
GUARDIANSHIP

I. Introduction

A. Description.

1. Guardianship is the legal empowerment of one person (the guardian) to act on behalf of and make decisions for a minor or an incompetent person (the ward).
2. Guardians may be appointed for minors and for incompetent adults. While adults are presumed to be competent until judicially determined to be incompetent, minors are incompetent as a matter of law because of their age and require parents or guardians to act for them.
3. A guardianship is a trust relationship with the guardian being subject to the same rules that govern other trustees. [*In re Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994); G.S. § 36A-1; Wiggins, *Wills and Administration of Estates in North Carolina* § 304 (3rd ed. 1993)]
4. Guardianship provisions are found in Subchapter II of G.S. Chapter 35A. Provisions for incompetency determinations are found in Subchapter I of G.S. Chapter 35A. See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85. Veterans' guardianship provisions are found in Chapter 34 of the General Statutes. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

B. Purpose.

1. Guardianship for an incompetent person. The purpose of guardianship for an incompetent person is to transfer to a guardian the individual's authority to make decisions when the individual does not have adequate capacity to make such decisions. [G.S. § 35A-1201(a)(3)]
2. Guardianship for a minor. The purpose of guardianship for a minor is to provide a responsible, accountable adult to handle property or benefits to which the minor is entitled. In addition, an unemancipated minor who does not have parents needs a responsible, accountable adult to be responsible for his or her personal welfare and for personal decision-making on behalf of the unemancipated minor. [G.S. § 35A-1201(a)(6)]

C. Types of guardians. Whenever the term "guardian" is used, it is important to keep in mind the context and the type of guardian intended.

1. General guardian is a guardian of both the estate and the person. [G.S. § 35A-1202(7)]

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2. Guardian of the estate is a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward. [G.S. § 35A-1202(9)] Powers and duties of a guardian of the estate are discussed in section VIII at page 86.38.
3. Guardian of the person is a guardian appointed solely for the purpose of performing duties related to the care, custody, and control of a ward. [G.S. § 35A-1202(10)] Powers and duties of a guardian of the person are discussed in section VII at page 86.34.
4. Guardian of the person appointed for a minor by a district court judge pursuant to G.S. § 7B-600.
5. Guardian ad litem is a person appointed pursuant to G.S. § 1A-1, Rule 17, Rules of Civil Procedure. [G.S. § 35A-1202(8)]
 - a) Despite the language in G.S. § 35A-1202(8), a guardian ad litem appointed in a guardianship proceeding under Chapter 35A is different from a Rule 17 guardian ad litem.
 - b) A Rule 17 guardian ad litem is appointed to represent the interest of a minor or incompetent adult in bringing or defending a court action. [G.S. § 1A-1, Rule 17]
 - (1) A Rule 17 guardian ad litem does not have to be an attorney.
 - (2) A Rule 17 guardian ad litem is chosen by the plaintiff/petitioner or the attorney for the plaintiff/petitioner.
 - (3) The provisions in Article 35A do not interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b). [G.S. § 35A-1102]
 - c) A Chapter 35A guardian ad litem represents the respondent in the guardianship proceeding, unless the respondent retains his or her own counsel. [G.S. § 35A-1107]
 - (1) The clerk has discretion whether to discharge the guardian ad litem when the respondent retains private counsel.
 - (a) A private attorney will be an advocate for the respondent's position. A Chapter 35A guardian ad litem is to determine what is in the best interest of the respondent as well as the respondent's express wishes.
 - (b) Because of this difference, some clerks do not discharge a guardian ad litem even though a private attorney has been retained.
 - (2) The role of a Chapter 35A guardian ad litem is to assist the clerk in determining whether the proposed

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ward is incompetent and if so, to assist the clerk in determining who should serve as guardian.

- (a) A Chapter 35A guardian ad litem must personally visit the respondent as soon as possible after appointment. [G.S. § 35A-1107(b)]
- (b) A Chapter 35A guardian ad litem may not handle money or other property of the minor or incompetent adult.
- (c) For more on incompetency proceedings, see Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.
- d) A Chapter 35A guardian ad litem must be an attorney. [G.S. § 35A-1107]
- e) The clerk should not appoint a Chapter 35A guardian ad litem based on the recommendation of the petitioner or the petitioner's attorney.
- f) A Chapter 35A guardian ad litem is more objective than a Rule 17 guardian ad litem in his or her representation of the respondent.
 - (1) The Chapter 35A guardian ad litem must make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. **The guardian ad litem must present to the clerk the respondent's express wishes at all relevant stages of the proceedings.** [G.S. § 35A-1107(b)]
 - (2) The Chapter 35A guardian ad litem may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. [G.S. § 35A-1107(b)]
 - (3) In appropriate cases, the Chapter 35A guardian ad litem must consider the possibility of a limited guardianship and must make recommendations to the clerk concerning the rights, powers and privileges that the respondent should retain under a limited guardianship. [G.S. § 35A-1107(b)]
- g) A Chapter 35A guardian ad litem is compensated as counsel rather than as a guardian ad litem under Chapter 7A.
 - (1) Fees of Chapter 35A guardians ad litem are recoverable pursuant to G.S. § 35A-1116(c2).

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- (2) Fees of Rule 17 guardians ad litem are recoverable as costs pursuant to G.S. § 7A-306(c)(5). [*See Van Every v. McGuire*, 125 N.C. App. 578, 481 S.E.2d 377 (1977).]
 - h) A guardian ad litem appointed in a proceeding under Chapter 35A has quasi-judicial (absolute) immunity. [*Dalenko v. Wake County Dept. of Human Services*, 157 N.C. App. 49, 578 S.E.2d 599 (2003).]
 - i) A guardian ad litem appointed in a juvenile proceeding has additional powers and duties in protecting and promoting the best interest of the juvenile. [G.S. § 7B-601]
 - 6. Interim guardian is a guardian, appointed **before** adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate. [G.S. § 35A-1101(11)] (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)
 - 7. Limited guardianship. Although not defined by statute, limited guardianship refers to a guardianship in which the incompetent ward retains certain rights and privileges and the guardian's powers are correspondingly limited. See section II.C at page 86.9.
 - 8. Natural guardian. Parents are the natural guardians of the person of their minor children. [G.S. § 35A-1201(a)(6)]
 - 9. Standby guardian is a person appointed pursuant to G.S. § 35A-1373 or designated pursuant to G.S. § 35A-1374 to become the guardian of the person or, when appropriate, the general guardian of a minor child upon the death of a petitioner or designator, upon a determination of debilitation or incapacity of a petitioner or designator, or with the consent of a petitioner or a designator. [G.S. § 35A-1370(11)] See section XVI at page 86.61.
 - 10. Testamentary guardian is a person recommended in a parent's last will and testament to serve as the guardian for a minor after the parent's death (in the absence of a surviving parent) until the minor becomes 18. [G.S. § 35A-1225] See section V.E.2 at page 86.25.
- D. Persons for whom a guardian may be appointed.
- 1. Minors.
 - a) Procedures set out in G.S. §§ 35A-1220 to –1228 apply to the appointment of:
 - (1) A guardian of the estate of any minor;
 - (2) A guardian of the person and a general guardian for minors who have no natural guardian; and

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- (3) A guardian as recommended in the will of the minor's deceased parents.
 - b) Procedures set out in G.S. §§ 35A-1370 to –1382 apply to the appointment of a standby guardian for a minor.
 - c) Procedures for the appointment of a guardian of an incompetent person, G.S. §§ 35A-1210 to –1215, apply to the appointment of a guardian for a minor who is adjudicated incompetent within 6 months before the minor turns 18. [See G.S. § 35A-1225(b).]
 - d) Appointment of a guardian for a minor is discussed in section V at page 86.22. Appointment of a standby guardian is discussed in section XVI at page 86.61.
2. Incompetent persons.
 - a) Procedures set out in G.S. §§ 35A-1210 to –1215 apply to the appointment of a guardian for an incompetent person. For definition of an incompetent, see G.S. § 35A-1101(7) and (8).
 - b) Appointment of a guardian for an incompetent person is discussed in section IV at page 86.15.
3. Veterans.
 - a) Procedures set out in G.S. §§ 34-1 to –18 apply to the appointment of a guardian for a minor or incompetent person receiving benefits from the Veterans Administration.
 - b) Appointment of a guardian under the Veterans' Guardianship Act is discussed in Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.
- E. Clerk's jurisdiction and authority.
 1. The clerk in each county has original jurisdiction to appoint guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings. [G.S. § 35A-1203(a)]
 2. The clerk has original jurisdiction to appoint guardians of the estate for minors, to appoint guardians of the person or general guardians for minors who have no natural guardian and of related proceedings. [G.S. § 35A-1203(a)]
 3. The clerk retains jurisdiction following appointment to assure compliance with the clerk's orders and those of superior court. [G.S. § 35A-1203(b)]
 4. The clerk has authority to:
 - a) Remove a guardian for cause and to appoint a successor guardian after removal, death, or resignation of a guardian [G.S. § 35A-1203(b)] (see section XII at page 86.52);

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- b) Set and adjust the amount of the guardian's bond [G.S. § 35A-1203(c)] (see section VI at page 86.27); and
 - c) Determine disputes between guardians [G.S. § 35A-1203(c)].
- F. Motions to modify or consider a matter in a guardianship proceeding. [G.S. § 35A-1207]
- 1. Any interested person may file a motion in the cause with the clerk in the county currently having jurisdiction over the guardianship to request:
 - a) Modification of the order appointing a guardian; or
 - b) Consideration of any matter pertaining to the guardianship. [G.S. § 35A-1207(a)]
 - (1) A guardian who questions the propriety of a particular charge against the estate may seek court approval before making payment by filing a motion in the cause with the clerk. [*Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988).]
 - (2) A spouse seeking support from her incompetent husband's estate is an "interested person" entitled to file a motion in the cause under this section. [*Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988).]
 - 2. The clerk must treat all such requests, however labeled, as motions in the cause. [G.S. § 35A-1207(b)]
 - 3. The person filing a motion must, unless the clerk orders otherwise:
 - a) Obtain from the clerk a date, time, and place for a hearing on the motion; and
 - b) Serve the motion and notice of hearing on all other parties and such other persons as directed by the clerk in the manner required by G.S. § 1A-1, Rule 5 (which allows service by first-class mail.) [G.S. § 35A-1207(c)]
- G. Emergency orders. The clerk may enter an appropriate ex parte order to address an emergency pending the disposition of the matter at the hearing if the clerk has reasonable cause to believe that the emergency:
- 1. Threatens the physical well-being of the ward; or
 - 2. Constitutes a risk of substantial injury to the ward's estate. [G.S. § 35A-1207(d)]
- H. Appeals.
- 1. G.S. § 1-301.3 applies to appeals of estate matters determined by the clerk. It provides that 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

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judgment after service of the order on that party. Review by the superior court judge is on the record and is limited to determining:

- a) Whether the findings of fact are supported by the evidence;
- b) Whether the conclusions of law are supported by the findings of fact; and
- c) Whether the order or judgment is consistent with the conclusions of law and applicable law. [G.S. § 1-301.3(c) and (d); *In re Flowers*, 140 N.C. App. 225, 536 S.E.2d 324 (2000).]

2. Since an appeal of a guardian proceeding is limited to a review of the record, the clerk must make written findings of fact and conclusions of law and have a record for the superior court to review.
3. However, appeal from an adjudication of incompetency is to the superior court for a *de novo* review. [G.S. §§ 35A-1115; 1-301.2(g)(1); see *In re Bidstrup*, 55 N.C. App. 394, 285 S.E.2d 304 (1982) (right to a trial *de novo* on appeal relates only to the adjudication of incompetency and not to the clerk's appointment of a guardian, which involves a routine determination not warranting a review any more extensive than a review of the record).]

