window closed; her parents always left it slightly open. She drove to the Sun City Aliante clubhouse, where her parents sometimes drank coffee. When she couldn't find them there, she thought that perhaps they had gone on an errand together—the farthest they usually drove was to Costco. But, when she returned to the house, it was still empty.

That weekend, she called her parents several times. She also called two hospitals to see if they had been in an accident. She called their landlord, too, and he agreed to visit the house. He reported that there were no signs of them. She told her husband, "I think someone kidnapped my parents."

On the Tuesday after Labor Day, she drove to the house again and found a note taped to the door: "In case of emergency, contact guardian April Parks." Belshe dialled the number. Parks, who had a brisk, girlish way of speaking, told Belshe that her parents had been taken to Lakeview Terrace, an assisted-living facility in Boulder City, nine miles from the Arizona border. She assured Belshe that the staff there would take care of all their needs.

"You can't just walk into somebody's home and take them!" Belshe told her.

Parks responded calmly, "It's legal. It's legal."

Guardianship derives from the state's *parens patriae* power, its duty to act as a parent for those considered too vulnerable to care for themselves. "The King shall have the custody of the lands of natural fools, taking the profits of them without waste or destruction, and shall find them their necessaries," reads the English statute *De Prerogative Regis*, from 1324. The law was imported to the colonies—guardianship is still controlled by state, not federal, law—and has remained largely intact for the past eight hundred years. It establishes a relationship between ward and guardian that is rooted in trust.

In the United States, a million and a half adults are under the care of guardians, either family members or professionals, who control some two hundred and seventy-three billion dollars in assets, according to an auditor for the guardianship fraud program in Palm Beach County. Little is known about the outcome of these arrangements, because states do not keep complete figures on guardianship cases—statutes vary widely—and, in most jurisdictions, the court records are sealed. A Government Accountability report from 2010 said, "We could not locate a single Web site, federal agency, state or local entity, or any other organization that compiles comprehensive information on this issue." A study published this year by the American Bar Association found that "an unknown number of adults languish under guardianship" when they no longer need it, or

never did. The authors wrote that “guardianship is generally “permanent, leaving no way out—‘until death do us part.’ ”

When the Norths were removed from their home, they joined nearly nine thousand adult wards in the Las Vegas Valley. In the past twenty years, the city has promoted itself as a retirement paradise. Attracted by the state’s low taxes and a dry, sunny climate, elderly people leave their families behind to resettle in newly constructed senior communities. “The whole town sparkled, pulling older people in with the prospect of the American Dream at a reasonable price,” a former real-estate agent named Terry Williams told me. Roughly thirty per cent of the people who move to Las Vegas are senior citizens, and the number of Nevadans older than eighty-five has risen by nearly eighty per cent in the past decade.

In Nevada, as in many states, anyone can become a guardian by taking a course, as long as he or she has not been convicted of a felony or recently declared bankruptcy. Elizabeth Brickfield, a Las Vegas lawyer who has worked in guardianship law for twenty years, said that about fifteen years ago, as the state’s elderly population swelled, “all these private guardians started arriving, and the docket exploded. The court became a factory.”

Pamela Teaster, the director of the Center for Gerontology at Virginia Tech and one of the few scholars in the country who study guardianship, told me that, though most guardians assume their duties for good reasons, the guardianship system is “a morass, a total mess.” She said, “It is unconscionable that we don’t have any data, when you think about the vast power given to a guardian. It is one of society’s most drastic interventions.”

After talking to Parks, Belshe drove forty miles to Lakeview Terrace, a complex of stucco buildings designed to look like a hacienda. She found her parents in a small room with a kitchenette and a window overlooking the parking lot. Rennie was in a wheelchair beside the bed, and Rudy was curled up on a love seat in the fetal position. There was no phone in the room. Medical-alert buttons were strung around their necks. “They were like two lost children,” Belshe said.

She asked her parents who Parks was and where she could find the court order, but, she said, “they were overwhelmed and humiliated, and they didn’t know what was going on.” They had no idea how or why Parks had targeted them as wards. Belshe was struck by their passive acceptance. “It was like they had Stockholm syndrome or something,” she told me.

Belshe acknowledged that her parents needed a few hours of help each day, but she had never questioned their ability to live alone. “They always kept their house really nice and clean, like a museum,” she said. Although Rudy’s medical records showed that he occasionally had “staring spells,” all his medical-progress notes from 2013 described him as alert and oriented. He did most of the couple’s cooking and shopping, because Rennie, though lucid, was in so much pain that she rarely left the house. Belshe sometimes worried that her father inadvertently encouraged her mother to be docile: “She’s a very smart woman, though she sometimes acts like she’s not. I have to tell her, ‘That’s not cute, Mom.’ ”

When Belshe called Parks to ask for the court order, Parks told her that she was part of the "sandwich generation," and that it would be too overwhelming for her to continue to care for her children and her parents at the same time. Parks billed her wards' estates for each hour that she spent on their case; the court placed no limits on guardians' fees, as long as they appeared "reasonable." Later, when Belshe called again to express her anger, Parks charged the Norths twenty-four dollars for the eight-minute conversation. "I could not understand what the purpose of the call was other than she wanted me to know they had rights," Parks wrote in a detailed invoice. "I terminated the phone call as she was very hostile and angry."

A month after removing the Norths from their house, Parks petitioned to make the guardianship permanent. She was represented by an attorney who was paid four hundred dollars an hour by the Norths' estate. A hearing was held at Clark County Family Court.

The Clark County guardianship commissioner, a lawyer named Jon Norheim, has presided over nearly all the guardianship cases in the county since 2005. He works under the supervision of a judge, but his orders have the weight of a formal ruling. Norheim awarded a guardianship to Parks, on average, nearly once a week. She had up to a hundred wards at a time. "I love April Parks," he said at one hearing, describing her and two other professional guardians, who frequently appeared in his courtroom, as "wonderful, good-hearted, social-worker types."

Norheim's court perpetuated a cold, unsentimental view of family relations: the ingredients for a good life seemed to have little to do with one's children and siblings. He often dismissed the objections of relatives, telling them that his only concern was the best interest of the wards, which he seemed to view in a social vacuum. When siblings fought over who would be guardian, Norheim typically ordered a neutral professional to assume control, even when this isolated the wards from their families.

Rudy had assured Belshe that he would protest the guardianship, but, like most wards in the country, Rudy and Rennie were not represented by counsel. As Rudy stood before the commissioner, he convinced himself that guardianship offered him and Rennie a lifetime of care without being a burden to anyone they loved. He told Norheim, "The issue really is her longevity—what suits her." Belshe, who sat in the courtroom, said, "I was shaking my head. No, no, no—don't do that!" Rennie was silent.

Norheim ordered that the Norths become permanent wards of the court. "Chances are, I'll probably never see you folks again; you'll work everything out," he said, laughing. "I very rarely see people after the initial time in court." The hearing lasted ten minutes.

The following month, Even Tide Life Transitions, a company that Parks often hired, sold most of the Norths' belongings. "The general condition of this inventory is good," an appraiser wrote. Two lithographs by Renoir were priced at thirty-eight hundred dollars, and a glass cocktail table ("Client states that it is a Brancusi design") was twelve hundred and fifty dollars. The Norths also had several pastel drawings by their son, Randy, who died in a motorcycle accident at the age of thirty-two, as well as Kachina dolls, a Bose radio, a Dyson vacuum cleaner, a Peruvian tapestry, a motion-step exerciser, a LeRoy Neiman sketch of a bar in Dublin, and two dozen

pairs of Clarke shoes. According to Parks's calculations, the Norths had roughly fifty thousand dollars. Parks transferred their savings, held at the Bank of America, to an account in her name.

Rennie repeatedly asked for her son's drawings, and for the family photographs on her refrigerator. Rudy pined for his car, a midnight-blue 2010 Chrysler, which came to symbolize the life he had lost. He missed the routine interactions that driving had allowed him. "Everybody at the pharmacy was my buddy," he said. Now he and Rennie felt like exiles. Rudy said, "They kept telling me, 'Oh, you don't have to worry: your car is fine, and this and that.' " A month later, he said, "they finally told me, 'Actually, we sold your car.' I said, 'What in the hell did you sell it for?' " It was bought for less than eight thousand dollars, a price that Rudy considered insulting.

Rudy lingered in the dining room after eating breakfast each morning, chatting with other residents of Lakeview Terrace. He soon discovered that ten other wards of April Parks lived there. His next-door neighbor, Adolfo Gonzalez, a short, bald seventy-one-year-old who had worked as a maître d' at the MGM Grand Las Vegas, had become Parks's ward at a hearing that lasted a minute and thirty-one seconds.

Gonzalez, who had roughly three hundred and fifty thousand dollars in assets, urged Rudy not to accept the nurse's medications. "If you take the pills, they'll make sure you don't make it to court," he said. Gonzalez had been prescribed the antipsychotic medications Risperdal and Depakote, which he hid in the side of his mouth without swallowing. He wanted to remain vigilant. He often spoke of a Salvador Dali painting that had been lost when Parks took over his life. Once, she charged him two hundred and ten dollars for a visit in which, according to her invoice, he expressed that "he feels like a prisoner."

Rudy was so distressed by his conversations with Gonzalez that he asked to see a psychologist. "I thought maybe he'd give me some sort of objective learning as to what I was going through," he said. "I wanted to ask basic questions, like What the hell is going on?" Rudy didn't find the session illuminating, but he felt a little boost to his self-esteem when the psychologist asked that he return for a second appointment. "I guess he found me terribly charming," he told me.

Rudy liked to fantasize about an alternative life as a psychoanalyst, and he tried to befriend the wards who seemed especially hopeless. "Loneliness is a physical pain that hurts all over," he wrote in his notebook. He bought a pharmaceutical encyclopedia and advised the other wards about medications they'd been prescribed. He also ran for president of the residents, promising that under his leadership the kitchen would no longer advertise canned food as homemade. (He lost—he's not sure if anyone besides Rennie voted for him—but he did win a seat on the residents' council.)

He was particularly concerned about a ward of Parks's named Marlene Homer, a seventy-year-old woman who had been a professor. "Now she was almost hiding behind the pillars," Rudy said. "She was so obsequious. She was, like, 'Run me over. Run me over.' " She'd become a ward in 2012, after Parks told the court, "She has admitted to strange thoughts, depression, and doing things she can't explain." On a certificate submitted to the court, an internist had checked a

box indicating that Homer was “unable to attend the guardianship court hearing because_____,” but he didn’t fill in a reason.

The Norths could guess which residents were Parks’s wards by the way they were dressed. Gonzalez wore the same shirt to dinner nearly every day. “Forgive me,” he told the others at his table. When a friend tried to take him shopping, Parks prevented the excursion because she didn’t know the friend. Rennie had also tried to get more clothes. “I reminded ward that she has plenty of clothing in her closet,” Parks wrote. “I let her know that they are on a tight budget.” The Norths’ estate was charged a hundred and eighty dollars for the conversation.

Another resident, Barbara Neely, a fifty-five-year-old with schizophrenia, repeatedly asked Parks to buy her outfits for job interviews. She was applying for a position with the Department of Education. After Neely’s third week at Lakeview Terrace, Parks’s assistant sent Parks a text. “Can you see Barbara Neely anytime this week?” she wrote. “She has questions on the guardianship and how she can get out of it.” Parks responded, “I can and she can’t.” Neely had been in the process of selling her house, for a hundred and sixty-eight thousand dollars, when Parks became her guardian and took charge of the sale.

The rationale for the guardianship of Norbert Wilkening, who lived on the bottom floor of the facility, in the memory-care ward, for people with dementia (“the snake pit,” Rudy called it), was also murky. Parks’s office manager, who advertised himself as a “Qualified Dementia Care Specialist”—a credential acquired through video training sessions—had given Wilkening a “Mini-Mental State Examination,” a list of eleven questions and tasks, including naming as many animals as possible in a minute. Wilkening had failed. His daughter, Amy, told me, “I didn’t see anything that was happening to him other than a regular getting-older process, but when I was informed by all these people that he had all these problems I was, like, Well, maybe I’m just in denial. I’m not a professional.” She said that Parks was “so highly touted. By herself, by the social workers, by the judge, by everyone that knew her.”

At a hearing, when Amy complained to Norheim that Parks didn’t have time for her father, he replied, “Yeah, she’s an industry at this point.”

As Belshe spoke to more wards and their families, she began to realize that Lakeview Terrace was not the only place where wards were lodged, and that Parks was not the only guardian removing people from their homes for what appeared to be superficial reasons. Hundreds of cases followed the same pattern. It had become routine for guardians in Clark County to petition for temporary guardianship on an ex-parte basis. They told the court that they had to intervene immediately because the ward faced a medical emergency that was only vaguely described: he or she was demented or disoriented, and at risk of exploitation or abuse. The guardians attached a brief physician’s certificate that contained minimal details and often stated that the ward was too incapacitated to attend a court hearing. Debra Bookout, an attorney at the Legal Aid Center of Southern Nevada, told me, “When a hospital or rehab facility needs to free up a bed, or when the patient is not paying his bills, some doctors get sloppy, and they will sign anything.” A recent study conducted by Hunter College found that a quarter of guardianship petitions in New York were brought by nursing homes and hospitals, sometimes as a means of collecting on overdue bills.

It often took several days for relatives to realize what had happened. When they tried to contest the guardianship or become guardians themselves, they were dismissed as unsuitable, and disparaged in court records as being neglectful, or as drug addicts, gamblers, and exploiters. (Belshe was described by Parks as a "reported addict" who "has no contact with the proposed ward," an allegation that Belshe didn't see until it was too late to challenge.) Family who lived out of state were disqualified from serving as guardians, because the law prohibited the appointment of anyone who didn't live in Nevada.

Once the court approved the guardianship, the wards were often removed from their homes, which were eventually sold. Terry Williams, whose father's estate was taken over by strangers even though he'd named her the executor of his will, has spent years combing through guardianship, probate, and real-estate records in Clark County. "I kept researching, because I was so fascinated that these people could literally take over the lives and assets of people under color of law, in less than ten minutes, and nobody was asking questions," she told me. "These people spent their lives accumulating wealth and, in a blink of an eye, it was someone else's."

Williams has reviewed hundreds of cases involving Jared Shafer, who is considered the godfather of guardians in Nevada. In the records room of the courthouse, she was afraid to say Shafer's name out loud. In the course of his thirty-five-year career, Shafer has assumed control of more than three thousand wards and estates and trained a generation of guardians. In 1979, he became the county's public administrator, handling the estates of people who had no relatives in Nevada, as well as the public guardian, serving wards when no family members or private guardians were available. In 2003, he left government and founded his own private guardianship and fiduciary business; he transferred the number of his government-issued phone to himself.

Williams took records from Shafer's and other guardians' cases to the Las Vegas police department several times. She tried to explain, she said, that "this is a racketeering operation that is fee-based. There's no brown paper bag handed off in an alley. The payoff is the right to bill the estate." The department repeatedly told her that it was a civil issue, and refused to take a report. In 2006, she submitted a typed statement, listing twenty-three statutes that she thought had been violated, but an officer wrote in the top right corner, "*NOT A POLICE MATTER*." Adam Woodrum, an estate lawyer in Las Vegas, told me that he's worked with several wards and their families who have brought their complaints to the police. "They can't even get their foot in the door," he said.

Acting as her own attorney, Williams filed a racketeering suit in federal court against Shafer and the lawyers who represented him. At a hearing before the United States District Court of Central California in 2009, she told the judge, "They are trumping up ways and means to deem people incompetent and take their assets." The case was dismissed. "The scheme is ingenious," she told me. "How do you come up with a crime that literally none of the victims can articulate without sounding like they're nuts? The same insane allegations keep surfacing from people who don't know each other."

In 2002, in a petition to the Clark County District Court, a fifty-seven-year-old man complained that his mother had lost her constitutional rights because her kitchen was understocked and a few bills hadn't been paid. The house they shared was then placed on the market. The son wrote, "If

the only showing necessary to sell the home right out from under someone is that their 'estate' would benefit, then no house in Clark County is safe, nor any homeowner." Under the guise of benevolent paternalism, guardians seemed to be creating a kind of capitalist dystopia: people's quality of life was being destroyed in order to maximize their capital.

When Concetta Mormon, a wealthy woman who owned a Montessori school, became Shafer's ward because she had aphasia, Shafer sold the school midyear, even though students were enrolled. At a hearing after the sale, Mormon's daughter, Victoria Cloutier, constantly spoke out of turn. The judge, Robert Lueck, ordered that she be handcuffed and placed in a holding cell while the hearing continued. Two hours later, when Cloutier was allowed to return for the conclusion, the judge told her that she had thirty days in which to vacate her mother's house. If she didn't leave, she would be evicted and her belongings would be taken to Goodwill.

The opinions of wards were also disregarded. In 2010, Guadalupe Olvera, a ninety-year-old veteran of the Second World War, repeatedly asked that his daughter and not Shafer be appointed his guardian. "The ward is not to go to court," Shafer instructed his assistants. When Olvera was finally permitted to attend a hearing, nearly a year after becoming a ward, he expressed his desire to live with his daughter in California, rather than under Shafer's care. "Why is everybody against that?" he asked Norheim. "I don't need that man." Although Nevada's guardianship law requires that courts favor relatives over professionals, Norheim continued the guardianship, saying, "The priority ship sailed."

When Olvera's daughter eventually defied the court's orders and took her father to live at her seaside home in Northern California, Norheim's supervisor, Judge Charles Hoskin, issued an arrest warrant for her "immediate arrest and incarceration" without bail. The warrant was for contempt of court, but Norheim said at least five times from the bench that she had "kidnapped" Olvera. At a hearing, Norheim acknowledged that he wasn't able to send an officer across state lines to arrest the daughter. Shafer said, "Maybe I can."

Shafer held so much sway in the courtroom that, in 2013, when an attorney complained that the bank account of a ward named Kristina Berger had "no money left and no records to explain where it went," Shafer told Norheim, "Close the courtroom." Norheim immediately complied. A dozen people in attendance were forced to leave.

One of Shafer's former bookkeepers, Lisa Clifton, who was hired in 2012, told me that Shafer used to brag about his political connections, saying, "I wrote the laws." In 1995, he persuaded the Nevada Senate Committee on Government Affairs to write a bill that allowed the county to receive interest on money that the public guardian invested. "This is what I want you to put in the statute, and I will tell you that you will get a rousing hand from a couple of judges who practice our probate," he said. At another hearing, he asked the committee to write an amendment permitting public guardians to take control of people's property in five days, without a court order. "This bill is not 'Big Brother' if you trust the person who is doing the job," he said. (After a senator expressed concern that the law allowed "intervention into somebody's life without establishing some sort of reason why you are doing it," the committee declined to recommend it.)

Clifton observed that Shafer almost always took a cynical view of family members: they were never motivated by love or duty, only by avarice. " 'They just want the money'—that was his answer to everything," she told me. "And I'm thinking to myself, Well, when family members die they pass it down to their children. Isn't that just the normal progression of things?"

After a few months on the job, Clifton was asked to work as a guardian, substituting for an absent employee, though she had never been trained. Her first assignment was to supervise a visit with a man named Alvin Passer, who was dying in the memory-care unit of a nursing home. His partner of eight years, Olive Manoli, was permitted a brief visit to say goodbye. Her visits had been restricted by Shafer—his lawyer told the court that Passer became "agitated and sexually aggressive" in her presence—and she hadn't seen Passer in months. In a futile attempt to persuade the court to allow her to be with him, Manoli had submitted a collection of love letters, as well as notes from ten people describing her desire to care for Passer for the rest of his life. "I was absolutely appalled," Clifton said. "She was this very sweet lady, and I said, 'Go in there and spend as much time with him as you want.' Tears were rolling down her cheeks."

The family seemed to have suffered a form of court-sanctioned gaslighting. Passer's daughter, Joyce, a psychiatric nurse who specialized in geriatrics, had been abruptly removed as her father's co-guardian, because she appeared "unwilling or (more likely) unable to conduct herself rationally in the Ward's best interests," according to motions filed by one of Shafer's attorneys.

She and Manoli had begged Norheim not to appoint Shafer as guardian. "Sir, he's abusive," their lawyer said in court.

"He's as good as we got, and I trust him completely," Norheim responded.

Joyce Passer was so confused by the situation that, she said, "I thought I was crazy." Then she received a call from a blocked number. It was Terry Williams, who did not reveal her identity. She had put together a list of a half-dozen family members who she felt were "ready to receive some kind of verbal support." She told Passer, "Look, you are not nuts. This is real. Everything you are thinking is true. This has been going on for years."

During Rennie North's first year at Lakeview Terrace, she gained sixty pounds. Parks had switched the Norths' insurance, for reasons she never explained, and Rennie began seeing new doctors, who prescribed Valium, Prozac, the sedative Temazepam, Oxycodone, and Fentanyl. The doses steadily increased. Rudy, who had hip pain, was prescribed Oxycodone and Valium. When he sat down to read, the sentences floated past his eyes or appeared in duplicate. "Ward seemed very tired and his eyes were glassy," Parks wrote in an invoice.

Belshe found it increasingly hard to communicate with her parents, who napped for much of the day. "They were being overmedicated to the point where they weren't really there," she said. The Norths' grandsons, who used to see them every week, rarely visited. "It was degrading for them to see us so degraded," Rudy said. Parks noticed that Rennie was acting helpless, and urged her to "try harder to be more motivated and not be so dependent on others." Rudy and Rennie began going to Sunday church services at the facility, even though they were Jewish. Rudy was

heartened by what he heard in the pastor's message: "Don't give up. God will help you get out of here." He began telling people, "We are living the life of Job."

At the end of 2014, Lakeview Terrace hired a new director, Julie Liebo, who resisted Parks's orders that medical information about wards be kept from their families. Liebo told me, "The families were devastated that they couldn't know if the residents were in surgery or hear anything about their health. They didn't understand why they'd been taken out of the picture. They'd ask, 'Can you just tell me if she's alive?' " Liebo tried to comply with the rules, because she didn't want to violate medical-privacy laws; as guardian, Parks was entitled to choose what was disclosed. Once, though, Liebo took pity on the sister of an eighty-year-old ward named Dorothy Smith, who was mourning a dog that Parks had given away, and told her that Smith was stable. Liebo said that Parks, who was by then the secretary of the Nevada Guardianship Association, called her immediately. "She threatened my license and said she could have me arrested," Liebo told me.

After Liebo arrived, Parks began removing wards from Lakeview Terrace with less than a day's notice. A woman named Linda Phillips, who had dementia, was told that she was going to the beauty salon. She never returned. Marlene Homer, the ward whose ailments were depression and "strange thoughts," was taken away in a van, screaming. Liebo had asked the state ombudsman to come to the facility and stop the removals, but nothing could be done. "We stood there completely helpless," Liebo said. "We had no idea where they were going." Liebo said that other wards asked her if they would be next.

Liebo alerted the compliance officer for the Clark County Family Court that Parks was removing residents "without any concern for them and their choice to stay here." She also reported her complaints to the police, the Department of Health Services, the Bureau of Health Care, and Nevada Adult Protective Services. She said each agency told her that it didn't have the authority or the jurisdiction to intervene.

At the beginning of 2015, Parks told the Norths that they would be leaving Lakeview Terrace. "Finances are low and the move is out of our control," Parks wrote. It was all arranged so quickly that, Rudy said, "we didn't have time to say goodbye to people we'd been eating with for seventeen months." Parks arranged for Caring Transitions to move them to the Wentworth, a less expensive assisted-living facility. Liebo said that, the night before the move, Rudy began "shouting about the Holocaust, that this was like being in Nazi Germany." Liebo didn't think the reference was entirely misguided. "He reverted to a point where he had no rights as a human being," she said. "He was no longer the caregiver, the man, the husband—all of the things that gave his life meaning." Liebo also didn't understand why Belshe had been marginalized. "She seemed like she had a great relationship with her parents," she said.

Belshe showed up at 9 *A.M.* to help her parents with the move, but when she arrived Parks's assistant, Heidi Kramer, told her that her parents had already left. Belshe "emotionally crashed," as Liebo put it. She yelled that her parents didn't even wake up until nine or later—what was the rush? In an invoice, Kramer wrote that Belshe "began to yell and scream, her behavior was out of control, she was taking pictures and yelling, 'April Parks is a thief.' " Kramer called the

police. Liebo remembers that an officer "looked at Julie Belshe and told her she had no rights, and she didn't."

Belshe cried as she drove to the Wentworth, in Las Vegas. When she arrived, Parks was there, and refused to let her see her parents. Parks wrote, "I told her that she was too distraught to see her parents, and that she needed to leave." Belshe wouldn't, so Parks asked the receptionist to call the police. When the police arrived, Belshe told them, "I just want to hug my parents and make sure they're O.K." An officer handed her a citation for trespassing, saying that if she returned to the facility she would be arrested.

Parks wrote that the Norths were "very happy with the new room and thanked us several times," but Rudy remembers feeling as if he had "ended up in the sewer." Their room was smaller than the one at Lakeview Terrace, and the residents at the Wentworth seemed older and sicker. "There were people sitting in their chairs, half-asleep," Rudy said. "Their tongues hung out."

Rennie spent nearly all her time in her wheelchair or in bed, her eyes half-closed. Her face had become bloated. One night, she was so agitated that the nurses gave her Haldol, a drug commonly used to treat schizophrenia. When Rudy asked her questions, Rennie said "What?" in a soft, remote voice.

Shortly after her parents' move, Belshe called an editor of the Vegas *Voice*, a newspaper distributed to all the mailboxes in senior communities in Las Vegas. In recent months, the paper had published three columns warning readers about Clark County guardians, writing that they "have been lining their pockets at the expense of unwitting seniors for a very long time."

At Belshe's urging, the paper's political editor, Rana Goodman, visited the Norths, and published an article in the *Voice*, describing Rudy as "the most articulate, soft spoken person I have met in a very long time." She called Clark County's guardianship system a "(legal) elder abuse racket" and urged readers to sign a petition demanding that the Nevada legislature reform the laws. More than three thousand people signed.

Two months later, the *Review-Journal* ran an investigation, titled "Clark County's Private Guardians May Protect—Or Just Steal and Abuse," which described complaints against Shafer going back to the early eighties, when two of his employees were arrested for stealing from the estates of dead people.

In May, 2015, a month after the article appeared, when the Norths went to court to discuss their finances local journalists were in the courtroom and Norheim seemed chastened. "I have grave concerns about this case," he said. He noted that Parks had sold the Norths' belongings without proper approval from his court. Parks had been doing this routinely for years, and, according to her, the court had always accepted her accounting and her fees. Her lawyer, Aileen Cohen, said, "Everything was done for the wards' benefit, to support the wards."

Norheim announced that he was suspending Parks as the Norths' guardian—the first time she had been removed from a case for misconduct.

“This is important,” Rudy, who was wearing a double-breasted suit, said in court. “This is hope. I am coming here and I have hope.” He quoted the Bible, Thomas Jefferson, and Euripides, until Belshe finally touched his elbow and said, “Just sit down, Dad.”

When Rudy apologized for being “overzealous,” Norheim told him, “This is your life. This is your liberty. You have every right to be here. You have every right to be involved in this project.”

After the hearing, Parks texted her husband, “I am finished.”

Last March, Parks and her lawyer, along with her office manager and her husband, were indicted for perjury and theft, among other charges. The indictment was narrowly focussed on their double billings and their sloppy accounting, but, in a detailed summary of the investigation, Jaclyn O’Malley, who led the probe for the Nevada Attorney General’s Office, made passing references to the “collusion of hospital social workers and medical staff” who profited from their connection to Parks. At Parks’s grand-jury trial, her assistant testified that she and Parks went to hospitals and attorneys’ offices for the purpose of “building relationships to generate more client leads.” Parks secured a contract with six medical facilities whose staff agreed to refer patients to her—an arrangement that benefitted the facilities, since Parks controlled the decisions of a large pool of their potential consumers. Parks often gave doctors blank certificates and told them exactly what to write in order for their patients to become her wards.

Parks and other private guardians appeared to gravitate toward patients who had considerable assets. O’Malley described a 2010 case in which Parks, after receiving a tip from a social worker, began “cold-calling” rehabilitation centers, searching for a seventy-nine-year-old woman, Patricia Smoak, who had nearly seven hundred thousand dollars and no children. Parks finally found her, but Smoak’s physician wouldn’t sign a certificate of incapacity. “The doctor is not playing ball,” Parks wrote to her lawyer. She quickly found a different doctor to sign the certificate, and Norheim approved the guardianship. (Both Parks and Norheim declined to speak with me.)

Steve Miller, a former member of the Las Vegas City Council, said he assumed that Shafer would be the next indictment after Parks, who is scheduled to go to trial next spring. “All of the disreputable guardians were taking clues from the Shafer example,” he said. But, as the months passed, “I started to think that this has run its course locally. Only federal intervention is going to give us peace of mind.”

Richard Black, who, after his father-in-law was placed into guardianship, became the director of a grassroots national organization, Americans Against Abusive Probate Guardianship, said that he considered the Parks indictment “irrefutably shallow. It sent a strong message of: We’re not going to go after the real leaders of this, only the easy people, the ones who were arrogant and stupid enough to get caught.” He works with victims in dozens of what he calls “hot spots,” places where guardianship abuse is prevalent, often because they attract retirees: Palm Beach, Sarasota, Naples, Albuquerque, San Antonio. He said that the problems in Clark County are not unusual. “The only thing that is unique is that Clark County is one of the few jurisdictions that doesn’t seal its records, so we can see what is going on.”

Approximately ten per cent of people older than sixty-five are thought to be victims of "elder abuse"—a construct that has yet to enter public consciousness, as child abuse has—but such cases are seldom prosecuted. People who are frail or dying don't make good witnesses—a fact that Shafer once emphasized at a 1990 U.S. congressional hearing on crimes against the elderly, in which he appeared as an expert at preventing exploitation. "Seniors do not like to testify," he said, adding that they were either incapable or "mesmerized by the person ripping them off." He said, "The exploitation of seniors is becoming a real cottage industry right now. This is a good business. Seniors are unable to fend for themselves."

In the past two years, Nevada has worked to reform its guardianship system through a commission, appointed by the Nevada Supreme Court, to study failures in oversight. In 2018, the Nevada legislature will enact a new law that entitles all wards to be represented by lawyers in court. But the state seems reluctant to reckon with the roots of the problem, as well as with its legacy: a generation of ill and elderly people who were deprived of their autonomy, and also of their families, in the final years of their lives. Last spring, a man bought a storage unit in Henderson, Nevada, and discovered twenty-seven urns—the remains of Clark County wards who had never been buried.

In the wake of Parks's indictment, no judges have lost their jobs. Norheim was transferred from guardianship court to dependency court, where he now oversees cases involving abused and neglected children. Shafer is still listed in the Clark County court system as a trustee and as an administrator in several open cases. He did not respond to multiple e-mails and messages left with his bookkeeper, who answered his office phone but would not say whether he was still in practice. He did appear at one of the public meetings for the commission appointed to analyze flaws in the guardianship system. "What started all of this was me," he said. Then he criticized local media coverage of the issue and said that a television reporter, whom he'd talked to briefly, didn't know the facts. "The system works," Shafer went on. "It's not the guardians you have to be aware of, it's more family members." He wore a blue polo shirt, untucked, and his head was shaved. He looked aged, his arms dotted with sun spots, but he spoke confidently and casually. "The only person you folks should be thinking about when you change things is the ward. It's their money, it's their life, it's their time. The family members don't count."

Belshe is resigned to the fact that she will be supporting her parents for the rest of their lives. Parks spent all the Norths' money on fees—the hourly wages for her, her assistants, her lawyers, and the various contractors she hired—as well as on their monthly bills, which doubled under her guardianship. Belshe guesses that Parks—or whichever doctor or social worker referred her to the Norths—had assumed that her parents were wealthier than they actually were. Rudy often talked vaguely about deals he had once made in China. "He exaggerates, so he won't feel emasculated," Belshe said. "He wasn't such a big businessman, but he was a great dad."

The Norths now live in what used to be Belshe's home office; it has a window onto the living room which Belshe has covered with a tarp. Although the room is tiny, the Norths can fit most of their remaining belongings into it: a small lamp with teardrop crystals, a deflated love seat, and two paintings by their son. Belshe rescued the art work, in 2013, after Caring Transitions placed the Norths' belongings in trash bags at the edge of their driveway. "My brother's paintings were folded and smelled," she said.

The Norths' bed takes up most of the room, and operates as their little planet. They rarely stray far from it. They lie in bed playing cards or sit against the headboard, reading or watching TV. Rudy's notebooks are increasingly focussed on mortality—"Death may be pleasurable"—and money. "Money monsters do well in this society," he wrote. "All great fortunes began with a crime." He creates lists of all the possessions he has lost, some of which he may be imagining: over time, Rennie's wardrobe has become increasingly elaborate and refined, as have their sets of China. He alternates between feeling that his belongings are nothing—a distraction from the pursuit of meaning—and everything. "It's an erasure," he said. "They erase you from the face of the earth." He told me a few times that he was a distant cousin of Leon Trotsky, "intellect of the revolution," as he called him, and I wondered whether his newfound pride was connected to his conflicted feelings about the value of material objects.

A few months after the Norths were freed, Rudy talked on the phone with Adolfo Gonzalez, his neighbor from Lakeview Terrace, who, after a doctor found him competent, had also been discharged. He now lived in a house near the airport, and had been reunited with several of his pets. The two men congratulated each other. "We survived!" Rudy said. "We never thought we'd see each other on the other side." Three other wards from Lakeview Terrace had died.

Rennie has lost nearly all the weight she gained at Lakeview Terrace, mostly because Belshe and her husband won't let her lounge in her wheelchair or eat starchy foods. Now she uses a walker, which she makes self-deprecating jokes about. "This is fun—I can teach you!" she told me.

In July, Rennie slipped in the bathroom and spent a night in the hospital. Belshe didn't want anyone to know about her mother's fall, because, she said, "this is the kind of thing that gets you into guardianship." She told me, "I feel like these people are just waiting in the bushes."

Two days after the fall, Rennie was feeling better—she'd had thirteen stitches—but she was still agitated by a dream she had in the hospital. She wasn't even sure if she'd been asleep; she remembers talking, and her eyes were open.

"You were loopedy-doopy," Scott Belshe, Julie's husband, told her. They were sitting on the couch in their living room.

"It was real," Rennie said.

"You dreamed it," Scott told her.

"Maybe I was hallucinating," she said. "I don't know—I was scared." She said that strangers were making decisions about her fate. She felt as if she were frozen: she couldn't influence what was happening. "I didn't know what to do," she told Scott. "I think I yelled for help. *Help me.*" The worst part, she said, was that she couldn't find her family. "Honest to God, I thought you guys left me all alone." ♦

This article appears in the print edition of the October 9, 2017, issue, with the headline "The Takeover."

Rachel Aviv joined *The New Yorker* as a staff writer in 2013.

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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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.

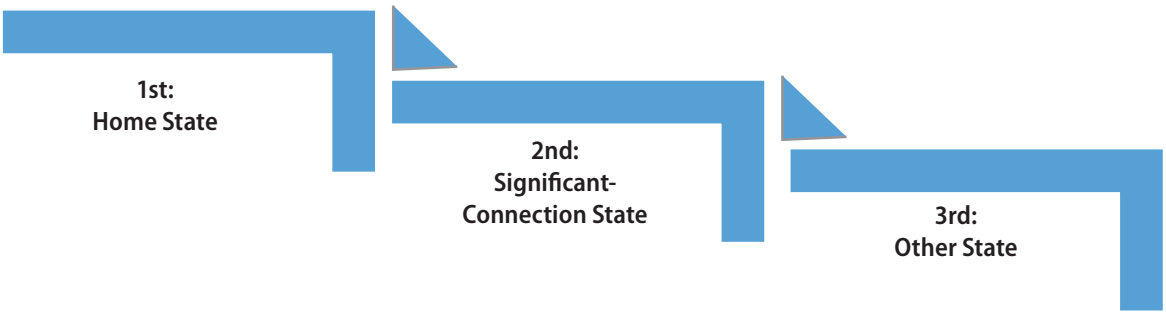
22. *See* State *ex rel.* Hanson v. Yandle, 235 N.C. 532, 535 (1952) (citations omitted) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment . . . and a void judgment may be attacked whenever and wherever it is asserted . . . .").

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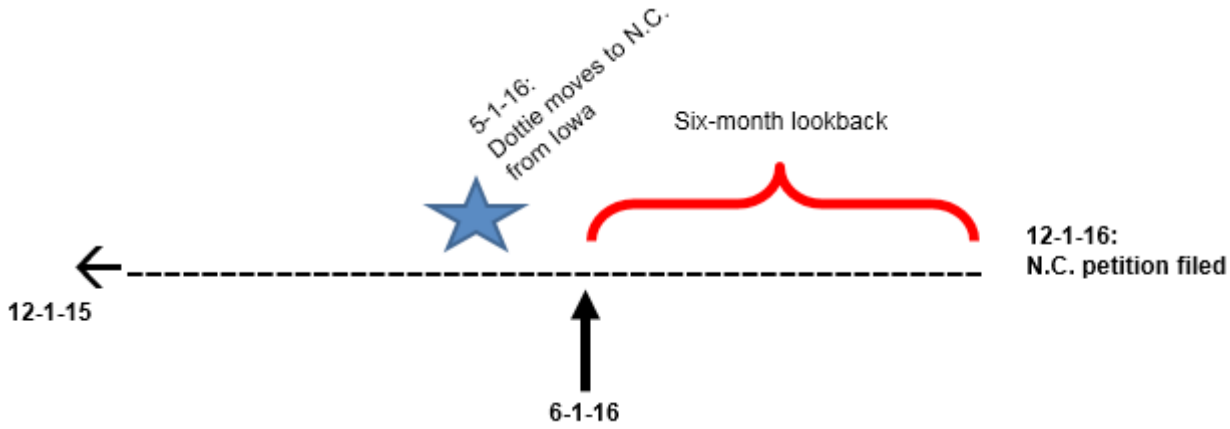
26. A "lookback period" is the period of time prior to and including the date the petition for adjudication of incompetency is filed; the court examines this period to determine whether jurisdiction is proper based on the physical presence of the respondent.