I. When to record a guardianship proceeding.

1. In the clerk's discretion or upon request by a party, all hearings and other matters covered by this section **shall be recorded by an electronic recording device**. If a recording is not made, the clerk must submit to the superior court a summary of the evidence presented to the clerk. [G.S. § 1-301.3(f)]
2. If the record is insufficient, the judge may receive additional evidence on the factual issue in question. [G.S. § 1-301.3(d)]
3. If available, the clerk may wish to hear the matter in a district courtroom where recording equipment is available.

J. Additional references. Other chapters in this manual that may be consulted on guardianship matters include:

1. Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.
2. Sale, Mortgage Exchange or Lease of a Ward's Estate, Special Proceedings, Chapter 124.
3. Proceeding by Foreign Guardian to Remove Ward's Property from State, Special Proceedings, Chapter 122.
4. Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

K. Guidelines for persons inquiring about guardianship or for recently appointed guardians. Guardianship guidelines are set out in Appendix I and may be

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made available to persons inquiring about guardianship or recently appointed as guardians.

II. Effect of Appointment of a Guardian

- A. Effect on legal rights of incompetent adults.
 - 1. Historically, an adult who was adjudicated incompetent was considered to have lost his or her authority to exercise virtually all of the legal and civil rights he or she possessed before being adjudicated incompetent. The legal status of an incompetent person was considered to be much like that of a minor child who lacks the legal capacity to enter into contracts, make a will, marry, vote, etc.
 - 2. The modern trend is to view an adjudication of incompetency as less global with respect to its effect on the legal rights and status of incompetent adults.
- B. Rights and privileges retained by the ward.
 - 1. An incompetent person may retain certain legal rights even if not expressly provided in the adjudication order.
 - a) Right to vote. North Carolina's Attorney General has issued an opinion holding that a person who has been adjudicated incompetent may register to vote and vote in all state elections in which he or she would otherwise be qualified to vote. [43:1 N.C. Atty.Gen. Reports 85 (1973)]
 - b) Privilege to drive. The clerk sends a certified copy of the adjudication order to the Division of Motor Vehicles pursuant to G.S. § 20-17.1(b) (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85, sections V.A.3 and 4 at page 85.19.) DMV decides whether the person retains the privilege to drive.
 - c) Right to marry. North Carolina's Court of Appeals has held in one case that a person who had been adjudicated incompetent retained the right to decide to get married, despite the objections of the guardian, because there was evidence that he retained sufficient capacity to understand the nature and consequences of his decision to marry. [*Geitner v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 (1984).]
 - d) Right to make a will. The fact that a person has been adjudicated incompetent raises a presumption that he or she lacks sufficient testamentary capacity to execute a valid will. This presumption, however, may be overcome by evidence that the individual had sufficient testamentary capacity (that he or she understood the "natural objects of his or her bounty," understood the kind, nature, and extent of his or her property, knew the manner in which he or she desired his or her act to take effect, and realized the effect his or her act

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would have upon the estate). [*In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983).]

- e) Right to contract. The fact that a person has been adjudicated incompetent raises a presumption that he or she lacks sufficient capacity to enter into a valid contract. This presumption, however, may be overcome by evidence that the individual had sufficient capacity to understand the nature and consequences of his or her actions at the time he or she entered into a contract. [*Medical College of Virginia v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952).] **More importantly, contracts between an incompetent adult and another person are generally considered voidable, not void.** An executed contract between an incompetent adult and another person may not be set aside by the other person, and may not be avoided by the incompetent adult unless he or she can prove that the other person knew that he or she was incompetent, that the other person took unfair advantage of him or her or failed to provide adequate value for the contract, and that the consideration or value has been or can be returned to the other person. An incompetent adult is responsible for the cost of necessary goods or services that are provided to him or her by others. [*In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).]
- f) Right to be a witness. A person who has been adjudicated incompetent is competent to testify as a witness in a lawsuit if he or she understands the nature of the oath to tell the truth, had the capacity to observe the matters about which he or she will testify, and has the capacity to remember and relate what he or she observed. [*State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).]

C. Rights and privileges retained **by order** (limited guardianship).

- 1. Guardianship statutes require preservation of those rights within an incompetent's comprehension and judgment.
 - a) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his or her comprehension and judgment, allowing for the possibility of human error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his or her capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him or her. [G.S. § 35A-1201(5)]
 - b) The clerk is authorized to order a limited guardianship if the clerk determines that the nature and extent of the ward's capacity justifies it. [G.S. § 35A-1212(a)]
 - c) If the clerk orders a limited guardianship, the clerk may order that the ward retain certain legal rights and privileges

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to which the ward was entitled before being adjudged incompetent. A limited guardianship order must include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian. [G.S. § 35A-1215(b)]

- d) The guardian ad litem must consider the possibility of a limited guardianship and make recommendations to the clerk concerning the rights, powers and privileges that the respondent should retain under a limited guardianship. [G.S. § 35A-1107(b)]
2. To identify in advance cases in which a limited guardianship might be appropriate, the clerk may:
- a) Ask the guardian ad litem to make the clerk aware of any such cases; and
 - b) Ask family members and friends of the ward to complete a questionnaire or provide information about the ward's capabilities, either in connection with the incompetency determination or in the proceeding for appointment of a guardian. **GUARDIANSHIP CAPACITY QUESTIONNAIRE (AOC-SP-208)** includes this information. **PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200)** also includes inquiries regarding capacity.
3. In the order creating a limited guardianship, the clerk must make findings as to the nature and extent of the ward's incompetence as it relates to the need for a guardian. [G.S. § 35A-1215(b)]
- a) **ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406)** has a subsection allowing the clerk to make findings and orders about the nature of ward's capacity.
 - b) Examples of findings in sample limited guardianship orders are included in Appendix II.
4. Situations in which a limited guardianship may be appropriate:
- a) When the ward has a medical condition that is controllable by medication, the guardianship may be limited to medical oversight of the drug regimen.
 - b) When the ward is developmentally disabled (mentally retarded) because levels of disability or retardation vary from case to case.
 - c) When the ward is a mentally, emotionally and neurologically impaired or violent minor involuntarily committed to a treatment facility in North Carolina (a "Willie M" class

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member) or a mentally retarded patient in a public psychiatric hospital in North Carolina (a “Thomas S” class member.)

III. Alternatives to Guardianship

A. Alternatives applicable to adults.

1. Power of attorney. [G.S. Chapter 32A]

a) A power of attorney is an instrument granting someone authority to act as agent or attorney-in-fact for the grantor. [BLACK’S LAW DICTIONARY 1191 (7th ed. 1999)]

b) A durable power of attorney is a power of attorney by which a principal designates another his or her attorney-in-fact and contains a statement that “This power of attorney shall become effective after I become incapacitated or mentally incompetent” or similar words showing the principal’s intent that the authority is exercisable notwithstanding the principal’s subsequent incapacity or mental incompetence. [G.S. § 32A-8]

(1) A durable power of attorney may be appropriate for a person who has periods of lucidity and periods of incompetence.

(2) Appointment of a guardian does not automatically revoke the authority of an attorney-in-fact appointed under a durable power of attorney that was executed by the ward before he or she became incapacitated. The guardian, however, may revoke the durable power of attorney. [G.S. § 32A-10]

c) A health care power of attorney [G.S. §§ 32A-15 to -27] with an advance instruction for mental health treatment [G.S. §§ 122C-71 to -77] may be used to allow an individual to specify treatment decisions should the person later lose capacity to give or withhold consent for those decisions. If the person who executed the power of attorney is adjudicated incompetent, upon petition of his or her guardian of the person, the court may suspend the authority of the health care agent for good cause shown. However the clerk’s order must direct whether the guardian must act consistently with the health care power of attorney or whether and in what circumstances the guardian may deviate from it. [G.S. §§ 32A-22(a) and 35A-1208]

2. Adult protective services.

a) County social services departments are responsible for providing protective services to disabled adults. [G.S. § 108A-103] A “disabled adult” is any person 18 years of age or over or any lawfully emancipated minor who is physically or mentally incapacitated due to mental retardation, cerebral

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palsy, epilepsy or autism; organic brain damaged caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age that are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances. [G.S. § 108A-101(d)]

b) Protective services are services necessary to protect the disabled adult from abuse, neglect, or exploitation. [G.S. § 108A-101(n)]

(1) They may include 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. [G.S. § 108A-101(i)]

(2) A petition for an order authorizing the provision of protective services is filed as a special proceeding but is heard in the district court. [G.S. § 108A-104 and -105]

(3) Chapter 108A is useful for situations that involve:

(a) A medical condition that is not likely to reoccur or is of a short duration; or

(b) The need to assess a person, which may include the need for guardianship.

3. Representative payee system.

a) If a recipient of federal or state benefits is unable to manage the benefits properly, the disbursing governmental agency can designate a third party as “representative payee” to receive and manage the benefits for the recipient.

b) A representative payee may be used even if a guardian of the person or estate has been appointed.

c) The guardian may serve as representative payee. If there is a guardian of the person or the estate, he or she may be a representative payee for government benefits.

d) A person other than the guardian may serve as representative payee.

e) Only the disbursing governmental agency:

(1) May designate or change a representative payee. [*Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985)]; or

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- (2) Has the power to determine that the representative payee is misusing benefits or to require that he or she account for the benefits. [*Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985).]
 - f) For more information regarding criteria and procedures for representative payee appointments, contact the government agency disbursing the benefits.
- 4. Transfers under the Uniform Custodial Trust Act (UCTA). [G.S. §§ 33B-1 to -22]
 - a) The UCTA basically creates a statutory trust with a built-in set of forms that can be used for providing support to an incapacitated person.
 - b) The UCTA allows an adult, while competent, to designate a person to act as his or her trustee should the adult become incompetent.
 - c) It also allows an adult to create a trust to provide for the management of property for the benefit of another person who is incapacitated.
 - d) One important provision is that if a person holds property belonging to an incapacitated person who is without a guardian of the estate, or owes a debt to that person, he or she may make a transfer to a custodial trustee under the UCTA. If the value of the property exceeds \$20,000, the transfer requires court approval. [G.S. § 33B-5(a)]
 - e) Termination of a custodial trust.
 - (1) The beneficiary, if not incapacitated, or a guardian of the estate of an incapacitated beneficiary may terminate a custodial trust. [G.S. § 33B-2(e)]
 - (2) An attorney-in-fact acting under a durable power that specifically grants power to terminate a trust may terminate the custodial trust. [G.S. §32A-1]
 - (3) The death of the beneficiary terminates a custodial trust. [G.S. § 33B-2(e)]
- 5. Establishment of a trust.
 - a) The trust document may require the trustee to distribute income for the benefit of a beneficiary.
 - b) Distribution may be at the discretion of the trustee or pursuant to a standard such as is necessary for the “health, maintenance, or well-being” of the beneficiary.
 - c) Pursuant to G.S. § 36A-115, the beneficiary’s interest in a discretionary or support trust may not be alienated or transferred.