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

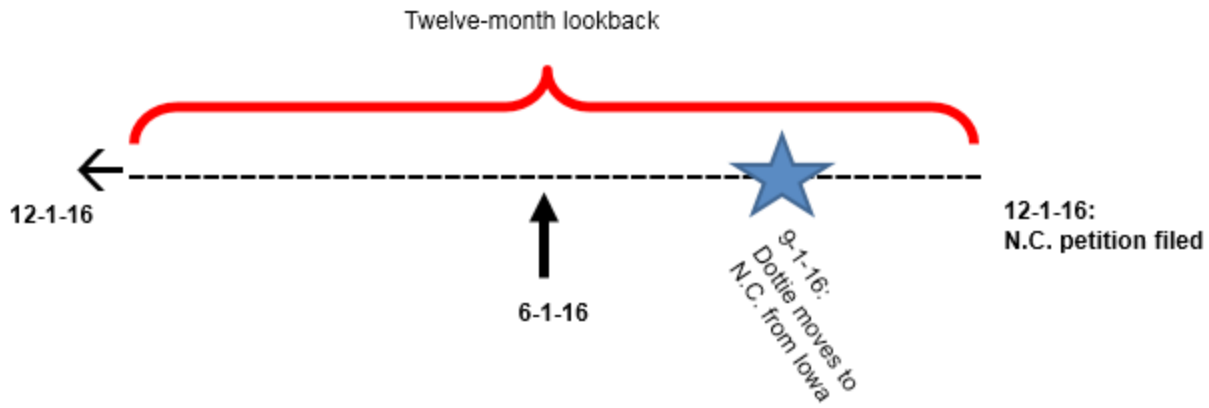
If the respondent was not physically present in any one state for six consecutive months immediately prior to the filing of the petition for adjudication of incompetence, the clerk must look back twelve months to determine whether the respondent was physically present in any one state for at least six 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.

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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

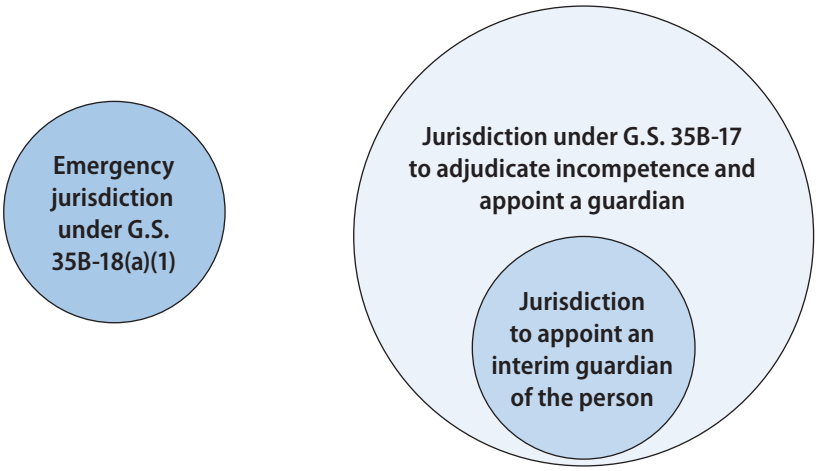
A North Carolina court otherwise lacking jurisdiction has special jurisdiction to appoint a guardian of the person in the event of an emergency for a respondent who is physically present in North Carolina.[70] "Emergency" is defined as a circumstance that will likely result in substantial harm to a respondent's 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

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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]

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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

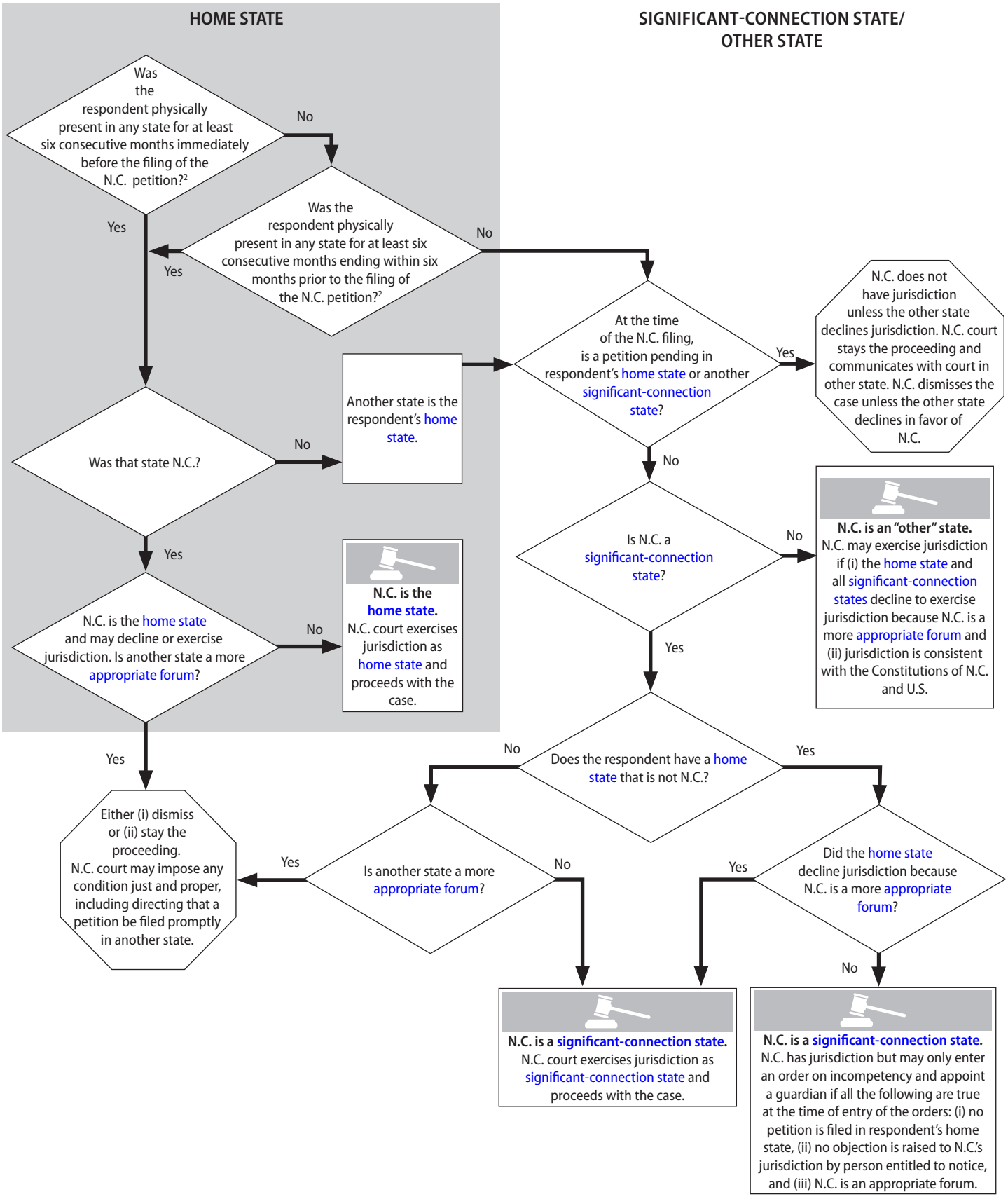
UAGPPJA is now a part of North Carolina law in the form of a new G.S. Chapter 35B. In addition to creating a framework for court communication and cooperation, it serves as a gatekeeper to the courts' authority under G.S. Chapter 35A to adjudicate incompetence and appoint guardians in North Carolina 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.

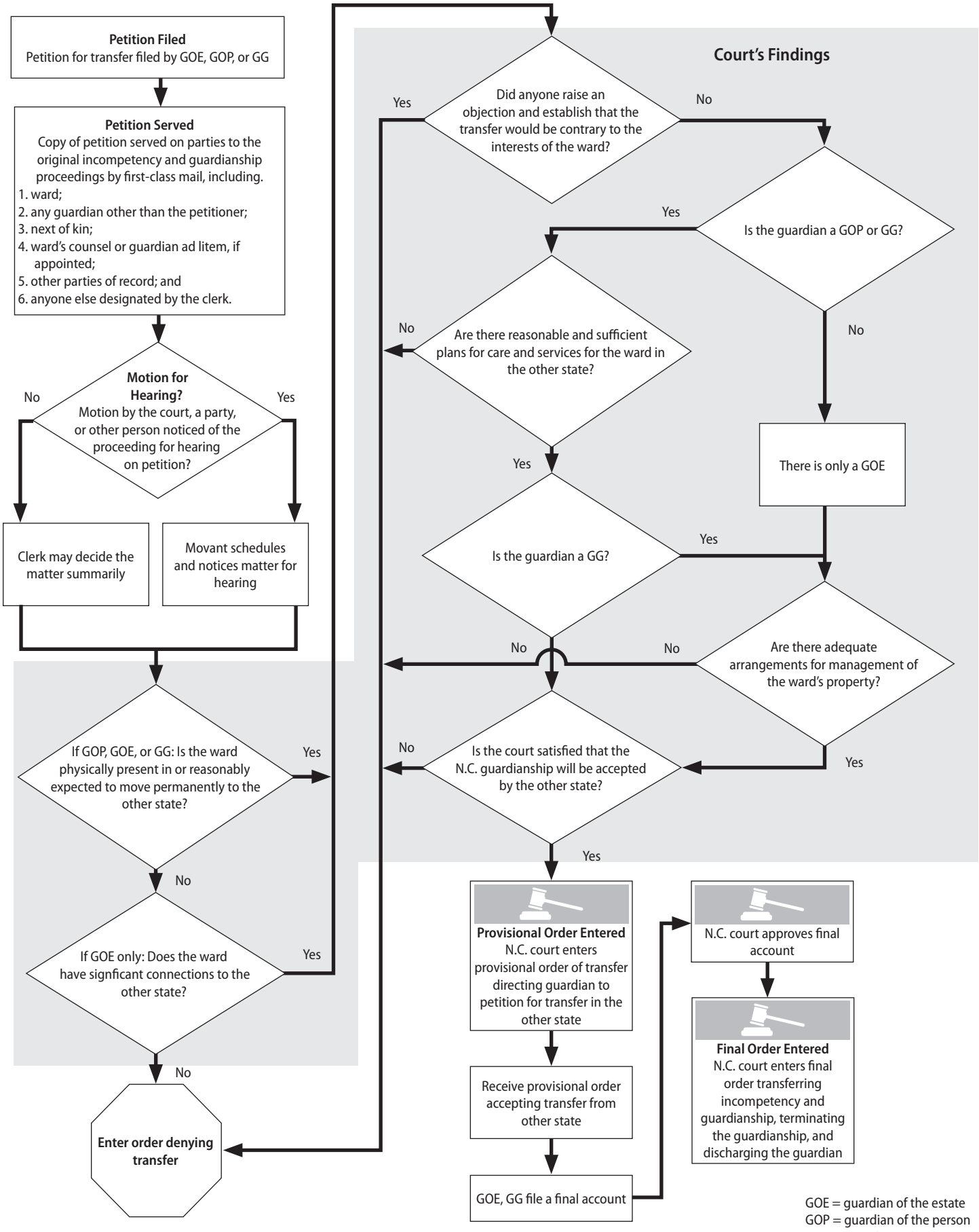
Special Jurisdiction (G.S. 35B-18). A court that lacks jurisdiction as a home state, significant-connection state, or "other" state has special jurisdiction to

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))

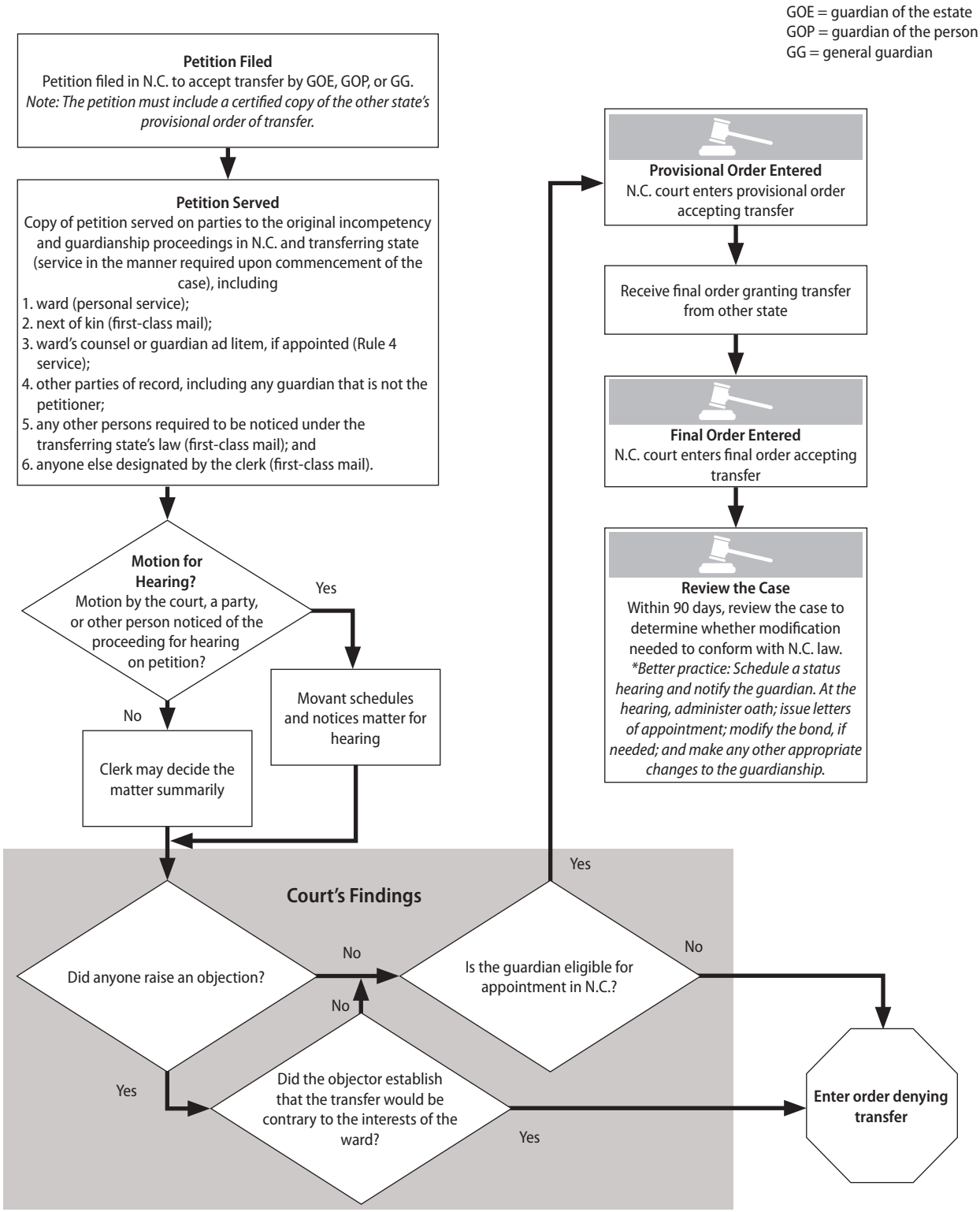
An emergency in this context is a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian of the person is necessary because no other person has authority and is willing to act on the respondent's behalf. G.S.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



Judicial Relief under the New GS Chapter 32A, the North Carolina Uniform Power of Attorney Act

Author : Meredith Smith

Categories : Clerks of Superior Court, Estates, Guardianship

Tagged as : Clerk of Superior Court, estates, guardianship, Incompetencypower of attorney

Date : September 1, 2017

On July 20, 2017, Governor Cooper signed Session Law 2017-153 (S569) known as the North Carolina Uniform Power of Attorney Act (NCPOAA). **This new law goes into effect on January 1, 2018** and applies to powers of attorney (POA) in North Carolina. It repeals provisions in GS Chapter 32A that pertain primarily to financial POAs, including the statutory short form POA in Article 1 and the enforcement provisions in Article 5. It does not apply to POAs that grant authority to a person to make health care decisions for another person. Article 3, health care POAs, and Article 4, consent to health care for a minor, under GS Chapter 32A continue to apply and are mostly unaffected by the NCPOAA.

The NCPOAA adopts, in large part, the Uniform Power of Attorney Act published by the Uniform Law Commission (ULC). In both the uniform law and the NCPOAA, there are sections on judicial relief. As noted by the ULC, the purpose of this judicial relief is two-fold: (i) to protect vulnerable or incapacitated persons who grant authority to another under a POA against financial abuse, and (ii) to protect the self-determination rights of the principal. Uniform Power of Attorney Act, Comment, Sec. 116.

The judicial relief provisions as adopted in NC are heavily modified from the uniform law. This is due in part to the fact that the judicial relief provisions under the NCPOAA specifically list proceedings that may be brought under the act and allocate jurisdiction over those proceedings between the clerk, who serves as the *ex officio* judge of probate in NC, and the superior court. The distribution of jurisdiction under the NCPOAA among these judicial officials mirrors estate proceedings under GS 28A-2-4. There are proceedings that are exclusively within the clerk's jurisdiction, ones that are initiated before the clerk but may be transferred by a party to superior court, and then finally proceedings that are excluded from the clerk's jurisdiction that may only be brought in superior court. The NCPOAA also sets forth the procedures, standing, venue, and appeal rights for these proceedings.

1. Jurisdiction

a. Clerk's Exclusive Jurisdiction

Under the NCPOAA, the clerk has original, exclusive jurisdiction over certain proceedings. Original jurisdiction before the clerk means that if a proceeding is filed, the proceeding must be filed before the clerk of superior court. Exclusive jurisdiction means that once it is filed before the clerk it may not be transferred to another court – the clerk decides all issues of fact and law and enters the order. GS 1-301.3(b). One exception to this rule is if a clerk has a conflict of interest. *See* GS 7A-104(a), (a1).

Under GS 32C-1-116(a), the clerk has original, exclusive jurisdiction over the following proceedings:

- To compel an accounting by an agent, including the power to compel production of evidence substantiating any expenditure by the agent of the principal's assets. Note, as of July 21, 2017, the clerk has expanded contempt authority. SL 2017-158 (H236). Once the NCPOAA is effective on January 1st, the clerk will have the authority to hold an agent in contempt for failure to comply with an order compelling an accounting or an order to

produce evidence substantiating an expenditure.

- To terminate a POA or limit, suspend, or terminate the authority of an agent when a guardian of the estate or general guardian is appointed by the clerk. Under GS 32C-1-108(b), if the clerk appoints a guardian of the estate or general guardian or other fiduciary, the POA and the agent's authority continues unless it is limited, suspended, or terminated by the court.
- To determine compensation of an agent. The clerk has the authority to determine reasonable compensation for an agent under a POA where the POA does not specify the manner or amount of compensation and the principal becomes incapacitated. GS 32C-1-112.

b. **Clerk's Non-Exclusive Jurisdiction**

There are some proceedings under the NCPOAA where the clerk has original, but not exclusive jurisdiction. This means the proceeding must be initiated before the clerk but then may be transferred to superior court upon the filing of a notice of transfer by any party. Notably, the NCPOAA does not provide that the clerk may file a notice of transfer on the court's own motion. *See* GS 32C-1-116(a)(4). This is unlike estate proceedings where the clerk expressly has that authority. *See* GS 28A-2-4(a)(4).

The proceedings under the NCPOAA that fall within the clerk's original, but not exclusive jurisdiction include:

- To determine an agent's authority and powers.
- To construe terms of the power of attorney under GS Chapter 32C.
- To determine any question arising in the performance by an agent of the agent's powers and authority, which includes but is not limited to the authority:
    - To determine whether and to what extent an agent holds a specific grant of authority under GS 32C-2-201.
    - To approve an agent's ability to make certain gifts under GS 32C-2-217 because the power of attorney grants the agent only a general authority with respect to gifts.
    - To authorize the agent to make a gift of principal's property under GS 32C-2-218.
    - To authorize the agent to do to do certain acts (except make a gift under GS 32C-2-219) that require a specific grant of authority.
    - To determine whether and to what extent acceptance of a power of attorney is mandated. GS 32C-1-116(a)(1)-(4).

If the proceeding remains before the clerk and is not transferred to superior court, the clerk has the authority to enter declaratory relief under GS Chapter 1, Article 26, to the extent it is not inconsistent with the NCPOAA. GS 32C-1-116(a)(4).

c. **No Clerk Jurisdiction; actions before Superior Court**

The NCPOAA excludes certain actions related to POAs from the clerk's jurisdiction. The clerk does not have jurisdiction over the following actions and such actions must be filed before the superior court:

- **To modify or amend a POA.**
- By or against creditors or debtors of an agent or principal.
- Involving claims for monetary damages, including breach of fiduciary duty, fraud, and negligence.
- To set aside a power of attorney based on undue influence or lack of capacity.
- To recover property transferred or conveyed by an agent on behalf of a principal with the intent to hinder, delay, or defraud the principal's creditors.

These mirror the actions excluded from the clerk's jurisdiction related to estates under GS 28A-2-4.

2. Actions before the Clerk Filed as an Estate Proceeding

If a proceeding is filed under the NCPOAA before the clerk, it is filed as an estate proceeding under GS 28A-2-6. This statute includes procedures for commencing an estate proceeding, including the requirement to issue an estate proceedings summons, the standard for pleadings, the method for obtaining an extension of time to file, and the applicability of the rules of civil procedure. My colleague, Ann Anderson, published a bulletin on estate proceedings under GS 28A-2-6, which may be found here.

The NC Administrative Office of the Courts is in the process of examining the applicable filing fees associated with the costs of filing these proceedings. The cost of an estate proceeding filed in connection with a decedent's estate is $120.00. *See* GS 7A-307.

3. Standing to File

The section on judicial relief under the NCPOAA also identifies who has standing to file one of these proceedings before the clerk. GS 32C-1-116(c). This includes:

- The principal
- The agent
- A general guardian, guardian of the estate, or guardian of the person
- The personal representative of the estate of a deceased principal
- Any other interested person, including a person asked to accept a power of attorney

Id.

4. Venue

Venue for a proceeding brought under the NCPOAA is proper (i) in the county where the principal resides or is domiciled, (ii) any county where an agent resides, or (iii) any county in which property of the principal is located. GS 32C-1-116(d).

5. Mandatory Dismissal

If a proceeding is filed before the clerk, the clerk is required to dismiss the petition if the principal (the individual who grants authority to an agent in a POA) files a motion requesting a dismissal. GS 32C-1-116(f). The one exception to this mandatory dismissal rule is if the clerk determines the principal is incapacitated. *Id.* For purposes of GS Chapter 32C, incapacity is defined as the inability to manage property or business affairs because the individual: (i) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance, or (ii) is missing, detained, including incarcerated in a penal system, or outside the United States and unable to return. GS 32C-1-102(6).

Note, there appears to be an error in the NCPOAA regarding references to the definition of incapacity. References are made throughout GS Chapter 32C, including the subsection on mandatory dismissal, to GS 32C-1-102(5) which is the definition of good faith, when it appears the intent was to reference the definition of incapacity under GS 32C-1-102(6).

6. Appeal of the Clerk's Order

Appeal of the clerk's order entered under GS Chapter 32C is pursuant to GS 1-301.3. GS 32C-1-116(g). This means a party aggrieved by an order of the clerk may appeal to superior court by filing a written notice of appeal with the clerk within 10 days of entry of the order after service of the order on the other party. GS 1-301.3(c). On appeal, the superior court does not conduct a new trial but rather reviews the clerk's order "on the record." The judge of the

superior court reviews the clerk's order to determine only the following:

- Whether the findings are supported by the evidence.
- Whether the conclusions of law are supported by the findings of facts.
- Whether the order or judgment is consistent with the conclusions of law and applicable law.

G.S. 301.3(d). Therefore, it is important for a clerk who enters an order in a proceeding under the NCPOAA to make findings of fact and conclusions of law in a written order. In the absence of a written order with findings and conclusions, the superior court will likely remand the matter for the clerk to make such findings and conclusions in a written order.

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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.

On the Civil Side
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http://civil.sog.unc.edu

Chapter 35A Guardianship Trumps Chapter 50 Custody

Author : Cheryl Howell

Categories : Family Law

Tagged as : Child custody; Chapter 35A Guardianship

Date : February 1, 2017

G.S. Chapter 35A authorizes the clerk of court to appoint a general guardian or guardian of the person for a child who has no natural guardian. A biological or adoptive parent is a natural guardian of a child, so these guardianships are an option only for children whose parents are both deceased. See G.S. 35A-1224(a). However, orphaned children also are often the subject of Chapter 50 custody actions. What happens if a child is the subject of both proceedings? Can both move forward or does one preclude or take priority over the other? In Corbett v. Lynch, (Dec. 20, 2016), the North Carolina Court of Appeals held that the appointment of a general guardian or guardian of the person renders pending issues of Chapter 50 custody moot. In supporting its holding, the court indicates that a Chapter 35A guardianship creates a relationship between the child and the guardian that is more comprehensive than a relationship between a child and a custodian designated pursuant to Chapter 50.

Corbett v. Lynch

The biological mother of the two minor children involved in this case died in 2006. Their father later married Ms. Corbett, referred to by the court of appeals as the "stepmother." Tragically, father was killed in 2015. Father's will designated the children's aunt, Ms. Lynch, and her husband as testamentary guardians of the two children, but stepmother filed a petition for guardianship of the children pursuant to Chapter 35A. In addition, the day after filing the guardianship petition, stepmother filed a Chapter 50 custody action and obtained an ex parte custody order granting her temporary custody of the children. Aunt thereafter filed an application for guardianship as well as an Answer and counterclaim for custody in the Chapter 50 proceeding.

The clerk of superior court granted general guardianship to Ms. Lynch and her husband. Following the entry of the guardianship order, the district court dismissed stepmother's custody case. Stepmother appealed the dismissal of the custody case, arguing that the district court erred in determining it did not have jurisdiction to proceed after the clerk entered the guardianship order.

Chapter 35A Guardianship

GS 35A-1221 allows "any person" to file an application with the clerk of superior court requesting the appointment of a guardian of the person or a general guardian for any minor who does not have a natural guardian. The clerk conducts a hearing to decide whether appointment of a guardian is required and if so, considers the child's best interest to determine who the guardian or guardians should be. Once guardianship is ordered, the clerk retains jurisdiction to enforce compliance with all guardianship provisions, to resolve disputes between guardians, and to remove and replace guardians if necessary. G.S. 35A-1203. In addition, at any time after a guardianship petition is filed, the clerk has authority to enter a temporary, *ex parte* order when "an emergency exists which threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate." GS 35A-1207.

In Corbett, the court of appeals affirmed the trial court's dismissal of stepmother's custody case, holding that "the appointment of a general guardian by the clerk of superior court in the Chapter 35A guardianship proceeding rendered Stepmother's Chapter 50 custody action moot" because an award of general guardianship "necessarily includes physical custody of the minor child." See GS 35A-1241(a)(1)(a general guardian or guardian of the person is entitled to

custody of the child).

Further, the court implies without specifically stating that a Chapter 35A general guardian or guardian of the person of a minor child takes on the legal role of a child's parent who has a "constitutionally-protected right to exclusive custody, care and control of [his or her] children." These parental rights include but are not limited to the right to physical custody of the child.

The court of appeals quoted the Supreme Court of Rhode Island to explain the relationship between guardianship and custody:

"Permanent custody, so called, with its attendant responsibilities, is an incident of guardianship and parents are the natural guardians of their children… Where, as here, a child has been orphaned, the appointment of a guardian supersedes that of a custodian since the latter is contained within the former."

Petition of Loudin, 219 A.2d 915, 917-18 (1966).

What is the effect of a guardianship on an existing Chapter 50 custody order?

The court in Corbett held that there was no reason to go forward with the pending custody case because the issue of who should have physical custody of the child had been resolved by the guardianship order making the pending custody case "moot." However, the court also held that a general guardianship or guardianship of the person supersedes any existing permanent custody order. The court stated:

"our [guardianship] statutes provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person: Chapter 35A allows for an eligible party to obtain guardianship of a minor child with no living parents even if the child's custody has *already been resolved* by the district court in a Chapter 50 proceeding." (emphasis in original)

As support for this conclusion, the court cited G.S. 35A-1221(4) which requires that an applicant for guardianship "include a copy of any … custody order" for the clerk's consideration in making a decision about guardianship. The court reasoned that this provision makes it clear that the legislature intended for guardianship orders to replace any existing custody order.

Does the entry of a guardianship preclude any future custody proceeding pursuant to Chapter 50?

The answer appears to be yes. As previously stated, Chapter 35A provides that once a guardianship is entered, the clerk retains jurisdiction to enforce or modify a guardianship and to resolve all disputes between guardians. In McKoy v. McKoy, 202 N.C. App. 509 (2010), the court of appeals held that the parents of a disabled adult child who had been appointed general guardians of the child could not proceed with a GS 50 custody proceeding to resolve their dispute over the allocation of physical custody of the child between the two of them. According to the court in McKoy, the clerk retained exclusive jurisdiction to "determine disputes between guardians." In an even more broad statement, the court in Mckoy held that, at least in the case of a disabled adult child, the district court has no jurisdiction to determine custody of the child once the clerk has entered a guardianship order.

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

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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_____
_____
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_____

Notes

North Carolina
Administrative Office
of the Courts

www.nccourts.org

Tab 03: Mental Health & Substance Abuse

Mental Health and Impaired Capacity

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May 2018

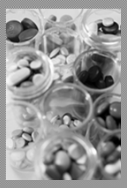
Diagnostic and Statistical Manual of Mental Disorders

- 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

Mental Health and Substance Abuse Quiz

1. True/False Schizophrenia is one of the most common mental disorders.

2. What is a blackout?
    a. Tar-like substance of hashish
    b. Losing consciousness
    c. Memory loss
    d. Passing out

3. Which of the following statements about substance abuse treatment is true?
    a. a person has to want treatment to benefit from it
    b. a person has to hit bottom before they are ready for treatment
    c. a person does better with rewards than with punishment
    d. a person has to be made to feel back about their behavior to change

4. True/False.
   90-95% of people who die by suicide have a clearly diagnosable mental illness.

5. True/False.
   Demonstrating poor judgement in decision-making is a clear indicator that the person needs some level of care or guardianship.

6. True/False. People with psychosis usually come from dysfunctional families.

7. True/False. It is best not to try to reason with people having delusions.

8. The effects of alcohol and drugs occur because they target which organ:
    a. Kidneys
    b. Brain
    c. Liver
    d. Stomach

9. True / False. People with mental health problems tend to have a better outcome if family members are not critical of them.

Tab 04: Clerk's Authority to Order Access to Records

Health, Mental Health, and Substance Abuse Records

Incompetency & Adult Guardianship
May 2018

Mark Botts

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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) 45 C.F.R. 160	**Protected health information (PHI)** – Information that identifies an individual and pertains to: • Health status or condition, or • Provision of health care, or • Payment for provision of health care.
Privileges (state) 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) G.S. 122C-51 thru -56.	**Confidential information –** Information that identifies an individual as receiving services from a: • Mental health, • Developmental disabilities, or • Substance abuse professional
Substance use disorder records (federal) 42 C.F.R. Part 2	**Confidential information –**Information received by a substance abuse treatment program that identifies an individual as • a recipient of alcohol or drug abuse services, or • 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

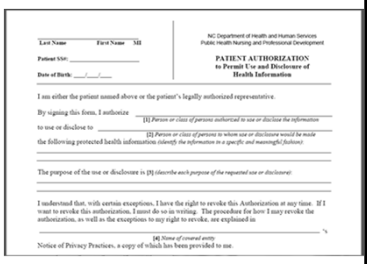
- A judge may compel disclosure of privileged information if, in the court's opinion, disclosure is "necessary to the proper administration of justice"
- What about the clerk?
  - "If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge 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

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*

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?

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Adult Incompetency and Guardianship—Court Order to Disclose Confidential Information

1. Ms. Smith is a 58 year-old woman who has been discharged from the hospital to a rehabilitation facility following a stroke. Her sister has filed a petition for adjudication of incompetence alleging that Ms. Smith has significant mental impairments, judgment issues, and will be unable to physically handle her own care when discharged to back to her home. The GAL has interviewed Ms. Smith and found that her long term memory is intact and her short term memory is poor. Ms. Smith is unable to perform many simple physical tasks during rehab sessions, but the GAL does not know the severity of her stroke or her prognosis for improving physical and mental functioning following rehabilitation. The GAL wants to talk to the rehab therapists and access the hospital and rehab records.
    a. Does the GAL need a court order?

    b. If so, what law or laws does the court order need to address?

    c. What legal standard or standards must be met for the clerk to order disclosure?

2. The GAL learns from interviewing Ms. Smith's sister that Ms. Smith has previously been diagnosed with bipolar disease and substance use disorder involving both alcohol and drugs. Ms. Smith's sister says that, even before the stroke, Ms. Smith had trouble handling her financial affairs during manic phases of bipolar (ran up credit card debt, contracted for work at home that she could not afford), and believes that the substance use contributed to the stroke. In addition, the sister says that Ms. Smith's condition deteriorated after contracting Lyme's disease a few years ago. The sister identifies for the GAL Ms. Smith's primary care physician and psychiatrist.
    a. Does the GAL need a court order to access the physician and psychiatrist records?

    b. If so, what law or laws must the court consider before ordering disclosure?

    c. What legal standard or standards must be met before the clerk orders disclosure?

Tab 05: Role of the Guardian Ad Litem

TO: Guardian ad Litem Attorneys / Incompetency Proceedings
FROM: Special Proceedings Division, Wake County
MEMO DATE: 8/23/2013

Counsel:

We want to begin by thanking you for the service you provide to Wake County citizens in our incompetency proceedings. We enjoy working with each of you and appreciate your willingness to accept these appointments.

We want to make you aware that the Campbell Senior Law Clinic directed by Prof. Roger Manus is back in session. They are accepting cases where the Respondent is contesting and his/her expressed wishes conflict with your recommendation regarding "best interests of the ward". Please feel free to contact Prof. Manus ManusR@law.campbell.edu or phone 919-865-4693 / fax 919-865-5997 to make your referrals. If you refer a case to the Senior Law Clinic, please let us know so we can accommodate sufficient time on the hearing calendar.

At this time, we thought it would be a good opportunity to touch base with you all to reiterate your basic duties and requirements as our carefully selected GAL attorneys. We realize that sometimes your individual practices get busy, and sometimes it becomes difficult to juggle your practice responsibilities. However, we have to make sure that the minimum duties are being carried out to ensure adequate representation. You are required to:

1. **Meet personally with the Respondent in advance of the hearing (not at the hearing or even the night before).** Talk with petitioner and other family/interested persons listed on the petition or motion to modify prior to the hearing.
2. **Have at least telephone contact with other "interested parties" so you can make an informed recommendation regarding competence and who should be appointed guardian.**
3. Find out views of Respondent/Ward and help him/her present their position to the court.
4. Make a recommendation of what is in the best interest of the Respondent/Ward AND what type of guardianship (i.e. guardian of person, limited guardianship, or general guardianship). Try to determine if the Respondent has assets that necessitate a guardian of the estate.
5. In cases where an interim hearing is scheduled, you must meet with the Respondent prior to the hearing and provide an update at the permanent hearing.
6. **Prepare a written report for the court AND email it at least the day before the adjudication hearing. A written report must be submitted in every case. A formal written report is not necessary for an interim hearing, but at a minimum we require an email of your findings and recommendation.** The report is very useful to a third party appointed who is not present at the hearing. It

is also helpful in future hearings when a motion to modify is filed. The report needs to include some minimum background and your recommendation.

7. Notify us in advance of the hearing if there is an indication that the hearing may be contested so that we can adjust the hearing calendar as needed.
8. Contact us immediately if you have a trial scheduled at the same time so we can reschedule and give advanced notice to all involved.
9. **You are expected to be present at all hearings.**
10. Be on time. If something comes up and you are going to be late, call and let us know (919-792-4600). **It is not acceptable to show up 30 minutes late with no call.**
11. **Let us know when your time on a case will exceed 10 hours. Indigent Defense Services expects the normal guardianship to take 2-4 hours. Provide a detailed timesheet if your time exceeds 5 hours. If you are billing for out of county driving, list the location you visited and the number of miles being claimed.**
12. Be familiar with N.C.G.S. 35A.

In some cases, a few of these basic requirements are not being carried out. Most of your clients face losing many or all of their rights. The work you do as a GAL is very important to your clients, and we expect your representation to reflect this.

Where do we go from here? We have a duty to make sure that our minimum requirements are being met. If the minimum standards are not met in a case, we will notify the attorney one time as a warning AND a fee application or motion for attorney fees will be reduced or not approved. If there is an issue a second time, you will be notified that our office will no longer refer cases to you.

We recognize that there are times when family and personal needs should come first. If you do not have the time to devote to these referrals, please feel free to come to us and we will be happy to accommodate a requested leave or obtain a replacement for you.

Special Proceedings Division

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?

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[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

---

[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); 35A-1207; 35A-1290; 35A-1292; 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; 35A-1116(c), (d); 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); 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); 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; 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; 7B-603(a), (a1); 7B-1103; 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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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.

> 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 06: Multidisciplinary Evaluations

UNC SCHOOL OF GOVERNMENT

SOCIAL SERVICES LAW BULLETIN NO. 47 | DECEMBER 2016

Ordering, Preparing, and Paying for Multidisciplinary Evaluations in Incompetency and Adult Guardianship Proceedings

Meredith Smith

Guardianship[1] is the legal process through which a person or entity[2] is appointed by the court to make decisions on behalf of another person who lacks capacity. Before the court may appoint a guardian, two proceedings must be initiated before the clerk of superior court:

1. an *incompetency proceeding* initiated by a petition filed by a petitioner[3] against a respondent, who is the alleged incompetent person, and
2. a *guardianship proceeding* initiated by an application filed by an applicant (usually also the petitioner) who seeks to be appointed as the respondent's general guardian, guardian of the estate, or guardian of the person.[4]

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

1. This bulletin focuses on guardianship of an adult under Chapter 35A of the North Carolina General Statutes (hereinafter G.S.). Article 1 of Chapter 35A sets forth the exclusive procedure for adjudicating a person to be an incompetent adult under North Carolina law. G.S. 35A-1102.

2. Under North Carolina law, an individual, corporation, or public agent may serve as guardian. Preference is given first to an individual recommended by a will or other writing. G.S. 35A-1212.1. Any parent may recommend the appointment of a guardian by will for an unmarried child adjudicated incompetent. *Id.* Next, preference is given to an individual, such as a family member of the ward or other person qualified to serve. G.S. 35A-1214. If there is no qualified individual, the clerk must then consider appointing a corporation. *Id*. 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 department of social services (DSS). *Id.*

3. The petitioner may be any person and may be the county DSS. G.S. 35A-1105.

4. G.S. 35A-1105; 35A-1210. "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). "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). "General guardian means a guardian of both the estate and the person." G.S. 35A-1202(7).

The clerk of superior court or an assistant clerk[5] presides over both proceedings as the judge and has the authority to determine questions of evidence, initiate contempt proceedings,[6] and enter orders.

Incompetency Proceeding

At the hearing on incompetency, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that the respondent is incompetent.[7]

An "incompetent adult" is defined as an adult or emancipated minor who lacks sufficient capacity to

1. manage the adult's own affairs, or
2. make or communicate important decisions concerning the adult's person, family, or property,

whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.[8]

If the clerk[9] finds that the petitioner did not meet the requisite burden of proof, then the clerk must dismiss the incompetency proceeding.[10] If the clerk finds that the petitioner has presented sufficient evidence to meet the burden of proof, then the clerk enters an order that the respondent is (1) incompetent or (2) incompetent to a limited extent.[11] The clerk may include in the order findings on the nature and extent of the respondent's incompetence.[12] Following an adjudication of incompetence, the clerk must appoint a guardian or transfer the matter to another county for the appointment of a guardian in that county.[13] A respondent who is adjudicated incompetent has the right to a qualified, responsible guardian.[14]

Guardianship Proceeding

During the guardianship proceeding, the clerk's role shifts to a more protective posture that considers the respondent's *best interests*.[15] This is evidenced by the fact that the clerk has the duty to inquire and receive evidence necessary to determine the following:

---

5. An assistant clerk is authorized to perform all the duties and functions of the elected clerk, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. *See* G.S. 7A-102(b). For purposes herein, "clerk" means both elected clerks of superior court and assistant clerks.

6. G.S. 7A-103(7). *See generally* G.S. Chapter 5A.

7. G.S. 35A-1112.

8. G.S. 35A-1101(7).

9. The majority of incompetency proceedings are presided over and decided by the clerk. However, the respondent has a right to trial by jury in an incompetency proceeding under G.S. 35A-1110.

10. G.S. 35A-1112(c).

11. G.S. 35A-1112(d).

12. *Id.*

13. G.S. 35A-1112(e).

14. G.S. 35A-1201(a)(2).

15. G.S. 35A-1214.

1. The nature and extent of the needed guardianship, including whether a limited guardianship may be appropriate
2. The assets, liabilities, and needs of the respondent
3. Who can most suitably serve as the guardian or guardians for the respondent[16]

Given the overlap in witness testimony and other evidence, some clerks will allow the parties to present evidence on the issue of incompetency and guardianship during the same hearing. However, because the clerk's duty changes between the two proceedings and a 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, the clerk enters two orders: an order adjudicating incompetence[17] and a second order appointing a guardian.[18]

The Multidisciplinary Evaluation

A multidisciplinary evaluation (MDE) is an important tool that assists the clerk in both the incompetency and guardianship proceedings.[19] A well-prepared MDE can be critical to carrying out the purposes of Chapter 35A of the North Carolina General Statutes (hereinafter G.S.), 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.

An MDE is defined as an evaluation that contains current (1) medical, (2) psychological, and (3) social work evaluations, *as directed by the clerk*.[20] The MDE 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.[21] The statutory definition of an MDE contemplates a dynamic and multifaceted evaluation that covers various areas of a respondent's cognitive and functional capacity.

16. G.S. 35A-1212(a).
17. This is typically done using Administrative Office of the Courts (AOC) form SP-202, available at www.nccourts.org.
18. This is typically done using AOC form E-406, available at www.nccourts.org.
19. G.S. 35A-1111(e); 35A-1212(b).
20. G.S. 35A-1101(14).
21. *Id.*

Ordering the MDE

The clerk may order an MDE of the respondent on the court's own motion at any time the clerk determines one is necessary or on the written motion of any party.[22]

If the clerk orders an MDE, *the clerk must order a designated agency* to prepare it, cause it to be prepared, or assemble it.[23] By this language, the statute contemplates that even though an entity may not directly provide services to a respondent, it still may be a designated agency and engage one or more providers to conduct the evaluations identified by the clerk in the order.

A "designated agency" is 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.[24] A designated agency includes, without limitation:

1. state, local, regional, or area
   a. mental health,
   b. mental retardation,
   c. vocational rehabilitation,
   d. public health,
   e. social service, and
   f. developmental disabilities agencies, and
2. diagnostic evaluation centers.[25]

In practice, clerks most frequently name county departments of social services and local management entities/managed care organizations (LME/MCOs) as the designated agency on the MDE order to prepare, cause to be prepared, or assemble the MDE. 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 statutory definition of designated agency.

Chapter 35A does not require the clerk to order an MDE in every incompetency and guardianship proceeding. If the clerk decides to order the MDE, the clerk typically uses AOC form SP-901M, the Request and Order for Multidisciplinary Evaluation. A copy of the form is included as Appendix 1.

Preparing the MDE

Timeline

Once the designated agency receives the order to prepare the MDE, the designated agency has *30 days* to (1) file the completed evaluation with the clerk; and (2) send copies of the MDE to the petitioner and the counsel or guardian ad litem for the respondent, unless the clerk orders

22. G.S. 35A-1111(a); 35A-1212(b). A request for an MDE made by a party pursuant to G.S. 35A-1111(a) must be in writing and filed within 10 days of service of the petition on the respondent. However, G.S. 35A-1212(b) also provides that the clerk may order an MDE on the clerk's own motion or the motion of any party. It is not clear whether the 10-day restriction set forth in G.S. 35A-1111(a) also applies to an MDE requested pursuant to G.S. 35A-1212(b).

23. G.S. 35A-1111(b).

24. G.S. 35A-1101(4).

25. *Id.*

otherwise.[26] The duty is on the designated agency named in the clerk's order to ensure compliance with the timelines imposed by statute, not on a provider that is engaged by the agency.

If at the 30-day deadline the MDE does not contain all evaluations ordered by the clerk, the designated agency still must file the MDE and send copies to the appropriate parties.[27] The designated agency is required to include a transmittal letter with the MDE that explains why the MDE does not contain the evaluations ordered by the clerk.[28] The clerk may continue the hearing to allow additional time to complete the MDE, if necessary.[29]

Contents

The completed MDE must

1. set forth the nature and extent of the disability, and
2. recommend a guardianship plan and program.[30]

The clerk also has the discretion to order the MDE to include an evaluation of the suitability of a prospective guardian and a recommendation as to an appropriate party or parties to serve as guardian based on the nature and extent of the needed guardianship and the respondent's assets, liabilities, and needs.[31] The North Carolina Department of Health and Human Services (DHHS) Division of Aging and Adult Services has developed suggested guidelines for the preparation of MDEs.[32] A copy of the guidelines is included as Appendix 2.

The clerk may order the respondent to attend the evaluation.[33] However, if the respondent fails to appear, the clerk does not have the authority to hold the respondent in contempt or otherwise force the respondent to appear at the evaluation.

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26. G.S. 35A-1111(b). The MDE is not a public record and its contents may be revealed only by order of the clerk. G.S. 35A-1111(b).

27. G.S. 35A-1111(c).

28. *Id.*

29. G.S. 35A-1108(a) & (b).

30. G.S. 35A-1101(14). Pursuant to G.S. 122C-51, it is the policy of the State of North Carolina to assure basic human rights of each client of a facility, which includes the right to dignity, privacy, humane care, and freedom from mental and physical abuse, neglect, and exploitation. Further, each client has the right to an individualized treatment or habilitation plan that sets forth a program, which may include a guardianship plan or program, that maximizes the development or restoration of his capabilities. G.S. 122C-51.

31. G.S. 35A-1212(c).

32. The guidelines are available as part of the Guardianship Services Manual published by the NC DHHS Aging and Adult Services Division, www.ncdhhs.gov/aging-and-adult-services-guardianship-services-policy-and-procedures-manual.

33. G.S. 35A-1111(d).

Paying for the 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.[34] The clerk is required to assess the costs as follows:

1. To the respondent if the respondent is adjudicated incompetent and is not indigent.
2. To DHHS if the respondent is adjudicated incompetent and is indigent.[35]
3. To either party, apportioned among the parties, or to DHHS, in the clerk's discretion, if the respondent is not adjudicated incompetent.[36] However, if the clerk denies the petition for adjudication of incompetency and finds that there were no reasonable grounds to bring the motion, the costs shall be taxed to the petitioner.[37]

34. G.S. 35A-1116(b).

35. "Indigent" means unable to pay for legal representation and other necessary expenses of an incompetency proceeding. G.S. 35A-1101(9).

36. G.S. 35A-1116(b).

37. G.S. 35A-1116(a).

Appendix 1. Form MDE Order

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
Superior Court Division
Before the Clerk

IN THE MATTER OF:

Name Of Respondent

Social Security No. Of Respondent (Last Four Digits Only)

REQUEST AND ORDER FOR MULTIDISCIPLINARY EVALUATION

G.S. 35A-1111(a), (b)

Name And Address Of Counsel Or GAL For Respondent

Name And Address Of Petitioner In Incompetency Proceeding

REQUEST

I, the undersigned, request that the Court order a multidisciplinary evaluation be performed on the respondent named above.

Name And Address Of Party Requesting Evaluation

Date

Signature

FINDINGS

The Court finds

☐ in accordance with the above request OR ☐ on its own motion

that a multidisciplinary evaluation

☐ should ☐ should not be performed on the respondent.

ORDER

Based on these findings

☐ the request for multidisciplinary evaluation is denied.

☐ it is ORDERED that the following agency shall prepare and provide a current multidisciplinary evaluation of the respondent. The agency shall file the evaluation with the Clerk, and send copies to the petitioner and the counsel or guardian ad litem for the respondent not later than thirty (30) days after receipt of this order.

Name And Address Of Designated Agency

Date

Signature

☐ *Assistant CSC* ☐ *Clerk of Superior Court*

AOC-SP-901M, Rev. 7/06
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Original-File Copy-Agency

Appendix 2. DHHS Division of Aging and Adult Services Guidelines for Multidisciplinary Evaluations

Appendix G

Guidelines For Multidisciplinary Evaluations

In order to determine issues of competency and guardianship, a multidisciplinary evaluation may be requested by a clerk of court, respondent, counsel or guardian. Minimally, a multidisciplinary evaluation team would contain a physician, psychologist, and social worker. However, professionals from other disciplines may participate in the evaluation at the request of the multidisciplinary evaluation team, clerk, or respondent. The evaluation would address the nature of the disability, the extent of incompetency, and the suggested limitations of guardianship.

The attached guidelines are suggestions for a two-part multidisciplinary evaluation. The first part would consist of separate evaluations by the physician, psychologist and social worker. These evaluations would reflect the expertise of the discipline. Hence, the physician would determine the client's physical and neurological status. Intellectual functioning, adaptive behavior and emotional status would be assessed by the psychologist. The social worker would focus on environmental conditions, social relations, and community resources. The second part of the evaluation procedure would consist of a conference, preferably in person, but if necessary by telephone, among the three evaluators. Based upon the findings of the discipline evaluations, the conference participants as a group will identify areas of competence and incompetence, as well as develop recommendations for general or limited guardianship. A summary of the conference recommendations will be written by one of the three participants. This summary as well as the reports of the three discipline evaluations will be forwarded to the clerk, petitioner, and respondent.

The guidelines for the discipline evaluations and for the multidiscipline conference are attached. The guidelines are designed as suggestions for focus and organization and not as prescriptions or requirements for a rigid format. It is recognized that these guidelines may not be complete or appropriate for each particular case. Hence, the evaluators' professional judgment would precede the guidelines in such situations.

MEDICAL EVALUATION GUIDELINES

Name Date of Birth Date of Evaluation

I. History

Character of deficit (mental illness, mental retardation, cerebral palsy, epilepsy, autism, inebriety, senility, disease injury):
Etiology (if known or presumed)
Contributory medical family history:
Present medical status (degree of disability, other relevant data):
Chronic medical problems other than above:
Previous hospitalizations for significant medical problems and/or operations (include hospital and dates):
Previous hospitalizations for treatment of mental illness (include hospital and dates):
Hearing (by history): Vision (by history):
Medications taken regularly or frequently (give dosage):
Current physician(s) or involved health agencies, with frequency of contact:
Evidence of alcoholism or drug abuse:
Other relevant information:

II. Examination

General appearance (note unusual findings):

Height: Weight: Pulse: B. P.
Skin Hair:
Head (include circumference, if contributory):
Eyes: Funduscopy:
Ears (include gross hearing to voice and whisper):
Nose, mouth, and oropharynx:
Teeth: Neck (include thyroid):
Heart (and peripheral circulation when appropriate):
Chest and lungs:
Abdomen: Genitalia (also R/O Herniae):
Spine, hips, and extremities (include symmetry):
Rectal (if appropriate): Other:

Neurological:

Cranial nerves (extraocular movements, nystagmus, pupillary responses, smile, gritting teeth, gag, shoulder shrug):

Motor strength, tone and coordination (spasticity, athetoid movements, tremor, fine motor functioning, etc.; include finger-to-nose, hand squeeze, rapid thumb to consecutive finger approximation, gait):

"2 -

Sensory (Romberg; touch, pin and vibration when indicated):

DTR's (symmetry and intensity): Plantar responses:

Gross vision (letter or symbol chart)

Without glasses:	R	L
With glasses, if worn:	R	L

Unusual behaviors:

Pertinent laboratory test results (CBC, urinalysis, possibly others):

III. Impression

Summary of abnormal findings and medical impression:

Assessment of mental competency (with reasons for this assessment):

Estimate of medical prognosis, when possible and appropriate (i.e., is the deficit one which is apt to result in a change in the level of competency with time?):

Examiner: Address:

PSYCHOLOGICAL EVALUATION GUIDELINES

I. Intellectual Assessment—This should be done with a standard evaluation instrument. The Wechsler Adult Intelligence Scale (WAIS) is the test of choice, especially for those mildly and moderately retarded citizens with good skills. The Wechsler Memory Scale can be used to test for short term memory. Other generally accepted intellectual instruments can be used such as the Slosson Intellectual Test-R, the Bender Motor Gestalt Test and Beck Depression Scale.

II. Behavioral Assessment—A standard evaluation instrument should also be used for this assessment. The Vinaland Adaptive Behavior Skills (Interview Edition) assesses adaptive and maladaptive behaviors. Domains include communication, socialization and daily living skills. Forms are available from the American Guidance Services, Inc., Circle Pines, Minnesota 55014-1796. The AAMD Adaptive Behavior Scale is another excellent instrument for assessing adaptive behavior. (Manual and Forms are available from AAMD, 5101 Connecticut Avenue, N. W., Washington, D.C. 20015.)

III. General Interview—In addition to the formal assessments, the psychologist should conduct a personal interview, lasting from 20-40 minutes. The following general areas should be assessed during the interview:

A. Ability to relate, to answer direct questions and to respond to the interviewer.
B. Activity level, distractibility.
C. General coordination, posture and balance.
D. Orientation to other persons, time and place.
E. Speech and language.

F. Thought processes organized or not, rigid or flexible, perseveration?
G. Affect and mood.
H. Self-concept.
I. Strengths and coping strategies.
J. Friends and other support systems.
K. Leisure interests and activities.

SOCIAL WORK EVALUATION GUIDELINES

The social work evaluation addresses the social and environmental aspects of the individual's life. The evaluation report would provide a description and assessment of living arrangements, interpersonal relationships, community resources, and potential guardians. A comprehensive evaluation will necessitate an observation of the individual in his usual environment, that is, place of employment and/or residence. In addition, it may be essential to interview, in person or by telephone, significant persons in the individual's social network such as parents, relative, friends, supervisors, potential guardians, and staff members of various agencies. Guidelines for the social work evaluations are suggested below. It is assumed that the guidelines will not be appropriate or complete for each particular situation. The social worker should exercise professional judgment and modify the guidelines depending upon the particular circumstances.

I. Environmental Aspects

A. Residence
   I. Current Residence—(i.e., location; type; supervision; household members, length of residence; household responsibilities; appropriateness of physical facilities and supervision; adjustment to environment.)
   2. Previous Residences—if less than 1 year in current residence (i.e., brief history; see item above.)

B. Employment
   1. Current Employment—(i.e., location, employer, supervision; supervisor; job responsibilities; salary; work behavior; length of employment; appropriateness of job; facility and supervision.)
   2. Previous Employment—(i.e., brief history, see item above.)

C. Training and Education
   I. Current Training and Education—(i.e., program, location, supervisor or teacher; skills developed; behavior; achievements; length of program; appropriateness of training program.)
   2. Previous Training and Education—(i.e., brief history; see item above.)

D. Transportation
   1. Current Transportation—(i.e., primary means of transportation, frequency, limitations, needs, appropriateness of transportation means.)
   2. Previous Transportation—(i.e., brief history; see item above.)

II. Financial Aspects

A. Current Finances—(i.e., sources and amount of income, expenses, debts, major assets; personal money management; supervised money management, bank and credit utilization, insurance utilization.)
B. Previous Finances—(i.e., brief history; see item above.)
C. Other—(i.e., pertinent information-related living arrangements and environmental situation.)

III. Social Aspects

A. Immediate Family—(i.e., parents, spouse, children—names; residence; frequency of contact: type of interaction; supervision; appropriateness of activities.)
B. Extended Family—(i.e., siblings; cousins; see item above.)
C. Friends—(see item II-A.)
D. Group Activities—(i.e., clubs, church groups, teams—type of activity; frequency; skills, participants; types of interaction; supervision; appropriateness of activities.)
E. Avocational Interests—(i.e., hobbies, personal interests; see item above.)
F. Other—(i.e., pertinent information concerning interpersonal relationships and social context.)

IV. Community Aspects

A. Health—(i.e., physicians, dentist, health care agencies—name of personnel and agencies; services provided; availability of services; frequency of contact; utilization of service; appropriateness of service and of utilization.)
B. Economic
C. Vocational/Education—(i.e., Vocational Rehabilitation, School System; see item Ill-A.)
D. Mental Health—(i.e., Mental Health Services; see item III-A.)
E. Legal—(i.e., attorney, courts, probation or parole officer; see item III-A.)
F. Other—(i.e., pertinent information related to community resources and interaction.)

V. Potential Guardian—(i.e., name; relation; frequency of contact; history of contact; interest; abilities; limitations.)

VI. Summary of Impression

A. Summary and Impression concerning environmental, social and community assessment (i.e., living arrangements, interpersonal relationships, community interaction; specific strengths and limitations; availability of environmental, social and community resources; ability and limitations concerning utilization of resources.)

B. Summary and Impression concerning potential guardian.

MULTIDISCIPLINARY EVALUATION CONFERENCE GUIDELINES

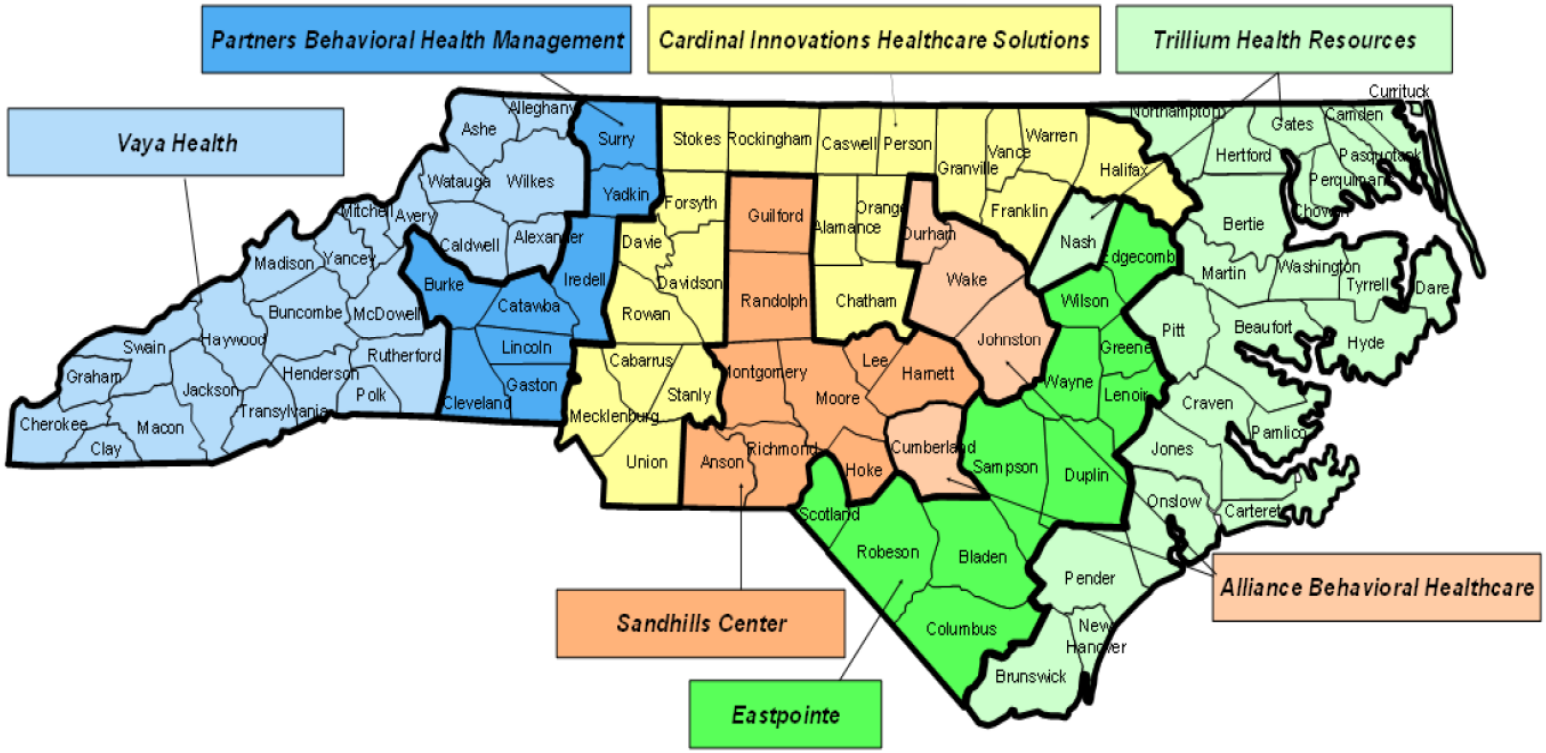
Following the discipline evaluations, the three evaluators will meet in conference to discuss the issues of disability, competency and guardianship. A report of the multidiscipline conference will be written by one of the participants and forwarded to the clerk, respondent and petitioner. This report will present the final impressions and recommendations of the multidisciplinary evaluation team concerning competency and guardianship. It is essential that the report contain references to specific evaluation findings and information which influenced the impressions and recommendations. Guidelines for the multidisciplinary evaluation conference and report are suggested below.

I. Competency—Describe the competency of the individual, including specific areas of competency (i.e., individual can decide and/or perform autonomously) and incompetency (i.e., individual cannot decide and/or perform autonomously.) For areas of incompetency, describe the extent to which the client can decide and/or perform and the amount of assistance needed. Description of areas of competency and incompetency should address the following categories: (1) self-care (2) residence (3) employment (4) financial management (5) medical and health care (6) mental health and social services (7) education and training (8) legal assistance.

II. Guardianship—Describe appropriate guardianship—either complete, person, estate or limited. If limited guardianship, describe specific power and limits of guardian in each specific category identified in item II. Describe specific duties of the guardian and specific issues to be reviewed in six months. Describe impressions of potential guardians.

Area Mental Health, Developmental Disabilities, and Substance Abuse Authorities in North Carolina
(Local Management Entities-Managed Care Organizations)

LME-MCO Catchment Areas
As of 7/1/17



LME-MCOs Operate Under the 1915 (b)(c) Waiver

LME/MCO Directory –May 2018

Vaya Health

200 Ridgefield Court, Suite 206
Asheville, NC 28801
Phone: 828-225-2785
Fax: 828-225-2796
Crisis Line: 800-849-6127
Counties Served: Alexander, Alleghany, Ashe, Avery, Buncombe, Caldwell, Cherokee, Clay, Graham, Haywood, Henderson, Jackson, Macon, Madison, McDowell, Mitchell, Polk, Rutherford, Swain, Transylvania, Watauga, Wilkes, Yancey

Cardinal Innovations Healthcare Solutions Office

4855 Milestone Avenue
Kannapolis, NC 28081
Phone: 704-939-7700
Fax: 704-939-7907
Crisis Line: 800-939-5911
Counties Served: Alamance, Cabarrus, Caswell, Chatham, Davidson, Davie, Forsyth, Franklin, Granville, Halifax, Mecklenburg, Orange, Rockingham, Person, Rowan, Stanly, Stokes, Union, Vance and Warren

Partners Behavioral Health Management Office

901 South New Hope Road
Gastonia, NC 28054
Phone: 704-884-2501
Fax: 704-884-2713
Crisis Line: 888-235-4673
Counties Served: Burke, Catawba, Cleveland, Gaston, Iredell, Lincoln, Surry, Yadkin

Alliance Behavioral Healthcare Office

4600 Emperor Boulevard
Durham, NC 27703
Phone: 919-651-8401
Fax: 919-651-8672

Crisis Line: 800-510-9132
Counties Served: Cumberland, Durham, Johnston, Wake

Sandhills Center Office

1120 Seven Lakes Drive
West End, NC 27376
Phone: 910-673-9111
Fax: 910-673-6202
Crisis Line: 800-256-2452
Counties Served: Anson, Guilford, Harnett, Hoke, Lee, Montgomery, Moore, Randolph, Richmond

Trillium Health Resources Office

201 W. First Street
Greenville, NC 27858-1132
Phone: 866-998-2597
Crisis Line: 877-685-2415
Counties Served: Brunswick, Carteret, Nash, New Hanover, Onslow, Pender, Beaufort, Bertie, Camden, Chowan, Craven, Currituck, Dare, Gates, Hertford, Hyde, Jones, Martin, Northampton, Pamlico, Pasquotank, Perquimans, Pitt, Tyrrell, Washington

Eastpointe Office

514 East Main Street
Beulaville, NC 28518
Phone: 800-913-6109
Fax: 910-298-7180
Crisis Line: 800-913-6109
Counties Served: Bladen, Columbus, Duplin, Edgecombe, Greene, Lenoir, Robeson, Sampson, Scotland, Wayne, Wilson

On the Civil Side
A UNC School of Government Blog
https://civil.sog.unc.edu

Multidisciplinary Evaluations in Incompetency and Adult Guardianship Proceedings: The Final Report

Author : Meredith Smith

Categories : Guardianship

Tagged as : capacity, Clerk of Superior Court, department of social services, guardianship, Incompetency multidisciplinary evaluation

Date : November 10, 2017

We have a new report available at the School of Government (SOG) for your weekend reading. The report is titled *Multidisciplinary Evaluations Assembled by LME/MCOs in Adult Guardianship Proceedings in North Carolina*.

The project behind the report arose out of an annual course offered by the SOG for elected and assistant clerks on the clerk's judicial role in incompetency and adult guardianship proceedings. As part of the course a few years back, I taught a session on multidisciplinary evaluations (MDEs). An MDE may be ordered in incompetency and guardianship proceedings to assist the court in determining the nature and extent of a respondent's capacity, what type of guardianship plan and program is appropriate, and the suitability of a particular guardian. G.S. 35A-1111(a); 35A-1212(c).

During the MDE session, it became apparent that many clerks were having trouble accessing quality, timely MDEs across the state. A clerk has the discretion to order a state or local human services agency to prepare, cause to be prepared, or assemble the MDE. One agency the clerk may name in the clerk's order to prepare or cause the MDE to be prepared is a local management entity/managed care organization (LME/MCO). An LME/MCO delivers mental health, developmental disability, and substance abuse 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.

Many clerks noted that the practice of ordering, preparing, and paying for MDEs from LME/MCOs did not match the law. At the next conference of elected clerks after the guardianship course, I conducted a survey of the body of elected clerks to get a better sense of the issue. From that survey, it became apparent that in some pockets of the state the process worked well and in other areas there was a limited relationship between clerks and LME/MCOs. As a result, I reached out to my colleague, Mark Botts, who works in the area of mental health and substance abuse law. We then planned and convened meetings to bring together LME/MCOs, providers, and clerks to establish and improve working relationships, suggest ways to strengthen the current system, and develop a plan for moving the work forward. To assist with the discussion of the law at each meeting, I published a bulletin on the process of ordering, preparing, and paying for MDEs in incompetency and guardianship proceedings.

We have now completed our meetings and held at least one meeting in each of the seven LME/MCO catchment areas in NC. As a result of the meetings, there is a memorandum available for each catchment area in the state that establishes a process for communication between the court and the LME/MCO related to MDEs. This means every clerk in the state has a point of contact and procedure at an LME/MCO to obtain an MDE in an incompetency and adult guardianship proceeding. If anyone would like a copy of the memo for their particular catchment area, feel free to reach out to me directly.

After the completion of the meetings, I put together the report mentioned at the start of this post summarizing the findings and recommended action steps collected from all of the meetings. One of the action steps identified in the report is already underway. The NC Administrative Office of the Courts Estates and Special Proceedings Forms

Committee is currently considering changes to the SP-901M form and other guardianship forms based on the specific feedback from the meetings, which is listed in Figure 1 on page 8 of the report. There are a number of other actions steps identified in the report that could be taken up by interested parties to carry the work forward to continue to improve this process in NC.

In addition to letting blog readers know about the availability of the report, I also wanted to use this post to say thank you to the people who took part in the project. Every LME/MCO across the state sent multiple representatives to the meetings in their respective catchment areas and clerks from 71 of 100 counties attended. LME/MCO providers, representatives from the DHHS Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, and county departments of social services directors, attorneys, and social workers also participated in some of the meetings. Each participant took a day out of their schedule to attend and to work to improve this process for the benefit of the citizens of NC. I am grateful for their time and their contributions to this project.

I also want to say thank you to my colleagues, Mark Botts and Aimee Wall, who jumped in on this project with me without hesitation. Their contributions to the meetings and the report were invaluable.

Thank you again to all who took part. I hope the participants found the project beneficial to their work and will continue to try to find ways to improve the delivery of these important evaluations in incompetency and guardianship proceedings in NC.

REPORT

A Report on Multidisciplinary Evaluations Assembled by LME/MCOs in Adult Guardianship Proceedings in North Carolina

October 2017

Meredith Smith

UNC SCHOOL OF GOVERNMENT

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Executive Summary

Over the course of a year, the UNC School of Government (SOG) convened meetings among clerks of superior court, local management entities/managed care organizations (LME/MCOs), and LME/MCO providers on the topic of multidisciplinary evaluations (MDEs) in adult guardianship proceedings. Guardianship proceedings may result in a significant deprivation of rights for the respondent to the proceeding, and clerks may order LME/MCOs to prepare MDEs when information is lacking or conflicting regarding the respondent's capacity or guardianship needs. When ordered to prepare an MDE, an LME/MCO will delegate that responsibility to one of its contracted service providers. There is a significant disparity across the state in courts' access to quality and timely prepared MDEs. The purpose of the meetings was to bring together stakeholders to improve relationships and collaboration related to court-ordered MDEs.

The meeting participants identified the following issues.

- There are multiple, inadequate sources of funding to cover the cost of MDEs and there is confusion regarding the process for accessing the limited funds that are available.
- The current statutory law governing MDEs does not account for the many changes made to the delivery of public mental health services in North Carolina over the last few decades.
- There is no comprehensive data on the demand for MDEs in North Carolina.
- Clerks statewide report problems with the quality of MDEs in that they lack information that is useful and relevant to the court and the content does not adhere to NC Department of Health and Human Services (DHHS) guidelines.
- Many LME/MCOs do not submit the MDE to the court within statutorily prescribed deadlines, and clerks regularly must continue hearings to allow more time to complete MDEs.
- LME/MCO provider networks do not have a sufficient number of appropriately trained professionals to perform the components of an MDE.
- When an LME/MCO engages a contracted provider to perform the MDE, the providers and the process require greater oversight by the LME/MCO to ensure the quality of the MDE and the timely return of the MDE to the court.
- Existing LME/MCO providers performing MDEs would like MDE- and guardianship-specific training, but few training opportunities are available.

In light of these issues, it is clear that there are areas for improvement of the MDE process in North Carolina. In a few areas of the state, the process works well. One key to a successful process is local collaboration among community stakeholders. This and other action steps recommended by meeting participants to address issues with MDEs across the state are included in this report together with a more detailed description of each of the issues identified above.

A. The Meetings (Methodology)

From May 2016 through July 2017, the SOG facilitated eight meetings among clerks of superior court, LME/MCOs, and LME/MCO providers on the topic of MDEs in adult guardianship proceedings. At least one meeting was held in each of the seven LME/MCO catchment areas. Ninety clerks from 71 counties participated in the meetings. Every LME/MCO sent multiple representatives to the meeting in their respective catchment areas. Provider representatives attended all but two meetings. The DHHS Division of Mental Health, Developmental Disabilities, and Substance Abuse Services (Division of MH/DD/SA Services), which serves as liaison to the LME/MCOs, also attended the meetings, in part because under statute DHHS must pay the costs of the MDE in certain circumstances.

The goal of each meeting was to establish relationships and create better cooperation and communication among clerks, LME/MCOs, and providers related to ordering, preparing, and paying for MDEs. While the clerk has the discretion to order an LME/MCO, a county department of social services (DSS), or a public health department, among others, to prepare or cause the MDE to be prepared, a survey of clerks conducted before the meetings revealed that building and reinforcing the relationship between clerks and LME/MCOs was particularly important in improving the MDE process. DSS representatives attended two of the meetings to explore collaborative opportunities with LME/MCOs for preparing the component parts of an MDE. But the primary goal of these meetings remained establishing an operational framework for the clerks, LME/MCOs, and providers.

At each meeting, SOG representatives provided a brief summary of the law concerning MDEs. The participants then engaged in a discussion to identify current practice, including any issues they encounter following the statutory procedure for ordering, preparing, and paying for MDEs. Each meeting ended with the participants working together to draft a uniform guide for the catchment area establishing a process for ordering, preparing, and paying for MDEs. Subsequent to each meeting, SOG faculty drafted a post-meeting report that documented this process.

As a result of these meetings, a report is now available for each catchment area in the state that establishes a process for communication between the court and the LME/MCO related to MDEs. This means every clerk in the state has a point of contact and process identified with each LME/MCO to obtain an MDE in a guardianship proceeding. Each report also summarizes ways to improve the MDE process and the next steps toward that end as identified by the meeting participants.

B. Findings

Although the meetings laid a foundation for communication and cooperation among key stakeholders regarding MDEs, there is a continued need for action to improve the MDE process. A large disparity continues to exist across the state in the ability of courts to access timely and substantive MDEs. The most common impediments identified by meeting participants to obtaining an effective MDE as well as the action items they recommended to improve the process are discussed below.

1. Payment of the Costs of the MDE

a. Insufficient funding. The Division of MH/DD/SA Services has recurring annual funding intended to cover the costs of certain MDEs[1] and forensic evaluations[2] for the entire state in the amount of $36,448. The Division of MH/DD/SA Services staff noted that this funding typically runs out in late February or early March of each fiscal year. It is unclear what happens when the court orders an MDE after funding runs out and DHHS is ordered by the court to pay the cost of the MDE. In some of these cases, it appears the LME/MCO absorbs the costs of the MDE.

The demand for these funds will likely grow in the future due to (1) a greater awareness of MDEs and an appreciation of their importance in certain guardianship proceedings as a result of the MDE meetings and (2) the elimination of LME/MCO funding to cover the costs of MDEs. For example, one LME/MCO that historically allocated $100,000 per year in single-stream dollars to cover the costs of MDEs eliminated that funding starting July 1, 2017.[3]

> *Action item: Awareness and advocacy by constituent groups.* Meeting participants suggested raising awareness and support among guardianship constituency groups impacted by a lack of access to MDEs, such as disability rights groups, the elder law section of the NC Bar Association, and others. Specifically, participants suggested the Conference of Clerks of Superior Court articulate the need for additional funding by way of a letter to the director of the Division of MH/DD/SA Services.

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1. DHHS is obligated to pay the costs of an MDE when ordered by the court. N.C. Gen. Stat. (hereinafter G.S.) 35A-1116(b). The court may order DHHS to pay when (1) the respondent is indigent and adjudicated incompetent or (2) if the respondent is not adjudicated incompetent and there were reasonable grounds to bring the petition. G.S. 35A-1116(a) and (b).

2. Forensic evaluations include evaluations to determine whether an individual has the capacity to proceed in a criminal case.

3. Vaya Health, letter to clerks of superior court in the Vaya catchment area, June 14, 2017, copy on file with author.

b. Lack of clarity regarding public funding sources. When the court orders an LME/MCO to complete an MDE, common practice is that the LME/MCO engages a provider to prepare the MDE, guarantees payment to the provider, and then pays the provider directly for the evaluations that comprise the MDE using LME/MCO funds. LME/MCOs do not typically seek and the court does not regularly enter orders specifically allocating the costs of MDEs. Instead, most LME/MCOs absorb all of the costs of the MDEs despite other statutory sources of funding. These sources include

1. DHHS, if the respondent is indigent or not adjudicated incompetent;
2. private insurance, if the respondent has applicable coverage;
3. the petitioner, if there were no reasonable grounds to bring the petition or the respondent is not adjudicated incompetent;
4. the respondent's estate, if the respondent has funds; and
5. Medicaid for certain medically necessary components of an MDE, provided the respondent is Medicaid-eligible.[4]

The most confusion seems to exist around funding when the respondent is indigent, specifically the appropriate use of and access to DHHS and Medicaid funding. DHHS data for fiscal year 2016–17 shows that five of seven LME/MCOs did not access any DHHS funds allocated for MDEs. One LME/MCO accessed over 80 percent of the total funds used statewide that year all for MDEs. Table 1 lists the amount DHHS reimbursed each LME/MCO for the cost of MDEs and forensic evaluations during fiscal year 2016–17.

Table 1: DHHS MDE and Forensic Evaluation Reimbursements for 2016–17

LME/MCO	Amount Reimbursed for Forensic Evaluations	Amount Reimbursed for MDEs
Vaya Health	$0.00	$0.00
Eastpointe	$0.00	$0.00
Alliance Behavioral Healthcare	$3,100.00	$0.00
Cardinal Innovations Healthcare	$4,300.00	$0.00
Partners Behavioral Health Management	$3,200.00	$15,159.17
Sandhills Center	$7,700.00	$0.00
Trillium Health Resources	$1,388.83	$2,988.83
TOTAL	**$19,688.83**	**$18,148.00**

As for Medicaid funding, participants at almost every meeting indicated that they did not have a clear understanding as to whether and to what extent Medicaid funds could be accessed to cover the cost of MDE components, including the psychological, social work, and medical evaluations.

4. *See* G.S. 35A-1116(a) and (b).

Action item: DHHS policy guidance. Participants expressed a desire for guidance from the Division of MH/DD/SA Services as to the expectations for billing the cost of MDEs, including what may be billed to Medicaid, the procedure for recouping costs from DHHS, and what should occur when DHHS funding is exhausted but the court continues to order MDEs during a fiscal year.