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6. Insurance proceeds or other funds under \$5,000 paid to or administered by the clerk pursuant to G.S. § 7A-111. See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

B. Alternatives for management of a minor's funds.

1. G.S. § 35A-1227 sets out four procedures that may allow funds of a minor to be managed without the need for a guardianship of the estate or a general guardianship.
 - a) Insurance proceeds or other funds under \$25,000 paid to or administered by the clerk pursuant to G.S. § 7A-111. See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.
 - b) Distribution of a devise of personal property to a parent or guardian up to the dollar amount specified in G.S. § 28A-22-7. (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.)
 - c) Property due a minor from a personal representative or collector may be delivered to the clerk pursuant to G.S. § 28A-23-2. (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.)
 - d) Transfers under the Uniform Transfers to Minors Act (UTMA). [Chapter 33A] (See Distribution and Renunciation of Interests, Estates, Guardianships and Trusts, Chapter 81.)
2. Other.
 - a) Structured settlements.
 - (1) If a minor is a successful plaintiff in a personal injury suit or in an action for the wrongful death of a parent, any award to the minor may be held by an insurance company or an indemnity company pursuant to a structured settlement agreement.
 - (2) The clerk has no responsibility or oversight over structured settlement funds unless and until those funds are paid to a guardian of the minor or to the clerk.
 - b) Funds left on deposit with an insurance company. If the minor is a beneficiary of a life insurance policy, sometimes those funds are left on deposit with the insurance company until the minor reaches majority.

IV. Appointment of a Guardian for an Incompetent Person

NOTE: In most cases, the appointment of a guardian is done in connection with the adjudication procedure as most petitioners seek appointment of a guardian at the same time as the adjudication of incompetency.

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- A. Applicability. If a person is adjudicated incompetent, the clerk must either appoint a guardian according to the procedures in Chapter 35A or, for good cause shown, transfer the proceeding for the appointment of a guardian to another appropriate county. [G.S. §§ 35A-1112(e), -1120]
1. Caution: The clerk should be aware that if he or she enters an adjudication order, and then transfers the matter to another county for appointment of a guardian, there will be a period of time during which the incompetent person will be without a guardian to make important decisions. Some clerks appoint an interim guardian in this situation before transferring the matter.
 2. See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.
 3. See section XIII at page 86.57 on transfer to another county.
- B. Venue. Venue for the appointment of a guardian for an incompetent person is in the county in which the person was adjudicated incompetent unless the clerk in that county has transferred the matter to a different county, in which case venue is in the county to which the matter has been transferred. [G.S. § 35A-1204]
- C. Application for appointment.
1. Who may file.
 - a) Any individual, corporation, or disinterested public agent may file an application for the appointment of a guardian for an incompetent person. [G.S. § 35A-1210]
 - (1) A “disinterested public agent” is defined as the director or assistant directors of a county department of social services. [G.S. § 35A-1202(4)(a)]
 - (2) See section IV.E at page 86.18 on qualifications of a guardian for an incompetent person.
 2. AOC forms. The application for appointment of a guardian may be joined with or filed subsequent to a petition for the adjudication of incompetence. [G.S. § 35A-1210]
 - a) To apply for the appointment of a guardian at the same time that the petition for an adjudication of incompetency is filed, the applicant may file PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200).
 - b) After an adjudication of incompetency, some clerks require an applicant to file APPLICATION FOR LETTERS OF GUARDIANSHIP OF THE ESTATE/LIMITED GUARDIANSHIP OF THE ESTATE/GUARDIANSHIP OF THE PERSON/ LIMITED GUARDIANSHIP OF THE

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PERSON/ GENERAL GUARDIANSHIP/ LIMITED GENERAL GUARDIANSHIP FOR AN INCOMPETENT PERSON (AOC-E-206) to request the appointment of a guardian, even if AOC-SP-200 has been filed. This form requests a more detailed statement of information than AOC-SP-200.

3. Contents of the application.
 - a) G.S. § 35A-1210 sets out the required content of the application.
 - b) AOC-SP-200 meets the requirements of G.S. § 35A-1210.
4. Service of the application.
 - a) The application for the appointment of a guardian and related motions and notices must be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk may direct. [G.S. § 35A-1211(a)]
 - b) When the application for the appointment of a guardian is joined with a petition for adjudication of incompetence, the application must be served with and in the same manner as the petition for adjudication of incompetence. [G.S. § 35A-1211(b)] (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.)
 - (1) Petitioner must have the sheriff personally serve the respondent with copies of the petition and initial notice of hearing. [G.S. § 35A-1109] **The Sheriff cannot leave service documents with any other person.**
 - (a) Respondent's counsel or guardian ad litem may not waive personal service.
 - (b) A sheriff who serves the notice and petition must do so without demanding fees in advance. [G.S. § 35A-1109]
 - (2) Respondent's counsel or guardian ad litem must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 35A-1109] In practice, the guardian ad litem accepts service by signing the back of AOC-SP-201. Subsequent notices to the initial notice of hearing to the parties must be served as provided by G.S. § 1A-1, Rule 5. [G.S. § 35A-1108]
 - (3) Within 5 days after filing the petition, the petitioner must mail by first-class mail a copy of the petition (with attachments, if any) and notice of hearing to respondent's next of kin alleged in the petition and

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any other persons designated by the clerk, unless such person has accepted notice. Proof of mailings or acceptance is by affidavit or certificate of acceptance of notice filed with the clerk. [G.S. § 35A-1109]

(a) CERTIFICATE OF SERVICE (AOC-SP-207) may be used.

(b) For a discussion of the meaning of “next of kin,” see Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85.

(4) The clerk must mail by first-class mail copies of any subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. [G.S. § 35A-1109]

c) Unless the clerk directs otherwise, when the application for the appointment of a guardian is filed subsequent to the petition for adjudication of incompetency, the applicant must serve the application as provided in G.S. § 1A-1, Rule 5. [G.S. § 35A-1211(b)]

D. Hearing on appointment of a guardian for an incompetent person.

1. In most cases, a hearing on the appointment of a guardian will immediately follow the adjudication hearing.

2. Right to counsel or guardian ad litem. An attorney appointed as a guardian ad litem under G.S. § 35A-1107 in the incompetency proceeding represents the respondent until the petition is dismissed or until a guardian is appointed. [G.S. § 35A-1107(b)]

3. Issues for the clerk to determine. After adjudicating incompetency or after the case is transferred to the clerk for appointment of a guardian, the clerk determines:

a) The nature and extent of the guardianship;

b) The assets, liabilities, and needs of the ward; and

c) Who can most suitably serve as guardian(s). [G.S. § 35A-1212(a)]

4. Evidence.

a) The clerk must inquire and receive such evidence as the clerk deems necessary to determine the issues listed above. [G.S. § 35A-1212(a)]

b) In general, a hearing for appointment of a guardian is an informal procedure. In any event, however, a hearing must be held, and if the matter of guardianship is contested, a more formal hearing is required. The rules of evidence [G.S.

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Chapter 8C] apply, and a record should be made for appeal purposes.

5. Multidisciplinary evaluation (MDE) and report of designated agency.
 - a) If a MDE is not available and the clerk determines that one is necessary, the clerk, on his or her own motion or the motion of any party, may order a MDE. [G.S. § 35A-1212(b)] REQUEST AND ORDER FOR MULTIDISCIPLINARY EVALUATION (AOC-SP-901M) may be used.
 - b) A MDE may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian, or both. [G.S. § 35A-1111(e)]
 - c) The clerk may require a report prepared by a designated agency to evaluate the suitability of a prospective guardian. [G.S. § 35A-1212(c)]
 - (1) The report should include a recommendation of a party or parties to serve as guardian, based on the nature and extent of the needed guardianship and the ward's assets, liabilities, and needs. [G.S. § 35A-1212(c)]
 - (2) If a designated agency has not been named, the clerk may name a designated agency. [G.S. § 35A-1212(d)] "Designated agency" is defined in G.S. § 35A-1202(3).

E. Qualifications of a guardian of an incompetent person.

1. Priorities for appointment. The clerk must base the appointment of a guardian on the best interest of the ward according to the following order of preference:
 - a) An individual recommended by a parent's will as provided in G.S. § 35A-1212.1. See section IV.E.2 below.
 - b) An adult individual (unlike decedent's estates, there is no priority between adult individuals);
 - c) A corporation specifically authorized by its charter to serve as a guardian (not simply one organized "for any lawful purpose"); or
 - d) A disinterested public agent (no public agent may be appointed until diligent efforts have been made to find an adult individual or corporation to serve as guardian.) [G.S. §§ 35A-1213 and -1214]
2. Recommendations.
 - a) By a parent in his or her will. [G.S. § 35A-1212.1]

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- (1) A parent may recommend the appointment of a guardian for an unmarried child who has been adjudicated incompetent and may specify the desired limitations on the powers to be given to the guardian.
 - (2) If both parents make recommendations, the will with the latest date, in the absence of other relevant factors, prevails.
 - (3) The clerk must take the recommendation as a strong guide, but is not bound by it if the clerk finds that a different appointment is in the best interest of the incompetent adult.
- b) By the applicant or next of kin.
- (1) The applicant may submit to the clerk the name(s) of potential guardians. [G.S. § 35A-1213(a)]
 - (2) The clerk may consider the recommendations of the next of kin or other persons. [G.S. § 35A- 1213(a)]
- c) By power of attorney.
- (1) A principal may nominate, by a health care power of attorney, a guardian of the principal's person if a guardianship proceeding is thereafter commenced. The court shall make its appointment in accordance with the most recent nomination in an unrevoked health care power of attorney, except for good cause shown. [G.S. § 32A-22(b)]
 - (2) A principal may nominate, by a durable power of attorney, the conservator, guardian of the estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney, except for good cause or disqualification. [G.S. § 32A-10(b)]
3. Eligibility of an individual to serve as guardian.
- a) A nonresident may be appointed general guardian, guardian of the estate, or guardian of the person of a North Carolina resident if the nonresident:
- (1) Agrees in writing to submit to the jurisdiction of North Carolina courts in matters relating to the guardianship (no AOC form);
 - (2) Appoints a resident process agent to accept service of process for the guardian (APPOINTMENT OF RESIDENT PROCESS AGENT, AOC-E-500); and

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- (3) Posts a bond if required by statute or ordered by the clerk (A general guardian or guardian of the estate must post a bond; the clerk may require a guardian of the person to post a bond.) (BOND (CORPORATE SURETY), AOC-E-401). [G.S. § 35A-1213(b)]
 - b) An employee of a treatment facility where the ward is an inpatient or resident may not serve as guardian for the ward. [G.S. § 35A-1213(e)]
- 4. Eligibility of a corporation to serve as guardian.
 - a) A corporation may be appointed guardian only if it is specifically authorized by its charter to serve as a guardian or in similar fiduciary capacities.
 - b) A corporation shall meet the requirements of G.S. Chapters 55 and 55D.
 - c) A corporation applying for appointment must provide the clerk a copy of the corporate charter.
 - d) A corporation contracting with a public agency to serve as guardian is required to attend guardianship training and provide verification of attendance to the contracting agency. [G.S. § 35A-1213(c)]
- 5. Eligibility of a disinterested public agent to serve as guardian.
 - a) A disinterested public agent who is appointed as guardian must serve in that capacity by virtue of his office or employment, which must be identified in the clerk's order and in the letters of appointment. [G.S. § 35A-1213(d)]
 - b) If the disinterested public agent, at the time of appointment or thereafter, believes that his or her role or the role of the agency in relation to the ward is such that service as guardian would constitute a conflict of interest, the disinterested public agent must notify the clerk and seek appointment of a different guardian. [G.S. § 35A-1213(d)]
 - c) When the disinterested public agent's office or employment terminates, the successor in office or employment, or his or her immediate supervisor if there is no successor, shall succeed the disinterested public agent as guardian without further proceedings unless the clerk orders otherwise. [G.S. § 35A-1213(d)]
 - d) The fact that a disinterested public agent provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian. [G.S. § 35A-1202(4)]
 - e) Prohibition on eligibility. [G.S. § 35A-1213(f)]

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- (1) An individual who contracts with or is employed by an entity that contracts with a local management entity (LME) for delivery of mental health, developmental disabilities, and substance abuse services may not serve as guardian for a ward for whom the individual or entity is providing these services, unless the individual is the ward's parent.
- (2) This prohibition does not apply to a member of the ward's immediate family who is under contract with a LME for delivery of the services listed above and is serving as guardian as of January 1, 2013. "Immediate family member" means spouse, child, sibling, parent, grandparent, grandchild, stepparent, stepchild, stepsiblings, and adoptive relationships.