Action item: Revise Form SP-200. Participants recommended revising NC Administrative Office of the Courts (AOC) Form SP-200, the Petition for Adjudication of Incompetence and Application for Appointment of a Guardian or Limited Guardian, to elicit information from the petitioner about whether the respondent has health or other insurance that might cover part or all of MDE costs. If the court provides a copy of the petition to the LME/MCO, the LME/MCO and the provider preparing the MDE will have more information about potential funding sources.

Action item: Revise Form SP-202. It was noted at a number of the meetings that the current AOC Form SP-202, Order on Petition for Adjudication of Incompetence, does not allow the court to specifically address the costs of the MDE.[5] The form allows the court to assess all costs against the petitioner or the respondent, or to waive the costs if the respondent is indigent. Because providers conducting the MDEs are private providers, the costs may not be waived; they must be allocated according to the statute and paid from an appropriate funding source. Therefore, participants suggested revising Form SP-202 to include boxes that would allow the court to allocate MDE costs in accordance with statute and available funding sources.

c. Lack of procedure for recoupment of costs from private funds. The availability of various funding sources, in particular private funding sources, disperses the cost of MDEs and reduces the strain on state funds. However, at the time of the meetings, no LME/MCO had an established process for recouping costs from the petitioner or the respondent in guardianship proceedings. This is despite the fact that under certain circumstances statute allows the court to allocate costs of the MDE to the petitioner or the respondent when either is able to pay them.

Action item: Draft procedure for recoupment. Participants suggested that LME/MCOs establish a process for recouping costs from the various funding sources. The process could, for example, include the following:

- The LME/MCO files a motion for costs with the court each time an MDE is returned to the court.
- The court rules on the motion after the incompetency hearing[6] and provides a copy of the order to the LME/MCO.
- If the court orders the petitioner or respondent to pay, the LME/MCO requests reimbursement from that party directly.
- If the petitioner or respondent fails to pay, the court may enforce its order via contempt.

5. *See* AOC Form SP-202, http://nccourts.org/Forms/Documents/439.pdf.

6. Whether the respondent is adjudicated incompetent and whether the respondent is indigent both have a bearing on how the court allocates costs. Therefore, the court would not be able to enter a final order allocating costs until final disposition of the incompetency petition after a hearing.

2. Legislative Change

The statues pertaining to MDEs in Chapter 35A of the North Carolina General Statutes (hereinafter G.S.) became law in 1987. The delivery of public mental health services in the state has drastically changed since that time. Many meeting particpants noted that the statutory scheme does not adequately address the current LME/MCO landscape. Therefore, existing challenges could be remedied through legislative change. This may include creating guidance for collaboration between various public agencies charged with the responsibility of performing MDEs, streamlining the system of payment of costs, and increasing the time allowed to complete an MDE.

> *Action item: Convene legislative work group.* Participants suggested convening a legislative work group that would analyze the statutory scheme in light of the current method for delivery of mental health and other public services in North Carolina and make recommendations for legislative change. The work group would consist of representatives from LME/MCOs, providers, DSS, public health, clerks, representatives from the Elder Law section of the NC Bar Association, and the AOC, among others.

3. Collection of MDE Data

In 2016–17, AOC data shows that over 4,700 adult guardianship cases were filed in North Carolina. However, the AOC does not currently track the number of MDE orders entered by the court in these cases each year. This lack of data creates challenges in determining the total demand for MDEs and the related funding needs. In addition, various clerks noted that they often refrain from ordering an MDE even when it is needed because of the strain and confusion related to the availability of funding to cover the costs of the MDE. In fact, a number of counties in the state stopped ordering MDEs because of confusion about who should be ordered to prepare them given the changes in the state mental health system and the difficulty and delays in obtaining the MDEs if they were ordered.

> *Action item: Track MDE orders.* Participants recommended that the AOC work with clerks to begin tracking MDE orders (Form SP-901M, Request and Order for Multidisciplinary Evaluation) to obtain an accurate reflection of the number of MDEs ordered statewide each year.

> *Action item: Court to order MDEs when necessary.* Participants recommended that clerks order an MDE whenever necessary, regardless of funding concerns, to ensure that the data accurately reflects the demand for MDEs. Until clerks actually order what is needed, participants acknowledged that gauging appropriate funding is impossible.

4. Quality of MDEs

The court has discretion to determine what evaluations must be included in the MDE. By default, an MDE includes a psychological, social work, and medical evaluation of the respondent. Upon completion of the evaluations contained in the MDE, the evaluators are expected to confer and

write summary recommendations to the court regarding: (1) the nature and extent of the respondent's incompetency; (2) the respondent's assets, liabilities, and needs; (3) a recommended guardianship plan or program; and (4) the suitability of a particular guardian, if requested by the court. The MDE returned to the court should include each court-ordered evaluation along with the summary recommendations.

Clerks noted issues with the quality of MDEs at every meeting. Some clerks stated that the MDEs returned to the court fail to contain information beyond what is already available in the court file. Others said that the MDEs do not regularly provide information as outlined in (1) through (4) above or the reasons behind evaluators' ultimate conclusions of incompetency. At all meetings, clerks expressed concern that they do not receive copies of each evaluation ordered along with summary recommendations.

LME/MCO representatives noted limitations on their ability to complete parts of an MDE due to the cost of such evaluations and lack of access to appropriate evaluators in their provider networks,[7] particularly for the medical component of an MDE.

Action item: Revise Form SP-901M. At every meeting, participants recommended revising AOC Form SP-901M,[8] Request and Order for Multidisciplinary Evaluation, to provide more information and clarity from the court to the providers conducting the MDE. In addition, it was suggested that the form include a way for the clerk to identify the specific evaluations needed in each case rather than to rely on the default (three evaluations) in all cases, which is how the form is currently drafted. A list of information recommended to be added to the form is included in Figure 1.

Action item: Create a model MDE. Participants suggested creating model medical, social work, and psychological evaluations that could be used by providers when preparing the component pieces of the MDE as well as model summary recommendations to help guide them as to what information the court needs for the guardianship proceeding.

Action item: Update DHHS guidelines. Another suggestion at multiple meetings was that DHHS revise the MDE guidelines to update the testing standards, establish recommendations regarding gathering of medical records and other information when appropriate, and clarify and expand upon the information needed by the court in the MDE, among other things.

Action item: Disseminate and follow DHHS guidelines. A repeated recommendation at multiple meetings was that the LME/MCO distribute a copy of the DHHS MDE guidelines to all providers who conduct MDEs and establish by contract expectations that the providers follow the guidelines when completing an MDE.

7. One option available under the statute is for the LME/MCO provider to collaborate with a respondent's existing provider, such as a primary care physician if the respondent has one, to gather the respondent's records or other medical history.

8. *See* AOC Form SP-901M for the MDE order, http://nccourts.org/Forms/Documents/668.pdf.

Figure 1. Form SP-901M Additions Suggested by Meeting Participants

- Information related to the respondent, including the following:
  - Date of birth
  - Phone number
  - Address
- Hearing date
- Additional contacts of the respondent, including next of kin and phone numbers
- Guardian ad litem name and contact information
- Space for the court to include an explanation as to why the court is ordering an MDE
- Definitions for MDE, incompetent adult, guardian of the person, general guardianship, guardian of the estate, and limited guardianship
- A box for each of the three types of evaluations: social work, medical, and psychological, along with a box for "other" with space to write in another type of evaluation ordered by the court to be included in the MDE
- A box for the court to select a request to evaluate the suitability of a particular guardian as part of the order along with a space to write in the name of that person
- Other information the court requests
  - Nature and extent of respondent's incapacity
  - Type of guardianship needed
  - Whether limited guardianship is appropriate
  - The assets, liabilities, and needs of the respondent
  - A recommended guardianship plan or program

5. Timeliness of MDEs Returned to the Court

Current statute affords the LME/MCO 30 days to complete the MDE, unless the court extends the time for good cause.[9] LME/MCO representatives and providers expressed difficulty in complying with this 30-day deadline given the coordination that must occur between providers and respondents to schedule and attend the MDE evaluations. Clerks stated that in some cases it would take up to six months or more to receive an MDE back from the LME/MCO. All parties expressed a desire to increase the initial time period allowed to complete the MDE.

Clerks also noted that given the sensitive and expedited nature of guardianship proceedings, LME/MCOs should complete the MDE as soon as possible or notify the court that the evaluation will not be completed before the 30-day deadline expires. Timely completion of the MDE or notification of its delay will also allow the court to avoid the situation where all the parties appear for a hearing and the hearing must be continued because the MDE has not yet been returned to the court. If the LME/MCO notifies the court of any delays, the court can appropriately adjust the hearing calendar to ensure an efficient use of judicial resources.

> *Action item: Revise legislation to allow more time to complete MDEs.* Participants suggested revising G.S. 35A-1111 to increase the time period to complete the MDE from 30 days to 45 days with an additional 45-day period extension available to align with an interim guardian appointment. This would give the court sufficient

9. G.S. 35A-1111(b).

flexibility to protect the respondent in the event of an emergency while waiting for an MDE to be returned.

Action item: Establish communication protocols regarding the status of the MDE. Participants suggested that each LME/MCO should implement protocols with providers whereby the providers would regularly communicate with the LME/MCO regarding the status of the MDE and indicate whether the MDE will be completed within the required timeframe. The protocols would also require the LME/MCO to notify the court of an anticipated delay as soon as possible but no later than five days before the scheduled hearing. Such notice would provide the court with sufficient time to postpone the hearing, if necessary.

6. Provider Network, Oversight, and Training

a. Network. Participants raised concerns regarding the network of providers in each catchment area capable of performing MDEs, including the number of providers engaged to perform MDEs, the location of the providers, and the reimbursement rate offered to each provider for performing MDEs. For example, one clerk noted that respondents in the clerk's county had to travel over an hour to reach a provider for an evaluation, another clerk in a heavily urban area highlighted that there was no provider engaged in the clerk's county to perform MDEs, and multiple clerks stated that providers in the clerks' counties indicated an unwillingness to perform MDEs because of low LME/MCO reimbursement rates.

Action item: Expand provider network. Participants strongly suggested that LME/MCOs expand their provider networks to ensure that respondents in each county can attend MDE evaluations at locations within a reasonable travel distance.

Action item: DHHS policy guidance on reimbursement rate. Participants asked that DHHS develop policy guidance for LME/MCOs regarding appropriate reimbursement rates for providers performing the various components of an MDE.

b. Oversight. In some of the catchment areas, once the clerk orders an MDE, he or she sends the order directly to the provider. The provider then returns the MDE to the court. The LME/MCO, the entity legally responsible for complying with the court's MDE order, was not involved with the process. It did not, for example, track MDE orders, provider compliance with the orders, or the quality of the MDEs.

Action item: LME/MCO to establish greater oversight of MDE process. Participants encouraged LME/MCOs to charge the LME/MCO point of contact that oversees the MDE process with not only receiving and tracking MDE orders entered in the catchment area, but also ensuring the timeliness of the response and the quality of the MDEs performed.

c. Training. Many participants, including providers and clerks, expressed concern over the lack of appropriate training for providers involved with preparing MDEs.

> *Action item: Train providers.* Participants would like to see specific training developed and offered for providers that addresses the adult guardianship proceedings and MDEs, including DHHS guidelines; information the clerk needs to make a decision; and the process for returning an MDE to the court.

7. Collaboration among Community Partners

The areas in the state where meeting participants expressed satisfaction with the MDE process were the ones where engagement, collaboration, and communication among community partners are the strongest. In one county, DSS, public health, and the LME/MCO work together to complete the component parts of the MDE and then make summary recommendations to the court, despite the fact that only the LME/MCO is named as the designated agency on the clerk's order to complete the MDE. These agencies met regularly with the clerk to discuss MDEs, devise a plan to improve the process, and make the system work within the current resources and statutory structure.

> *Action item: Regularly convene county stakeholders.* Participants recommended greater ongoing collaboration among county stakeholders through regular meetings and communication to devise an MDE process that is workable within current resources and responds to the needs and orders of the court.

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

2. *Id.*

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

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

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

II. WHY DO JUDGES RULE AS THEY DO?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. Andrews, *supra* n. 1, at 76–77.

20. *Id.* at 82.

21. Fell, *supra* n. 9, at 200–201.

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

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

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

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

Id.

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

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

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

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

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

independence.[25]

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

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

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

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

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

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

29. *Id.*

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

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

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

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

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

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

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

31. *Id.*

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

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

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

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

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

III. IS LIMITED GUARDIANSHIP BETTER FOR INCAPACITATED PERSONS?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

48. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

56. *Id.* at 197.

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. WILL JUDGES USE LIMITED GUARDIANSHIP?

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

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

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

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

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

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

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

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

67. *E.g. id.*

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

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

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

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

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

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: Autism & Limited Guardianship

Tab 09:
APS Records & County Departments of DSS

Adult Protective Services vs. Guardianship
Comparing Tools for Helping Adults in Need

What is the purpose of adult protective services?

Temporary (and possibly immediate) protection of a disabled adult from abuse, neglect, or exploitation.

Adult protective services (APS) programs in North Carolina focus on providing the services that are necessary to protect a disabled adult from abuse, neglect (including self-neglect), or exploitation. An adult may consent to the services or, if the adult lacks capacity to consent, a district court may order that the services be provided. These may be short-term emergency situations (up to 14 days). They can also be longer-term situations – up to 120 days if services are being provided pursuant to a court order or possible longer if the adult consents.

Citation: G.S. Chapter 108A, Articles 6 and 6A

What is the purpose of interim guardianship?

Immediate, short-term decision-making and/or action on behalf of an adult who is probably incompetent.

A clerk of superior court has the authority to appoint an interim guardian for an adult for a temporary period if someone needs to intervene on the adult's behalf in order to take steps to address a situation that presents an imminent and foreseeable risk of harm to the adult's physical well-being or estate. A motion for an interim guardian is only appropriate if an incompetency petition has been filed and or is filed at the same time as the motion. The clerk must find that there is reasonable cause to believe that the person is incompetent, even though he or she has not yet been adjudicated incompetent. The interim guardian's powers and duties must be limited to those necessary to address the reason for the appointment. The interim guardianship may last up to 90 days.

Citation: G.S. 35A-1114

What is the purpose of emergency guardianship?

Immediate, short-term decision-making and/or action on behalf of an adult when the court lacks jurisdiction to appoint a guardian otherwise.

If the clerk lacks standard jurisdiction to appoint a guardian or interim guardian but believes that a guardian must be appointed immediately to address an emergency situation, the clerk may rely on "special jurisdiction" to appoint an emergency guardian for a person who is present in North Carolina. A situation will qualify as an emergency only if: (1) it is a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare; and (2) no

other person has authority and is willing to act on the respondent's behalf. An appointment of an emergency guardian may last for no more than 90 days.

Citation: G.S. 35B-18

What is the purpose of guardianship?

Long-term decision-making and/or action on behalf of an adult who is incompetent.

A clerk of superior court has the authority to appoint a guardian for an adult who has been adjudicated incompetent. The clerk may appoint a general guardian, a guardian of the person and/or a guardian of the estate. A general guardian or guardian of the person has expansive authority to make decisions on behalf of the individual, including decisions about housing and medical care. The clerk may also narrow the scope of the guardian's authority with an order for limited guardianship. State law explains that guardianship "should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights." In addition, the law provides that the individual "should be permitted to participate as fully as possible in all decisions that will affect him."

G.S. Chapter 35A

Selected Statutes

Protective Services

§ 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.

§ 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-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.)

Interim Guardianship

§ 35A-1114. Appointment of interim guardian.

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

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

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

(2) One or both of the following:

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

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

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

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

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

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

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

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

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

(f) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 12.)

Emergency Guardianship

Article 2.

Jurisdiction.

§ 35B-15. Definitions.

(a) The following definitions apply in this Article:

(1) Emergency. – 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.

(2) Home state. – The state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for the adjudication of incompetence; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition for the adjudication of incompetence.

(3) Significant-connection state. – A state, other than the home state, with which a respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available.

(b) In determining under G.S. 35B-17 and G.S. 35B-30(e) whether a respondent has a significant connection with a particular state, the court shall consider:

(1) The location of the respondent's family and other persons required to be notified of the incompetency, guardianship, or protective proceeding.

(2) The length of time the respondent at any time was physically present in the state and the duration of any absence.

(3) The location of the respondent's property.

(4) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, drivers license, social relationship, and receipt of services. (2016-72, s. 1.)

§ 35B-16. Exclusive jurisdictional basis.

This Article provides the exclusive jurisdictional basis for a court of this State to adjudicate incompetence, appoint a general guardian or guardian of the person, or issue a protective order for an adult. (2016-72, s. 1.)

§ 35B-17. Jurisdiction.

Notwithstanding the provisions of G.S. 1-75.4(1), a court of this State has jurisdiction to adjudicate incompetence, appoint a general guardian or guardian of the person, or issue a protective order for a respondent only if:

(1) This State is the respondent's home state; or

(2) On the date the petition for the adjudication of incompetence is filed, this State is a significant-connection state and either of the following is true:

a. The respondent does not have a home state, or a court of the respondent's home state has declined to exercise jurisdiction because this State is a more appropriate forum.

b. The respondent has a home state, a petition for an appointment or order is not pending in a court of that state or another significant-connection state, and, before the court makes the appointment or issues the order, all of the following are true:

1. A petition for an appointment or order is not filed in the respondent's home state.

2. An objection to the court's jurisdiction is not filed by a person required to be notified of the proceeding.

3. The court in this State concludes that it is an appropriate forum under the factors set forth in G.S. 35B-20; or

(3) This State does not have jurisdiction under either subdivision (1) or (2) of this section, the respondent's home state and all significant-connection states have declined to exercise jurisdiction because this State is the more appropriate forum, and jurisdiction in this State is consistent with the constitutions of this State and the United States; or

(4) The requirements for special jurisdiction under G.S. 35B-18 are met. (2016-72, s. 1.)

§ 35B-18. Special jurisdiction.

(a) A court of this State lacking jurisdiction under G.S. 35B-17 has special jurisdiction to do any of the following:

(1) Appoint a guardian of the person in an emergency for a term not exceeding 90 days for a respondent who is physically present in this State.

(2) Issue a protective order with respect to real or tangible personal property located in this State.

(3) Appoint a general guardian, guardian of the person, or guardian of the estate for an incapacitated or protected person for whom a provisional order to transfer the proceeding from another state has been issued under procedures similar to G.S. 35B-30.

(b) If a petition for the adjudication of incompetence and application for the appointment of a guardian of the person in an emergency is brought in this State and this State was not the respondent's home state on the date the petition was filed, the court shall dismiss the proceeding at the request of the court of the home state, if any, whether dismissal is requested before or after the emergency appointment. (2016-72, s. 1.)

Guardianship

§ 35A-1201. Purpose.

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

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

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

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

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

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

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

(b) The purposes of this Subchapter are:

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

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

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

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

Coates' Canons Blog: UPDATED: Limitations on the Authority and Role of Adult Protective Services Programs

By Aimee Wall

Article: http://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

Tab 10: A View from a Guardian

Tab 11: Presiding Over Cases with Unrepresented Litigants

Pro Se Litigants

Cheryl Howell
February 2015
With Additions
A. Elizabeth Keever, May 17, 2018

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 ad 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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Pro Se Litigants - Page 18

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]

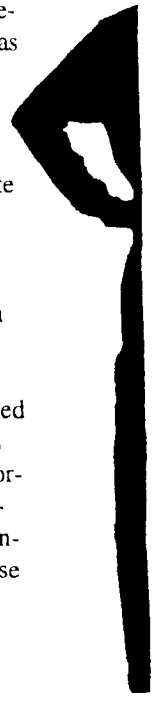
All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers. The courts will construe them as liberally as possible in favor of the litigant, searching 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]nled 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

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***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

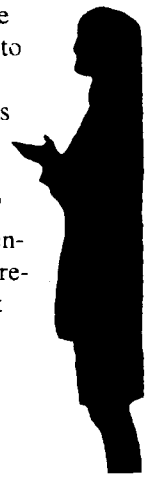
unrepresented litigant in the courtroom. The first posits a basically passive role for the judge, with the litigant bearing the burden of becoming sufficiently familiar with the law, rules of procedure, and rules of evidence to function as a lawyer. The second instructs the judge to aid the unrepresented 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.



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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**

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 1H: Status Reports

Status Reports
GS 35A-1242

Incompetency and Adult Guardianship for Clerks
May 2018

UNC SCHOOL OF GOVERNMENT www.sog.unc.edu

Course Agenda

1. Screen the case.
2. Gather information.
3. Conduct the hearing.
4. Make a determination.
5. Ensure oversight.

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings ©American Bar Association Commission on Law and Aging – American Psychological Association

What is the point?

1. Is the guardian doing his or her job and working themselves out of a job?
2. Is the ward progressing, regressing?
3. Have the needs of the ward changed?

UNC SCHOOL OF GOVERNMENT

Living Being – Needs Change

UNC

Triangle Business Journal

Lawsuit alleges dementia patients mistreated in North Carolina

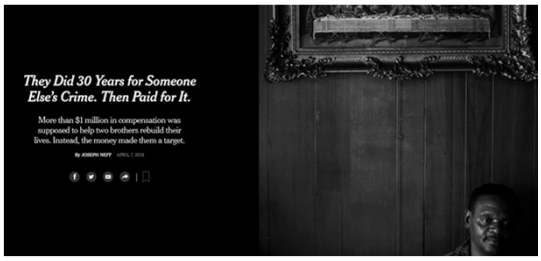
Apr 26, 2016, 9:40am EDT **Updated** Apr 26, 2016, 10:58am EDT

Health Care

A class action lawsuit was filed against the operator of adult care homes in North Carolina, claiming dementia patients were left to sit in their own waste, not bathed, locked out of their rooms and mistreated in other ways.

The lawsuit was filed on behalf of hundreds of North Carolina residents of Alzheimer's and dementia care units owned and operated by Saber Healthcare Group, including Franklin Manor Assisted Living Center in Youngsville, Gabriel Manor Assisted Living Center in Clayton, and The Crossings at Steele Creek in Charlotte.

UNC



UNC

Status Report: GS 35A-1242

- Who must file… GOP + GG
  - All corporate and DPAG guardians
  - Individuals *when ordered by the clerk*
- Filed at 6 months and annually thereafter
- 2014 changes – new required contents
  - DHHS form – provided in materials + online

Contents

Each report **shall** include…

GS 35A-1242(a1) list – not exhaustive.

"any additional information required by the clerk"

UNC SCHOOL OF GOVERNMENT

The **Eight** Things Status Reports **shall** include….

1. Report recent medical and dental examinations or explanation why diligent and unsuccessful if no information

The **Eight** Things Status Reports **shall** include….

2. Report the guardian's performance of the duties under GS 35A and CSC order

The **Eight** Things Status Reports **shall** include….

3. Report on the ward's residence, education, employment, and rehabilitation or habilitation.

The **Eight** Things Status Reports **shall** include….

4. Efforts to restore competency.

5. Recommendations for implementing a more limited guardianship.

The **Eight** Things Status Reports **shall** include….

6. Efforts to seek **alternatives to guardianship**.

7. Report of the efforts to identify **alternative guardians** if corporate or public guardian.

The **Eight** Things Status Reports **shall** include….

8. Any additional reports or information required by the clerk.

- CSC with very broad discretion here; not reasonably, not in best interests – just required by CSC.

Status Reports **may** include….

9. Guardian may include additional information pertaining to the ward's best interests

What else? The Six Pillars

1. Medical condition
2. Cognition
3. Everyday functioning
4. Values, preferences of the ward
5. Risk and level of supervision
6. Means to enhance capacity

Judicial Determination of Capacity of Older Adults in Guardianship Proceedings, American Bar Association

Always, Always, Always

- **File and read** the report
  - Under guardian's oath or affirmation or signature of witness that report is complete and accurate with info of the witness (name, address, phone)
- **Follow up if necessary** – ask for more info
  - Must include any report or additional information required by the clerk
- **Motion in the cause** and hearing to consider any matter in the status report – modify the guardianship as necessary to carry out 35A
  - Clerk's motion or motion of interested party

UNC SCHOOL OF GOVERNMENT

Confidentiality

Failure to File Status Report

GS 35A-1244

1. Guardian fails to file or renders an ***unsatisfactory*** report
2. Clerk on own motion or motion of interested party
3. **Order** guardian to report w/n 20 days after service of the order

GS 35A-1244

If guardian fails to file or renders unsatisfactory report after order to file, clerk may:

- Remove guardian
- Enter show cause (civil or criminal contempt)

GS 35A-1244

** Guardian may be held personally liable for costs of the proceeding or the amount may be deducted from commission

Clerk's Authority

GS 7A-103

The Clerk of Superior Court is authorized to….

(7) Preserve order in this court, punish criminal contempts, and hold persons in civil contempt; subject to the limitations contained in **Chapter 5A** of the General Statutes of North Carolina.

The Clerk and Civil Contempt

Except when the clerk of superior court has original subject matter jurisdiction and issued the order or when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court…..

G.S. 5A-23(b)
Amended SL 2017-158 (H236)

What would you do?

Work in groups – review the sample status report.

- Is the report sufficient?
- How would you respond to the report?
- What other information would you require, if any?

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. (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.

United States Senate
Special Committee on Aging

Fighting Fraud:

Senate Aging Committee Identifies

Top 10 Scams Targeting Our Nation's Seniors

Senator Susan M. Collins (R-ME), Chairman
Senator Robert P. Casey, Jr. (D-PA), Ranking Member

Tips from the United States Senate Special Committee on Aging for

Avoiding Scams

- Con artists force you to make decisions fast and may threaten you.
- Con artists disguise their real numbers, using fake caller IDs.
- Con artists sometimes pretend to be the government (e.g. IRS).
- Con artists try to get you to provide them personal information like your Social Security number or account numbers.
- Before giving out your credit card number or money, please ask a friend or family member about it.
- Beware of offers of free travel!

If you receive a suspicious call, hang up and please call the U.S. Senate Special Committee on Aging's Fraud Hotline at 1-855-303-9470

Table of Contents

Dear Friends:

Our nation's seniors worked hard their entire lives and saved for retirement. Unfortunately, many criminals target them and seek to rob them of their hard-earned savings. Far too many older Americans are being financially exploited by strangers over the telephone, through the mail, and, increasingly, online. Worse yet, these seniors may also be targeted by family members or by other people they trust. Many of these crimes are not reported because the victims are afraid that the perpetrator may retaliate, are embarrassed that they have been scammed, or sometimes simply because they are unsure about which law enforcement or consumer protection agency they should contact. Additionally, some seniors do not realize they have been the victims of fraud.

The U.S. Senate Special Committee on Aging has made consumer protection and fraud prevention a major focus of its work. In recent years, the Committee has held hearings examining telephone scams, tax-related schemes, Social Security fraud, and the implications of payday loans and pension advances for seniors, among other issues. The Committee maintains a toll-free Fraud Hotline: **1-855-303-9470**. By serving as a resource for seniors and others affected by scams, the Hotline has helped increase reporting and awareness of consumer fraud.

The Senate Aging Committee remains committed to protecting older Americans against fraud and to bringing greater awareness of this pervasive problem. The Fraud Hotline has been successful in meeting both of those goals, assisting individuals who contacted the Committee over the telephone or through the online form on the Committee's website. The Fraud Hotline allows the Committee to maintain a detailed record of common fraud schemes targeting seniors. This record informs the efforts of the Committee and, ultimately, the work of the United States Congress.

Additionally, the Fraud Hotline offers real help to victims and to those targeted by scammers. Committee staff and investigators who have experience dealing with a variety of scams and fraud speak directly with callers and can assist callers by providing them with important information regarding steps they can take, including where to report the fraud and ways to reduce the likelihood that the senior will become a victim or a repeat victim.

Investigators typically refer seniors to the relevant local, state, and/or federal law enforcement entities with jurisdiction over the particular scam. In addition to law enforcement, Fraud Hotline investigators may also direct seniors to other resources, such as consumer protection groups, legal aid clinics, congressional caseworkers, or local nonprofits that assist seniors.

Over the past year, more than 1,400 individuals all across the country contacted the Fraud Hotline. Since the Fraud Hotline's inception in 2013, more than 6,800 individuals from all 50 states have contacted the Committee's Fraud Hotline to report a possible scam. Consumer advocacy organizations, community centers, and local law enforcement have provided invaluable assistance to the Committee by encouraging consumers to call the Fraud Hotline to document scams. We would like to thank all of the groups and governmental entities that work with us to fight fraud.

In an effort to educate seniors on emerging trends and to help protect them from becoming victims, this Fraud Book features the top ten scams reported to our Hotline last year. In addition, it includes resources for consumers who wish to report scams to state and federal agencies.

The range and frequency of scams perpetrated against seniors that were reported to the Fraud Hotline in 2017 demonstrate the extent of this epidemic. In 2018, the Aging Committee intends to build on its successful efforts to investigate and stop scams aimed at our nation's seniors and ensure that federal agencies are aggressively pursuing the criminals who commit these frauds.

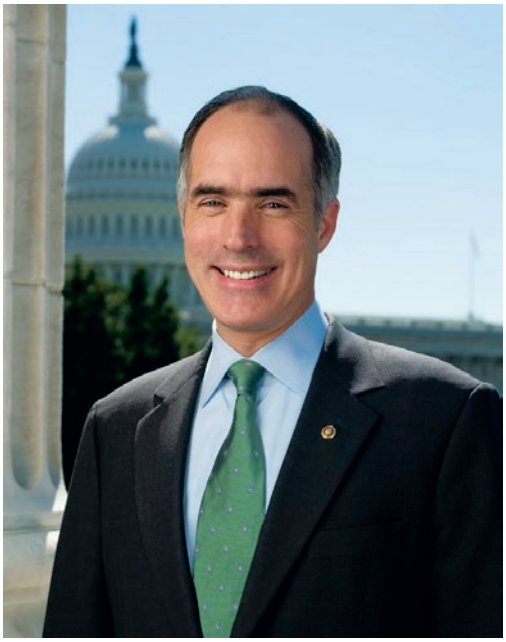
Sincerely,

Susan M. Collins

Chairman

Robert P. Casey, Jr.

Ranking Member



Executive Summary

From January 1, 2017, through December 31, 2017, the Senate Aging Committee's Fraud Hotline received a total of 1,463 complaints from residents all across the country. Calls pertaining to the top 10 scams featured in this report accounted for more than 75 percent of the complaints.

The top complaint, the focus of more than twice as many calls as any other scam, involves seniors who receive calls from fraudsters posing as agents of the Internal Revenue Service (IRS). These criminals falsely accuse seniors of owing back taxes and penalties in order to scam them. Due to the extremely high call volume and continued reports from constituents from across the country, the Aging Committee held a hearing on April 15, 2015, to investigate and raise awareness about the IRS imposter scam. Prior to a large law enforcement crackdown in October 2016, nearly three out of four calls to our Hotline involved the IRS impersonation scam. In the three months after the arrests, reports of the scam into the Committee's hotline dropped by an incredible 94 percent. Though the numbers have since rebounded somewhat, they are still far below the levels we have seen in the past.

The second most common scam reported to the Hotline involved robocalls or unwanted telephone calls. On June 10, 2015, the Aging Committee held a hearing on the increase in these calls that are made despite the national Do-Not-Call Registry. The Committee examined how the rise of new technology has made it easier for scammers to contact and deceive consumers and has rendered the Do-Not-Call registry ineffective in many ways. On October 4, 2017, the Aging Committee held an additional hearing on robocalls, this time examining recent developments by both the private and public sectors to combat robocalls and protect seniors from fraud.

Sweepstakes scams, such as the Jamaican lottery scam, continue to be a problem for seniors, placing third on the list. A March 13, 2013, Aging Committee hearing and investigation helped bring attention to these scams and put pressure on the Jamaican government to pass laws cracking down on criminals who convinced unwitting American victims that they had been winners of the Jamaican lottery. The United States government has had some recent success in bringing individuals connected to the Jamaican lottery scam to trial, but these types of scams continue to plague seniors.

A new scam to make the top 10 list for 2017 involves consumers receiving calls in which the caller would simply ask "Are you there?" or "Can you hear me?" in order to prompt the recipient to say "yes." According to the Federal Trade Commission (FTC), these illegal robocalls are pre-recorded, and are designed to identify numbers that consumers are likely to answer, allowing scammers to better identify and connect with potential victims. The increased use of this tactic by scammers in robocalls last year demonstrates how sophisticated scammers are.

Grandparent scams, the focus of a July 16, 2014, Aging Committee hearing, were next on the list. In these scams, fraudsters call a senior pretending to be a family member, often a grandchild, and claim to be in urgent need or money to cover an emergency, medical care, or a legal problem.

Computer scams were sixth on the list and the subject of an October 21, 2015, Committee hearing. Although there are many variations of computer scams, fraudsters typically claim to represent a well-known technology company and attempt to convince victims to provide them with access to their computers. Scammers often demand that victims pay for bogus tech support services through a wire transfer, or, worse yet, obtain victims' passwords and gain access to financial accounts.

Romance scams were seventh on the list. These calls are from scammers who typically create a fake online dating profile to attract victims. Once a scammer has gained a victim's trust over weeks, months,

or even years – the scammer requests money to pay for an unexpected bill, an emergency, or another alleged expense or to come visit the victim – a trip that will never occur.

Elder financial abuse was eighth on the list and the topic of a February 4, 2015, Committee hearing. The calls focused on the illegal or improper use of an older adult's funds, property, or assets. Chairman Susan M. Collins, former Ranking Member Claire McCaskill, and current Ranking Member Robert P. Casey Jr. have introduced the *Senior$afe Act*, which would allow trained financial services employees to report suspected cases of financial exploitation to the proper authorities without concern that they would be sued for doing so. The Committee also examined the financial abuse of guardians and other court appointed fiduciaries at a hearing in November 2016.

Identify theft was the ninth most reported consumer complaint to the Fraud Hotline in 2017. This wide-ranging category includes calls about actual theft of a wallet or mail, online impersonation, or other illegal efforts to obtain a person's identifiable information. On October 7, 2015, the Aging Committee held a hearing titled *"Ringing Off the Hook: Examining the Proliferation of Unwanted Calls"*, to assess the federal government's progress in complying with a new law requiring the removal of seniors' Social Security numbers from their Medicare cards, which will help prevent identity theft. Medicare will start mailing the new cards in April 2018.

Government grant scams rounded out the top 10 scams to the Fraud Hotline last year. In these scams, thieves call victims and pretend to be from a fictitious "Government Grants Department." The con artists then tell the victims that they must pay a fee before receiving the grant.

2017 Key Figures

Rank	Type of Scam	# of Complaints
1	IRS Impersonation Scams	381
2	Robocalls / Unsolicited Phone Calls	166
3	Sweepstakes / Jamaican Lottery Scam	111
4	"Can you hear me?" Scam	97
5	Grandparent Scam	87
6	Computer Scam	79
7	Romance Scam	64
8	Elder Financial Abuse	51
9	Identity Theft	40
10	Government Grant Scam	37

Figure 1. Top 10 Scams Reported To Aging Committee Fraud Hotline from January 1, 2017, to December 31, 2017.

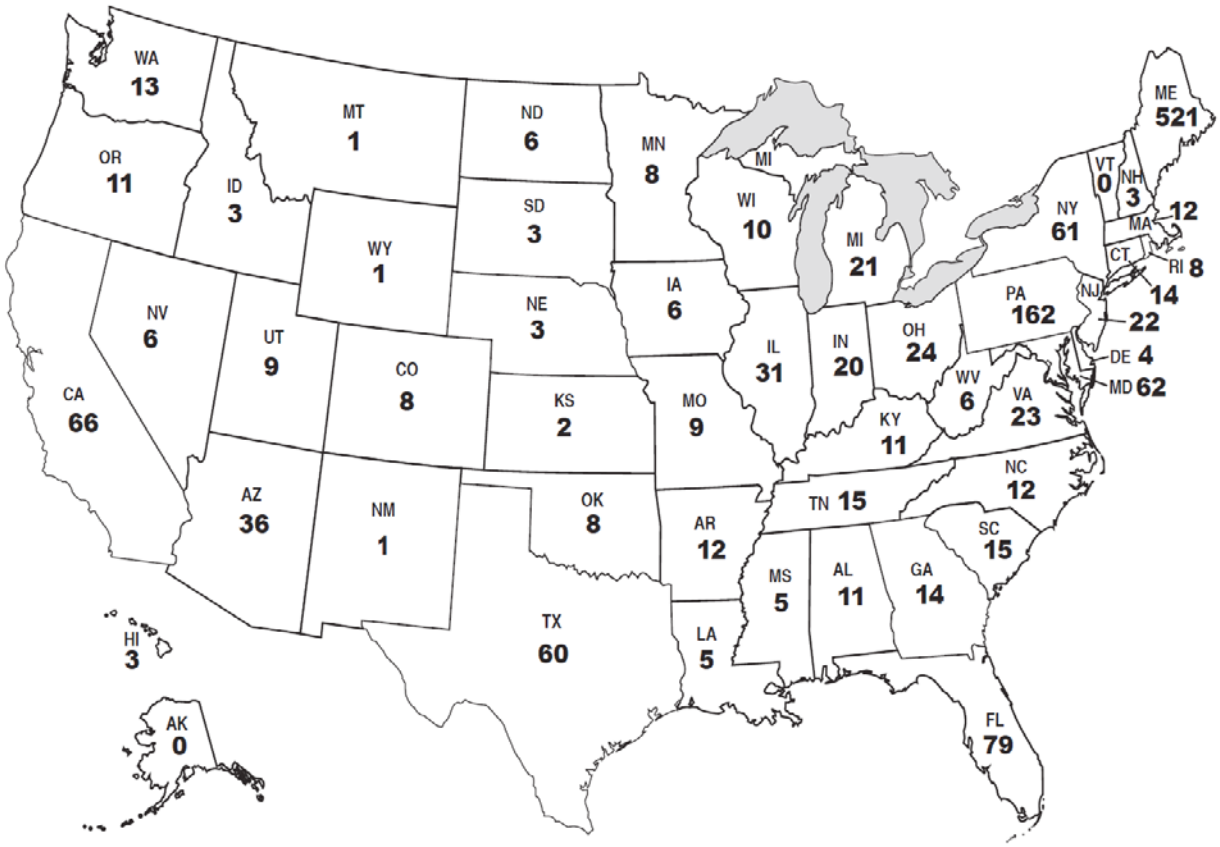


Figure 2. Origin of Calls Received by the Aging Committee Fraud Hotline from January 1, 2017, to December 31, 2017.