F. Clerk's order appointing a guardian for an incompetent person.

1. An order appointing a guardian for an incompetent person must include:
 - a) The name of the guardian(s);
 - b) The nature of the guardianship created;
 - c) Any modification to the statutory powers and duties of the guardian regarding the ward's person (see section VII at page 86.34) or the estate (see section VIII at page 86.38); and
 - d) The identity of the designated agency, if there is one. [G.S. § 35A-1215(a)]
2. ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) may be used.
3. If applicable, the order may include any bond requirements. (See section VI at page 86.27 on guardian's bond.)
4. Modification of the order. Any request for modification of the order appointing a guardian (or other matter relating to the guardianship) is treated as a motion in the cause. [G.S. § 35A-1207]
5. Cases. Where the guardian failed to sign either the application for her appointment or the oath appearing in said record, the appointment was not void. [*Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935).]

G. Letters of appointment.

1. The clerk must issue letters of appointment to the guardian(s). [G.S. § 35A-1215(c)]
 - a) Bond requirement. A guardian of the estate or a general guardian must post a bond approved by the clerk before issuance of letters. [G.S. § 35A-1231; see section VI at page 86.27.]

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2. The letters must specify the type of guardianship. [G.S. § 35A-1206]
3. The following AOC forms may be used.
 - a) LETTERS OF APPOINTMENT GUARDIAN OF THE ESTATE (AOC-E-407)
 - b) LETTERS OF APPOINTMENT GENERAL GUARDIAN (AOC-E-413)
 - c) LETTERS OF APPOINTMENT GUARDIAN OF THE PERSON (AOC-E-408)
 - d) LETTERS OF APPOINTMENT LIMITED GUARDIAN OF THE ESTATE (AOC-E-417)
 - e) LETTERS OF APPOINTMENT LIMITED GUARDIAN OF THE PERSON (AOC-E-418)
 - f) LETTERS OF APPOINTMENT LIMITED GENERAL GUARDIAN (AOC-E-419)
 - g) The powers and duties of each type of guardian are discussed in sections VII–IX at pages 86.34 to 86.44.

V. Appointment of a Guardian for a Minor

- A. **Applicability.** The clerk is authorized to appoint a guardian of the estate of any minor and to appoint a guardian of the person or general guardian for any minor who has no natural guardian. [G.S. § 35A-1203(a)]
- B. **Venue.** Venue for the appointment of a guardian for a minor is in the county where the minor resides or is domiciled. [G.S. § 35A-1204(b)]
- C. **Application for appointment.**
 1. **Who may file.** Any person or corporation, including any State or local human resources agency through its authorized representative, may apply for appointment of a guardian for a minor. [G.S. § 35A-1221]
 2. **AOC form.** APPLICATION FOR APPOINTMENT OF GUARDIAN OF THE ESTATE/GUARDIAN OF THE PERSON/GENERAL GUARDIAN FOR A MINOR (AOC-E-208) may be used.
 - a) The applicant must indicate whether he or she is seeking appointment of a guardian of the estate, a guardian of the person, or a general guardian. [G.S. § 35A-1221(6)]
 - b) G.S. § 35A-1221 sets out the required contents of the application. AOC-E-208 meets the requirements of G.S. § 35A-1221.
 3. **Service of the application and notice.**
 - a) A copy of the application and written notice of the time, date, and place set for hearing must be served on each of the following (other than the applicant):

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- (1) Each parent, if living;
 - (2) Guardian;
 - (3) Legal custodian of the minor; and
 - (4) Any other person the clerk may direct (including the minor.) [G.S. § 35A-1222]
- b) Service must be made by one of the approved methods in G.S. § 1A-1, Rule 4, unless the clerk directs otherwise. [G.S. § 35A-1222]
- c) Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered. [G.S. § 35A-1222] Side Two of AOC-E-208 contains a Waiver and Consent to Guardianship section.
- (1) It should be noted that the form provides not just for waiver of notice, but that the waiving party “consents to the appointment of the applicant(s) as guardians for the minor to serve in the capacity indicated.” This language goes beyond the waiver permitted in G.S. § 35A-1222. Despite the waiver language of the form, the clerk should hold a hearing and make a determination of the guardianship on the merits.
 - (2) **Regardless of any waiver or consent, clerk must hold a hearing and make the appointment determination.**
- d) A sheriff who serves the notice and application must do so without demanding fees in advance. [G.S. § 35A-1222]
- D. Hearing on appointment of a guardian for a minor.
1. Right to counsel or guardian ad litem. It is not clear whether Chapter 35A requires that the minor be represented by counsel or a guardian ad litem before proceeding with appointment of a guardian.
 - a) There is no provision in Subchapter II of Chapter 35A (the guardianship section) that requires the clerk to appoint a guardian ad litem in the guardianship proceeding when the respondent is not represented by counsel.
 - b) However, the clerk may require notice of hearing to be served on a minor [G.S. § 35A-1222] and if required, may want to appoint a guardian ad litem. If the minor has no natural guardian, the best practice is to treat the minor as a party and require notice to be given to him or her. G.S. § 1A-1, Rule 17 would then require the appointment of a guardian ad litem to represent the child in the proceeding.

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- (1) If a Rule 17 guardian ad litem is appointed, the appointee does not need to be an attorney and the State would not pay the expenses of the guardian ad litem.
 - (2) G.S. § 7A-307(c) allows the clerk to assess the costs of the guardian ad litem to the parties.
 2. Issues for the clerk to determine. The clerk must receive evidence necessary to determine three issues:
 - a) Whether appointment of a guardian is required, and if so;
 - b) The type of guardianship needed; and
 - c) Who the guardian(s) will be. [G.S. § 35A-1223]
 3. Evidence.
 - a) If the clerk determines that a guardian is required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs and who the guardians will be. [G.S. § 35A-1223]
 - b) The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest. [G.S. § 35A-1223]
- E. Qualifications of guardians for minors.
 1. In general.
 - a) The clerk must base the appointment of a guardian on the minor's best interest. [G.S. § 35A-1223]
 - b) The clerk has authority to appoint a guardian of the estate for any minor but **only** has authority to appoint a guardian of the person or general guardian for a minor who has no natural guardian. [G.S. § 35A-1224(a)]
 - (1) The clerk may not appoint a general guardian for a minor if a natural guardian exists, even when the appointment would be for the limited purpose of receiving death benefits pursuant to an award from the Industrial Commission. [*Valles de Portillo ex rel. Portillo Valles v. D.H. Griffin Wrecking Co.*, 134 N.C. App. 714, 518 S.E.2d 555 (1999).] NOTE: The clerk could have appointed a guardian of the estate.
 - (2) Parents cannot voluntarily seek to terminate their parental rights so that their child may be considered a minor with no natural guardian. [*In re Jurga*, 123 N.C. App. 91, 472 S.E.2d 223 (1996) (parents of a severely retarded child in a care facility in North Carolina were transferred out of state; child's eligibility for funding entitlements required his

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parent or legal guardian to be domiciled in North Carolina; parents' petition to terminate their parental rights and have clerk appoint a resident family member as guardian dismissed for lack of jurisdiction).]

2. Testamentary recommendation.
 - a) A parent may **recommend** in the parent's last will and testament a guardian for a minor child. [G.S. § 35A-1225(a)]
 - (1) Validity of the testamentary recommendation is not affected by whether the parent was an adult or minor when the will was made.
 - (2) If both parents make a testamentary recommendation, the will with the latest date will prevail in the absence of other relevant factors.
 - (3) In the absence of a surviving parent, the recommendation is to be a strong guide for the clerk in appointing a guardian, but is not binding if the clerk finds that the appointment of a different guardian is in the minor's best interest.
 - (4) The clerk may allow a guardian appointed pursuant to a testamentary recommendation to qualify and serve without giving bond if the will specifically directs. Notwithstanding the provision in the will, the clerk may require a bond if the clerk finds as a fact that the interest of the minor would be best served by requiring bond.
 - b) Any person authorized by law to recommend a guardian for a minor may direct by will that the guardian appointed for his or her incompetent child petition the clerk during the six months before the child reaches majority for an adjudication of incompetence and appointment of a guardian under Chapter 35A. [G.S. § 35A-1225(b)]
 - (1) If so directed, the guardian must timely file such a petition unless the minor is no longer incompetent.
 - (2) Even in the absence of such testamentary direction, the guardian of an incompetent child (or any other person) may file such petition.
3. Criteria for appointment of guardians for minors.
 - a) The clerk may appoint as guardian of the person or general guardian only an adult individual, whether or not that individual is a resident of North Carolina. [G.S. § 35A-1224(b)]
 - b) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of

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North Carolina, or a corporation that is specifically authorized by its charter to serve as a guardian or in similar fiduciary capacities. [G.S. § 35A-1224(c)]

- c) If a nonresident is appointed guardian, the nonresident must appoint a resident process agent to accept service of process. [G.S. § 35A-1230]
 - d) An employee of a treatment facility where the ward is an inpatient or resident may not serve as guardian for a minor who is an inpatient in or resident of the facility in which the employee works. [G.S. § 35A-1224(e)] “Treatment facility” includes group homes, halfway houses, and other community-based residential facilities. [G.S. § 35A-1101(16)]
- F. Clerk’s order appointing a guardian for a minor.
- 1. An order appointing a guardian for a minor should include:
 - a) Findings as to the minor’s circumstances, assets, and liabilities as they relate to the need for a guardian or guardians; and
 - b) Whether there will be one or more guardians, the identity of each, and if more than one, who shall be guardian of the person and who will be guardian of the estate. [G.S. § 35A-1226]
 - 2. ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) may be used.
 - 3. Bond required. See section VI at page 86.27. The order may include any bond requirements.
 - 4. The appointment of a guardian of the estate of a minor does not in any way limit or diminish the parental rights of a parent or natural guardian. [*Valles de Portillo ex rel. Portillo Valles v. D.H. Griffin Wrecking Co.*, 134 N.C. App. 714, 518 S.E.2d 555, review denied, 351 N.C. 188, 541 S.E.2d 727 (1999).]
- G. Letters of appointment.
- 1. The clerk must issue letters of appointment to the guardian(s). [G.S. § 35A-1226]
 - 2. The letters must specify the type of guardianship. [G.S. § 35A-1206]
 - 3. The following AOC forms may be used:
 - a) LETTERS OF APPOINTMENT GUARDIAN OF THE ESTATE (AOC-E-407);
 - b) LETTERS OF APPOINTMENT GENERAL GUARDIAN (AOC-E-413) **(if there is no natural guardian)**; or
 - c) LETTERS OF APPOINTMENT GUARDIAN OF THE PERSON (AOC-E-408) **(if there is no natural guardian)**.

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- H. DSS director as temporary guardian. When a minor either has no natural guardian or has been abandoned and requires public assistance from DSS, the social services director in the county in which the minor resides or is domiciled shall be the guardian of the person of the minor until:
1. A general guardian or a guardian of the person is appointed for the minor; or
 2. A court order is entered awarding custody of the minor. [G.S. § 35A-1220]
- I. Legal title to the property of an infant ward is in the ward, rather than in the guardian. The guardian is merely the custodian and manager or conservator of the ward's estate. When a guardian takes a deed or mortgage for his ward, the title is regarded as being in the ward. When a guardian takes title to property in his own name, the guardian holds the title as trustee for the ward. [*Owen v. Hines*, 227 N.C. 236, 41 S.E.2d 739 (1947).]

VI. Guardian's Bond

- A. Purpose. The purpose of a bond is to compensate the ward if he or she suffers financial loss as a result of the guardian's failure to properly exercise his duties to the ward. The bond is required to be posted for the protection of the ward and the ward's estate and is to compensate the ward if the guardian squanders or otherwise misapplies the assets of the ward's estate.
- B. Liability of the clerk arising from the guardian's bond.
1. **CAUTION: TAKING OR MAINTAINING AN INADEQUATE BOND SUBJECTS CLERKS TO GREAT LIABILITY.** See Liability of the Clerk, Introduction, Chapter 13.
 2. The clerk is liable to the ward's estate if the clerk fails to:
 - a) Take good and sufficient security for the bond [G.S. § 35A-1238(a)];
 - b) Require an increase in the amount of the bond sufficient to cover any increase in, or sale of, the ward's assets [G.S. § 35A-1231(b)]; or
 - c) Timely renew (every 3 years) every guardian's bond executed by a personal surety rather than by a duly authorized surety company. [G.S. § 35A-1236]
- C. When bond is required. [G.S. § 35A-1230]
1. Guardian of the estate and general guardian.
 - a) A guardian of the estate or a general guardian must post a bond approved by the clerk before receipt of the ward's property. [G.S. § 35A-1230]
 - b) BOND (AOC-E-401) may be used.
 - (1) G.S. § 35A-1231 requires that the bond be acknowledged before and approved by the clerk.

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- (2) **Because the clerk must acknowledge and approve the bond, the signatures of the principal and sureties cannot be sworn and subscribed to before a notary.**
- c) Deposited money. When it appears to the clerk that the ward's estate includes money deposited (or to be deposited) in an account with a financial institution upon condition that the money will not be withdrawn except at the court's authorization, the clerk may exclude such money from the calculation of the bond or reduce the bond by the amount deposited or an amount he or she deems reasonable. [G.S. § 35A-1232]
2. Guardian of the person.
- a) The clerk shall not require a resident guardian of the person to post a bond. [G.S. § 35A-1230]
- b) The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties. [G.S. §§ 35A-1213(b) and -1230] FAITHFUL PERFORMANCE BOND NON-RESIDENT GUARDIAN OF THE PERSON (MINOR OR INCOMPETENT) (AOC-E-903M) may be used.
3. Testamentary guardian. A guardian of the person, guardian of the estate or general guardian of a minor is not required to post a bond if
- a) The guardian is appointed pursuant to the recommendation in a parent's will;
- b) The will specifically directs that no bond is required; and,
- c) The clerk does **not** find that the interest of the minor would be best served by requiring a bond. [G.S. § 35A-1225(a)]
4. Disinterested public agent as guardian for an incompetent person. The Secretary of the Department of Health and Human Services must require or purchase individual or blanket bonds for all disinterested public agents appointed as a guardian of the estate, guardian of the person or general guardian. [G.S. § 35A-1239]
- a) DHHS may deny a request for coverage under the DHHS blanket bond if the ward's assets are sufficient to purchase an individual bond.
- b) There is no cap on coverage under a DHHS blanket bond.
- D. Terms and conditions of the guardian's bond.
1. Bond options. The clerk may accept any of the following:
- a) Bond executed by a duly authorized surety company; or
- b) Bond executed by personal sureties in the form of a:

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- (1) Personal surety bond (sometimes called a property bond);
 - (2) Cash bond; or
 - (3) Mortgage in lieu of a bond.
2. Even though the clerk may accept a bond executed by a personal surety, **the better practice is to require a duly authorized surety company to post all bonds.**
 - a) The clerk's risk of liability is less on a bond executed by a duly authorized surety company than on a bond executed by a personal surety.
 - b) Bonds executed by personal sureties are strongly discouraged because they increase risks of liability and work for the clerk.
 - (1) It is difficult to determine if a person has sufficient assets (real and personal) after liabilities and exemptions to cover the bond. (See Criminal Appearance Bonds: Taking Secured Bonds, Criminal Procedures, Chapter 22, for information on resources the clerk can consult to determine whether to accept a property bond and for information on common issues in taking all bonds.)
 - (2) It is unclear whether the clerk has any responsibility for determining the value of the land or for checking title.
 - (3) Bonds executed by a personal surety **must be renewed every three years.** [G.S. § 35A-1236]
3. Practice tips.
 - a) The clerk should require the agent of an authorized surety company to provide a copy of the power of attorney authorizing the agent to act on behalf of the company. The clerk should attach the power of attorney to the bond.
 - b) When the guardian files an annual account, the clerk should look closely at the balance held by the guardian and confirm that the bond is still sufficient. This is particularly important when the estate receives more income than the guardian disburses in a given year.
 - c) If the clerk takes a personal surety bond, it is good practice to ask for a deed of trust.
 - d) It is good practice to condition an order authorizing the sale of real property on appropriate bond being approved. The clerk should not confirm the sale until appropriate bond is posted.

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- e) The clerk should ensure that maximum coverage is obtained for any required minimum premium.

EXAMPLE: A bond company may require a minimum premium of \$100. Payment of a \$100 premium may provide coverage up to \$18,000. Even if less than \$18,000 in coverage is required or desired, the bond should be written for \$18,000.

- f) For a worksheet that allows the clerk to track bond calculations over the life of a guardianship, see Appendix VI.

4. A guardian's bond must:

- a) Be payable to the State;
- b) Be secured with two or more sureties, jointly and severally bound [in practice, principal and surety who are jointly and severally liable];
- c) Be acknowledged before and approved by the clerk;
- d) Be conditioned on the guardian's faithfully executing the duties of the office and obeying court orders relating to the guardianship;
- e) Be recorded in the office of the clerk appointing the guardian, except if the guardianship is transferred to another county, the bond is recorded in the clerk's office in the county where the guardianship is transferred; and
- f) **Be posted before the clerk issues letters of appointment.**
[G.S. § 35A-1231(a)]

E. Setting bond amount.

1. The clerk must determine the value of all the ward's personal property and the rents and profits of the ward's real estate by examining, under oath, the applicant or others. [G.S. § 35A-1231(a)]
2. To determine the amount of the bond that must be posted, the clerk must estimate and include all annual income and any receipts to be received by the guardian.
 - a) The clerk must estimate and include income from personal property assets, i.e., investment accounts.
 - b) The clerk must include social security benefits processed through the guardianship account. (If the guardian handles social security benefits outside the guardianship account, as a representative payee or otherwise, the clerk does not have to include or bond for these amounts.)
3. The clerk has discretion to exclude from the computation money that has been or will be deposited in a financial institution upon condition that the money will not be withdrawn except with court

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authorization. Alternatively, the clerk may reduce the amount of the bond “in respect of such money” to an amount it deems reasonable. [G.S. § 35A-1232(a)]

- a) RECEIPT AND AGREEMENT (AOC-E-901M) may be used.
- b) AUTHORIZATION TO RELEASE FUNDS (AOC-E-907M) may be used when the clerk authorizes release of all or a portion of the funds on deposit. As the released funds will be coming into the guardianship account, the amount of the bond must be increased.

4. The penalty (amount) of the bond.

- a) If personal sureties execute the bond, the penalty must be at least double the value of all the ward’s personal property plus rents and profits from real estate. [G.S. § 35A-1231(a)(1)]
- b) If a duly authorized surety company executes the bond, the penalty must be fixed at not less than 1 ¼ times the value of all the ward’s personal property plus rents and profits from real estate. [G.S. § 35A-1231(a)(2)]
- c) If the value of the ward’s estate exceeds \$100,000, the clerk may accept a bond equal to that value, plus 10%. [G.S. § 35A-1231(a)(3)]
- d) If the guardian is a nonresident and the value of the property received by that guardian exceeds \$1,000, the bond must be executed by a duly authorized surety or secured by cash or by a mortgage (deed of trust) on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least 1 ¼ times the amount of the bond. [G.S. § 35A-1230]

5. Change in the amount of the bond.

- a) The clerk has continuing authority to adjust the amount of the guardian’s bond. [G.S. § 35A-1203(c)]
- b) The clerk is authorized to reduce the amount of the bond when the personal assets and income of the estate have been diminished by proper disbursements, but not to an amount less than the amount that would be required if the guardian were first qualifying to administer the estate. [G.S. § 35A-1233]
 - (1) This means an amount not less than what would be required if setting an original bond for an estate the size of the diminished estate.
- c) **The clerk must increase the amount of the bond when real property is sold.**

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- (1) It is good practice to condition an order authorizing the sale of real property on appropriate bond being approved.
- (2) The clerk should not confirm the sale until appropriate bond is posted.
- (3) BOND (AOC-E-401) may be used to increase amount of a bond.

F. Renewal of bond.

1. When a duly authorized surety company executes a bond, renewal of the bond is not required. [G.S. § 35A-1236] **The clerk should still review the amount of the bond to determine whether it needs to be increased or decreased.**
2. **A bond executed by a personal surety must be renewed every 3 years.** [G.S. § 35A-1236]
 - a) If the guardian fails to renew the bond as required, the clerk must issue a citation requiring renewal within 20 days after service of the citation. [G.S. § 35A-1236]
 - b) If the guardian is duly served but fails to comply, the clerk must remove the guardian and appoint a successor. [G.S. § 35A-1236] (See section XII at page 86.52 regarding removal of a guardian.)
 - c) While G.S. § 35A-1236 requires that a bond executed by a personal surety be renewed every 3 years, the guardian does not have to be reappointed. [*Thornton v. Barbour*, 204 N.C. 583, 169 S.E. 153 (1933).]
3. Effect of failure to require a bond. Failure to require a bond does not make the appointment of a trustee void. It is but an irregularity relating to the qualification of the appointee. [*State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E.2d 806 (1956) (parties sought to impose liability upon former trustee on ground that resignation of the former trustee was not effective because successor trustee did not give bond; this cause of action failed).]
4. Cases.
 - a) Liability on the bond of Guardian A ends when the term of Guardian A ends. The default of a successor guardian may not impose liability upon the bond for Guardian A. [*Adams v. Adams*, 212 N.C. 337, 193 S.E.2d 661 (1937).]
 - (1) The bond for Guardian A remains liable after the term of Guardian A for any acts or omissions of Guardian A occurring during his or her term.
 - (2) The bond for Guardian A is not available for any acts or omissions of successor guardians.

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- b) It is doubtful whether the clerk who is required to approve a bond has the power to accept a bond conditionally. [*Cheshire v. Howard*, 207 N.C. 566, 178 S.E. 348 (1935) (sureties alleged that they signed the bond on the assurance that the guardian would sign the bond as principal and that the bond would not be effective as to them until she had signed as principal).]
 - c) The amount of coverage is the face amount of the bond. Repeated renewals of the bond do not result in increased coverage. [*State of North Carolina ex rel. Duckett v. Pettee*, 50 N.C. App. 119, 273 S.E.2d 317 (1980) (surety bond for \$6,000 provided \$6,000 of coverage upon default of the guardian; fact that it was renewed 7 times does not result in coverage of \$42,000).]
- G. Actions on official bonds.
- 1. Any person injured by a breach of the condition of the guardian's bond may prosecute a suit thereon. [G.S. § 35A-1234]
 - a) In the event a guardian breaches a condition of the bond, the clerk enters an order removing the guardian, stating the grounds for removal, and appoints a successor guardian.
 - b) See section XII at page 86.52 on removal.
 - 2. Venue. All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. [G.S. § 1-78]
 - a) This section includes guardians, notwithstanding the only words used are "executors" and "administrators." [*Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).]
 - b) Even when the principal resided in County B at the time of his death and the executor of his will resided there, venue was proper in County A, the county where the bond was given. [*Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389 (1938).]
 - 3. Statute of limitations.
 - a) An action against the sureties of any executor, administrator, collector or guardian on the official bond of their principal must be brought within 3 years after the breach thereof complained of. [G.S. § 1-52(6)]
 - b) In a suit against a former guardian for misappropriation of the ward's funds, the three-year statute of limitations did not begin to run until the successor guardian was appointed. [*State of North Carolina ex rel. Duckett v. Pettee*, 50 N.C.