Abbreviations

Adult Protective Services	**APS**
Better Business Bureau	**BBB**
Department of Homeland Security	**DHS**
Department of Justice	**DOJ**
Federal Communications Commission	**FCC**
Federal Trade Commission	**FTC**
Financial Industry Regulatory Authority	**FINRA**
Government Accountability Office	**GAO**
Health insurance claim number	**HICN**
Internal Revenue Service	**IRS**
Internet Crime Complaint Center	**IC3**
Legal Services for the Elderly	**LSE**
Private Debt Collection	**PDC**
Social Security Number	**SSN**
Treasury Inspector General for Tax Administration	**TIGTA**
Voice over Internet Protocol	**VoIP**

Top Ten Types of Scams Reported to the Hotline

1 IRS Impersonation Scam

The Treasury Inspector General for Tax Administration (TIGTA) has called the Internal Revenue Service (IRS) impersonation scam "the largest, most pervasive impersonation scam in the history of the IRS."[1] According to TIGTA, more than 2.1 million Americas have been targeted by scammers impersonating IRS officials.[2] More than 12,300 Americans have lost a total of more than $64.9 million from this scam.[3] At the scam's peak, there were approximately between 20,000 and 40,000 people submitting complaints on this scam every week, with an average of 150 to 200 victims a week.[4] The IRS impersonation scam was the most frequent scam reported to the Committee's Fraud Hotline for the past three years.

In response to the initial flux of calls to the Fraud Hotline, the Committee held a hearing on April 15, 2015, titled, "*Catch Me If You Can: The IRS Impersonation Scam and the Government's Response*," that examined how the scam works, steps seniors can take to protect themselves, law enforcement's response, and what more can be done to combat this scam.[5] Since the hearing, the IRS has released several tips to spot these scams and what steps individuals should take if they receive a call.[6]

TIGTA data suggest that increased public awareness has made a difference and harder from criminals to find victims.[7] TIGTA reports, however, that the scam has morphed and evolved in response to guidance the IRS has issued.[8] For example, one of the IRS' anti-fraud tips advises consumers that the agency will not call about taxes owed without first mailing a bill.[9] Recent fraud calls have revealed to investigators that some scam artists now claim that they are following up on letters that the IRS previously sent to the victims.

While there are multiple variations of the IRS impersonation scam, criminals generally accuse victims of owing back taxes and penalties. They then threaten retaliation, such as home foreclosure, arrest, and in some cases, deportation, if immediate payment is not made by a certified check, credit card, electronic wire-transfer, prepaid debit card or gift card. In April 2016, TIGTA announced that it began receiving an influx of complaints that IRS impersonators were demanding payment in the form of iTunes gift cards[10]. At the same time, the Committee's Fraud Hotline also began receiving reports from callers that scammers were demanding payments

Caller-ID Spoofing is a tactic used by scammers to disguise their true telephone numbers and or names on the victims' caller-ID displays to conceal their identity and convince the victims that they are calling from a certain organization or entity.

via gift cards. The criminals tell victims that if they immediately pay the amount that is allegedly owed, the issue with IRS will be resolved and the arrest warrant, or other adverse action, will be cancelled.

Once victims make an initial payment, they will often be told that further review of their tax records has identified another discrepancy and that they must pay an additional sum of money to resolve that difference or else face arrest or other adverse action. Scammers will often take victims through this process multiple times. As long as the victims remains hooked, the scammers will tell them they owe more money.

Fraud Case #1:

"Sharon," from Texas, called the Fraud Hotline to report that she lost $21,000 to the IRS Impersonation Scam. Sharon said she received a call from someone claiming to work for the IRS. The alleged scammer directed her to send several electronic money transfers in various amounts until the "outstanding debt" was paid off. A Fraud Hotline investigator filed a report with TIGTA and the FTC. Sharon was also encouraged to report this scam to her local police department.

These scams calls most often involve a disguised, or "spoofed," caller identification (caller ID) number to make the victim believe that the call is coming from the "202" area code, the area code for Washington, DC, where the U.S. Department of the Treasury and the IRS are headquartered. In a recent variation of the scam, calls also appear to be coming from the "509," "206," and "306" area codes, all Washington State areas codes. Scammers have also "spoofed" their phone numbers to make it appear as though they are calling from a local law enforcement agency. When the unsuspecting victims see the "Internal Revenue Service" or the name of the local police department appear on their caller IDs, they are understandably concerned and often willing to follow the supposed government official's instructions in order to resolve the alleged tax issue.

As of January 2018, TIGTA and the Department of Justice (DOJ) have obtained 62 convictions for individuals involved in IRS impersonation scams, up from just five convictions a year ago.[11] In 2016, TIGTA and DOJ began making progress in arresting and charging more criminals for their role in this pervasive scam.

Because of a tip reported to the Committee's Fraud Hotline, in May 2016, TIGTA arrested five individuals in Miami, Florida, connected with the IRS impersonation scam. Two individuals were identified as a direct result of the crucial information provided by a fraud investigator with the Committee's Hotline.[12] Based on the investigative results, in 2017, several additional suspects were identified as co-conspirators in this massive fraud scheme. TIGTA was ultimately able to identity and indict 10 additional suspects who were involved in the impersonation scam.[13] To date, the teams developed evidence and established the 15 indicted individuals victimized nearly 8,000 people and stole approximately $9,000,000 from the victims.[14]

The arrests stemmed from a call to the Aging Committee's Fraud Hotline in October 2015. The caller reported that an individual claiming to be from the IRS has recently contacted her husband demanding immediate payment of alleged back taxes. The scammer demanded that the victim drive to a local department store and wire nearly $2,000 via MoneyGram. On his way to the retailer, the distraught victim crashed his car. The victim was so convinced that the scammer was an authentic IRS agent, however, that he left the scene of the accident to wire the payment in order to avoid the scammer's threats of possible legal action.

The Fraud Hotline investigator who received the victim's report was able to trace the

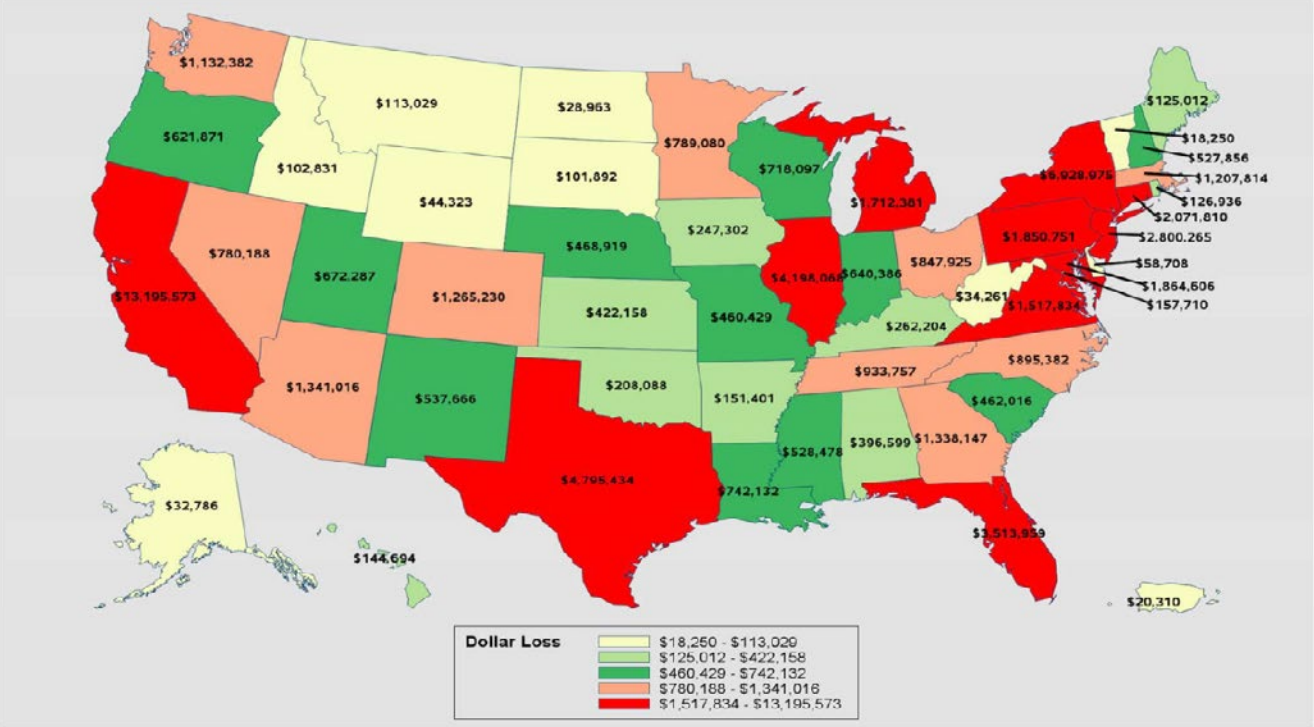
Fraud Case #2:

"Sue" from Michigan, called the Fraud Hotline to report that she had fallen victim to the IRS impersonation scam. Sue said she had paid the scammers using iTunes gift cards which she purchased at a grocery store. In all, Sue bought $12,000 worth of gift cards. After purchasing the gift cards, Sue read the numbers on the back of the cards to the person on the phone whom she believed was an IRS agent. This allowed the scammer to steal the funds on the cards. Sue did not realize she had been scammed until later in the day when she told her friend about the phone call. A Fraud Hotline investigator filed a report with TIGTA and the FTC on her behalf.

wire transfer to Minnesota and reported this information to TIGTA. TIGTA sent agents to Minnesota, pulled surveillance tapes, and quickly identified three additional suspects.[15] Law enforcement arrested all give suspects and subsequently charged them with wire fraud[16] and conspiracy to commit wire fraud. At the time, this was the largest single law enforcement action in the history of the IRS impersonation scam.[17]

The largest enforcement action came on October 27, 2016, when TIGTA and DOJ announced that after an exhaustive three-year joint investigation, 20 individuals were arrested in the United States and 32 individuals and five call centers in India were charged for their alleged involvement in the scam.[18] Following this crack down, both TIGTA and the Committee's hotline noticed a decline in the number of IRS scam cases being reported. During the scam's peak, TIGTA was receiving between 20,000 and 40,000 complaints a week, with an average of 15 to 200 victims a week. In December 2016, however, TIGTA reported receiving less than 2,000 calls a week, with fewer than 15 victims a week.[19] During the second week of January 2017, TIGTA reported that it received just eight new reports of victims losing money to this scam.[20] TIGTA believes this substantial drop-off is due, in part, to the October 2016 indictments of Indian call center operators.

Cumulative IRS Impersonation Scam Dollar Loss



$64,927,461 Total Dollar Loss as of January 31, 2018 ($768,901 have no state associations)

The Committee's own data show that these arrests had a real impact. Prior to the October 2016 arrests, nearly three out of four calls to our Hotline involved the IRS impersonation scam. In the three months after the arrests, reports of the scam dropped an incredible 94 percent. Moreover, in 2017, the Committee saw an overall 77 percent reduction in the number of IRS impersonation scams reported compared to the previous year. Though the numbers have since rebounded somewhat, they are still far below the levels we have seen in the past. On October 4, 2017, Genie Barton, the President of the Better Business Bureau's Institute for Marketplace Trust, testified before the Senate Aging Committee's hearing titled, "*Still Ringing Off the Hook: An Update on Efforts to Combat Robocalls*, that her organization saw a similar trend. According Ms. Barton, the Better Business Bureau's Scam Tracker saw an immediate 95 percent drop in reports of tax collection scams following the arrests in India.[21] Ms. Barton adds that while the volume of tax scams has since risen, the volume is only 30 percent of what the volume was at the scam's peak in 2016.

Fraud Case #3:

In February 2017, the Committee heard testimony from Philip Hatch, an 81-year-old resident of Portland, Maine, who lost $8,000 in the IRS scam, and narrowly escaped losing another $15,000. Mr. Hatch paid the scammers using iTunes gift cards that he purchased at several different grocery and convenience stores. Mr. Hatch, who was a naval officer and served 23 years in the Navy, described feeling both mad and upset that he had been scammed by these criminals.

Besides the arrests made in early 2017 in relation to the tip provided by the Senate Aging Committee, on November 30, 2017, TIGTA and the DOJ announced that four individuals had been arrested for their alleged involvement in the IRS impersonation scam. According to the criminal complaint, the individuals were "runners" who used fraudulent identification cards to pick up fraud proceeds sent by victims all across the country.[22] According to the complaints, the individuals picked up $666,537 sent from 784 victims during the period from January 25, 2016, through August 8, 2017.[23] The false identities used by the individuals were linked to an additional 6,530 fraudulent transactions totaling $2,836,745.[24] The individuals were charged with wire fraud, conspiracy to commit wire fraud, and aiding and abetting.[25] Each of these charges carries a maximum of 20 years imprisonment and a $250,000 fine.[26]

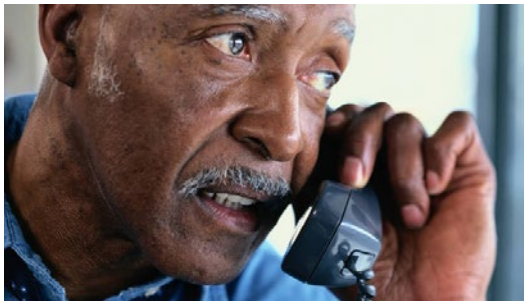
Beginning in April 2017, the IRS began doing something taxpayers had been long told the IRS would never do – call taxpayers over the telephone to tell them they owe back taxes. A provision in the *Fixing America's Surface Transportation Act* (Pub. L. 114-94), passed by Congress in 2015, enabled the IRS to begin using private debt collectors (PDCs) to collect overdue tax debts. Under the new law, the IRS will first notify a taxpayer in writing that their account is being transferred to a private collection agency.[27] Once the IRS sends its letter, the private company will send its own letter and then may begin calling the taxpayer.[28]

While there have not yet been reports of fraudsters impersonating PDCs to scam delinquent taxpayers, TIGTA, the IRS, and consumer groups have expressed concerns that it may only be a matter of time before the scammers do so.[29]

In response to concerns about the new PDC program, and its possible susceptibility to scammers, Chairman Collins and Ranking Member Casey requested the Government Accountability Office (GAO) to analyze the IRS's implementation of the PDC program. In particular, the senators asked GAO to compare the current program to lessons learned from previous times when the IRS used PDCs; how the IRS is tracking and comparing the costs and benefits of the PDC program; and how the IRS is protecting taxpayers from abusive PDC behavior as well as from scams and identify theft, including protecting older Americans to ensure that the program does not increase the likelihood that they will be targeted by scam artists. The GAO has not yet completed the study.

The IRS released the following tips to help taxpayers identify suspicious calls that may be associated with the IRS imposter scam:

- The IRS will never call a taxpayer to demand immediate payment, nor will the agency call about taxes owed without first having mailed a bill to the taxpayer.
- The IRS will never demand that a taxpayer pay taxes without giving him or her the opportunity to question or appeal the amount claimed to be owed.
- The IRS will never ask for a credit or debit card number over the phone.
- The IRS will never threaten to send local police or other law enforcement to have a taxpayer arrested.
- The IRS will never require a taxpayer to use a specific payment method for taxes, such as a prepaid debit card.



2 Robocalls and Unsolicited Phone Calls

In 2003, Congress passed legislation creating the national Do-Not-Call registry with the goal of putting an end to the plague of telemarketers who were interrupting Americans at all hours of the day with unwanted calls.[30] Unfortunately, after 14 years after the registry was implemented, Americans are still being disturbed by telemarketers and scammers who ignore the Do-Not Call registry and increasingly use robocall technology. According to the Federal Communications Commission (FCC), there are nearly 2.4 billion robocalls made every month.[31] To demonstrate the growing problem, in 2016, the Federal Trade Commission (FTC) received more than 3.4 million robocall complaints. In 2017, the FTC received more than 3.5 million robocall complaints within the first eight months.[32]

Robocalling is the process of using equipment to mechanically, as opposed to manually, dial phone numbers in sequence.

Robodialers can be used to distribute prerecorded messages or to connect the person who answers the call with a live person. Robocalls often originate overseas. Con artists usually spoof the number from which they are calling to either mask their true identity, or take on a new identity. As described in the first chapter on Internal Revenue Service impersonation scams, fraudsters spoof their numbers to make victims believe they are calling from the government or another legitimate entity. In addition, scammers are increasingly spoofing numbers to appear as if they are calling from the victims' home states or local area codes.

Robocalls have become an interesting nuisances to consumers in recent years due to advances in technology. Phone calls used to be routed though equipment that was costly and complicated to operate, which made high-volume calling from international locations difficult and expensive. This traditional, or legacy, equipment sent calls in analog format over a copper wire network and could not easily spoof a caller ID. Today, phone calls can be digitized and routed from anywhere in the world at virtually no cost. This is done using Voice over Internet Protocol (VoIP) technology, which sends voice communications over the Internet. Robocalling allows scammers to maximize the number of individuals and households they reach.

Many companies now offer third-party spoofying and robodialing services. Third-party spoofing companies provide an easy-to-use computer interface or cell phone application that allows calls to be spoofed at a negligible cost. To demonstrate how accessible this technology is, an Aging Committee staff member spoofed two separate calls to Chairman Susan Collins during a Committee hearing on June 10, 2015, titled "*Ringing Off the Hook: Examining the*

Voice over Internet Protocol (VoIP) is a technology that allows a caller to make voice calls using a broadband Internet connection instead of a traditional (or analog) phone connection. Some VoIP services may only allow a user to call other people using the same service, but others may allow users to call anyone who has a telephone number, including local, long distance, mobile, and international numbers.

Fraud Case #4:

"Stuart," from Virginia, called the Fraud Hotline to report a large number of telemarketing and soliciting phone calls including some that were "obviously" scams. Stuart described receiving calls about an expired warranty on his vehicle, when its warranty was still current. A Fraud Hotline investigator advised Stuart to list his number on the national Do-Not-Call registry, and to contact his local telephone company and inquire about call blocking features.

Proliferation of Unwanted Calls".[33] By using an inexpensive smartphone app, the staff member was able to make it appear that the calls were from the Internal Revenue Service. The hearing examined why so many Americans are constantly receiving unsolicited calls even though they are on the national Do-Not-Call registry, discussed how advanced in telephone technology makes it easier for scammers to case a wide net and increase the number of potential victims they can reach, and highlighted possible technological solutions to this menace.[34]

As Professor Henning Schulzrinne, a former FCC Chief Technology Officer, explained during the Committee's 2015 robocall hearing, it is possible to fight technology with technology, and the technology exists now for carriers to offer robocall filters that have been proven effective in combatting robocalls. Previously, the primary impediment to carriers deploying robocall filters had been the concern that these filters violate the Commission's call completion requirements. In 2015, the FCC, under then-Chairman Wheeler, clarified that common carrier obligations do not restrict the ability of service providers to offer call-blocking technology to customers who request it.[35]

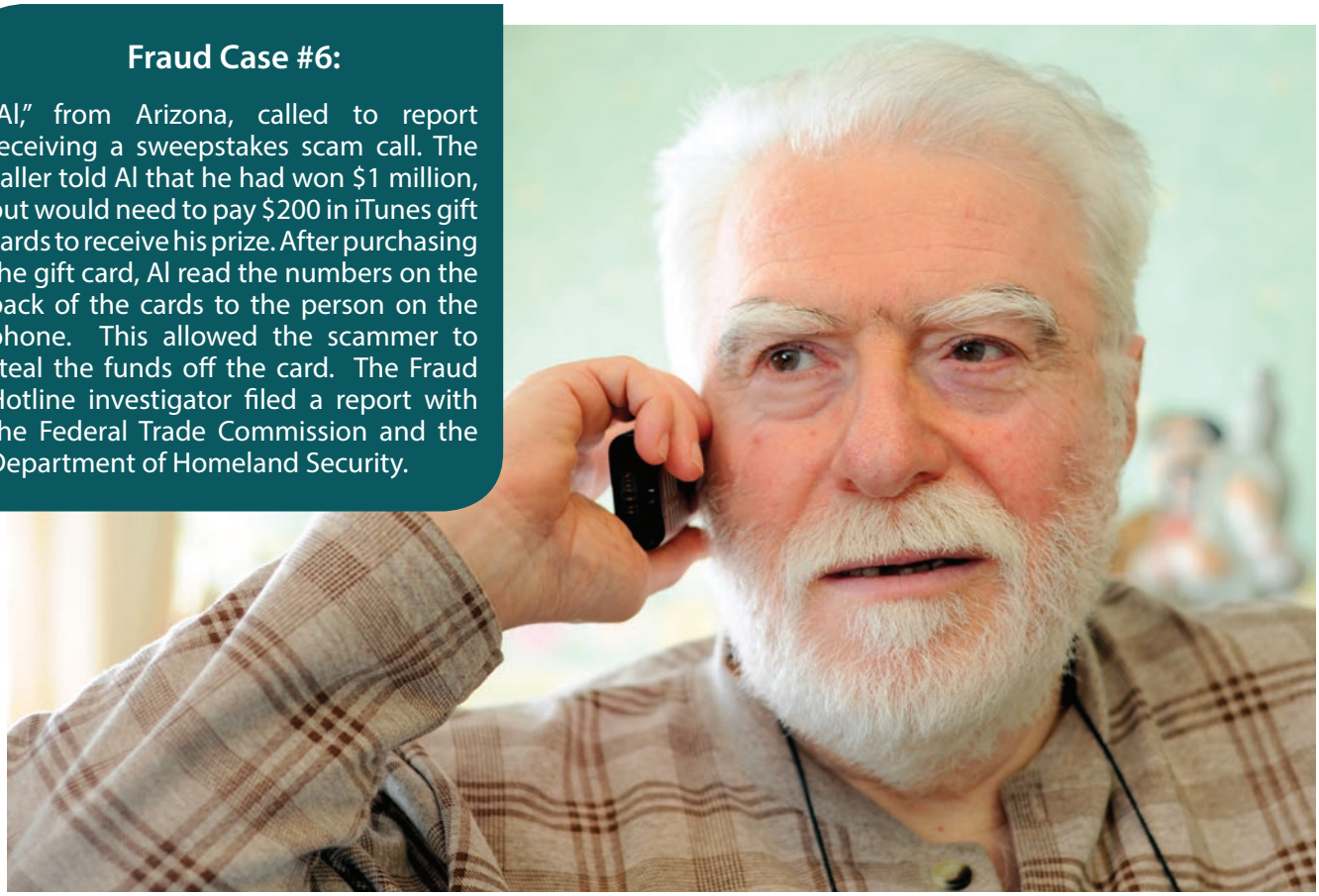
In 2016, the FCC convened a "Robocall Strike Force" comprised of telecom and tech company representatives to accelerate the

Fraud Case #5:

"Kate," from New York, contacted the Fraud Hotline to report receiving unsolicited phone calls that show up as "Women's Cancer" on her caller-ID. The caller claims to offer help fighting breast cancer. Kate has repeatedly asked the caller to stop calling. The Fraud Hotline investigator filed a report with the FTC on her behalf. Kate was encouraged not to answer that call and other calls that she doesn't recognize on her caller-ID. In addition, Kate was directed to contact her local telephone company and inquire about call blocking features.

Fraud Case #6:

"Al," from Arizona, called to report receiving a sweepstakes scam call. The caller told Al that he had won $1 million, but would need to pay $200 in iTunes gift cards to receive his prize. After purchasing the gift card, Al read the numbers on the back of the cards to the person on the phone. This allowed the scammer to steal the funds off the card. The Fraud Hotline investigator filed a report with the Federal Trade Commission and the Department of Homeland Security.



development and adoption of new tools to combat illegal robocalls.[36] The Strike Force also seeks to promote greater consumer control over the calls they wish to receive, and to make recommendations to the FCC on the role government can play to stop these annoying calls. On October 4, 2017, Kevin Rupy, Vice President of Law and Policy, USTelecom, testified before the Aging Committee's hearing, titled, *Still Ringing Off the Hook: An Update on Efforts to Combat Robocalls*, that the Strike Force has made significant progress toward arming consumers with call blocking tools and identifying ways voice providers can proactively block illegal robocalls before they ever reach the consumer's phone. The Strike Force has developed a blocking framework that includes four types of phone numbers to help increase flexibility given to voice providers to better block robocalls: invalid, unallocated, unassigned, and those requested by the subscriber.[37]

On November 16, 2017, at the urging of Chairman Collins and Ranking Member Casey, the FCC took another step forward in protecting consumers from illegal robocalls.[38] The Commission voted to finalize new rules to allow phone companies to block certain phone numbers that do not or cannot make outgoing calls.[39] The rule allows providers to block numbers that are not valid under the North American Numbering Plan and block valid numbers that have not been allocated to any phone company. They are also able to block valid numbers that have been allocated to a phone company but haven't yet been assigned to a subscriber.

The new rule also codifies the FCC's previous guidance that phone companies can block calls when requested by the spoofed number's subscriber. For example, under the proposal, the IRS could request the blocking of its own numbers – including the public number (1-800-829-1040) taxpayers are instructed to

call, but is never used to make outgoing calls to taxpayers. That way, if someone attempts to spoof a number appearing to be the IRS's main line, it would be flagged as fraudulent and could be automatically blocked by the provider. This is precisely what Treasury Inspector General for Tax Administration (TIGTA), the Department of Homeland Security (DHS) and Verizon did in 2016 through a pilot program. Together, TIGTA, Verizon, and DHS blocked almost two million calls that were spoofed to appear as though the calls were being made from the aforementioned IRS phone number. The new rule gives providers the authority to block these calls and thus helps prevent countless seniors from falling victim to these scams by preventing these calls from getting to the senior in the first place.

In addition to the FCC, the FTC has also played a role in helping foster technological developments to combat robocalls. In response to the high volume of robocalls that are made in violation of the national Do-Not-Call Registry, the FTC launched a contest in October 2012 to identity innovative solutions to protect consumers from these calls.[40] In April 2013, the FTC announced that Nomorobo, a free service that screens and blocks robocalls made to VoIP phone numbers, was one of two winners of their Robocall Challenge.[41]

Once a consumer registers his or her phone number, Nomorobo reroutes all incoming phone calls to a server that instantly checks the caller against a whitelist of legitimate callers and a blacklist of spammers.[42] If the caller is one the whitelist, the phone continues to ring, but if the number is on the blacklist, the call will disconnect after one ring. Aging Committee Fraud Hotline investigators have referred callers who contact the Hotline regarding robocalls to the Nomorobo website and have received positive feedback from callers who chose to register for the service.

In the spring of 2015, the FTC announced that it was launching two new robocall contests challenging the public to develop a crowdsourced "honeypot" and to better analyze data from an existing honeypot.[43] In this context, a honeypot is an information system that attracts robocalls so that researchers can analyze them and develop preventive techniques.[44] In August 2015, the FTC announced that RoboKiller, a mobile app that blocks and forwards robocalls to a crowdsourced honeypot, was selected as the winner of the Robocalls: Humanity Strikes Back contests.[45] Champion Robosleuth, which analyzes data from an existing robocall honeypot and develops algorithms that identify likely robocalls, was selected as the winner of the FTC's DetectaRobo Challenge.[46]

The Federal Communications Commission (FCC) has published the following tips for consumers to avoid being deceived by caller-ID spoofing:

- Do not give out personal information in response to an incoming call. Identity thieves are clever: they often pose as representatives of banks, credit card companies, creditors, or government agencies to convince victims to reveal their account numbers, Social Security numbers, mothers' maiden names, passwords, and other identifying information.
- If you receive an inquiry from aa company or government agency seeking personal information, do not provide it. Instead, hang up and call the phone number on your account statement, in the phonebook, or on the company's or government agency's website to find out if the entity that supposedly called you actually needs the requested information from you.

Source: https://www.irs.gov/uac/Five-Easy-Ways-to-Spot-a-Scam-Phone-Call

3 Sweepstakes Scams/ Jamaican Lottery Scam

Sweepstakes scams continue to claim senior victims who believe they have won a lottery and only need to take a few actions to obtain their winnings. In this scam, fraudsters generally contact victims by phone or through the mail to tell them that they have won or have been entered to win a prize. Scammers then require the victims to pay a fee to either collect their supposed winnings or improve their odds of winning the prize.[47] According to the Federal Trade Commission (FTC), the number of sweepstakes scams increased by 44.5 percent between 2013 and 2016.[48,49] One example of such a scheme was reported in Pennsylvania by the *Lebanon Daily News*, which told of an 82 year old man who lost $30,000 after paying "taxes" on $10.5 million in Publishers Clearing House "winnings".[50]

During the 113th Congress, the Aging Committee launched an investigation of the Jamaican lottery scam, one of the most pervasive sweepstakes scams.[51] At its peak, law enforcement and FairPoint Communications estimated that sophisticated Jamaican con artists placed approximately 30,000 phone calls to the United States per day and stole $300 million per year from tens of thousands of seniors.[52]

Lead Lists are lists of victims and potential victims. Scammers buy and sell these lists and use them to target consumers in future scams.

Sweepstakes scams start with a simple phone call, usually from a number beginning with "876," the country code for Jamaica. At first glance, this country code looks similar to a call coming from a toll-free American number. Scammers tell victims that they have won the Jamaican lottery or a brand new car, and that in order for their winnings to be delivered they must first wire a few hundred dollars to cover processing fees and taxes. The criminals will often instruct their victims not to share the good news with anyone so that it will be a "surprise" when their families find out. Scammers tell victims to send the money in a variety of ways, including prepaid debit card, electronic wire transfers, money orders, and even cold hard cash.

Fraud Case #7:

"Vickie," from Pennsylvania, called the Fraud Hotline to report a sweepstakes scam from a company, which had no name. They told her she was a recipient of a $1 million prize, but would have to wire $500 via Western Union. Knowing this was not real, she hung up the phone and called the police. A Fraud Hotline investigator filed a complaint to the FTC on her behalf.

Of course, no such winnings are ever delivered, and the "winners" get nothing but more phone calls, sometimes 50 to 100 calls per day, from scammers demanding additional money. Behind these calls is an organized and sophisticated criminal enterprise, overseeing boiler room operations in Jamaica. Indeed, money scammed from victims helps fund organized crime in that island nation.[53] Criminals once involved in narcotics trafficking have found these scams to be safer and more lucrative.

Fraud Case #8:

"Kelly," from Connecticut, called the Fraud Hotline to report that her grandmother lost $200 in a sweepstakes scam. The scammer claimed to be various people, but did not associate with any organization. She was told she won $1 million and a brand new car. A Fraud Hotline investigator filed a report with the electronic wire transfer company, the Federal Trade Commission, and the Department of Homeland Security. The investigator also sent Kelly additional information on the sweepstakes scam to share with her grandmother.

Since the Committee began investigating this issue, the Jamaican government passed new laws enabling extradition of the criminals to the United States for trial, leading to the extradition of one scammer for prosecution in the United States.[54] Several convictions have been obtained in connection with this scam. In November 2015, a 25-year old Jamaican national living in the United States was sentenced to 20 years in prison after being found guilty of selling lists of potential victims referred to as "lead lists."[55]

Expensive "lead lists" identify potential victims. Satellite maps are used to locate and describe victims' homes to make the callers appear familiar with the community. Elaborate networks for the transfer of funds are established to evade the anti-fraud systems of financial institutions. Should victims move or change their phone numbers, the con artists use all of the technology at their disposal to find them and re-establish contact. Fraud Hotline investigators have even heard reports of scammers calling the police to do wellness checks on victims, when they haven't heard from them in a couple of days.

While on a trip to Jamaica in early February 2018, Secretary of State Rex Tillerson noted the important progress Jamaica was making combatting lottery scams, including cooperating closely with the United States to extradite suspected lottery scammers and for establishing a bilateral lottery scam task force.[56] As Secretary Tillerson noted, it is in both countries' interests to work together to investigate crimes, share intelligence, conduct asset seizures where legally and appropriate to do so, and bolster existing anti-corruption and anti-gang programs.[57]

The con artists adopt a variety of identities to keep the money coming in ever-increasing amounts. Some spend hours on the phone convincing seniors that they care deeply for them. Victims who resist their entreaties begin receiving calls from Jamaicans posing as American government officials, including local law enforcement, the Federal Bureau of Investigation, the Social Security Administration, and the Department of Homeland Security, asking for personal data and bank account numbers so they can "solve" the crime.

4 "Can You Hear Me?" Scams

In early 2017, consumers began reporting receiving calls in which the caller would simply ask "Are you there?" or "Can you hear me?" in order to prompt the recipient to say "yes." Within just the first few months of 2017, the Federal Trade Commission (FTC) had already received hundreds of complaints about these calls.

After responding, "yes," consumers would often report that the call would immediately drop, or get disconnected. As a result, the immediate concern was that scammers would record the consumer's voice, and thus obtain a voice signature, and use the recording to authorize unwanted charges on items like utility bills, phone bills, or even stolen credit cards.[58]

In February 2017, a man from Washington claimed there was an unauthorized $100 charge on his credit card, one day after saying "yes" to someone on the phone who asked, "Hello, hello, can you hear me?" The caller describes that once he said yes, the caller began to pitch a resort vacation package. When the victim challenged the caller, the caller immediately hung up. A few days later, the victim, not yet knowing that he had been defrauded, read about the "Can you hear me?" scam, and immediately checked his credit card statement. The victim noticed an unauthorized charge of $100.79 for a hotel room, less than 24 hours after he received the "Can you hear me?" call. The victim's credit card company reversed the charge when he filed a fraud report.

Fraud Case #9:

"Cindy," from Pennsylvania called the Fraud Hotline to report receiving a call from someone who asked her, "Can You Hear Me?" Cindy was scared and contacted her bank and local police department. A Fraud Hotline investigator filed a report with the Federal Trade Commission and encouraged her to monitor her accounts and not to answer any call she doesn't recognize.

Only a few consumers have reported losing money to this scam. On October 4, 2017, Genie Barton, the President of the Better Business Bureau's Institute for Marketplace Trust, testified before the Senate Aging Committee's hearing titled, "*Still Ringing Off the Hook: An Update on Efforts to Combat Robocalls*, that out of the 10,000 published "Can you hear me?" reports, fewer than 20 involved a reported dollar loss, and those losses cannot be definitively connected to a "yes" response.[59] The fact that more people were not reporting a monetary loss caused consumer protection advocates and law enforcement agencies to believe that these calls were not being placed to scam people out of their money, but to help identify active phone numbers and thus increase the odds of being able to scam a victim.

According to the FTC, these illegal robocalls are originated by recordings,[60] and are designed to identify numbers that consumers are likely to answer.[61] The FTC believes that the "Can you hear me?" recording may act as a sort of filler.[62] Instead of music, or dead air, the recording may be a filler waiting for a live telemarketer to free up and actually get on the call.[63] In addition, the FTC believes that if the recipient of the call answers "yes," the calls are then automatically transferred to a live scammer or telemarketer.[64] A staggering 34 percent of all published reports to the Better Business Bureau's Scam Tracker in the first half of 2017 regarding robocalls can be classified as robocalls.[65] The increased use of this tactic by scammers last year demonstrates how sophisticated these scammers are and the success it could have in helping scammers better identify and connect with likely victims.

The Federal Trade Commission (FTC) has published the following tips for consumers who get a call from someone they don't recognize asking, "Can you hear me?":

- Don't respond, just hang up. If you get a call, don't press 1 to speak to a live operator or any other number to be removed from the list. If you respond in any way, it will probably just lead to more robocalls – and they're likely to be scams.
- Contact your phone provider. Ask your phone provider what services it provides to block unwanted calls.
- Put your phone number on the Do Not Call registry. Access the registry online or by calling 1-888-382-1222. Callers who don't respect the Do Not Call rules are more likely to be crooks.
- File a complaint with the FTC. Report the experience online or call 1-877-382-4357.

Source: https://www.consumer.ftc.gov/blog/2017/03/calls-asking-can-you-hear-me-now

5 Grandparent Scams

A common scam that deliberately targets older Americans is the "grandparent scam." In this scam, imposters either pretend to be the victim's grandchild and/or claim to be holding the victims' grandchild. The fraudsters claim the grandchild is in trouble and needs money to help with an emergency, such as getting out of jail, paying a hospital bill, or leaving a foreign country. Scammers play on victims' emotions and trick concerned grandparents into wiring money to them. Once they money is wired, it is difficult to trace. For example, last summer the *Lebanon Daily News* in Pennsylvania reported a grandmother being scammed out of thousands of dollars after being told her granddaughter had been arrested and jailed.[66]

Fraud Case #10:

"Bob," from Florida, called the Fraud Hotline to report losing $6,000 to a grandparent scam. Bob received a call from someone claiming to be his grandson, saying he had been in an accident. The caller instructed Bob to purchase iTunes gift cards. After purchasing them, Bob read the numbers on the back of the cards to the person on the phone. This allowed the scammer to steal the funds off the card. Bob became suspicious when the person on the phone began requesting more money. The Fraud Hotline investigator filed a report with the Federal Trade Commission on his behalf and sent him a copy of the Fraud Book.

The Fraud Hotline has received frequent reports of con-artists telling victims their family member was pulled over by the police and arrested after drugs were found in the car. The scammer who is pretending to be the victim's grandchild will often tell the victim to refrain from alerting the grandchild's parents. The scammer then asks the victim to help by sending money in the fastest way possible. This typically requires the victim to go to a local retailer and send an electric wire transfer of several thousand dollars.

After payment has been made, the fraudster will more likely than not call the victim back, claiming that more money is needed. Scammers often claim that there was another legal fee they were not initially aware of. The second call is typically what alerts the victims that they have been scammed. Victims have told Fraud Hotline investigators that, once they realized they had been duped, they wished they had asked the con artists some simple questions that only their true grandchild would know how to answer.

In another version of the scam, instead of the "grandchild" making the phone call, the con-artist pretends to be an arresting police officer, a lawyer, or a doctor. It is also common for con artist impersonating victims' grandchildren to talk briefly with the victims and then hand the phone over to an accomplice impersonating an authority figure. This gives the scammers' stories more credibility and reduces the chance that they victim will recognize that the voice on the phone does not belong to their grandchild.

In 2016, the Federal Trade Commission (FTC) received 14,898 complaints of individuals impersonating friends and family members, up from 12,404 in 2013.[67],[68] Between January 1, 2012, and May 31, 2014, individuals reported more than $42 million in losses to the FTC from scams involving the impersonation of family members and friends.[69]

Fraud Case #11:

"Molly," from Mississippi, called the Fraud Hotline to report losing $3,800 in a grandparent scam. Molly received a call from someone claiming to be her grandson who told her that he had been arrested in the Dominican Republic and needed bail money. Among other things, the scammer requested $1,860 for an appearance bond and $900 to pay a fine for negligence. In the end, Molly ended up paying approximately $3,800 via electronic wire transfers at Western Union. The Fraud Hotline investigator filed a report Western Union and with the Federal Trade Commission.