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App. 119, 273 S.E.2d 317 (1980) (stating that “[n]o one could expect that the guardian here would bring an action against himself to recover for his own defalcation”).]

- H. Expense of bond charged to fund. A guardian required by law to give a bond as such may include as a lawful expense of the ward’s estate the amount of the bond premium actually paid per annum as the clerk, judge or court may allow. [G.S. § 58-73-35]
- I. A surety in danger of sustaining loss by the suretyship may bring a motion in the cause in the guardianship pursuant to G.S. § 35A-1237.

VII. Powers and Duties of a Guardian of the Person

A. Generally.

- 1. The powers and duties of a guardian of the person are also applicable to general guardians exercising authority as guardian of the person. [See G.S. § 35A-1240 and definition of general guardian in G.S. § 35A-1202(7)]
- 2. Unless the clerk specifically orders otherwise, all statutory powers and duties set out in G.S. § 35A-1241 are applicable to general guardians and guardians of the person.
- 3. The clerk has authority in every case to modify the statutory powers and duties of a guardian by specifying in ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) that certain powers or duties be added or that certain limits be imposed.

B. Duties of a guardian of the person.

- 1. General duties. A guardian of the person has the duty to:
 - a) Provide for the ward’s care, comfort and maintenance;
 - b) Arrange for the ward’s training, education, employment, rehabilitation or habilitation; and
 - c) Take reasonable care of the ward’s personal property. [G.S. § 35A-1241(a)(1)]
- 2. Duty to file status reports for incompetent wards. [G.S. § 35A-1242]
 - a) Who must file a status report.
 - (1) If the guardian of the person is a corporation or a disinterested public agent, the guardian must file status reports. [G.S. § 35A-1242(a)]
 - (2) If the guardian is an individual, the guardian does not have to file status reports unless the clerk specifically so orders. [G.S. § 35A-1242(a)]
 - b) Definition of a “status report.”

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- (1) A “status report” means the report required by G.S. § 35A-1242 to be filed by the general guardian or guardian of the person.
 - (2) A status report must include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the guardian’s performance of the duties set forth in Chapter 35A and in the clerk’s order appointing the guardian, and a report on the ward’s condition, needs, and development. The clerk may direct that the report contain other or different information. The report may also contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons *in loco parentis*, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department of Health and Human Services, or any other interested persons including, if applicable to the ward’s situation, group home parents or supervisors, employers, members of the staff of a treatment facility, or foster parents. [G.S. § 35A-1202(14)]
- c) Filing procedure.
- (1) The guardian files the required status reports with the designated agency, if there is one, or with the clerk. [G.S. § 35A-1242(a)]
 - (a) A “designated agency” is the State or local human services agency designated by the clerk in an order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. [G.S. § 35A-1202(3)]
 - (b) A “designated agency” includes without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers. [G.S. § 35A-1202(3)]
 - (2) The guardian must file the status reports with both the designated agency and the clerk if the guardian is employed by the designated agency. [G.S. § 35A-1242(a)]

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- (3) The guardian must file an initial status report within 6 months of being appointed. [G.S. § 35A-1242(a)]
 - (4) The guardian must file a second status report one year after appointment and subsequent reports annually thereafter. [G.S. § 35A-1242(a)]
 - (5) Each status report must be filed under the guardian's oath or affirmation stating that the report is complete and accurate so far as the guardian is informed and can determine. [G.S. § 35A-1242(b)]
- d) Practice tips.
- (1) The clerk may by administrative order designate mental health to receive status reports. [G.S. § 35A-1202(3)] In the administrative order the clerk should require mental health to notify the clerk when the status report indicates some action is needed.
- e) Limited access to status reports. Status reports are not required to be filed with the clerk (unless the guardian is employed by the designated agency) but if filed with the clerk:
- (1) A clerk or designated agency that receives a status report is not to make reports available to anyone other than the guardian, ward, the court, or State or local human resources agencies providing services to the ward. [G.S. § 35A-1242(c)]
 - (2) If the clerk receives a status report, the clerk should place the report in a sealed envelope in the guardianship file.
- f) Procedure to compel status reports.
- (1) If the guardian fails to file a satisfactory status report as required, the clerk must, on the clerk's own motion or upon the request of an interested party, promptly order the guardian to render a full and satisfactory report within 20 days after service of the order. [G.S. § 35A-1244]
 - (2) If the guardian does not file the required report, or obtain further time in which to file it on or before the return day of the order (20 days), the clerk may:
 - (a) Remove the guardian from office (see section XII at page 86.52);
 - (b) Issue an order or notice to show cause for civil or criminal contempt;

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- (c) Hold the defaulting guardian personally liable for the costs of the proceeding, including the costs of service of all notices or motions incidental thereto, or may deduct the costs of the proceeding from any commissions due the guardian; and
 - (d) When the guardian is a corporation or disinterested public agent, proceed against the president, director, or other persons having charge of the guardianship, or having the responsibility for filing status reports, as if he or she were the guardian personally, and may also fine or remove the corporation or agency as guardian. [G.S. § 35A-1244]
- g) Duties of the designated agency upon receipt of the status report.
- (1) The designated agency, upon receipt of a status report filed pursuant to G.S. § 35A-1242:
 - (a) Must certify to the clerk that it has reviewed the report within 30 days of receipt and must mail a copy of its certification to the guardian [G.S. § 35A-1243(a)];
 - (b) May send written comments on the status report to the clerk, guardian or any other person interested in the ward's welfare;
 - (c) May notify the guardian that it is able to help the guardian perform duties; and
 - (d) May petition the clerk for an order:
 - (i) Requiring the guardian to perform duties;
 - (ii) Modifying the terms of the guardianship or the guardianship program or plan;
 - (iii) Removing the guardian and appointing a successor;
 - (iv) Adjudicating restoration to competency (See Incompetency Determinations, Estates, Guardianships and Trusts, Chapter 85); or

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- (v) For other appropriate relief. [G.S. § 35A-1243(b)]
 - (2) The officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition must sign and acknowledge the petition, and must set out all facts known to it that support the relief sought. [G.S. § 35A-1243(c)]
- C. Powers of a guardian of the person.
- 1. A guardian of the person is entitled to custody of the person of the ward and can establish the ward's place of abode in or out of the State. [G.S. § 35A-1241(a) (1) and (2)]
 - a) The guardian must give preference to in-state if places are substantially equivalent. [G.S. § 35A-1241(a)(2)]
 - b) The guardian must give preference to places that are not treatment facilities. If the only available and appropriate place is a treatment facility, the guardian must give preference to community-based treatment facilities, such as group homes or nursing homes. [G.S. § 35A-1241(a)(2)]
 - 2. A guardian of the person may consent to or approve the ward's receipt of medical, legal, psychological, or other professional care, counsel, treatment or service. [G.S. § 35A-1241(a)(3)]
 - a) The guardian may give any other consent or approval on the ward's behalf that may be required or be in the ward's best interest and may petition the clerk for the clerk's concurrence in the consent or approval. [G.S. § 35A-1241(a)(3)]
 - b) The guardian **may not** consent to the sterilization of a mentally ill or mentally retarded ward. [G.S. § 35A-1241(a)(3)] This is the case even if the sterilization is a secondary consequence of a medical procedure (e.g., in a hysterectomy).
 - 3. A guardian of the person is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in performing duties. [G.S. § 35A-1241(b)]
 - 4. A guardian of the person **may not** (unless appointed as a guardian ad litem pursuant to G.S. § 1A-1, Rule 17) commence or defend any court actions on behalf of the ward or the ward's estate, although a guardian of the estate and general guardian do have such authority. [See G.S. § 35A-1251(3) regarding guardian of the estate and G.S. § 35A-1252(3) regarding guardian of the estate of a minor.]

VIII. Powers and Duties of a Guardian of the Estate

- A. Generally.

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1. The powers and duties of a guardian of the estate are also applicable to general guardians exercising authority as guardian of the estate. [See definition of general guardian in G.S. § 35A-1202(7)]
 2. Unless the clerk specifically orders otherwise, all statutory **duties** set out in G.S. § 35A-1253 are applicable to general guardians and guardians of the estate.
 3. The statutory **powers** provided in G.S. § 35A-1251 apply to guardians of the estate and general guardians of incompetent persons.
 4. The statutory **powers** provided in G.S. § 35A-1252 apply to guardians of the estate and general guardians of minors.
 5. The clerk has authority in every case to modify the statutory powers and duties of a guardian by specifying in ORDER ON APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-E-406) that certain powers or duties be added or that certain limits be imposed.
- B. Duties of a guardian of the estate.
1. General duties. A guardian of the estate has the duty to:
 - a) Take possession of the ward's estate for the use of the ward;
 - b) Collect, or try to collect, all bonds, notes, obligations or moneys due the ward;
 - c) Pay out of the ward's estate any income taxes, property taxes, or other taxes or assessments owed by the ward;
 - d) Use the judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence who is a fiduciary of property of others would use in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property;
 - e) Use any special skills or expertise that the guardian has or was represented to have; and
 - f) Obey all lawful orders of the court. [G.S. § 35A-1253(1) – (5)]
 2. Duty to account and file inventories. Every guardian of the estate and general guardian must comply with the accounting requirements in Chapter 35A. [G.S. § 35A-1253(5)] (See section X at page 86.45.)
- C. Powers of a guardian of the estate.
1. Generally.
 - a) The powers of a guardian of the estate of an incompetent or a minor are described very broadly in G.S. § § 35A-1251 and -1252 as follows:

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A guardian of the estate of an incompetent or a minor 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.

- b) G.S. § 35A-1251 lists 24 specific powers of a guardian of the estate of an incompetent.
 - c) G.S. § 35A-1252 lists 17 specific powers of a guardian of the estate of a minor.
 - (1) Many of the powers listed are identical to those relating to the estate of an incompetent.
 - (2) One notable difference is that a guardian for a minor may maintain an action to obtain support to which the minor is legally entitled. [G.S. § 35A-1252(3)]
2. Actions of a guardian of the estate that require prior court approval:
- a) Expenditures from estate principal [G.S. § 35A-1251(12)];
 - b) Giving of certain gifts [G.S. §§ 35A-1335, -1340, -1350];
 - c) Expenditures from estate principal for the support, maintenance and education of the ward's minor children, spouse, and dependents [G.S. § 35A-1251(21)];
 - d) Selling and mortgaging the ward's property [G.S. § 35A-1251(19); § 35A-1301(c)] (Sale, Mortgage, Exchange or Lease of A Ward's Estate, Special Proceedings, Chapter 124);
 - e) Lease of the ward's real estate for a term of more than 3 years [G.S. § 35A-1251(17a)]; and
 - f) Sale, lease or exchange of the ward's personal property having an aggregate value of more than \$5000 in a single accounting period. [G.S. § 35A-1251(17)a]
3. Expenditures by the guardian of the estate from an incompetent ward's estate.
- a) General authority.
 - (1) A guardian may expend estate income on the ward's behalf and may petition the court for prior approval of expenditures from estate principal. [G.S. § 35A-1251(12)] Thus, expenditures of estate income do not require prior court approval unless so ordered by the clerk in the order appointing the guardian.

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- (2) A guardian may make disbursements that are suitable to the degree and circumstances of the estate of the ward. [G.S. § 35A-1267]
 - (3) A guardian may pay from the ward's estate necessary expenses of administering the ward's estate. [G.S. § 35A-1251(13)]
- b) Amount guardian may expend for the support of the ward.
- (1) The guardian of an estate of an incompetent person who has no other adequate means or source of support is authorized, if not required, to use for the support of the ward, in keeping with his or her age, condition and station in life, so much of the income from the ward's properties as is reasonably required for such purpose. [*Kuykendall v. Proctor*, 270 N.C. 510, 155 S.E.2d 293 (1967).]
 - (2) Whether an expenditure in support of the ward is proper depends on the specific circumstances of each case, and in particular, the size of the estate and the ward's accustomed life style.
- c) Expenditures for child and spousal support.
- (1) A guardian may expend estate **income** for support, maintenance, and education of the ward's minor children, spouse, and dependents without prior court approval unless the clerk in the order appointing the guardian or a subsequent order required advance approval. [G.S. § 35A-1251(21)] A guardian may petition the court for prior approval of expenditures from estate **principal** for the same purposes. [G.S. § 35A-1251(21)]
 - (2) In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account:
 - (a) The ward's legal obligations to his minor children, spouse, and dependents;
 - (b) The sufficiency of the ward's estate to meet the ward's needs;
 - (c) The needs and resources of the ward's minor children, spouse, and dependents; and
 - (d) The ward's conduct or expressed wishes, before becoming incompetent, in regard to the support of these persons. [G.S. § 35A-1251(21)]

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- (3) The spouse of an incompetent person who seeks support from the ward's estate may file a claim before the clerk either as a motion in the cause pursuant to G.S. § 35A-1207 or, if circumstances warrant, as a special proceeding for the sale of real property pursuant to G.S. § 35A-1307. [*Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988).]
 - d) Expenditures for gifts.
 - (1) Expenditures from the **income** of the incompetent's estate for certain types of gifts are authorized upon approval of a superior court judge. [G.S. §§ 35A-1335 to -1338]
 - (2) Expenditures from the **principal** of the incompetent's estate are authorized for certain types of gifts upon approval of a superior court judge. [G.S. §§ 35A-1340 to -1345]
 - (3) Expenditures from an incompetent's estate are authorized for a gift of the incompetent's life interest in a revocable trust the guardian has declared irrevocable upon approval of a superior court judge. [G.S. §§ 35A-1350 to -1355]
4. Expenditures from a minor's estate.
 - a) General authority. A general guardian or guardian of the estate of a minor ward:
 - (1) May expend estate income on the ward's behalf and may petition the court for prior approval of expenditures from estate principal, provided neither the existence of the estate nor the guardian's authority to make expenditures shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward. [G.S. § 35A-1252(9)]
 - (2) May pay from the ward's estate necessary expenses of administering the ward's estate. [G.S. § 35A-1252(10)]
 - b) Limit on expenditures. Expenditures of estate income of a minor are generally limited to those used for the minor's education or maintenance.
 - (1) A minor's parents have a legal duty to provide support for their child. [G.S. § 35A-1252(9)]
 - (2) If the minor's parents do not have sufficient means to provide the necessary support for their child, the guardian may make expenditures from the child's estate for that purpose.

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- (3) The clerk should carefully review requests to expend guardianship property for a minor's support when the minor lives with a parent.
 - (a) Whether an expenditure from a minor's estate is proper depends on the specific circumstances of each case, in particular, the ability of the minor's parents to provide suitable support. [*Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).]
 - (b) *See also Burke v. Turner*, 85 N.C. 500 (1881) (father of a minor child who was financially able to support the child could not, as guardian, expend guardianship funds for the child's support).]
- 5. Expenditures for attorney fees.
 - a) General authority.
 - (1) A guardian is authorized to employ persons, including attorneys, to advise or assist the guardian in the performance of the guardian's duties. [G.S. §§ 35A-1251(14) (incompetent's estate); 35A-1252(11) (minor's estate)]
 - (2) Attorney fees are a proper expense to be charged in the guardian's account if reasonable in amount and expended for the benefit of the ward in connection with the proper administration of the ward's estate. [*Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).]
 - (a) However, if the interests of the guardian and ward are antagonistic and the services rendered by the attorney are in the interest of the guardian rather than the ward, the guardian is individually liable for the payment of attorney fees. [*Maryland Casualty Co. v. Lawing*, 225 N.C. 103, 33 S.E.2d 609 (1945).]
 - (b) If the guardian is an attorney and is submitting a request for fees for services rendered as an attorney, G.S. § 35A-1269 allows fees as provided in G.S. § 28A-23-4. See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.
 - b) Procedure for authorization of fees.

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- (1) Generally, the guardian and the attorney have agreed on the amount of fees or have established the method by which fees are to be calculated.
 - (2) Many clerks require the guardian to file a petition requesting authorization to pay attorney fees of a certain amount.
 - (a) The petition should be signed by the guardian (the fiduciary.)
 - (b) The petition is usually filed with an annual or final account. Depending on the circumstances, the guardian may file a petition and the clerk may authorize payment of fees between accountings.
 - (c) The practice whereby a guardian pays attorney fees before being approved by the clerk and lists the amount paid in an accounting should be avoided. If the clerk does not approve the amount already paid, it is often difficult to recoup the portion that was excessive.
 - (d) For a worksheet that allows the clerk to track attorney fees over the life of a guardianship, see Appendix VI.
 - (3) If fees appear excessive, the clerk may require an affidavit specifically describing the legal services rendered.
6. Expenditures for commissions. See section XVIII at page 86.72.
 7. Renunciation of an interest of the ward. A guardian of the estate has the power to renounce any interest in property but renunciation must be in the best interest of the ward. [*In re Caddell*, 140 N.C. App. 767, 538 S.E.2d 626 (2000) (clerk's denial of a petition to renounce a sizeable inheritance by a ward maintained in a retirement center by public assistance upheld as not in ward's best interest).]

IX. Powers and Duties of a General Guardian

- A. A general guardian means a guardian of both the estate and the person. [G.S. § 35A-1202(7)]
- B. Unless otherwise ordered by the clerk, a general guardian has the powers and duties of both a guardian of the person (described in section VII at page 86.34) and a guardian of the estate (described in section VIII at page 86.38) [G.S. §§ 35A-1240 and -1250(a)]
- C. No right to maintain action for divorce. A court has held that a general guardian may not maintain an action on behalf of an incompetent for divorce.

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[*Freeman v. Freeman*, 34 N.C. App. 301, 237 S.E.2d 857 (1977).] A competent spouse may file an action to divorce an incompetent spouse.

X. Inventory and Accounting Requirements

- A. Generally.
 - 1. The procedures for guardianship inventories and accounts are similar to the requirements for decedent's estates and are covered in Article 10 of Chapter 35A.
 - 2. The requirements of Article 10 are applicable only to general guardians and guardians of the estate. [G.S. § 35A-1260]
- B. The inventory.
 - 1. When required.
 - a) Every guardian, within 3 months of appointment, must file with the clerk an inventory or account, upon oath, of the ward's estate. [G.S. § 35A-1261]
 - b) The clerk can, for good cause shown, extend the time for filing up to 6 months. [G.S. § 35A-1261]
 - 2. AOC form. INVENTORY FOR GUARDIANSHIP ESTATE (AOC-E-510) may be used.
 - 3. Procedure to compel the inventory.
 - a) If the guardian fails to file the inventory within the time required, the clerk must issue an order requiring the guardian to file the inventory or to show cause why the guardian should not be removed from office or held in civil contempt, or both. [G.S. § 35A-1262(a)]
 - b) If the guardian is served with the clerk's order and does not, within the time specified in the order, file the inventory or obtain an extension of time, the clerk may remove the guardian from office, hold the guardian in civil contempt, or both. [G.S. § 35A-1262(a)]
 - c) The guardian is personally liable for the costs of any proceeding incident to the guardian's failure to file the required inventory. The clerk must tax costs against the guardian and may deduct that amount from any commissions due the guardian upon final settlement of the estate. [G.S. § 35A-1262(b)]
 - (1) The guardian's liability for costs does **not** include attorney fees of any of the parties to the proceeding to compel. [G.S. § 35A-1262] Unless authorized by statute, costs do not include attorney fees. [*City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972); *Joines v. Herman*, 89 N.C. App. 507, 366 S.E.2d 606 (1988).]

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- (2) Attorney fees are recoverable in an action to compel an account. (See G.S. § 35A-1265 and section X.D.4 at page 86.47.)
- C. The supplemental inventory. [G.S. § 35A-1263.1]
 1. Whenever the guardian learns of any property not included in the original inventory, or that the valuation or description of any property or interest indicated in the inventory is erroneous or misleading, the guardian must file a supplemental inventory.
 2. The guardian must prepare and file the supplemental inventory in the same manner as the original inventory.
 3. A guardian who fails to file a supplemental inventory as required may be compelled to do so pursuant to the same enforcement procedures applicable to compel the original inventory, which are set out in G.S. § 35A-1262 and are described in section X.B.3 above.
- D. Annual account.
 1. When filed. The guardian must file an annual account within 30 days after the end of one year from the date of qualification or appointment and annually thereafter as long as any of the estate remains under the guardian's control. [G.S. § 35A-1264]
 2. AOC form. ACCOUNT (AOC-E-506) may be used.
 3. What the account is to include.
 - a) The account must be under oath and include:
 - (1) The amount of property received or invested by the guardian;
 - (2) The manner and nature of any investments;
 - (3) Receipts and disbursements for the past year in debit and credit form; and
 - (4) Vouchers or verified proof for all payments. [G.S. § 35A-1264]
 - b) The guardian may charge in the annual account all reasonable disbursements and expenses. [G.S. § 35A-1267]
 - (1) If the guardian has made real and bona fide disbursements for the ward's education and maintenance in one year that total more than the profits of the ward's estate for that year, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year. [G.S. § 35A-1267]
 - (2) The disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. [G.S. § 35A-1267]

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- (3) Other disbursements authorized by statute include, but are not limited to:
 - (a) Cost of the guardian's bond [G.S. § 58-73-35]; and
 - (b) Payment of taxes due on the estate [G.S. § 105-240].
4. Procedure to compel an annual account. [G.S. § 35A-1265]
 - a) If the guardian fails to file an annual account or files an insufficient or unsatisfactory account, the clerk must order the guardian to render a full and satisfactory account within 20 days after service of the order.
 - b) Upon return of a duly served order, if the guardian fails to appear or present a satisfactory account, the clerk may hold the guardian in civil contempt, remove the guardian from office, or both.
 - (1) While both remedies are available, it is generally better practice to remove a guardian rather than find the guardian in contempt.
 - (2) Contempt is useful, however, when the clerk is trying to compel a certain act, such as the filing of an account.
 - (3) When the guardian fails to appear or present a satisfactory account after being ordered to do so, the clerk can remove the guardian without a hearing.
 - c) Personal liability of a defaulting guardian.
 - (1) Costs (including attorney fees). A defaulting guardian is personally liable for costs of any proceeding to compel an account, including service of process fees and reasonable attorney fees and expenses incurred by the successor guardian (or other person) in bringing the proceeding that are deemed reasonable and necessary to discover or obtain possession of the ward's assets from the defaulting guardian or that the defaulting guardian should have discovered or turned over to the successor guardian. [G.S. § 35A-1265(a)]
 - (2) The clerk may deduct the foregoing costs and expenses from the commission due the guardian on settlement of the estate. [G.S. § 35A-1265(a)]
 - (3) Corporation as guardian. [G.S. § 35A-1265(b)]
 - (a) When the guardian is a corporation, the clerk may proceed against the president,

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cashier, trust officer or other person having charge of the estate or the responsibility for making reports, if the clerk finds the officer's failure or omission was willful.