6 Computer Tech Support Scams

The Aging Committee began seeing an increase in the frequency and severity of computer-based scams in 2015. Private industry has also seen a similar increase in the prevalence of this scam: Microsoft reported receiving more than 180,000 consumer complaints of computer-based fraud between May 2014 and October 2015.[70] The company estimated that 3.3 million Americans are victims of technical support scams annually, with losses of roughly $1.5 billion per year.[71] Unlike other victim-assisted frauds, where the scammers are successful in just one out of a hundred-plus attempts, it appears that computer-based scams have a very high success rate.[72] In 2016, the Internet Crime Complaint Center (IC3), a partnership between the Federal Bureau of Investigation (FBI) and the National White Collar Crime Center, received 10,850 tech support fraud complaints with losses in excess of $7.8 million.[73] The IC3, noted that while fraud affects victims of all ages, older victims are often the most vulnerable.[74]

In response to the increase in complaints to the Fraud Hotline, the Committee held a hearing on October 21, 2015, titled "*Virtual Victims: When Computer Tech Support Becomes a Scam*".[75] The hearing featured representatives from Microsoft and the FTC who spoke about the challenges in combatting this fraud given its many variations and constant changes.[76]

The basic scam involves con artists trying to gain victims' trust by pretending to be associated with a well-known technology company, such as Microsoft, Apple, or Dell. They then falsely claim that the victims' computers have been infected with a virus. Con artists convince victims to give them remote access to their computers, personal information, and credit card and bank account numbers so that victims can be "billed" for fraudulent services to fix the virus. In a related scam, individuals surging the Internet may see a pop-up window on their computer instructing them to contact a tech-support agent. Sometimes, scammers have used the pop-up window to hack into victims' computers, lock them out, and require victims to pay a ransom to regain control of their computers.

Fraud Case #12:

"Brian," from Georgia, called the Fraud Hotline to report that he had fallen victim to a tech support scam. Brain explains that a pop-up appeared on his computer screen that would prevent him from doing anything. The pop-up was masking itself as a Microsoft dialogue box and informed him to call a number to get a virus removed. The first couple of times it appeared, Brian would restart his computer, but he eventually called the number on the dialogue box. The person on the phone identified himself as "Cam" from "US Infotech" in Texas. The scammer told Brain that his computer was infected with a virus and that he would need to take control of his computer to clean it and install anti-virus software. Brian paid the scammers $895 in "service fees, software, and damage repair costs" using his credit card. The Fraud Hotline investigator encouraged Brian to dispute the charge with his credit card company, and filed a report with the Federal Trade Commission and the FBI's Internet Crime Complaint Center on his behalf.

Below are several of the most common variations of this scam:

- **Scammers Contact Victims.** In the most prevalent variation of this scam, con artists randomly call potential victims and offer to clean their computers and/or sell them a long-term or technical support "service". The con artist usually direct victims' computers to display benign error messages that appear on every computer to convince victims that their computers are malfunction. Scammers generally charge victims between $150 and $800 and may install free programs or trial versions of antivirus programs to give the illusion that they are repairing victims' computers. If victims express concern about the price, the con artists will often entice victims to pay by offering a "senior citizen discount."

- **Victims Unknowingly Contact Scammers.** Some consumers unknowingly call a fraudulent tech support number after viewing the phone number online. Consumers who search for tech support online may see the number for the scammer at the top of their "sponsored results". The FTC found that a network of scammers paid Google more than one million dollars since 2010 for advertisements and for certain key search terms.[77] Some key search terms included: "virus removal," how to get rid of a computer virus," McAfee Customer Support," and "Norton Support." These search terms are cleverly chosen to confuse the consumer into thinking the fraudsters re associated with well-known companies. Other fraudsters use pop-up messages on consumers' computer screens that direct potential victims to call them.

- **Ransomware.** Scammers use malware or spyware to infect victims" computers with a virus or encrypt the computers so they cannot be used until a fee is paid. If victims refuse to pay, scammer's will render the computer useless, prompting the appearance of a blue screen that can only be removed with a password known by the scammers. The Fraud Hotline has received reports that scammers sometimes admit to victims that it is a scam and refuse to unlock the victims' computers unless a "ransom" payment is made.

- **Fraudulent Refund.** Scammers contact victims stating that they are owed a refund for prior services. The scammers generally convince victims to provide them with access to their computers to process an online wire transfer. Instead of refunding the money, however, the fraudsters use the victims' account information to charge consumers.

Fraud Case #13:

In October 2015, Frank Schiller, from Maine, testified at an Aging Committee hearing on computer tech support scams. Frank's experience with tech support scammers began in October 2013, when he received a call from a man who claimed to be a Microsoft contractor. The con artist told Frank there was a problem with his computer. He gained Frank's trust and convinced Frank to allow him to obtain remote access to his computer. Shortly thereafter, Frank's computer began to malfunction, and the con artist explained that this was due to viruses that "Microsoft" could fix using two programs costing $249 and $79. Frank attempted to pay for these programs using his credit card, but the scammer told him that he could not use a credit card because Microsoft's bank was in India. The con artist directed Frank to the Western Union website and moved very quickly through the payment system before Frank could tell what was happening. Two months later, the con artist called Frank again to say that Microsoft had rescinded his contract and would need to refund Frank's money. The con artist claimed that the refund could not be processed using Frank's credit card and asked for his checking account number. This information was used to steal another $980 from Frank.

The FTC has responded to computer-based scams through law enforcement actions and ongoing investigations. In 2014, the agency brought action against six firms based primarily in India that were responsible for stealing more than $100 million from thousands of victims.[78]

On May 12, 2017, the Department of Justice announced that seven individuals were charged for their participation in the tech support scam.[79] Seven individuals received criminal indictments for their role in the Florida-based Client Care Experts fraudulent operation. According to the indictments, Client Care/First Choice purchased pop-up advertisements, which appeared without warning on the victims' computer screens and locked up their browsers.[80] These pop-ups falsely informed the victims that serious problems, such as viruses or malware, had been detected on their computers.[81] From approximately November 2013 through 2016, Client Care Experts victimized over 40,000 people and defrauded these individuals out of more than $25,000,000.[82]

Tips from the Federal Trade Commission (FTC) to help consumers avoid becoming a victim of a computer-based scam:

- Do not give control of your computer to a third party that calls you out of the blue.
- Do not rely on caller ID to authenticate a caller. Criminals spoof caller ID numbers. They may appear to be calling from a legitimate company or a local number when they are not even in the same country as you.
- If you want to contact tech support, look for a company's contact information on its software package or on your receipt. Never provide your credit card or financial information to someone who calls and claims to be from tech support.
- If a caller pressures you to buy a computer security product or says there is a subscription fee associated with the call, hang up.
- If you're concerned about your computer, call your security software company directly and ask for help.
- Make sure you have updated all of your computer's anti-virus software, firewalls, and popup blockers.

Source: http://www.consumer.ftc.gov/articles/0346-tech-support-scams

7 Romance Scams

More and more Americans are turning to the Internet for dating. As of February 2016, approximately 15 percent of American adults had used online dating services.[83] In particular, online dating use among seniors has also risen in recent years. According to the Pew Research Center, 12 percent of those aged 55-to 64-years old reported using an online dating site or mobile dating up, this is up from just six percent back in 2013.[84]

As Americans increasingly turn to online dating to find love, con artists are following suit, not for love, but for money. In 2014, the Aging Committee's Fraud Hotline began receiving reports from individuals regarding romance scams, with the number of reports increasing each year. Sometimes these reports were not just from seniors, but also from friends and family members whose loved ones were deeply involved in a fictitious cyber-relationship. This is one of the most heartbreaking scams because con artists exploit seniors' loneliness and vulnerability.

In a related scam known as confidence fraud, con artist gain the trust of victims by assuming the identities of U.S. soldiers. Victims believe they are corresponding with an American soldier who is serving overseas who claims to need financial assistance. Scammers will often take the true name and rank of a U.S. soldier who is honorably serving his or her country somewhere in the world, or has previously served and been honorably discharged. In addition, the con artist will even use real photos of that soldier in their profile pages, giving their stories more credibility.

Typically, scammers contact victims online either through a chatroom, dating site, social media site, or email. According to the Federal Bureau of Investigation's (FBI) Internet Crime Complaint Center (IC3), 90 percent of the complaints submitted in 2016 contained a social media aspect.[85] Con artists have been known to create elaborate profile pages, giving their fabricated story more credibility. Con artist often call and chat on the phone to prove that they are real. These conversation can take place over weeks and even months as the con arts build trust with their victims. In some instances, con artist have even promised to marry their victims.

Fraud Case #14:

"Linda," from California, called the Fraud Hotline on behalf of her sister who was in the midst of a romance scam. According to Linda, her sister had sent $729,500 over the span of two years to a scammer she met on an online dating website. She had been directed to send the money through her bank in wire transfers. The Fraud Hotline investigator filed a report with the Federal Trade Commission, the FBI's Internet Crime Complaint Center, and the Secret Service. Linda was also encouraged to report this crime to the California Attorney General's office and to her sister's local police department. The investigator also sent Linda additional information about this type of scam to share with her sister.

Inevitably, con artists in these scams will ask their victims for money for a variety of things. Often con artists will ask for travel expenses so they can visit the victims in the United States. In

other cases, they claim to need money for medical emergencies, hotel expenses, hospital bills for a child or other relative, visas or other official documents, or losses from a temporary financial setback.[86] Unfortunately, in spite of telling their victims they will never ask for any more money, something always comes up resulting in the con artist requesting more money.

Con artists may send checks for victims to cash under the guise that they are outside the country and cannot cash the checks themselves, or they may ask victims to forward the scammer a package. The FBI warns that, in addition to losing money to these con artists, victims may also have unknowingly taken part in money laundering schemes or shipped stolen merchandise.[87]

In 2016, the FBI's IC3 received 14,546 complaints about romance and confidence scams that cost victims $219,807,706, the second highest type of scam by victim loss reported to the IC3.[88] In comparison, in 2014, the IC3 received 5,883 complaints about romance and confidence scams that cost victims $86.7 million dollars.[89] Nearly half of the victims in 2014 were age 50 or older, and this group accounted for approximately 70 percent of the money lost to this scam last year.[90] Romance and confidence scams disproportionally target women, usually between the ages of 30 and 55 years old.[91] Unfortunately, both the amount of financial loss and the number of complaints for the crime have increased in recent years.[92]

Tips Tips from the FBI's Internet Crime Complaint Center to help prevent consumers from falling victim to romance scams:

- Be cautious of individuals who claim the romance was destiny or fate, or that you are meant to be together.
- Be cautious if an individual tells you he or she is in love with you and cannot live without you but needs you to send money to fund a visit.
- Fraudsters typically claim to be originally from the United States (or your local region), but are currently overseas, or going overseas, for business or family matters.

Source: https://www.fbi.gov/news/news_blog/2014-ic3-annual-report

8 Elder Financial Abuse

Financial exploitation of older Americans is the illegal or improper use of an older adult's funds, property, or assets. According to MetLife's Mature Market Institute, in 2010 seniors lost an estimated $2.9 billion because of financial exploitation, $300 million more than the year before, although these numbers are likely substantially underreported.[93] One study found that, for every case of financial fraud that is reported, as many as 14 go unreported.[94]

A 2011 Government Accountability Office (GAO) study found that approximately 14.1 percent of adults age 60 and older experienced physical, psychological, or sexual abuse; potential neglect; or financial exploitation in the past year.[95]

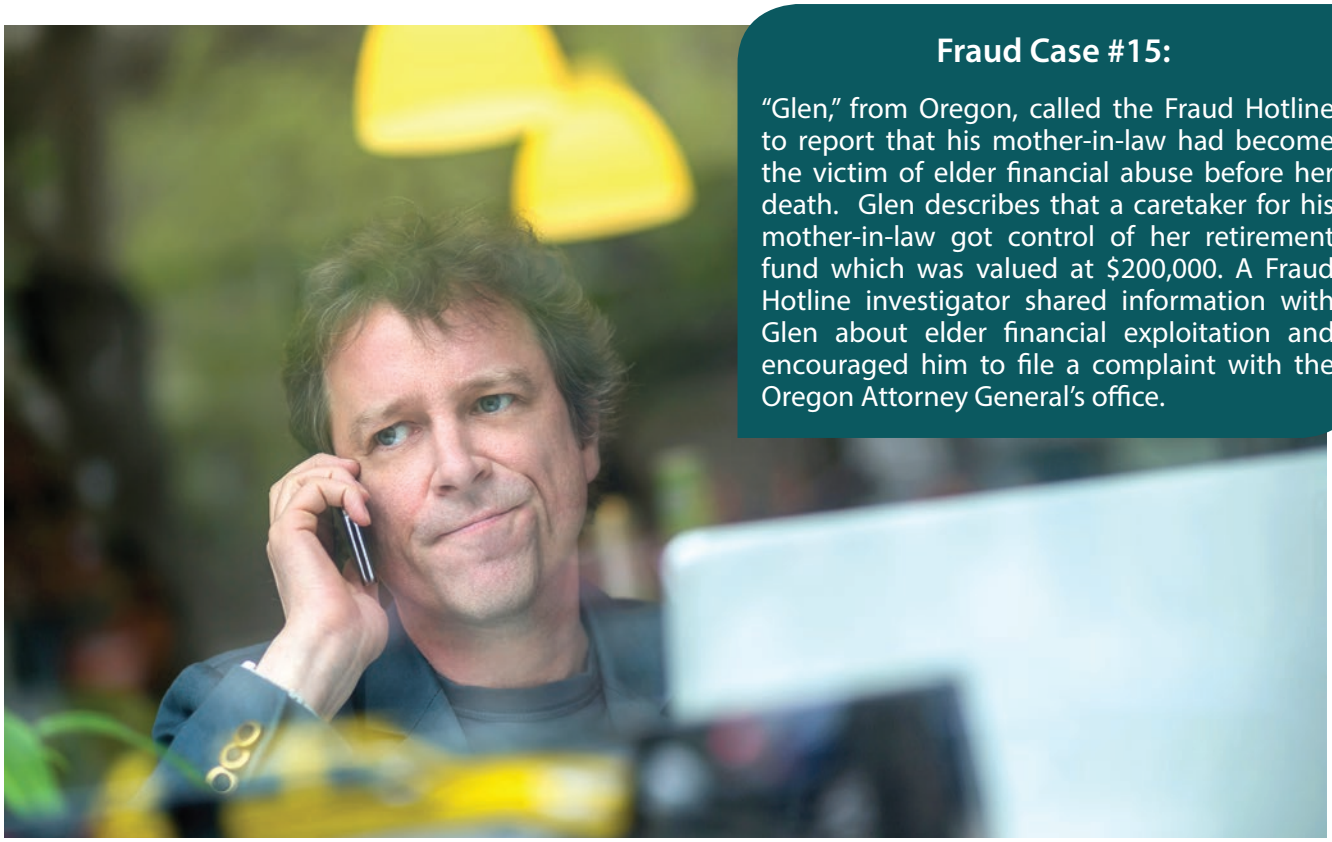
The Fraud Hotline documents complaints of elder abuse and refers calls to local jurisdiction's Adult Protective Services (APS) for further action. APS employees receive reports of alleged abuse, investigate these allegations, determine whether the alleged abuse can be substantiated, or arrange for services to ensure victims' well-being.[96] APS can also refer cases to law enforcement agencies or district attorneys for criminal investigation and prosecution.[97] APS workers ideally coordinate with local law enforcement and prosecutors to take legal action, but the effectiveness of this relationship can vary significantly from state to state. As of 2015, every state has an elder abuse statute.[98]

Older Americans are particularly vulnerable to financial exploitation because financial decision-making ability can decrease with age. One study found that women are almost twice as likely to be victims of financial abuse.[99] Most victims are between the ages of 80 and 89, live alone, and require support with daily activities.[100] Perpetrators include family members; paid home care workers; those with fiduciary responsibilities, such as financial advisors or legal guardians or strangers who defraud older adults through mail, telephone, or Internet scams.[101]

Victims whose assets were taken by family members typically do not want their relatives to be criminally prosecuted, leaving civil actions as the only mechanism to recover stolen assets.[102] Few civil attorneys, however, are trained in issues related to older victims and financial exploitation.[103] Money that is stolen is rarely recovered, which can undermine victims' ability to support or care for themselves. Consequently, the burden of caring for exploited older adults may fall to various state and federal programs.[104]

One of the provisions of the Elder Justice Act of 2009, which was enacted in 2010, seeks to improve the federal response to this issue.[105] The law formed the Elder Justice Coordinating Council, which first convened on October 11, 2012, and is tasked with increasing cooperation among federal agencies.[106] Experts agree that multidisciplinary teams that bring together professionals from various fields such as social work, medicine, law, nursing, and the financial industry can expedite and resolve complex cases, identify systemic problems, and raise awareness about emerging scams.[107]

While some states have laws that require financial professionals to report suspected financial exploitation of seniors to the appropriate local or state authorities, there currently is no federal requirement to do so. Some financial



Fraud Case #15:

"Glen," from Oregon, called the Fraud Hotline to report that his mother-in-law had become the victim of elder financial abuse before her death. Glen describes that a caretaker for his mother-in-law got control of her retirement fund which was valued at $200,000. A Fraud Hotline investigator shared information with Glen about elder financial exploitation and encouraged him to file a complaint with the Oregon Attorney General's office.

professionals may fail to report suspected financial exploitation due to a lack of training or fear of repercussions for violating privacy laws. Aging Committee Chairman Susan Collins and former Ranking Member Claire McCaskill have introduced the Senior Safe Act, a bipartisan bill cosponsored by Ranking Member Robert P. Casey Jr. and others, which would provide certain individuals with immunity for disclosing suspected financial exploitation of senior citizens.[108] The Financial Regulatory Authority is simultaneously pursuing rulemaking that would empower financial professionals to protect their senior clients from financial abuse.[109]

Some localities with large senior populations have established special units to address elder abuse, including elder financial abuse. In October 2015, prosecutors in Montgomery County, Maryland, successfully brought charges against an individual who, over several years, embezzles more than $400,000 before one of the victim's bankers discovered suspicious activity in his account and alerted APS.[110] The fraudster had convinced the victim to give her power of attorney and control of his finances. She was sentenced to five years in jail for financial exploitation of a vulnerable adult, theft, and embezzlement.[111]

In March 2016, an attorney in Belfast, Maine was sentenced to 30 months in prison for bilking two elderly female clients out of nearly a half of a million dollars over the course of several years.[112] The lawyer's brazen theft was uncovered when a teller at a local bank noticed that he was writing large checks to himself on his clients' accounts.[113] When confronted by authorities, he offered excuses that the prosecutor later described as "breathtaking."[114] For example, according to the *Bangor (Maine) Daily News,* he put one of his clients into a nursing home to recover from a temporary medical condition, and then kept her there for four years until the theft of her funds came to light. Meanwhile, he submitted bills for "services," sometimes totaling $20,000 a month, including charging her $250 per hour for six to seven hours to check on her house, even though

his office was just a one-minute drive down the road.[115]

Another tragic case of theft and abuse was featured in a November 2016, *Maine Sunday Telegram* article. The article detailed the story of an elderly woman from Los Angeles, California, who went missing in 2008.[116] In 2012, authorities found her, alive but in poor health, abandoned in a tiny cabin in Maine by three people who had "befriended" her years earlier. After gaining the woman's trust, and control of her finances, these criminals sold her house and stole her money, cheated her of an estimated $1 million in assets.[117] Today, this 90-year-old woman is a ward of the state and lives in a nursing home in rural Maine – thousands of miles away from the life she used to know.[118]

The Aging Committee has brought to light many schemes that have defrauded seniors out of their heard-earned retirement savings. It is deeply troubling when a senior falls victim to one of these schemes, but it's even more egregious when the perpetrator is a family member, caregiver, or trusted financial advisory.

In November 2016, the Aging Committee examined financial abuse committed by guardians and other court appointed fiduciaries. During the hearing, titled, *"Trust Betrayed: Financial Abuse of Older Americans by Guardians and Others in Power",* the Committee released a new GAO report on guardianship abuse. The report builds on a 2010 study which found hundreds of cases of abuse, neglect, and exploitation and identified $5.4 million that had been improperly diverted.[119] The updated report examined cases of elder financial abuse over a four-year period, from 2011 to 2015, and examined measured taken by several states to help protect older adults with guardians.

According to the GAO, guardianship abuse is widespread, but it remains difficult to determine the extent of elder abuse by guardians nationally due to limited data. GAO noted that some progress is being made to collect data on guardianships and improve the guardianship process. In 2013, the Department of Health and Human Services (HHS) began developing the National Adult Mistreatment Reporting System (NAMRS) to provide consistent and accurate national data on senior abuse. HHS has completed the pilot project in 2015 and issued its first report in August 2017.

In addition, GAO identified a number of measures that can be taken to protect seniors from guardianship abuse, including for courts to ensure that a guardianship is truly needed before appointing one and periodically reexamining whether a guardianship is still needed. Courts should also make sure that guardians are screened for criminal backgrounds and are properly education on their role and responsibilities.

During the hearing, the Committee heard testimony about some of the promising initiatives that are being undertaken at the state level to combat this form of financial exploitation. One such example is the Minnesota Conservator Account Auditing Program, which monitors guardians of seniors by requiring them to file regular reports. The state uses an automated software0based system that scams these conservator reports for 30 "red flags" that may indicate abuse or mismanagement of the estate. Minnesota is making this innovative software reporting and analysis system available to other states free of change.

Another witness, Jaye Martin, the Executive Director of Legal Services of the Elderly (LSE) in Maine, testified that her organization assisted 260 victims of elder abuse during the last 12 months. This was a 24 percent increase from the prior year. While this number includes physical and emotional abuse as well, roughly half of the cases handled by LSE involved financial exploitation of seniors. Even more alarming was Ms. Martin's testimony that in 75 percent of those cases, the financial exploitation was carried out by a family member. Unfortunately, these numbers only represent the tip of the iceberg, since so many abuses cases go unreported. Victims are often ashamed or afraid to alert authorities about financial exploitation, particularly when it involves a family member.

9 Identity Theft

Identity thieves not only disrupt the lives of individuals by draining bank accounts, marking unauthorized credit card charges, and damaging credit reports, but they also often defraud the government and taxpayers by using stolen personal information to submit fraudulent billings to Medicare or Medicaid, or apply for an receive Social Security benefits to which they are not entitled. Fraudsters also use stolen personal information, including Social Security numbers (SSN), to commit tax fraud or to fraudulently apply for jobs and earn wages. According to the Federal Trade Commission (FTC), identity theft was the most common type of consumer complaint in 2016, with 399,225 complaints.[120]

For the first time in 15 years, however, identify theft was not the FTC's most common consumer complaint in 2015. Even so, 490,220 Americans still reported being victimized.[121] Consumers age 50 and older reported 45 percent of the identity theft complaints that the FTC received in 2015.[122]

The growing use of commercial tax filing software and online tax filling services has led to opportunities for thieves to commit fraud without stealing SSNs. In some cases, thieves can illegally access an existing customer's account simply by entering that individual's username, e-mail address, or name and correctly guessing the password. This is often referred to as an "account takeover". Whether the thief uses this method to access an existing account or uses stolen personal information to create a new account, the end result is often the same: early in the tax filing season, the thief files a false tax return using a victim's identity and directs the refund to his own mailing address or bank account. The victim only discovers this theft when they file his own return and the Internal Revenue Service (IRS) refuses to accept it because a refund has already been issued. In November 2015, the IRS reversed a long-standing policy and now provides victims with copies of the fake retuned upon written request.[123] The documents will provide victims with details to help them discover how much of their personal information was stolen. The IRS saw a marked improvement in the battle against identity theft in 2017.[124] According to the IRS, the number of people reporting stolen identities on federal tax retuned fell by more than 40 percent, with nearly 242,000 fewer victims compared to a year ago.[125]

Fraud Case #16:

"Rob," from Iowa, called the Fraud Hotline because he believed his father was the victim of identity theft. Rob explains that his father began receiving multiple collection notices about credit cards that apparently were opened in his name. The Fraud Hotline investigator gave Rob information on how to file a credit freeze and to dispute the transactions.

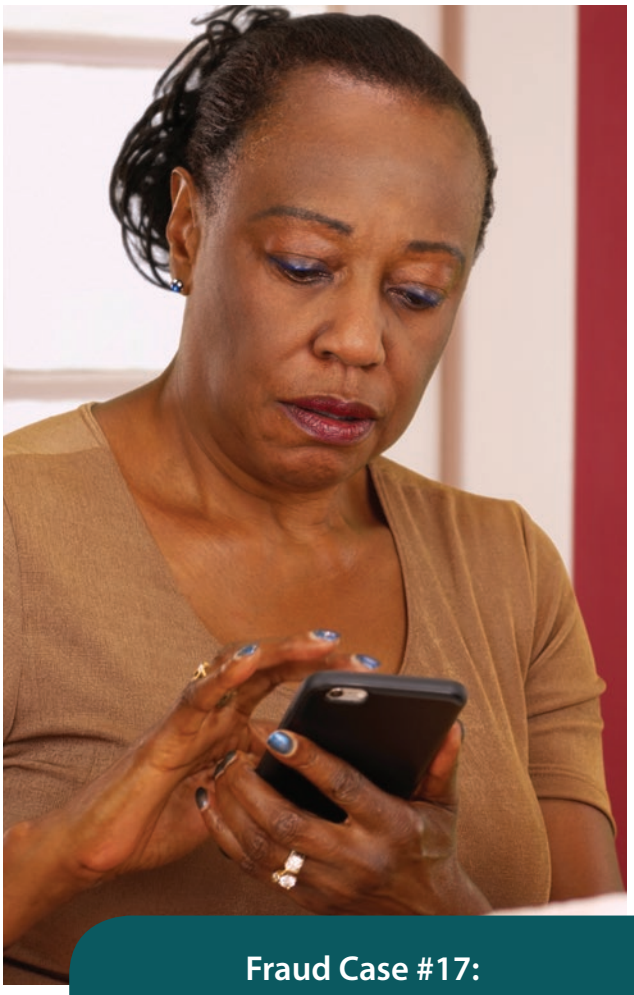
Medical identity theft occurs when someone steals personal information – an individual's name, SSN, or health insurance claim number (HICN) – to obtain medical care, buy prescription drugs, or submit fake billings to Medicare. Medical identity theft can disrupt lives, damage credit rating, and waste taxpayer dollars. Some identity theft can disrupt lives, damage credit ratings, and waster taxpayer

dollars. Some identify thieves even use stolen personal information to obtain medical care for themselves or others, putting lives at risk if the theft is not detected and the wrong information ends up in the victims' medical files. Claims for services or items obtained with stolen HICNs might be included in the beneficiary's Medicare billing history and could delay or prevent the beneficiary from receiving needed services until the discrepancy is resolved.

In April 2015, President Obama signed a law that requires the Centers for Medicare & Medicaid Services (CMS) to remove SSNs from Medicare cards by 2019.[126] Medicare is mailing new Medicare cards to all people beginning in April 2018.[127] On October 7, 2015, the Aging Committee held a hearing titled, "*Protecting Seniors from Identity Theft: Is the Federal Government Doing Enough*".[128] The Committee heard testimony from the CMS official in charge of implementing the Medicare card replacement process and from the Department of Health and Human Services Office of Inspector General about investigative efforts to combat medical identity theft.[129]

The 2017 Equifax data breach may have exposed private information belonging to 145.5 million people — nearly half of the U.S. population.[130] The Senate Aging Committee was particularly concerned with the devastating impact this breach could have on older Americans, whose retirement savings and financial security are at unique risk. In the aftermath of the data breach, Chairman Collins and Ranking Member Casey sent a letter to Equifax seeking additional information on the steps the company has taken and plans to take in an effort to mitigate and remediate the unique threats facing seniors, including risks to their life savings, entitlement benefits, and credit scores.

Scammers have begun capitalizing on the breach through robocalls claiming to be calling from Equifax to verify account information.[131] The scammers try to trick victims into sharing personal identifiable information, such as their Social Security numbers. In a case reported to the Better Business Bureau's Scam tracker on September 15, 2017, a consumer from New Jersey reported receiving a voicemail from someone claiming to be from the IRS saying that a lawsuit had been filed against the consumer for unpaid back taxes. When the consumer called the number left on the voicemail, the consumer was told that his information had been compromised in the Equifax security breach, and that the consumer would have to pay $100,000 in back taxes.[132] The scammer also tried to get the consumer's sensitive personal information, including full name and Social Security number.



Fraud Case #17:

"Diane," from Maine, called the Fraud Hotline to inquire about how to freeze her credit in light of the recent Equifax data breach. A Fraud Hotline investigator gave Diane information about identity theft and how to place a credit freeze.

What to Do if You Suspect You are a Victim of Identity Theft

Source: https://www.identitytheft.gov

What to Do *Right Away*:

1. **Call the companies** where you know the fraud occurred.
2. **Place a fraud alert** with a credit reporting agency and get your credit report from one of the three national credit bureaus.
3. **Report identity theft** to the FTC.
4. **File a report** with your local police department.

What to *Do Next*:

1. **Close new accounts** opened in your name.
2. **Remove bogus charges** from your accounts.
3. **Correct** your credit report.
4. **Consider** adding an extended fraud freeze.

Tips to Help Secure Your Identity:

- Neither Medicare nor Social Security will call to ask for your bank information or SSN.
- There will never be a fee charged to obtain a Social Security or Medicare card.
- Never give out personal information over the phone to someone you do not know.
- Sensitive personal and financial documents should be kept secure at all times.
- Review all medical bills to spot any services that you didn't receive.

10 Government Grant Scams

Grant scams, of which there are multiple variations, are frequently reported to the Senate Aging Committee's Fraud Hotline. In the most common variation of this scam, consumers receive and unsolicited phone call from con artists claiming that they are from the "Federal Gants Administration," or the "Federal Grants Department" – agencies that do not exist. In another version of this scam, scammers place advertisements in the classified section of local newspapers offering "free grants," and will request that victims wire money for processing fees or taxes before the money can be sent to them.

The Federal Trade Commission (FTC) defines grant scams as, "[deceptive practices by businesses or individuals marketing either government grant opportunities or financial aid assistance services; problems with student loan processors, debt collectors collecting on defaulted student loans, diploma mills; and other unaccredited educational institutions, etc." [133] According to FTC data, the frequency of Americans reporting grant scams has dropped over the past three years.[134] In 2016, the FTC received 4,969 complaints, which is almost a 22 percent increase from the previous year.[135,136]

Fraud Case #18:

"Deb," from Ohio, called the Fraud Hotline to report losing $245 in a government grant scam. Deb described receiving a call from someone named "Max Fletcher" who told her she won a grant for $9,000 from the "Washington Money Fund." In order to collect the funds, she was instructed to wire $250 to cover processing fees. She realized this was a scam once the scammers demanded more money for "additional unforeseen fees." Deb said this was a huge financial mistake as she only receives $855 per month on disability. A Fraud Hotline investigator filed a report with the electronic transfer company and the Federal Trade Commission.

The National Consumers League has published the following tips for consumers to avoid falling victim to a federal grant scam:

- Do not give out your bank account information to anyone you do not know. Scammers pressure people to divulge their bank account information so that they can steal the money in the account. Do not share bank account information unless you are familiar with the company and know why the information is necessary.
- Government grants are made for specific purposes, not just because someone is a good taxpayer. They also require an application process; they are not simply given over the phone. Most government grants are awarded to states, cities, schools, and nonprofit organizations to help provide services or fund research projects. Grants to individuals are typically for things like college expenses or disaster relief.
- Government grants never require fees of any kind. You might have to provide financial information to prove that you qualify for a government grant, but you never have to pay to get one.

Source: http://www.fraud.org/scams/telemarketing/government-grants

Conclusion

One of the Senate Aging Committee's top priorities in the 115th Congress is to continue combatting fraud that targets seniors. The Fraud Hotline has been instrumental in this fight, providing more than 1,400 people in 2017 with information on common scams and offering tips on how to avoid becoming victims of fraud. In addition, Fraud Hotline investigators have encouraged victims to report fraud to the appropriate law enforcement agencies to improve the government's data as well as its ability to prosecute the perpetrators of these scams. Committee investigators have even helped some victims recover thousands of dollars of their hard-earned retirement savings.

The Aging Committee has held hearings on seven of the top ten scams on this list. The Committee's hearings have helped raise public awareness to prevent seniors from falling victim to these scams, as well as to provide valuable oversight of the federal government's effort to combat these frauds and protect consumers. The Committee has pressed federal law enforcement agencies to combat fraud and put the criminals who prey on our nations' seniors behind bars.

While tangible progress has been made in countering a number of consumer scams, it is evident that more work remains to be done. For example, in November 2017, AARP released a report that found that military veterans are more likely than other Americans to be victims of scams and that some scams are specifically aimed at programs and charities geared to veterans.[137]

As the Aging Committee enters the second session of the 115th Congress, Chairman Collins and Ranking Member Casey intend to maintain the Committee's focus on frauds targeting seniors and will continue to work with their Senate colleagues to ensure that law enforcement has the tools it needs to pursue these criminals and to encourage a more effective federal response to these scams.

This Fraud Book is designed to serve as a resource for seniors and others who wish to learn more about common scams and ways to avoid them. For further assistance, contact the Aging Committee's Fraud Hotline at **1-855-303-9470**.

Top Scams by State

These scams are based on calls into the Aging Committee's Fraud Hotline in 2017.

Alabama

1. IRS Impersonation Scam
2. Unsolicited Phone Calls
3. Grandparent Scam
4. Romance Scam
5. Identity Theft

Alaska

1. IRS Impersonation Scam
2. Grandparent Scam

**Since the Fraud Hotline did not receive any calls from consumers in Alaska in 2017, this list is based on call data from 2015 and 2016.*

Arizona

1. IRS Impersonation Scam
2. Grandparent Scam
3. Romance Scam
4. Unsolicited Phone Calls
5. "Can You Hear Me?" Scam

Arkansas

1. IRS Impersonation Scam
2. Romance Scam
3. Impending Law Suit Scam
4. IRS Fraudulent Tax Returns

California

1. IRS Impersonation Scam
2. Elder Financial Abuse
3. Romance Scam
4. Unsolicited Phone Calls
5. "Can You Hear Me?" Scam

Colorado

1. IRS Impersonation Scam
2. Computer Tech Support Scams
3. Romance Scams
4. "Can You Hear Me?" Scam
5. Debt Collection Scams

Connecticut

1. Grandparent Scams
2. IRS Impersonation Scam
3. Computer Tech Support Scams
4. Romance Scams
5. Timeshare Scams

Delaware

1. IRS Impersonation Scam

Florida

1. IRS Impersonation Scam
2. Romance Scams
3. Unsolicited Phone Calls
4. Elder Financial Abuse
5. Grandparent Scams

Georgia

1. Elder Financial Abuse
2. IRS Impersonation Scam
3. Romance Scams
4. Computer Tech Support Scams
5. Unsolicited Phone Calls

Hawaii

1. IRS Impersonation Scam
2. Government Grant Scams

Idaho

1. Identity Theft
2. IRS Impersonation Scam
3. Romance Scams

Illinois

1. IRS Impersonation Scam
2. Elder Financial Abuse
3. Unsolicited Phone Calls
4. Government Grant Scams
5. Grandparent Scams

Indiana

1. Unsolicited Phone Calls
2. Grandparent Scams
3. Computer Tech Support Scams
4. Impending Law Suit Scams
5. Social Security Fraud

Iowa

1. Unsolicited Phone Calls
2. Identity Theft
3. Inheritance Scams

Kansas

1. Romance Scams
2. Mortgage Fraud

Kentucky

1. IRS Impersonation Scam
2. Computer Tech Support Scams
3. Romance Scams

Louisiana

1. IRS Impersonation Scam
2. Romance Scams
3. “Can You Hear Me?” Scam
4. Elder Financial Abuse

Maine

1. IRS Impersonation Scam
2. “Can You Hear Me?” Scam
3. Unsolicited Phone Calls
4. Grandparent Scam
5. Computer Tech Support Scams

Maryland

1. IRS Impersonation Scam
2. Computer Tech Support Scams
3. Impending Law Suit Scams
4. Health-Related Scams
5. Unsolicited Phone Calls

Massachusetts

1. Computer Tech Support Scams
2. IRS Impersonation Scam
3. Romance Scams
4. Unsolicited Phone Calls
5. Grandparent Scams

Michigan

1. IRS Impersonation Scam
2. Computer Tech Support Scams
3. Romance Scams
4. Unsolicited Phone Calls
5. “Can You Hear Me?” Scam

Minnesota

1. IRS Impersonation Scam
2. Romance Scams
3. Unsolicited Phone Calls
4. Counterfeit Check Scams
5. Timeshare Scams

Mississippi

1. IRS Impersonation Scam
2. Grandparent Scam
3. Elder Financial Abuse

Missouri

1. IRS Impersonation Scam
2. Identity Theft
3. Grandparent Scams
4. Government Grant Scams

Montana

1. IRS Impersonation Scam

Nebraska

1. Elder Financial Abuse
2. Legal Referral

Nevada

1. IRS Impersonation Scam
2. Government Grant Scam
3. Debt Collection Scam
4. IRS Fraudulent Tax Returns
5. Investment Fraud

New Hampshire

1. Unsolicited Phone Calls
2. Debt Collection Scams

New Jersey

1. IRS Impersonation Scam
2. Grandparent Scam
3. Computer Tech Support Scams
4. Unsolicited Phone Calls
5. Government Grants

New Mexico

1. Computer Tech Support Scams

New York

1. IRS Impersonation Scam
2. Unsolicited Phone Calls
3. Computer Tech Support Scams
4. Grandparent Scams
5. “Can You Hear Me?” Scam

North Carolina

1. Romance Scams
2. IRS Impersonation Scams
3. Grandparent Scams
4. Elder Financial Abuse
5. Identity Theft

North Dakota

1. Unsolicited Phone Calls

Ohio

1. IRS Impersonation Scam
2. Grandparent Scams
3. Counterfeit Check Scams
4. Unsolicited Phone Calls
5. Computer Tech Support Scams

Oklahoma

1. Grandparent Scams
2. IRS Impersonation Scam
3. Unsolicited Phone Calls
4. Elder Financial Abuse
5. Romance Scams

Oregon

1. Elder Financial Abuse
2. Impending Law Suit Scams
3. Unsolicited Phone Calls
4. Identity Theft
5. Computer Tech Support Scams

Pennsylvania

1. IRS Impersonation Scam
2. Unsolicited Phone Calls
3. Wire Fraud
4. Elder Financial Abuse
5. Computer Tech Support Scams

Rhode Island

1. IRS Impersonation Scam
2. Unsolicited Phone Calls
3. Romance Scams
4. Grandparent Scams
5. IRS Fraudulent Tax Returns

South Carolina

1. IRS Impersonation Scam
2. Romance Scams
3. Identity Theft
4. Grandparent Scams
5. Elder Financial Abuse

South Dakota

1. Grandparent Scams
2. Unsolicited Phone Calls

Tennessee

1. IRS Impersonation Scam
2. Grandparent Scams
3. Identity Theft
4. Investment Fraud
5. Unsolicited Phone Calls

Texas

1. IRS Impersonation Scam
2. Romance Scams
3. Grandparent Scam
4. Computer Tech Support Scam
5. Government Grant Scam

Utah

1. IRS Impersonation Scam
2. Grandparent Scam
3. Unsolicited Phone Calls
4. "Can You Hear Me?" Scam
5. Timeshare Scams

Vermont

1. IRS Impersonation Scam

**Since the Fraud Hotline did not receive any calls from consumers in Vermont in 2017, this list is based on call data from 2015 and 2016.*

Virginia

1. Grandparent Scams
2. Unsolicited Phone Calls
3. Computer Tech Support Scams
4. Elder Financial Abuse
5. IRS Impersonation Scam

Washington

1. IRS Impersonation Scam
2. Unsolicited Phone Calls
3. Grandparent Scam
4. Romance Scams
5. Investment Fraud

West Virginia

1. IRS Impersonation Scam
2. Elder Financial Abuse
3. Robbery / Theft

Wisconsin

1. IRS Impersonation Scam
2. Grandparent Scam
3. Elder Financial Abuse
4. Identity Theft

Wyoming

1. IRS Impersonation Scam

Appendix 1: 2017 Complete Aging Fraud Hotline Statistics

Scam Type	Total
IRS Scam	381
Unsolicited Phone Calls	166
Sweepstakes / Jamaican Lottery Scam	111
Can You Hear Me? Scam	97
Grandparent Scam	87
Computer Scam	79
Romance Scam	64
Elder Abuse	51
Identity Theft	40
Government Grant	37
Impending Law Suits	37
Wire Fraud	28
Mail Scam	22
Health-Related Scam	21
Check Scam	19
Debt Collection Scam	13
IRS Fraudulent Tax Returns	10
Investment Fraud	9
Utility Scams	9
Mortgage Fraud	8
Timeshare Scam	6
Social Security Fraud	5
Spam Email	5
Charity Scam	4
Home Improvement Scam	4
Legal Referral	4
Pension/Retirement Savings Fraud	2
Unclaimed Property Scam	2
Bank Fraud	1
Grand Jury Impersonation Scam	1
Inheritance Scam	1
Payday Lending	1
Robbery/Theft	1
Miscellaneous**	137
TOTAL	**1463**

Origin of Call	Total
Alabama	11
Alaska	0
Arizona	36
Arkansas	12
California	66
Colorado	8
Connecticut	14
Delaware	4
Florida	79
Georgia	14
Hawaii	3
Idaho	3
Illinois	31
Indiana	20
Iowa	6
Kansas	2
Kentucky	11
Louisiana	5
Maine	521
Maryland	62
Massachusetts	12
Michigan	21
Minnesota	8
Mississippi	5
Missouri	9
Montana	1
Montana	4

Origin of Call	Total
Nebraska	3
Nevada	6
New Hampshire	3
New Jersey	22
New Mexico	1
New York	61
North Carolina	12
North Dakota	6
Ohio	24
Oklahoma	8
Oregon	11
Pennsylvania	162
Rhode Island	8
South Carolina	15
South Dakota	3
Tennessee	15
Texas	60
Utah	9
Vermont	0
Virginia	23
Washington	13
West Virginia	6
Wisconsin	10
Wyoming	1
Unknown	17
Wyoming	2

Appendix 2: Aging Committee's Top 10 Historical Data

2017 Rank	Type of Scam	2015	2016	2017
1	IRS Impersonation Scam	387	1680	381
2	Robocalls / Unsolicited Phone Calls	93	92	166
3	Sweepstakes / Jamaican Lottery Scam	157	124	111
4	"Can you hear me?" Scam	** New Scam in 2017**		97
5	Grandparent Scam	63	39	87
6	Computer Scam	87	77	79
7	Romance Scam	28	36	64
8	Elder Financial Abuse	59	53	51
9	Identity Theft	75	16	40
10	Government Grant Scam	37	35	37

Appendix 3. Fraud Resources

General Consumer Complaints

Agency	Website	Phone Number
Better Business Bureau	www.bbb.org	Use zip code to find local caller's local BBB
National Do-Not-Call Registry	www.donotcall.org	1-888-382-1222
National Do-Not-Call Complaint Form	www.fcc.gov/complaints	1-888-225-5322
USA.gov for Seniors	http://www.usa.gov/Topics/Seniors.shtml	1-800-333-4636
AARP Fraud Fighter Call Center	http://www.aarp.org/content/dam/aarp/money/scams_fraud/2013-10/Who-To-Contact-AARP.PDF	1-877-908-3360
AARP Fraud Watch Network	www.aarp.org/fraudwatchnetwork	1-800-646-2283
Local/State AG Office	http://www.naag.org/current-attorneys-general.php	
US Senator/Rep. Office for Constituent Casework	http://www.senate.gov/general/contact_information/senators_cfm.cfm http://www.house.gov/	
Federal Trade Commission Sentinel Network	http://www.ftc.gov/enforcement/consumer-sentinel-network	1-877-701-9595
Federal Trade Commission Consumer Response Center	http://www.consumer.ftc.gov/	1-877-382-4357
Federal Communications Commission	http://www.fcc.gov/	1-888-225-5322
State/Local Consumer Protection Agencies	http://www.usa.gov/directory/stateconsumer/index.shtml	
Assist Guide Information Services – Government Agency/Programs by State	http://www.agis.com/listing/default.aspx	
DOJ Elder Justice Initiative	www.justice.gov/elderjustice/	1-202-514-2000 (DOJ Main Switchboard)
Area Agency on Aging	http://www.n4a.org/	
IRS Scam Reporting Hotline	https://www.treasury.gov/tigta/contact_report_scam.shtml	1800-366-4484
HHS OIG	http://www.hhs.gov/grants/grants/avoid-grant-scams/index.html	1-800-447-8477
National Center for Victims of Crime	https://www.victimsofcrime.org/	1-855-484-2846
FINRA Securities Helpline for Seniors	http://www.finra.org/investors/finra-securities-helpline-seniors	1- 844-574-3577
Center for Elder Rights Advocacy	http://www.legalhotlines.org/legal-assistance-resources.html	

Resources – Issue Area

Computer Fraud

If receiving spam email, forward the spam email to spam@uce.gov . This website is managed by the Federal Trade Commission.

Agency	Website	Phone Number
Internet Crime Complaint Center (IC3)	www.ic3.gov/crimeschemes.aspx	
Federal Trade Commission	http://www.consumer.ftc.gov/articles/0346-tech-support-scams	1-877-382-4357

Elder Abuse

Agency	Website	Phone Number
Local/State AG Office	http://www.naag.org/current-attorneys-general.php	
National Adult Protection Services Association	Find local APS Association: www.napsa-now.org/get-help/help-in-your-area/	
DOJ Elder Justice Initiative	www.justice.gov/elderjustice/	1-202-514-2000 (DOJ Main Switchboard)
Financial exploitation	www.eldercare.gov	1-800-677-1116
Center for Elder Rights Advocacy	http://www.legalhotlines.org/legal-assistance-resources.html	

Health-Related Scams

Agency	Website	Phone Number
Federal Communications Commission	www.fcc.gov/complaints	1-888-225-5322
Federal Trade Commission	http://www.consumer.ftc.gov/blog/robocall-scams-push-medical-alert-systems	1-888-382-1222
Medicare.gov	State/Local resources: www.medicare.gov/contacts/topic-search-criteria.aspx	
DHHS IG to report Medicare Fraud	https://forms.oig.hhs.gov/hotlineoperations/	1-800-447-8477
Medicare Ombudsman's Office	http://www.medicare.gov/claims-and-appeals/medicare-rights/get-help/ombudsman.html	
Medicare Rights Center	http://www.medicarerights.org/	1-800-333-4114
Health Insurance Marketplace Fraud	DHHS IG Marketplace Consumer Fraud Hotline: https://oig.hhs.gov/fraud/consumer-alerts/alerts/marketplace.asp	1-800-318-2596

Identity Theft

Call one of the three national credit bureaus to place a scam alert:

- **Equifax:** 1-800-685-1111 (Fraud Hotline: 1-888-766-0008)
- **Experian:** 1-888-397-3742 (Fraud Hotline: 1-888-397-3742)
- **TransUnion:** 1-800-916-8800 (Fraud Hotline: 1-800-680-7289)

Agency	Website	Phone Number
Local Police Department		Check with your local police department. Many departments have non-emergency numbers you may call to file a report.
FTC ID Theft Hotline	https://www.identitytheft.gov/	1-877-438-4338
FTC Identity Theft Resource Center	http://www.consumer.ftc.gov/features/feature-0014-identity-theft	1-888-400-5530
IRS Identity Protection Specialized Unit	http://www.irs.gov/Individuals/Identity-Protection	877-777-4778
Office of the Comptroller of the Currency	http://www.occ.gov/topics/bank-operations/financial-crime/identity-theft/index-identity-theft.html	1-202-649-6800
SSA – File a report of theft or fraudulent use of SS number	http://www.ssa.gov/pubs/EN-05-10064.pdf	1-800-269-0271

Investment/Securities Fraud

Agency	Website	Phone Number
FINRA Securities Helpline for Seniors	http://www.finra.org/investors/finra-securities-helpline-seniors	1- 844-574-3577
Consumer Financial Protection Bureau (CFPB)	http://www.consumerfinance.gov	1-855-411-2372
CFPB ombudsman – consumer who has a process issue from using CFPB complaint function	http://www.consumerfinance.gov/ombudsman/	1-855-830-7880
Financial Industry Regulatory Authority (FINRA)	www.finra.org	1-800-289-9999
Better Business Bureau	www.bbb.org	
Securities Investor Protection Corporation (SIPC)	http://www.sipc.org/	1-202-371-8300
Federal Reserve Consumer Help	http://www.federalreserveconsumerhelp.gov/	1-888-851-1920

Jamaican Lottery Scam

Agency	Website	Phone Number
AARP Fraud Fighter Call Center	http://www.aarp.org/content/dam/aarp/money/scams_fraud/2013-10/Who-To-Contact-AARP.PDF	1-800-646-2283
Department of Homeland Security Tip Line	https://www.ice.gov/tipline	1-866-347-2423
Postal Inspector	https://postalinspectors.uspis.gov/	1-877-876-2455
Western Union Fraud Unit	https://www.westernunion.com/us/en/fraudawareness/fraud-report-to-authorities.html	1-800-448-1492
Moneygram Fraud Unit	http://corporate.moneygram.com/compliance/fraud-prevention	1-800-666-3947
GreenDot MoneyPak Report Fraud	https://www.moneypak.com/protectyourmoney.aspx	
FBI Field Office	http://www.fbi.gov/contact-us/field	
Secret Service Field Office	http://www.secretservice.gov/field_offices.shtml	

PCH/Sweepstakes Fraud

Agency	Website	Phone Number
Postal Inspector	https://postalinspectors.uspis.gov/	1-877-876-2455
AARP Fraud Fighter Call Center	http://www.aarp.org/content/dam/aarp/money/scams_fraud/2013-10/Who-To-Contact-AARP.PDF	1-800-646-2283
FCC	www.fcc.gov/complaints	1-888-225-5322
FTC Consumer Response Center	http://www.consumer.ftc.gov/	1-877-382-4357
PCH Fraud Department		1-800-392-4190
PCH Email Scams	Forward to abuse@pch.com	

Mortgage Fraud

Agency	Website	Phone Number
Consumer Financial Protection Bureau (CFPB)	http://www.consumerfinance.gov/	1-855-411-2372
Foreclosure Prevention Counseling – HUD's Housing Counseling Program	www.hud.gov/offices/hsf/sfh/hcc/fc/	Find State counseling program
HUD OIG Fraud Hotline	https://www.hudoig.gov/report-fraud	1-800-347-3735

Payday Lending

Agency	Website	Phone Number
Consumer Financial Protection Bureau (CFPB)	http://www.consumerfinance.gov/	1-855-411-2372
FTC Consumer Response Center	http://www.consumer.ftc.gov/	1-877-382-4357

Social Security Fraud

Contact local Social Security field office to place a freeze on any changes to their Social Security account to prevent future misuse of their Social Security benefits.

Call one of the three national credit bureaus to place a scam alert:

- **Equifax:** 1-800-685-1111 (Fraud Hotline: 1-888-766-0008)
- **Experian:** 1-888-397-3742 (Fraud Hotline: 1-888-397-3742)
- **TransUnion:** 1-800-916-8800 (Fraud Hotline: 1-800-680-7289)

Agency	Website	Phone Number
SSA OIG	https://www.socialsecurity.gov/fraudreport/oig/public_fraud_reporting/form.htm	1-800-269-0271
Financial Exploitation	www.eldercare.gov	1-800-677-1116
Information on Representative Payee for victim's social security benefits	http://www.socialsecurity.gov/payee/faqrep.htm#a0=2.	
SSA	https://secure.ssa.gov/ICON/main.jsp	1-800-772-1213

Timeshare Scam

Agency	Website	Phone Number
State Attorney General	http://www.naag.org/current-attorneys-general.php	
FTC Consumer Response Center	http://www.consumer.ftc.gov/	1-877-382-4357
Better Business Bureau	www.bbb.org	
Internet Crime Complaint Center (IC3)	www.ic3.gov/crimeschemes.aspx	

Grandparent Scam

Agency	Website	Phone Number
FTC Consumer Response Center	http://www.consumer.ftc.gov/	1-877-382-4357
State Attorney General	http://www.naag.org/current-attorneys-general.php	
Department of Homeland Security Tip Line	https://www.ice.gov/tipline	1-866-347-2423
FBI Field Office	http://www.fbi.gov/contact-us/field	
Secret Service Field Office	http://www.secretservice.gov/field_offices.shtml	

State Attorneys General

Alabama
Steve Marshall
(334)-242-7300

Alaska
Jahna Lindemuth
(907)-269-5100

Arizona
Mark Brnovich
(602)-542-5025

Arkansas
Leslie Rutledge
(800)-482-8982

California
Xavier Becerra
(916)-445-9555

Colorado
Cynthia Coffman
(720)-508-6022

Connecticut
George Jepsen
(860)-808-5400

Delaware
Matthew Denn
(302)-577-8600

District of Columbia
Karl A . Racine
(202)-442-9828

Florida
Pam Bondi
(850)-414-3300

Georgia
Chris Carr
(404)-656-3300

Hawaii
Douglas Chin
(808)-586-1500

Idaho
Lawrence G. Wasden
(208)-334-2400

Illinois
Lisa Madigan
(312)-814-3000

Indiana
Curtis Hill
(317)-232-6330

Iowa
Tom Miller
(515)-281-5044

Kansas
Derek Schmidt
(785)-296-3751

Kentucky
Andy Beshear
(502)-696-5300

Louisiana
Jeff Landry
(225)-326-6465

Maine
Janet T. Mills
(207)-626-8800

Maryland
Brian Frosh
(410)-576-6300

Massachusetts
Maura Healey
(617)-727-2200

Michigan
Bill Schuette
(517)-373-1110

Minnesota
Lori Swanson
(651)-296-3353

Mississippi
Jim Hood
(601)-359-3680

Missouri
Josh Hawley
(573)-751-3321

Montana
Tim Fox
(406)-444-2026

Nebraska
Doug Peterson
(402)-471-2682

Nevada
Adam Laxalt
(702)-486-3132

New Hampshire
Joseph Foster
(603)-271-3658

New Jersey
Gurbir Grewal
(609)-292-8740

New Mexico
Hector Balderas
(505)-490-4060

New York
Eric T. Schneiderman
(518)-776-2000

North Carolina
Josh Stein
(919)-716-6400

North Dakota
Wayne Stenehjem
(701)-328-2210

Ohio
Mike DeWine
(614)-466-4986

Oklahoma
Mike Hunter
(405)-521-6246

Oregon
Ellen Rosenblum
(503)-378-4400

Pennsylvania
Josh Shapiro
(701)-328-2210

Rhode Island
Peter Kilmartin
(401)-274-440

South Carolina
Alan Wilson
(803)-734-3970-

South Dakota
Marty Jackley
(605)-773-3215

Tennessee
Herbert Stlatery
(615)-741-3491

Texas
Ken Paxton
(512)-463-2100

Utah
Sean Reyes
(800)-244-4636

Vermont
TJ Donovan
(802)-828-3173

Virginia
Mark Herring
(804)-786-2071

Washington
Bob Ferguson
(360)-753-6200

West Virginia
Patrick Morrisey
(304)-558-2021

Wisconsin
Brad Schimel
(608)-266-1221

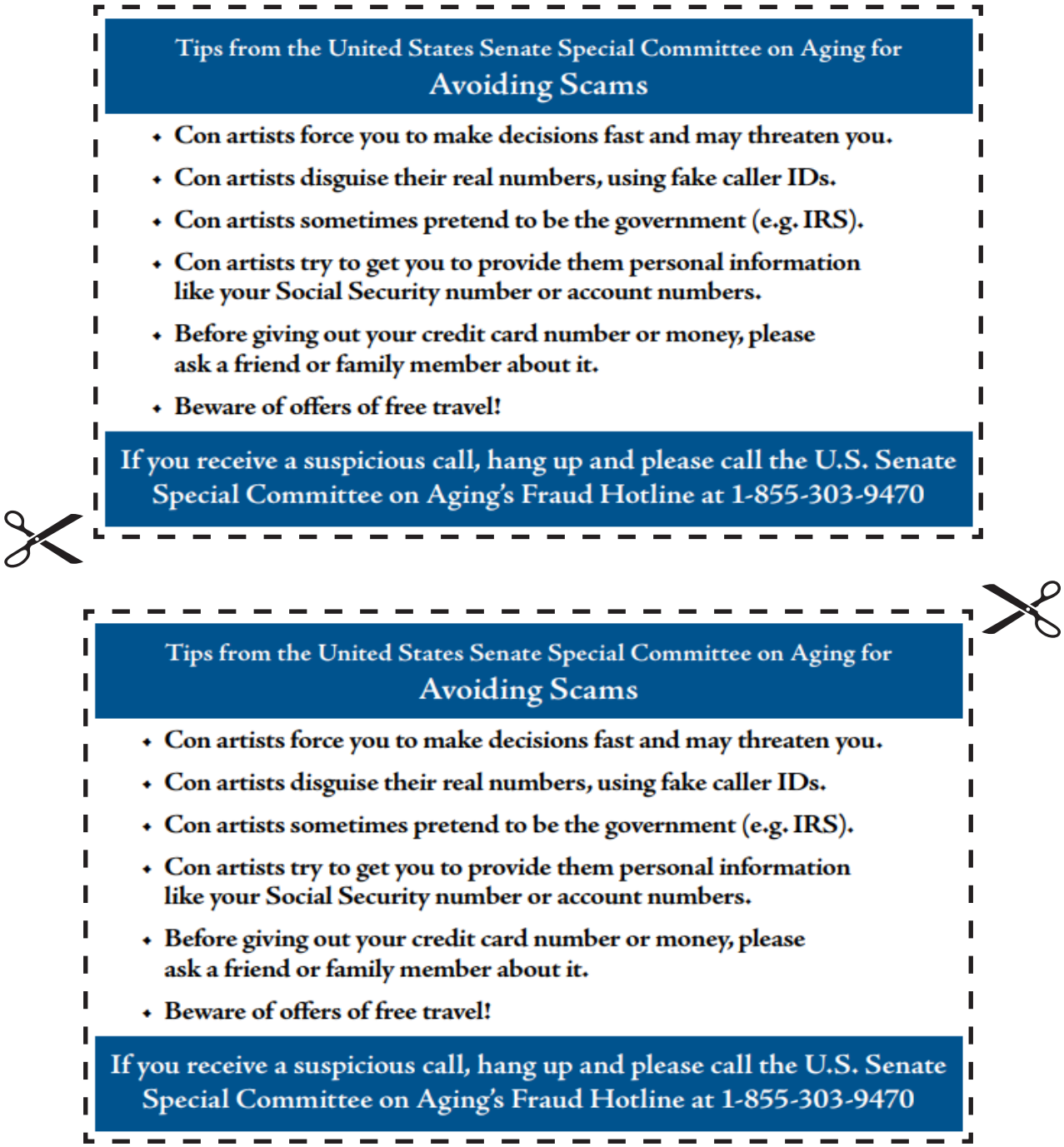
Wyoming
Peter K. Michael
(307)-777-7841

Puerto Rico
Wanda Vasquez Garced
(787)-721-2900

US Virgin Islands
Claude Earl Walker
(340)-774-5666

Appendix 4. Cut out Scam Prevention Tip Cards

Please cut out these cards and place them by your phone. Feel free to give one to a friend, family member, or neighbor. We hope these cards may be a useful tool to help protect you against the deceptive means scammers use to try to get your money and personal information.



Tips from the United States Senate Special Committee on Aging for
Avoiding Scams

- Con artists force you to make decisions fast and may threaten you.
- Con artists disguise their real numbers, using fake caller IDs.
- Con artists sometimes pretend to be the government (e.g. IRS).
- Con artists try to get you to provide them personal information like your Social Security number or account numbers.
- Before giving out your credit card number or money, please ask a friend or family member about it.
- Beware of offers of free travel!

If you receive a suspicious call, hang up and please call the U.S. Senate Special Committee on Aging's Fraud Hotline at 1-855-303-9470

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1-855-303-9470

They Did 30 Years for Someone Else's Crime. Then Paid for It.

More than $1 million in compensation was supposed to help two brothers rebuild their lives. Instead, the money made them a target.

Henry McCollum spent 30 years on death row before DNA evidence exonerated him and his half brother, Leon Brown, in a rape and murder case in North Carolina. Much of their $750,000 settlements from the state were siphoned off by their supposed protectors. Credit Travis Dove for The New York Times

By Joseph Neff

April 7, 2018

FAYETTEVILLE, N.C. — The state of North Carolina paid $750,000 to Henry McCollum in 2015 to compensate him for the 30 years that he, an innocent man, spent on death row.

Seven months later, he was broke. Mr. McCollum, who is intellectually disabled, then began borrowing money at 38 percent interest. He kept his financial plight hidden from friends and supporters from his death row years.

But last fall, he briefly and wearily opened up when he was handed documents showing he owed $130,000 on $65,000 in recent loans.

"Sometimes I feel like I shouldn't be out here," he said.

Mr. McCollum and his half brother, Leon Brown, who is also intellectually disabled, were demonized and convicted in one of the state's most notorious rape and murder cases. Their

decades in prison and their disabilities would have made for a difficult return to society under the best circumstances.

What happened to them after their release proved even more problematic. As exonerees, they emerged with big dollar signs on their backs. Most states compensate the wrongfully imprisoned in amounts that can reach millions of dollars, and exonerees can also win settlements from police agencies — awards that can attract predators.

Mr. McCollum, 54, and Mr. Brown, 50, proved virtually helpless as hundreds of thousands of dollars of state compensation were siphoned off by their supposed protectors: a sister back home; a lawyer from Orlando, Fla.; a self-proclaimed advocate from Atlanta, and her so-called business partner, a college instructor from Brooklyn, according to documents and interviews by The Marshall Project.

By the time a federal judge intervened in the spring of 2017, no trust had been set up for the brothers and money intended for their care had been spent on predatory loans, exorbitant legal fees, multiple cars, women's jewelry and children's toys.

Jeffrey Deskovic, an exoneree who established a foundation to help the wrongfully convicted, said he had advised about 60 other exonerees on how to manage compensation and the unwanted attention it brings. The experiences of Mr. McCollum and Mr. Brown are extreme, he said, but the underlying dynamics are common.

"All were hit up for money by family and friends or were targets of scammers," Mr. Deskovic said.

The brothers' tragic story began decades earlier. Schools had identified Henry McCollum and Leon Brown as mentally challenged: Mr. McCollum read at a second-grade level when he dropped out of high school; his younger brother could barely read or write.

In 1983, the body of 11-year-old Sabrina Buie was found in a soybean field in Red Springs. The killer had jammed her underwear down her throat with a stick.

A field in Red Springs, N.C., where the body of Sabrina Buie, the 11-year-old victim in the brothers' case, was found. Credit Jeremy M. Lange for The New York Times

A schoolgirl's rumor prompted detectives to interrogate the brothers, then 19 and 15, who confessed to the crime.

Both soon recanted, saying they were coerced, but to no avail. They became two more convictions for District Attorney Joe Freeman Britt, listed as the deadliest prosecutor in the Guinness Book of World Records.

A jury sentenced both to be executed, and Mr. Brown, at 16, became the youngest person on death row. After the State Supreme Court ordered separate retrials, Mr. McCollum returned to death row and Mr. Brown was sentenced to life in prison with the label of child rapist.

Then, in 2014, the North Carolina Innocence Inquiry Commission announced that new DNA testing of a cigarette butt found at the crime scene matched the DNA of Roscoe Artis, who had lived next door.

While the brothers were in jail awaiting trial, Mr. Artis raped and strangled an 18-year-old woman one mile from where Sabrina Buie was killed. Mr. Britt tried and convicted Mr. Artis for that crime before he put Mr. McCollum and Mr. Brown on trial. Police investigated Mr. Artis as a suspect in Sabrina's murder, but never told defense lawyers.

In September 2014, a judge declared Mr. McCollum and Mr. Brown innocent, sending a packed courtroom into pandemonium.

The brothers knew the wrongs done to convict them. It's less clear they understand the wrongs they have suffered since their exonerations.

Drafting a Deal

Nobody was more elated by the exonerations than Ken Rose, Mr. McCollum's lawyer. Mr. Rose had been visiting his client on death row for 20 years: "Every time I saw him, he'd say, 'I don't belong here, I'm innocent, when can I go home?'"

Before the brothers could qualify for the maximum $750,000 in state reparations, Mr. Rose needed to obtain an official pardon from the governor.

In the meantime, the brothers went home to the care of Geraldine Brown, Mr. Brown's sister and Mr. McCollum's half sister. In the 30 years the men were in prison, Ms. Brown had visited Mr. Brown once; she never went to see Mr. McCollum.

Geraldine Brown, left, Mr. Brown's sister, in 2015. She spent much of Mr. Brown's money after she was named his guardian. Credit Travis Dove for The New York Times

She had no job or car, and relied on funds raised by Mr. Rose's nonprofit law center for rent and utilities. Sometimes social workers took the men shopping. They said they learned that if they entrusted the sister with cash, the bills went unpaid.

Months passed with no pardon and no compensation. A cousin mentioned the brothers' plight to Kimberly Weekes, an Atlanta woman who said she was an advocate who worked on voter registration, food drives and recycling campaigns.

After speaking with Ms. Brown, Ms. Weekes contacted an instructor at Metropolitan College in New York who she said was her business partner. Ms. Weekes and the partner, Deborah Pointer, then drafted a contract for "advocacy and civil rights." The brothers would owe Pointer & Weekes Inc. a cut of any reparation: 10 percent of loans, 5 percent of state compensation and 1 percent of lawsuit settlements.

Ms. Brown signed and Ms. Weekes began searching for a lawyer to take over the case.

Mr. Rose soon received a fax from Ms. Brown saying that he should step aside and that Ms. Weekes represented the family "in all or any of the Civil/Litigation."

Mr. Rose viewed the fax as nonsense. But he didn't view the women as cranks: "I think they were very serious in taking whatever they could from my clients."

Taking a Big Cut

On Feb. 27, Ms. Brown and her brothers finalized a contract with Patrick Megaro, a lawyer based in Orlando, Fla., to take over from Mr. Rose and other lawyers suing the police. Leon Brown signed with an "X." The contract specified that the family owed Mr. Megaro 33 percent of awards, even if they fired him. Legal experts said the contingency clause probably violated state bar rules.

Ms. Weekes and Ms. Pointer secured money for the brothers — and for themselves — from a firm that lends to plaintiffs in anticipation of a settlement or jury award.

Mr. Megaro approved two $100,000 loans, one for each brother, with an annual interest rate of 41.6 percent and a $5,000 fee wrapped into the principal. The loan documents show that Mr. Megaro authorized the payment of $20,000 to Ms. Pointer and Ms. Weekes.

Mr. Megaro sent a letter to Mr. Rose and the legal team suing the police, demanding their files and stating that he alone represented the brothers. The coup stunned the lawyers, but they could see no way to challenge the contract.

After her $10,000 payout arrived, Ms. Weekes made one trip to North Carolina. She said she helped the family with shopping and found a nicer rental home. Ms. Pointer never met the brothers. She set up a Facebook page and a change.org petition, and had her students at Metropolitan College call the governor's office to demand a pardon.

In June 2015, the governor pardoned the men. A publicist for Ms. Pointer and Ms. Weekes touted them as "the two female power execs" behind the men's freedom.

In September 2015, an administrative law judge approved the $750,000 payouts to each brother. Mr. Brown did not attend the hearing. He had been admitted to a psychiatric facility, his seventh since his release.

Mr. Brown and his sister outside a home he and Mr. McCollum shared after their release from prison. Credit Travis Dove for The New York Times

Mr. Brown had had psychotic breaks in prison, which were now getting worse. His sister could not get him to take his antipsychotic medications. She said he had talked about being raped by inmates and tied to his bunk by guards. He worried that God wouldn't forgive him. He rocked in place and refused to eat or drink for days.

The day before the administrative hearing, Mr. Megaro requested that Ms. Brown be named Leon Brown's guardian, despite her inability to manage his mental illness or her own finances. Creditors have filed at least 16 liens against her; she has been evicted three times. Nevertheless, the guardianship was granted.

In October, North Carolina wrote Mr. Megaro a check for $1.5 million, half intended for each client, tax-free. Mr. Megaro took more than one-third of each brother's compensation, according

to Mr. Brown's court files and Mr. McCollum. Payment on the high-interest loan took another $110,000. Each brother was left with less than half of his award.

Mr. Megaro declined to discuss his fees, the loans, the payments to the advocates or making Ms. Brown guardian.

In an April 2017 interview, he denied taking advantage of his clients.

"I like these guys," Mr. Megaro said. "They are nice people, even if they are mentally disabled. It doesn't matter."

' Frivolous Spending'

Mr. Rose, who worked pro bono on the pardons, had planned to protect the brothers' money in trusts that guaranteed fixed payments for life, about $3,000 a month each, based on the $750,000 awards.

That has been the practice in North Carolina: Exonerees keep their entire compensation. Lawyers are typically paid by taking a cut of settlements with the police.

For his part, Mr. Megaro did not set up trusts, even after admitting in court that his clients needed protection from "fraudsters and frivolous spending." After taking his cut, Mr. Megaro distributed the remainder to Mr. McCollum and began sending money to Ms. Brown, as Leon's guardian.

Mr. McCollum was soon broke and borrowing with Mr. Megaro's approval. He would not discuss where the money went.

His brother's finances, supervised by the court, have more of a paper trail. Although guardians can legally spend money only on their wards, Ms. Brown bought women's jewelry and shoes, diapers and toys.

Motor vehicle records show she also acquired a Dodge van, 2010 Mustang, 2004 BMW and 1995 Lexus.

The court ultimately stripped her of the guardianship and cut off access to her brother's money. At a hearing, Ms. Brown admitted she had also asked Mr. McCollum for thousands of dollars and had taken out a $25,000 high-interest loan in Leon Brown's name, also with Mr. Megaro's approval.

The judge found her in contempt of court and ordered her jailed.

"Why you would take advantage of a poor soul like that, I do not know," the judge said.

Ms. Brown replied: "I'm sorry you feel that way."

She conceded in an interview that she should have never been made guardian. When it comes to lawyers, loans and contracts, Ms. Brown said: “I’m incompetent too. I’m not going to stand here and lie.”

Last spring, Mr. Megaro filed court papers saying he had reached a settlement with the Red Springs police. Each client would be awarded $500,000.

Judge Terrence Boyle of Federal District Court announced he would not approve any settlement before determining whether Mr. McCollum was competent to sign the contract with Mr. Megaro. Judge Boyle appointed a guardian to investigate.

The guardian discovered the predatory loans. He learned Mr. Megaro had not set up a trust or estimated his clients’ future medical needs. After Mr. Megaro’s fees and loan payments, Mr. McCollum would net $178,000 and Mr. Brown $308,000 from the police settlement.

At the next hearing, Mr. Megaro angered the judge by repeatedly refusing to reveal his fees for the earlier state compensation.

Mr. McCollum, left, leaving court in March. Credit Jeremy Lange for The Marshall Project

He insisted that Mr. McCollum was competent to hire his own lawyer.

Judge Boyle zeroed in on this claim when Mr. Rose took the stand: “Is it your impression that the same vulnerability that subjected him to a false confession and 31 years of death row imprisonment is now operating on his claims for recovery, that he’s subject to manipulation and control?”

Mr. Rose responded: “There’s no question in my mind, your honor, that’s true.”

At the next hearing, Judge Boyle declared that the brothers were incompetent and that their contracts with Mr. Megaro were void.

The judge said he would approve the police settlement, $500,000 for each brother, and would determine Mr. Megaro’s fees. Court-appointed guardians would put the money in trust and the brothers would not be obliged to repay their loans out of the settlement.

Mr. Megaro agreed to the terms but the case is far from over. The State Bureau of Investigation and the Robeson County Sheriff's Office still face lawsuits.

Mr. McCollum lives in Virginia with his fiancé. On Monday, a judge there appointed a guardian to protect Mr. McCollum's finances and recover any misappropriated money.

Mr. Brown lives in a North Carolina group home, where his sister visits regularly and sometimes takes him home on weekends. In a phone call, Mr. Brown said he didn't belong in a group home. "A judge put me here," he said. "I want my freedom."

As for Ms. Pointer and Ms. Weekes, they said they were still owed $75,000 from the state compensation and may sue Mr. Megaro. Asked if she had any regrets, Ms. Pointer said she was offended by the question.

"We came into this with pure hearts to help two brothers who had suffered," she said.

Joseph Neff is a staff writer for The Marshall Project, a nonprofit news organization that focuses on criminal justice issues.

A version of this article appears in print on April 8, 2018, on Page A12 of the New York edition with the headline: As Wrongly Imprisoned Men Went Free, Predators Pounced.

Tab 13:
Consent
to Treatment

Consent to Treatment

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Patient Right to Self-Determination

"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without the patient's consent commits an assault for which he is liable in damages."

- Justice Cardozo, *Schloendorf v. Society of New York Hospitals*, 105 N.E. 92 (1914).

Patient Right to Information

- Surgeons failed to warn patient of risk of permanent paralysis as a result of the spinal surgery
- Surgeons had a duty to disclose "any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."
  - *Salgo v. Leland Stanford Jr. Board of Trustees*, 317 P.2d 170 (1957)

UNC SCHOOL OF GOVERNMENT

Patient Right to Refuse Treatment

- Patient sued physician for failure to obtain informed consent to cobalt radiation therapy, from which she suffered severe radiation burns.
- "A doctor might well believe that an operation or form of treatment is desirable or necessary but the law does not permit him to substitute his own judgment for that of the patient . . ."—*Natansan v. Kline*, 350 P.2d 1093 (1960)

Consent to Treatment

- Treatment requires patient consent
- Consent must be informed
- Patient may refuse treatment that others feel is necessary

Exceptions

- A person who currently lacks sufficient understanding or capacity to make and communicate mental health treatment decisions is clinically incapable of giving informed consent to treatment
- A person who has been adjudicated incompetent is legally incapable of giving informed consent to treatment

Persons with Mental Disabilities

- Lack of decisional capacity cannot be presumed because the individual is receiving treatment for mental illness or intellectual or developmental disabilities
- Obligation to obtain informed consent stands except:
  - where the patient has been judicially declared incompetent, or
  - where the patient, either temporarily or permanently, has been determined by a health professional to lack decisional capacity

NC Mental Health Act—G.S. 122C

Each voluntarily admitted client or the client's legally responsible person has the right to consent to or refuse any treatment

G.S. 122C-57(d)

Legally Responsible Person Means:

- When applied to an adult who has been adjudicated incompetent, a guardian.
  - "Guardian" means a person appointed as a guardian of the person or a general guardian by the court under Chapter 35A
- When applied to an adult who is "incapable," as defined in G.S. 122C-72(c), and who has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney.

G.S. 122C-3(20)

Mental Health Act—Consent to Treatment for Adults

- Adult client
- Adult adjudicated incompetent--court appointed guardian
- Adult who is "incapable"-- a health care agent named in a health care power of attorney

UNC

Other Legally Responsible Persons

State law outside of MH/DD/SA act recognizes other surrogate decision makers—GS 90-21.13

- Attorney-in-fact
- Spouse
- Majority of parents and children ≥ 18 years of age
- Majority of siblings ≥ 18
- Established relationship, good faith, can communicate wishes

S 630 would add these to GS 122C, State Mental Health Act

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G.S. 35A-1241. Powers and duties of guardian of the person

The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service

- Unless patient has a health care agent appointed pursuant to a valid health care power of attorney
- The guardian may petition the clerk for the clerk's concurrence in the consent or approval

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Hypothetical Case

- Patient diagnosed in 2013 with schizophrenia.
- Guardian recently appointed because of patient's "health issues and failure to attend to basic needs." Patient not taking his medication for schizophrenia and a serious heart condition. Not eating very much.
- Patient denies having a mental illness and refuses to meet with guardian. Tells guardian, "you better back off, Jack." "Don't you come around me."
- Guardian says patient is "menacing" and "hostile."

Questions?

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Resources:

- Mental health website sog.unc.edu/resources/microsites/mental-health
- "Mental Health Services," by Mark F. Botts, in County and Municipal Government in North Carolina, Second Edition, 2014 sog.unc.edu/publications/book-chapters/mental-health-services

Incompetency and Adult Guardianship

Consent to Treatment for Mental Illness, Developmental Disabilities and Substance Abuse

May 2018

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I. State Mental Health Law—the Legally Responsible Person. In North Carolina, a client of mental health, developmental disabilities, and substance abuse (MH/DD/SA) services has the right to

- consent to treatment,
- access client records, and
- authorize the disclosure of client records.

When a client is legally or clinically unable to exercise these rights, someone else must exercise them on behalf of the client.

A. Except where otherwise provided by law, whenever in G.S. Chapter 122C the phrase "client or his legally responsible person" is used, and the client is a *minor* (a person under 18 years of age) or an *incompetent adult* (a person judged by a court to be incompetent), the duty or right involved shall be exercised not by the client, but by the "legally responsible person"[1]

B. The term "legally responsible person"[2] means

1. When applied to an adult who has been adjudicated incompetent, a person appointed as a guardian of the person or general guardian by the court.

2. When applied to an adult who has *not* been adjudicated incompetent but who currently lacks sufficient understanding or capacity to make and communicate mental health treatment decisions ("incapable"), a health care agent named pursuant to a valid health care power of attorney as prescribed in Article 3 of GS Chapter 32. Decisional incapacity, or the status referred to in statute as "incapable," must be determined by a physician or eligible psychologist.[3]

II. Consent to Treatment. Consent to treatment is governed by state law. Each "client or the client's legally responsible person" has the right to consent to or refuse any treatment offered by an

[1] G.S. 122C-4.
[2] See G.S. 122C-3(20) for full statutory definition of "legally responsible person."
[3] GS 122C-72(4).

MH/DD/SA facility.[4] The client or the client's legally responsible person shall be informed of the potential risks and alleged benefits of the treatment choices.

A. Adult clients: If the client is an adult who has not been adjudicated incompetent and has not been declared by a physician or psychologist to be "incapable" of making treatment decisions (as defined at GS 122C-72(4)), consent to treatment must be given by the adult client.

B. Guardian: If the client is an adult who has been adjudicated incompetent, consent to treatment must be given by the person appointed by the court as guardian of the person or general guardian.

C. Health care agent: If the client has been declared "incapable" (lacks sufficient understanding or capacity to make and communicate mental health treatment decisions) and has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney may provide consent to treatment as authorized in the power of attorney.

III. Access to Records. State law provides that, upon request, a client or the client's legally responsible person, shall have access to confidential information in the client's record except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if there is none, the facility director or his designee.[5]

A. Adult clients: If the client is an adult client who has not been adjudicated incompetent or declared "incapable" (defined at GS 122C-72(4)), the adult client has a right to access his or her own treatment records.

B. Guardian: If the client is an adult who has been adjudicated incompetent, the right to access records belongs to the person appointed by the court as guardian of the person or general guardian.

C. Health care agent: If the client has been declared by a physician or psychologist to be "incapable" (lacks sufficient understanding or capacity to make and communicate mental health treatment decisions) and has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney may access records during the period of time that the client is incapable unless otherwise provided for in the power of attorney.

IV. Consent to Disclose Records. A facility may disclose confidential information if the client or his legally responsible person consents in writing to the release of the information to a specified person.[6] Generally, the authority to have access to, or to consent to the disclosure of, a client's record belongs to the person who authorized the treatment service. Thus, release of confidential

[4] G.S. 122C-57(a), (d). In the case of an emergency or involuntary commitment, a client may be administered treatment or medication despite the refusal of the client or legally responsible person.
[5] GS 122C-53(d) and (c).
[6] GS 122C-53(a).

information requires consent from the client or, if the client is a minor or an adult who has been adjudicated incompetent, the client's legally responsible person.

A. Adult clients: If the client is an adult client who has not been adjudicated incompetent and has not been determined incapable (defined at GS 122C-72(4)), consent to release confidential information must be given by the client.

B. Guardian: If the client is an adult who has been adjudicated incompetent, authorization to release confidential information must be given by the person appointed by the court as guardian of the person or general guardian.

C. Health care agent: If the client has been declared "incapable" and has not been adjudicated incompetent, a health care agent named pursuant to a valid health care power of attorney may authorize disclosure during the client's period of incapacity.

V. The Right to Access or Disclose Records Under Other Applicable Laws.

A. HIPAA Privacy Rule—the Personal Representative. The right to access and to disclose records must be executed by the individual who is the subject of the information (the patient) or the patient's "personal representative." HIPAA generally defines "personal representative" as the person authorized by state law to act on behalf of a minor or an incompetent adult in making decisions related to health care.[7] Therefore, where a person has the authority under state law to act on behalf of a minor or adult—i.e., is a "legally responsible person" under G.S. 122C—he or she also has the authority to act as the individual's "personal representative" for purposes of the Privacy Rule.[8] The HIPAA Privacy Rule provides that an individual or the individual's personal representative shall have a right of access to the individual's protected health information[9] and may authorize the disclosure of this information.

B. Substance Abuse Records—42 C.F.R. Part 2. The federal regulations governing substance abuse patient records do not govern consent to treatment, nor do they prohibit—or provide a right for—patient access to records. The regulations do address the question of who may authorize the disclosure of records.

1. **Guardian.** If the patient is adjudicated incompetent, the individual appointed by the court as guardian-for-the-person or general guardian may sign the consent for release.
2. **Director.** When a patient has not been adjudicated incompetent, but suffers from a medical condition that prevents knowing or effective action on his or her behalf, the program director may exercise the right of the patient to consent to a disclosure for the sole purpose of obtaining payment for services from a third-party payer.

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[7] 45 CFR 164.502(g).

[8] In some cases involving abuse, neglect, or endangerment of the individual, a covered entity may choose not to treat a person who would normally be a personal representative as such.

[9] 45 C.F.R. 164.524.

On the Civil Side
A UNC School of Government Blog
https://civil.sog.unc.edu

The Guardian's Role in Health Care Decision-making

Author : Aimee Wall

Categories : Guardianship

Tagged as : Public guardianship; Social Services

Date : April 5, 2017

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

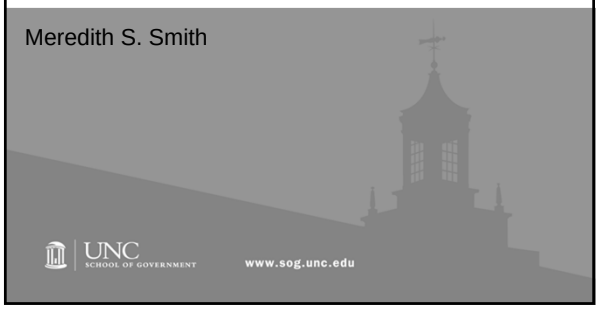
School of Law, and this brochure from the North Carolina Bar Association.

**Note, this post was also published on the School's Coates' Canons: NC Local Government blog on March 28th.*

Tab 14: Restoration to Competency

Restoration to Competency
G.S. 35A-1130

Meredith S. Smith



Incompetent Adult
G.S. 35A-1101(7)

Lack sufficient capacity to:

- **Functional**: Manage own affairs, *or*
- **Cognitive**: Make or communicate important decisions concerning the adult's person, family, or property.

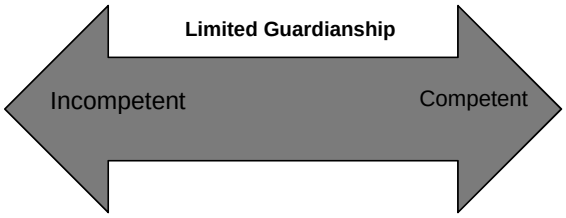
Competent Adult
G.S. 35A-1101(7)

Sufficient capacity to:

- **Functional**: Manage own affairs, *AND*
- **Cognitive**: Make or communicate important decisions concerning the adult's person, family, or property.

UNC SCHOOL OF GOVERNMENT

Spectrum of Competency



Status Reports

G.S. 35A-1242(a1)

Each status report **shall** include all of the following:

- Report on efforts to restore competency
- Recommendations for limited guardianship

Who Can Petition for Restoration?

1. Ward
2. Guardian
3. Any Other Interested Person

G.S. 35A-1130(a)

UNC SCHOOL OF GOVERNMENT

What Does The Petitioner File?

- "Party **Petitions** for Restoration
  By Filing a **Motion in the Cause"**

Motion in the Cause
Form AOC-SP-215

STATE OF NORTH CAROLINA
_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

MOTION IN THE CAUSE FOR RESTORATION TO COMPETENCY

G.S. 35A-1130

County Of Residence Of Ward | Date Of Birth

State

Name And Address Of Petitioner

Name And Address Of Attorney For Petitioner (if any)

Telephone No. Of Petitioner

Telephone No. Of Petitioner's Attorney | State Bar No.

Petitioner's Relationship To Ward Or Interest In Proceeding

Name And Address Of Treatment Facility If Ward Is Inpatient Or Resident

Name And Address Of Current Guardian

Name And Address Of Current Co-Guardian (if any)

☐ Of The Estate ☐ Of The Person ☐ General Guardian

☐ Of The Estate ☐ Of The Person ☐ General Guardian

Telephone No. Of Current Guardian

Telephone No. Of Current Co-Guardian (if any)

Take a step back….

Document must have:

1. **Statement indicating filing party seeking restoration for an identifiable ward**
2. **Facts tending to show the ward is competent**
3. **A verification**
   1. Signed by the petitioner
   2. Under Oath
   3. Before a notary public or other authorized officer
   4. Under a declaration of penalty of perjury
   5. That the information is true and correct

GS 35A-1130(a)

What is NOT Required to File?

1. Doctor's letter or other medical professional's statement of competency or recommendation for restoration

2. Attorney, unless filed by
- Corporation
- Nonprofit corporation, or
- LLC…..

Obtaining Medical Evidence

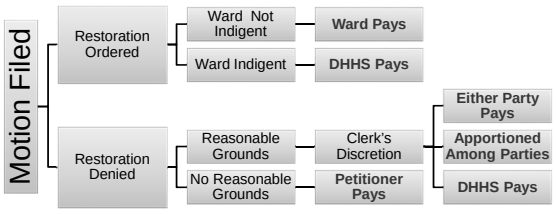
1. GOP or general guardian obtains directly

2. Court Order

3. MDE
   - Motion of clerk or any party (Form 901M)
   - ***Modify*** clerk's order to include payment of costs (not waived)

Costs of the MDE

GS 35A-1116(b)



UNC SCHOOL OF GOVERNMENT

SP-202 re: Costs

Further, it is ORDERED that pursuant to G.S. 35A-1116: *(select from 1 or 2)*

1. costs are taxed to: ☐ petitioner. ☐ respondent.
2. due to respondent's indigency, costs are taxed: ☐ IDS *(GAL fees, if any)*, ☐ NCAOC *(witness fees, if any)*, ☐ NC DHHS *(MDE costs, if any)*, and all other costs are waived.

UNC

Where to file the Motion?

- The motion is filed in the….
  original special proceeding.
- The petition is file in the county where the incompetency/guardianship is currently being administered, even if the county is not the county where the ward was originally adjudicated incompetent.
- May not be transferred to superior court – starts with the clerk, stays with the clerk.

UNC

Motion is filed, now what?

Clerk schedules the matter for hearing

- Hearing must be between 10-30 days from date service on the ward, the guardian and the petitioner
- Unless clerk for good cause orders otherwise (MDE)

UNC

UNC SCHOOL OF GOVERNMENT

Motion is filed, now what?

Notice of motion and hearing

- Notice must be served on:
  - Ward
  - Guardian
  - Any other party to the original incompetency proceeding
    - Ex. DSS filed, family filed – other non-guardian petitioners
    - Ex. next of kin who received notice

AOC Form SP-216

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

Name And Address Of Guardian

Name And Address Of Co-Guardian (If any)

NOTICE OF HEARING ON RESTORATION TO COMPETENCY
☐ AND ORDER APPOINTING GUARDIAN AD LITEM

G.S. 35A-1130, -1295

Name And Address Of Attorney/Guardian Ad Litem

State Bar No.

NOTICE

TO THE ABOVE NAMED PARTIES:
You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached motion.

A motion in the cause has been filed alleging that the ward is competent and requesting that the ward be restored to competency. If, at the hearing, the Court or a jury finds by a preponderance of the evidence that the ward is competent, an order restoring the ward to competency will be entered, every guardianship of the ward shall terminate, and the powers and duties of the guardian(s) shall cease.
NOTE: If the ward is restored to competency, a guardian of the estate or a general guardian is still responsible for accountings under Article 10 of Chapter 35A until the guardian is discharged by the clerk.

Date Of Hearing | Time | ☐ AM ☐ PM | Place To Appear

ORDER APPOINTING GUARDIAN AD LITEM

It is ORDERED that the attorney named above is appointed as guardian ad litem to represent the ward at the hearing on the matter. The ward has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date | Time | ☐ AM ☐ PM | Signature

Name

☐ Assistant CSC ☐ Clerk Of Superior Court

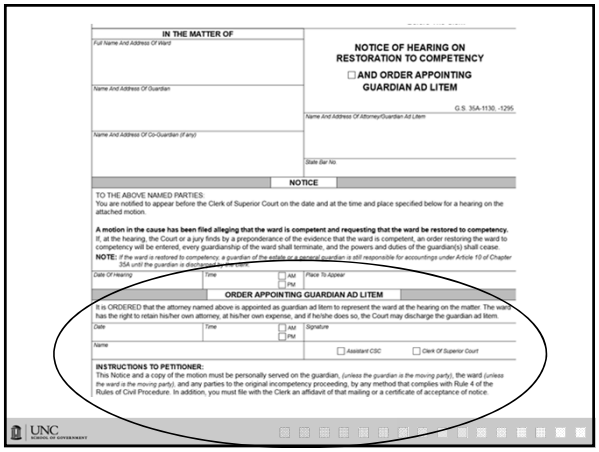
What type of service?

Petitioner required to serve via Rule 4

- Personal delivery
- Leaving copies at home with suitable person
- Delivering to authorized agent
- Mailing via CMRRR or FedEx, etc. sign confirmation

Guardian Ad Litem

- Ward is entitled to be represented by counsel or a guardian ad litem
  - SHALL have GAL if indigent and not represented by counsel
- GAL should meet personally with the ward; at least interview guardian, family, and other interested persons
- Provide similar report to original appointment – express + best



IN THE MATTER OF

Full Name And Address Of Ward

Name And Address Of Guardian

Name And Address Of Co-Guardian (if any)

NOTICE OF HEARING ON RESTORATION TO COMPETENCY

☐ AND ORDER APPOINTING GUARDIAN AD LITEM

G.S. 35A-1130, -1295

Name And Address Of Attorney/Guardian Ad Litem

State Bar No.

NOTICE

TO THE ABOVE NAMED PARTIES:
You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached motion.

A motion in the cause has been filed alleging that the ward is competent and requesting that the ward be restored to competency. If, at the hearing, the Court or a jury finds by a preponderance of the evidence that the ward is competent, an order restoring the ward to competency will be entered, every guardianship of the ward shall terminate, and the powers and duties of the guardian(s) shall cease.

NOTE: *If the ward is restored to competency, a guardian of the estate or a general guardian is still responsible for accountings under Article 10 of Chapter 35A until the guardian is discharged by the Clerk.*

Date Of Hearing | Time ☐ AM ☐ PM | Place To Appear

ORDER APPOINTING GUARDIAN AD LITEM

It is ORDERED that the attorney named above is appointed as guardian ad litem to represent the ward at the hearing on the matter. The ward has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date | Time ☐ AM ☐ PM | Signature

Name

☐ Assistant CSC ☐ Clerk Of Superior Court

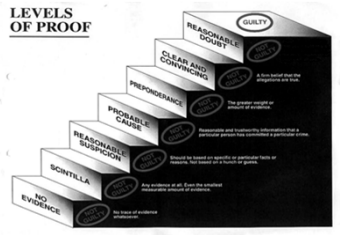
INSTRUCTIONS TO PETITIONER:
This Notice and a copy of the motion must be personally served on the guardian, *(unless the guardian is the moving party)*, the ward *(unless the ward is the moving party)*, and any parties to the original incompetency proceeding, by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, you must file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

GAL Fees

- By the ward, if the ward is not indigent
- By the movant if the relief is not granted and there were no reasonable grounds to bring the action
- In all other cases, by IDS

Burden of Proof

- Burden on the PETITIONER
- Preponderance of the evidence



UNC

Things to look for….

- 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

UNC

Things to look for….

- 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

UNC

Right to a Trial by Jury

- Request or waive
  - Ward
  - Ward's attorney
  - GAL
- Require anytime
  - Clerk
- Jury of 6 people

Form SP-218

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

Date Of Birth | Driver's License No. Of Ward | State

ORDER ON MOTION IN THE CAUSE FOR RESTORATION TO COMPETENCY

G.S. 35A-1130, -1295

This matter is before the Court on a motion in the cause to restore the ward to competency. This Court has jurisdiction of the subject matter of this proceeding and of the person of the ward, a copy of the Motion In The Cause and a notice of this hearing were properly served on all persons entitled thereto; and this county is a proper venue.

☐ **Trial By Court**
A hearing was held before the Court and, after hearing evidence, the Court ☐ does ☐ does not find by a preponderance of the evidence that the ward is competent.

☐ **Trial By Jury**
A hearing was held before the Clerk of Superior Court and a jury of six persons. After hearing the evidence and the instructions of the Court, and upon deliberation, the jury ☐ did ☐ did not find by a preponderance of the evidence that the ward is competent.

ORDER

☐ The motion is allowed and it is adjudged that the ward is competent; it is ORDERED that the ward is restored to competency. The ward is authorized to manage his/her affairs, make contracts, control and sell his/her property, both real and personal, and exercise all rights as if he/she had never been adjudicated incompetent.

☐ The motion is denied.

Pursuant to G.S. 35A-1116, costs are: ☐ waived. ☐ taxed to: ☐ petitioner. ☐ ward.

NOTE: *When the ward is restored to competency pursuant to G.S. 35A-1130, every guardianship shall be terminated and all Article 9, Chapter 35A powers and duties of the guardian shall cease. However, a guardian of the estate or a general guardian is still responsible for all accountings required by Article 10 of Chapter 35A until the guardian is discharged by the clerk. G.S. 35A-1293. "Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability." G.S. 35A-1295.*

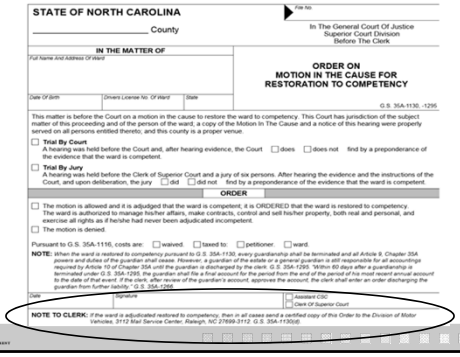
Date | Signature | ☐ Assistant CSC ☐ Clerk Of Superior Court

NOTE TO CLERK: *If the ward is adjudicated restored to competency, then in all cases send a certified copy of this Order to the Division of Motor Vehicles, 3112 Mail Service Center, Raleigh, NC 27699-3112. G.S. 35A-1130(d).*

Effect of Restoration

- Effective immediately upon entry of clerk's order restoring ward's capacity
- Ward can exercise all rights as if never adjudicated incompetent
  - Exception for firearms, NICS designation removed only by district court judge
  - Eff. Oct. 1, 2015 – clerk must send copy of restoration order to DMV

Form SP-218



STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

Date Of Birth | Driver's License No. Of Ward | State

ORDER ON MOTION IN THE CAUSE FOR RESTORATION TO COMPETENCY

G.S. 35A-1130, -1295

This matter is before the Court on a motion in the cause to restore the ward to competency. This Court has jurisdiction of the subject matter of this proceeding and of the person of the ward, a copy of the Motion In The Cause and a notice of this hearing were properly served on all persons entitled thereto, and this county is a proper venue.

☐ **Trial By Court**
A hearing was held before the Court and, after hearing evidence, the Court ☐ does ☐ does not find by a preponderance of the evidence that the ward is competent.

☐ **Trial By Jury**
A hearing was held before the Clerk of Superior Court and a jury of six persons. After hearing the evidence and the instructions of the Court, and upon deliberation, the jury ☐ did ☐ did not find by a preponderance of the evidence that the ward is competent.

ORDER

☐ The motion is allowed and it is adjudged that the ward is competent; it is ORDERED that the ward is restored to competency. The ward is authorized to manage his/her affairs, make contracts, control and sell his/her property, both real and personal, and exercise all rights as if he/she had never been adjudicated incompetent.

☐ The motion is denied.

Pursuant to G.S. 35A-1116, costs are: ☐ waived. ☐ taxed to: ☐ petitioner. ☐ ward.

NOTE: *When the ward is restored to competency pursuant to G.S. 35A-1130, every guardianship shall be terminated and all Article 9, Chapter 35A powers and duties of the guardian shall cease. However, a guardian of the estate or a general guardian is still responsible for all accountings required by Article 10 of Chapter 35A until the guardian is discharged by the clerk. G.S. 35A-1293. "Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability." G.S. 35A-1256*

Date | Signature | ☐ Assistant CSC ☐ Clerk Of Superior Court

NOTE TO CLERK: *If the ward is adjudicated restored to competency, then in all cases send a certified copy of this Order to the Division of Motor Vehicles, 3112 Mail Service Center, Raleigh, NC 27699-3112. G.S. 35A-1130(d).*

UNC SCHOOL OF GOVERNMENT

Not so fast….

Guardian of the Estate + General Guardian

- Must file final accounting within 60 days of restoration order
- Accounting period runs from the last annual accounting filed until the date of restoration
- Clerk reviews and enters an order discharging guardian from further liability
  - NOT discharged until clerk enters order

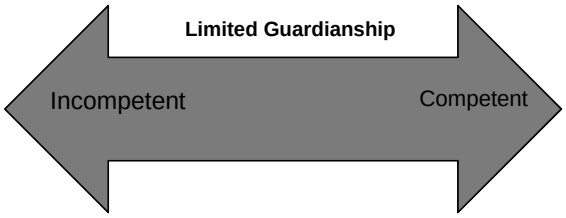
UNC SCHOOL OF GOVERNMENT

Appeal

- Clerk denies restoration
- **Ward** or **ward's attorney** may appeal in writing for trial *de novo* (*not petitioner*)
- 10 days from entry of clerk's order to appeal
- Guardianship remains in place pending appeal

UNC SCHOOL OF GOVERNMENT

Spectrum of 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?

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.

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).

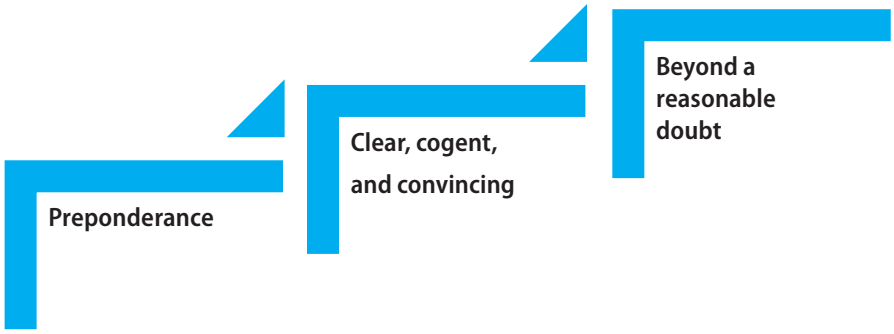
95. *See* G.S. 35A-1130(c).

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).

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

County Of Residence Of Ward | *Date Of Birth*

State

Name And Address Of Petitioner

Telephone No. Of Petitioner

Petitioner's Relationship To Ward Or Interest In Proceeding

MOTION IN THE CAUSE FOR RESTORATION TO COMPETENCY

G.S. 35A-1130

Name And Address Of Attorney For Petitioner (if any)

Telephone No. Of Petitioner's Attorney | *State Bar No.*

Name And Address Of Treatment Facility If Ward Is Inpatient Or Resident

Name And Address Of Current Guardian

☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian*

Telephone No. Of Current Guardian

Name And Address Of Current Co-Guardian (if any)

☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian*

Telephone No. Of Current Co-Guardian (if any)

The undersigned, being duly sworn, requests that the Court, after notice and hearing, adjudicate the ward above to be restored to competency.

In support of this Motion, the undersigned states:

1. The Court is currently exercising jurisdiction over the ward's original incompetency proceeding.
2. The following facts establish that the ward now has sufficient capacity to manage his/her own affairs and to make and communicate important decisions concerning his/her person, family and property: *(Set forth the facts which tend to show that the ward is competent. Give facts demonstrating that the ward presently has capacity. Be specific. See Section 3 for additional capacity information.)*

(Over)

3. ADDITIONAL CAPACITY INFORMATION

A. **Language and Communication** (understands/participates in conversations, can read and write, understands signs such as "keep out," "men," "women")

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

B. **Nutrition** (makes independent decisions re: eating, prepares food, purchases food)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

C. **Personal Hygiene** (bathes, brushes teeth, uses proper hygiene when using the restroom)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

D. **Health Care** (makes and communicates choices re: medical treatment/caregivers, notifies others of illness, follows medication instructions, reaches emergency health care)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

E. **Personal Safety** (recognizes danger and seeks assistance as needed, protects self from exploitation/personal harm)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

F. **Residential** (makes and communicates decisions re: residence/roommates, maintains safe shelter)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

G. **Employment** (makes and communicates decisions re: employment, demonstrates vocational skills such as neatness and punctuality, writes or dictates application form)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

H. **Independent Living** (follows a daily schedule, conducts housekeeping chores, uses community resources such as bank, store, post office)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

I. **Civil** (knows to contact advocate if being exploited, understands consequences of committing a crime, registers to vote)

☐ has capacity. ☐ lacks capacity. Comment: _____

_____

J. **Financial**

1. Makes and communicates decisions about paying bills and spending discretionary money, and makes change for $1, $5, and $20

   ☐ has capacity. ☐ lacks capacity. Comment: _____

   _____

2. Makes and communicates decisions regarding management of a personal bank account, savings, investments, real estate, and other substantial assets

   ☐ has capacity. ☐ lacks capacity. Comment: _____

   _____

3. Can resist attempts at financial exploitation by others

   ☐ has capacity. ☐ lacks capacity. Comment: _____

   _____

(Over)

IN THE MATTER OF	File No.
Name Of Ward	

4. All other persons known to have an interest in the incompetency proceeding are:

Name And Address	Name And Address
Telephone No.	Telephone No.
Relationship To Ward Or Interest In Proceeding	Relationship To Ward Or Interest In Proceeding
Name And Address	Name And Address
Telephone No.	Telephone No.
Relationship To Ward Or Interest In Proceeding	Relationship To Ward Or Interest In Proceeding
Name And Address	Name And Address
Telephone No.	Telephone No.
Relationship To Ward Or Interest In Proceeding	Relationship To Ward Or Interest In Proceeding

VERIFICATION

I, the undersigned petitioner, have read this Motion and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe to be 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	

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

Name And Address Of Guardian

Name And Address Of Co-Guardian (if any)

NOTICE OF HEARING ON RESTORATION TO COMPETENCY

☐ AND ORDER APPOINTING GUARDIAN AD LITEM

G.S. 35A-1130, -1295

Name And Address Of Attorney/Guardian Ad Litem

State Bar No.

NOTICE

TO THE ABOVE NAMED PARTIES:
You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached motion.

A motion in the cause has been filed alleging that the ward is competent and requesting that the ward be restored to competency. If, at the hearing, the Court or a jury finds by a preponderance of the evidence that the ward is competent, an order restoring the ward to competency will be entered, every guardianship of the ward shall terminate, and the powers and duties of the guardian(s) shall cease.

NOTE: *If the ward is restored to competency, a guardian of the estate or a general guardian is still responsible for accountings under Article 10 of Chapter 35A until the guardian is discharged by the clerk.*

Date Of Hearing	*Time*	*Place To Appear*
	☐ AM ☐ PM	

ORDER APPOINTING GUARDIAN AD LITEM

It is ORDERED that the attorney named above is appointed as guardian ad litem to represent the ward at the hearing on the matter. The ward has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date	*Time*	*Signature*
	☐ AM ☐ PM	

Name

☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

INSTRUCTIONS TO PETITIONER:
This Notice and a copy of the motion must be personally served on the guardian, *(unless the guardian is the moving party)*, the ward *(unless the ward is the moving party),* and any parties to the original incompetency proceeding, by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, you must file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

(Over)

RETURN OF SERVICE

I certify that this Notice Of Hearing and a copy of the Motion In The Cause were received and served as follows:

WARD

Date Served	*Time Served*	☐ AM ☐ PM	*Name Of Ward*

☐ By delivering to the ward named above a copy of the Notice Of Hearing and Motion In The Cause.

☐ By leaving a copy of the Notice Of Hearing and Motion In The Cause at the dwelling house or usual place of abode of the ward named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left

☐ Other manner of service *(specify)*

☐ Ward WAS NOT served for the following reason:

Date Received	*Signature Of Deputy Sheriff Making Return*
Date Of Return	*Name Of Deputy Sheriff Making Return (type or print)*
	County Of Deputy Sheriff Making Return

GUARDIAN

Date Served	*Time Served*	☐ AM ☐ PM	*Name Of Guardian*

☐ By delivering to the guardian named above a copy of the Notice Of Hearing and Motion In The Cause.

☐ By leaving a copy of the Notice of Hearing and Motion In The Cause at the dwelling house or usual place of abode of the guardian named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Service accepted by guardian

Date Accepted	*Signature*

☐ Other manner of service *(specify)*

☐ Guardian WAS NOT served for the following reason:

Date Received	*Signature Of Deputy Sheriff Making Return*
Date Of Return	*Name Of Deputy Sheriff Making Return (type or print)*
	County Of Deputy Sheriff Making Return

RETURN OF SERVICE

I certify that this Notice of Hearing and a copy of the motion in the cause were received and served as follows:

CO-GUARDIAN *(if applicable)*

Date Served	*Time Served*	☐ AM ☐ PM	*Name Of Co-Guardian*

☐ By delivering to the co-guardian named above a copy of the Notice Of Hearing and Motion In The Cause.

☐ By leaving a copy of the Notice of Hearing and Motion In The Cause at the dwelling house or usual place of abode of the co-guardian named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Service accepted by co-guardian

Date Accepted	*Signature*

☐ Other manner of service *(specify)*

☐ Co-Guardian WAS NOT served for the following reason:

Date Received	*Signature Of Deputy Sheriff Making Return*
Date Of Return	*Name Of Deputy Sheriff Making Return (type or print)*
	County Of Deputy Sheriff Making Return

GUARDIAN AD LITEM ATTORNEY

Date Served	*Time Served*	☐ AM ☐ PM	*Name Of Guardian Ad Litem Attorney*

☐ By delivering to the guardian ad litem attorney named above a copy of the Notice of Hearing and motion in the cause.

☐ By leaving a copy of the Notice of Hearing and motion in the cause at the dwelling house or usual place of abode of the guardian ad litem attorney named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left

☐ Service accepted by guardian ad litem attorney

Date Accepted	*Signature*

☐ Other manner of service *(specify)*

☐ Guardian Ad Litem Attorney WAS NOT served for the following reason:

Date Received	*Signature Of Deputy Sheriff Making Return*
Date Of Return	*Name Of Deputy Sheriff Making Return (type or print)*
	County Of Deputy Sheriff Making Return

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Full Name And Address Of Ward

Date Of Birth	*Drivers License No. Of Ward*	*State*

ORDER ON MOTION IN THE CAUSE FOR RESTORATION TO COMPETENCY

G.S. 35A-1130, -1295

This matter is before the Court on a motion in the cause to restore the ward to competency. This Court has jurisdiction of the subject matter of this proceeding and of the person of the ward; a copy of the Motion In The Cause and a notice of this hearing were properly served on all persons entitled thereto; and this county is a proper venue.

☐ **Trial By Court**
A hearing was held before the Court and, after hearing evidence, the Court ☐ does ☐ does not find by a preponderance of the evidence that the ward is competent.

☐ **Trial By Jury**
A hearing was held before the Clerk of Superior Court and a jury of six persons. After hearing the evidence and the instructions of the Court, and upon deliberation, the jury ☐ did ☐ did not find by a preponderance of the evidence that the ward is competent.

ORDER

☐ The motion is allowed and it is adjudged that the ward is competent; it is ORDERED that the ward is restored to competency. The ward is authorized to manage his/her affairs, make contracts, control and sell his/her property, both real and personal, and exercise all rights as if he/she had never been adjudicated incompetent.

☐ The motion is denied.

Pursuant to G.S. 35A-1116, costs are: ☐ waived. ☐ taxed to: ☐ petitioner. ☐ ward.

NOTE: *When the ward is restored to competency pursuant to G.S. 35A-1130, every guardianship shall be terminated and all Article 9, Chapter 35A powers and duties of the guardian shall cease. However, a guardian of the estate or a general guardian is still responsible for all accountings required by Article 10 of Chapter 35A until the guardian is discharged by the clerk. G.S. 35A-1295. "Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability." G.S. 35A-1266.*

Date	*Signature*	☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

NOTE TO CLERK: *If the ward is adjudicated restored to competency, then in all cases send a certified copy of this Order to the Division of Motor Vehicles, 3112 Mail Service Center, Raleigh, NC 27699-3112. G.S. 35A-1130(d).*

CERTIFICATION

I certify that this Order On Motion In The Cause For Restoration To Competency is a true and complete copy of the original on file in this case.

Date	*Name (type or print)*	*Signature*	☐ *Deputy CSC* ☐ *Asst. CSC* ☐ *Clerk Of Superior Court*	**SEAL**

Tab 15: Mock Hearing

Tab 16: NC Guardianship Law

Incompetency and Guardianship
NC Supreme Court and NC Court of Appeals Published Case Summaries
Meredith Smith, UNC School of Government
February 4, 2014 – September 29, 2017

Removal of the Guardian of the Estate
In re Estate of Skinner, N.C. , 804 S.E.2d 449 (2017) (with dissent)
The NC Supreme Court held that the NC Court of Appeals erred in reversing the trial court's order removing a guardian of the estate (GOE) and trustee under a special needs trust (SNT) for breach of fiduciary duty. Respondent was adjudicated incompetent in 2010, and after her subsequent marriage, her husband was appointed guardian. After Respondent's mother died in 2012, one of her siblings petitioned to be GOE, as Respondent was entitled to an inheritance. After hearing, the clerk appointed Respondent's husband as GOE, and directed him to post a bond and to establish an SNT, which he did. A few months after assets were distributed and placed in the trust, Respondent's siblings petitioned the court to remove Respondent's husband as trustee, on the basis he had not complied with reporting and accounting obligations. After a hearing, the clerk entered an order removing the husband as trustee and as GOE, after determining that he had mismanaged assets, converted assets to his own use, and breached his fiduciary duty.

The trial court affirmed the clerk's order on appeal, and the matter was appealed to the court of appeals, which reversed in a divided opinion. The court of appeals majority concluded that the clerk's order of removal contained findings not supported by evidence and conclusions of law that were legally erroneous, and therefore the clerk abused his discretion in removing the husband as trustee. The dissenting judge argued that the majority essentially re-weighed the evidence and disregarded the deferential standard of review on appeal. The dissenting judge stated that the clerk's findings of fact were supported by competent evidence, save one, and that the findings supported the conclusions of law.

The NC Supreme Court reversed the court of appeals decision. The court noted that the superior court has derivative jurisdiction when reviewing an order from the clerk, and that such review is limited. Statutes govern how clerks make a determination regarding removal of a trustee or guardian. Clerks are authorized, but not required, to remove a trustee or guardian if a statutory ground for removal exists. The clerk must determine what the relevant facts are, whether the facts establish one or more grounds for removal, and if so, make a discretionary determination whether removal is justified. Findings of fact supported by competent evidence are conclusive on appeal, even if the evidence could be viewed as supporting a different finding. Facts not supported by competent evidence or that are found under a misapprehension of law are not conclusive and not binding on appeal. Even if some findings have been made in error, others properly made may be sufficient to support the clerk's conclusions. Conclusions of law are reviewed de novo, and decisions made by exercising discretion granted by statute are not reviewable except for abuse of discretion; that is, a

determination of whether the decision is manifestly unsupported by reason and so arbitrary that it could not have been made with a reasoned decision.

In the instant case, the NC Supreme Court recited the relevant statutory provisions enumerating grounds for removal of a guardian or trustee (G.S. 35A-1290(b), (c) and 36C-7-706), the duties and standard of care of a trustee (G.S. 32-71, 36C-1-105, and 36C-9-902) and the duties and standard of care of a guardian (G.S. 35A-1251). The trustee/GOE was obligated to act reasonably and prudently and in a manner that would serve the ward's best interests. The Court concluded that the unchallenged findings of fact supported the clerk's conclusions that the trustee/GOE used trust assets for his own personal benefit, that such use constituted self-dealing and a breach of fiduciary duty, that his actions demonstrated a lack of appropriate judgment and prudence, and that he wasted the trust's assets, mismanaged those assets, and converted them to his own use. The clerk had "ample justification" for determining that grounds exist for removal, and did not abuse his discretion when deciding that removal was the appropriate remedy. Even though the clerk erroneously construed a number of provisions of the SNT, the clerk did not rest his decision solely on whether the trustee/GOE's conduct violated the SNT. As the Court explained, "the extent to which a guardian or trustee violated his or her fiduciary duty is a separate, and broader, question than the issue of whether he or she violated a specific provision of a written trust instrument." Thus, the clerk appropriately focused on the actions of the trustee/GOE, without regard to their consistency with the terms of the SNT.

The dissent argued that the clerk's legal errors were too "fundamental" to salvage his order, including misunderstanding the essential purpose of the SNT. The dissent would adopt the opinion of the court of appeals, and remand to that court to remand to the trial court to apply the appropriate legal standard.

Rule 11

In re Cranor (COA15-541; May 17, 2016) (with dissent)

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

Action Abates at Death; Nunc Pro Tunc

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

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

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

Civ. Pro. Rule 58: Entry of Orders/Judgments
In re Thompson, N.C. App. (Feb. 4, 2014)
Respondent adjudicated incompetent and guardian appointed. Clerk orally announced the ruling in court on both matters and signed and dated the order as well as letters appointing guardian. Interested party filed motions challenging the incompetency and guardianship orders. Clerk denied the orders and entered sanctions against interested party. Interested party appealed. Trial court upheld the decision of the clerk. Interested party appealed to the NC Court of Appeals. NC Court of Appeals held:

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

Appeal of Dismissal of Incompetency Proceeding
In re Dippel (COA16-54; Sept. 20, 2016)

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

Jurisdiction between Ch. 50 Custody and Ch. 35A Guardianship of Minor
Corbett v. Lynch (COA16-221; Dec. 20, 2016).
Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.

Procedural History:

- August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court
- August 5, 2015, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.
- August 7, 2015, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, 2015, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

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

Power of Attorney Executed After Adjudication of Incompetence

O'Neal v. O'Neal (COA16-1299; July 5, 2017)

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

Authority of Interim Guardian to Admit a Ward to a Mental Health Facility

In re Matter of Winebarger (COA15-1357; Oct. 4, 2016) (unpublished)

The NC Court of Appeals held that an interim guardian powers include the power to apply for voluntary admission of a ward to a mental health facility where the clerk's order appointing the interim guardian gives the interim guardian all powers and duties of a general guardian.

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: • AOC-E-413-Letters of Appointment of General Guardian • AOC-E-408-Letters of Appointment General Guardian of Estate • AOC-E- 407-Letters of Appt. General Guardian of Person • AOC-E-419-Letters Appt. Limited General Guardian • AOC-E-417-Letters of Appointment Limited Guardian of Estate • 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.

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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Westlaw.
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.

Westlaw.

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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