(b) The corporation itself may be fined or removed as guardian upon a finding that the corporate officer's failure or omission was willful.

d) See section XII.D at page 86.56 on the remedies available against a former guardian for failure to account.

E. Final account and discharge of guardian. [G.S. § 35A-1266]

1. When a guardianship is terminated under G.S. § 35A-1295 (discussed in section XI at page 86.52), the guardian must file a final account within 60 days after the guardianship is terminated.

2. If after review the clerk approves the account, the clerk must enter an order discharging the guardian from further liability. [G.S. § 35A-1266]

a) The "further liability" referenced in the statute means that the guardian is no longer empowered to act as such. It does not mean "liability" in its normal context.

b) Even though the guardian has been discharged, the guardian remains potentially liable for acts or omissions occurring before discharge.

c) The guardian's bond remains liable for any judgment entered against the guardian for acts or omissions occurring before discharge.

3. The clerk does not enter a separate order to discharge the guardian. The clerk marks the appropriate block on ACCOUNT (AOC-E-506) to effect a discharge.

F. Clerk's review of inventories and accounts.

1. Clerk's review of the annual account. [G.S. § 35A-1264]

a) The guardian must show in the annual account the amount of property that the guardian received or invested, the manner and nature of the investments, and receipts and disbursements for the past year in the form of debit and credit.

b) The guardian must produce vouchers for all payments or verified proof for all payments in lieu of vouchers. (Even though G.S. § 35A-1264 is directed to an annual account, the clerk should require the guardian to produce vouchers when filing a final account.)

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- c) The clerk may examine under oath the guardian, or any other person, concerning the receipts, disbursements or any other matter relating to the estate.
 - d) If after careful revision and audit the clerk approves the account, the clerk must endorse his or her approval on the account, which is deemed *prima facie* evidence of correctness.
2. Examination of disbursements and expenses. The clerk should be satisfied that any disbursements shown were suitable to the degree and circumstances of the ward. [G.S. § 35A-1267]
- a) The guardian may charge in the annual account all reasonable disbursements and expenses. [G.S. § 35A-1267]
 - (1) If the guardian has made real and bona fide disbursements for the ward's education and maintenance in one year that total more than the profits of the ward's estate for that year, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year. [G.S. § 35A-1267]
 - (2) Other disbursements authorized by statute include, but are not limited to:
 - (a) Cost of the guardian's bond [G.S. § 58-73-35]; and
 - (b) Payment of taxes due on the estate [G.S. § 105-240].
3. Examination of investments.
- a) A general guardian or guardian of the estate is authorized to acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing:
 - (1) Bonds, debentures, and other corporate or governmental obligations;
 - (2) Stocks, preferred or common;
 - (3) Real estate mortgages;
 - (4) Shares in building and loan associations or savings and loan associations;
 - (5) Annual premium or single premium life, endowment, or annuity contracts; and
 - (6) Securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended. [G.S. § 35A-1251(16) for

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incompetent ward; G.S. § 35A-1252(13) for minor ward]

- b) Clerk's examination required by G.S. § 35A-1268.
 - (1) When an account is filed, the clerk must require the guardian to exhibit all investments and bank statements showing a cash balance. [G.S. § 35A-1268]
 - (a) **EXCEPTION:** Banks organized under North Carolina law or an act of Congress that are engaged in a trust or fiduciary business in this state and act as guardian or in other fiduciary capacity are exempt from this requirement when they file a certificate with the clerk that complies with G.S. § 35A-1268. [G.S. § 35A-1268]
 - (2) The clerk must certify on the original account that he or she examined all investments and the cash balance and that they are correctly stated in the account. [G.S. § 35A-1268]
 - (a) The clerk in the county in which the guardian resides **or** in which the securities are located may conduct the examination.
 - (b) When the guardian is a duly authorized bank or trust company, the clerk in the county in which the bank or trust company has its principal office or in which the securities are located may conduct the examination.
 - (c) The clerk should be alert to investments or any use of the ward's assets that appear to be for the benefit of individuals other than the ward. Examples include loans to individuals or closely held corporations.
 - (d) Certification does not mean that the clerk approves specific investments listed in an account.
 - (e) The clerk is entitled to examine the guardian or any other person about any matter relating to the estate [G.S. § 35A-1268] so the clerk may question the guardian about the nature and specifics of any investment shown on an account.

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- (3) The clerk of any county in which the guardian is required to file an account must accept the certificate of the clerk who conducted the examination.
 - (4) The clerk has inherent authority to order production of securities, even by banks that are exempt from this requirement.
4. Review of bond. When the clerk reviews an annual account, the clerk should confirm that the bond is sufficient to cover the investments and cash balances shown on the account.
 - a) The clerk should review the balance on hand, estimate income over the next year and make any adjustment in the bond that is necessary.
 - b) The clerk should pay particular attention when receipts exceed disbursements, causing the ward's estate to increase.
5. Review when previous accounts filed by a former guardian.
 - a) Accounts filed by a former guardian are only *prima facie* correct and are not binding upon the ward or its successor guardian. [*Humphrey v. American Surety*, 213 N.C. 651, 197 S.E. 137 (1938) (amount actually due by the former guardian was determined in a judicial proceeding and differed from what had been shown on account former guardian filed).]
6. Review of transactions designed to make ward eligible for Medicaid or other benefits.
 - a) A guardian may try to "spend down" or deplete the ward's assets so that the ward becomes eligible for Medicaid or other benefits that are based on need.
 - b) The clerk should determine whether the proposed transaction:
 - (1) Is one that the guardian is authorized by chapter 35A to undertake; and
 - (2) Is for the ward's use and benefit or is for the use and benefit of an individual other than the ward.
 - c) Gifts from income and principal are limited as provided in G.S. § 35A-1335 *et seq.* [See G.S. § 35A-1341.1(1) providing that gifts from principal to individuals must not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent.]
 - d) In *Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988), the court cautioned against depleting the estate of a ward for the benefit of another. "We do not hold that the estate of an incompetent may be so depleted in favor of a spouse as to

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compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge.”

XI. Termination of Guardianship

- A. All powers and duties of a guardian cease and the guardianship ends when the ward:
 - 1. Ceases to be a minor as defined in G.S. § 35A-1202(12);
 - 2. Has been restored to competency pursuant to G.S. § 35A-1130; or
 - 3. Dies. [G.S. § 35A-1295(a)]
- B. Notwithstanding the termination of the guardianship, a guardian of the estate or a general guardian is responsible for all accounts required until the clerk discharges the guardian. [G.S. § 35A-1295(b)] (See section X at page 86.45 on inventories and accounts.)

XII. Removal or Resignation of a Guardian and Appointment of a Successor Guardian

- A. Removal of a guardian.
 - 1. Clerk’s authority.
 - a) The clerk has authority on information or complaint (which should be verified) to:
 - (1) Remove any guardian appointed under subchapter II of Chapter 35A;
 - (2) Appoint a successor guardian; and
 - (3) Make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents. [G.S. §§ 35A-1290(a); 35A-1203(b)]
 - b) The clerk may not remove a guardian based on a “mere change of circumstances”; one of the statutory grounds must be shown. [*In re Williamson*, 77 N.C. App. 53, 334 S.E.2d 428 (1985), *review denied*, 316 N.C. 194, 341 S.E.2d 584 (1986).]
 - c) When letters of guardianship are revoked, the clerk may make interlocutory orders and decrees necessary for the protection of the ward, the ward’s estate or the other party seeking relief by such revocation, pending resolution of any controversy regarding removal. [G.S. § 35A-1291]
 - d) Following removal of a guardian, the clerk may immediately appoint a successor guardian and does not need to wait until the former guardian’s final account has been approved.
 - 2. It is the clerk’s duty under G.S. § 35A-1290(b) to remove a guardian or take other action to protect the ward’s interest when any of the following occurs:

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- a) The guardian wastes the ward's money or estate or converts it to the guardian's own use;
 - (1) Court upheld removal of a co-guardian under this section when the co-guardian rented land from the ward for less than fair market value and lived rent-free in a home in which the ward had a life estate. [*Parker v. Barefoot*, 61 N.C. App. 232, 300 S.E.2d 571 (1983).]
 - b) The guardian in any manner mismanages the ward's estate;
 - c) The guardian neglects to care for or maintain the ward or his dependents in a suitable manner;
 - (1) Court upheld removal of a guardian under this section when the guardian did not visit the ward in the hospital or make inquiry about him and had done nothing to help the ward in over 2 years. [*In re Simmons*, 266 N.C. 702, 147 S.E.2d 231 (1966).]
 - d) The guardian or his sureties are likely to become insolvent or become nonresidents of the State;
 - e) The original appointment was made on the basis of a false representation or a mistake;
 - f) The guardian has violated a fiduciary duty through default or misconduct; or
 - g) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out the duties of a guardian. [G.S. § 35A-1290(b)]
 - (1) A court upheld removal under this section of co-guardians who held ownership interests in several family-held corporations in which the ward also owned stock. [*In re Estate of Armfield*, 113 N.C. App. 467, 439 S.E.2d 216 (1994) (stating that this section authorizes removal of a guardian where there is a showing of **any** potential for conflict between the interests of the ward and guardian; statute does not require actual and adverse effect upon the ward's interest).]
3. It is the clerk's duty under G.S. § 35A-1290(c) to remove a guardian or take other action to protect the ward's interest when any of the following occurs:
- a) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competency;
 - b) The guardian has been convicted of a felony under the laws of the United States or any state or territory and citizenship has not been restored;

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- c) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment due to a change in residence [Note that this appears to be in conflict with recent changes allowing nonresidents of North Carolina to act as guardians of the estate (G.S. § 35A-1213(b)).], a change in the charter of a corporate guardian, or any other reason;
 - d) The guardian is the ward's spouse and has lost his rights as provided by Chapter 31A of the General Statutes;
 - e) The guardian fails to post, renew, or increase a bond as required by law or court order;
 - f) The guardian refuses or fails without justification to obey any citation, notice or process served on him in regard to the guardianship;
 - g) The guardian fails to file required accountings with the clerk (see section X.D.4 at page 86.47 on the procedure to compel an accounting); or
 - h) The clerk finds the guardian unsuitable to continue serving as guardian for any reason; or
 - i) The guardian is a nonresident of the State and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent. [G.S. § 35A-1290(c)]
4. Depending on the circumstances warranting removal and the procedures the clerk has undertaken to compel compliance, the clerk may in some cases remove the guardian without a hearing.

EXAMPLES:

- a) When the clerk has taken the steps set out in the statute to compel an accounting (see section X.D.4 at page 86.47), and the guardian has failed to comply, the clerk may summarily remove the guardian. [G.S. § 35A-1265(a)]
- b) If the clerk has taken the steps set forth in the statute to require the guardian to renew the bond, and the guardian has failed to do so, the clerk shall summarily remove the guardian. [G.S. § 35A-1236]

Emergency removal. The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate. Pending such removal, the clerk may make orders as necessary to protect the ward, the ward's estate, or the party seeking relief by the revocation. [G.S. § 35A-1291]

B. Resignation of a guardian.

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1. Any guardian who wishes to resign shall file a motion with the clerk, describing the circumstances of the case. [G.S. § 35A-1292(a)] Resignation of a guardian is not a special proceeding. [Rule of Recordkeeping 7.1]
 2. A general guardian or guardian of the estate who wishes to resign must submit a final account for settlement. [G.S. § 35A-1292(a)]
 - a) If the clerk is satisfied that the guardian has fully accounted, the clerk may accept the resignation, discharge the guardian, and appoint a successor guardian.
 - b) The discharged guardian and his sureties remain liable for all matters connected with the guardianship before discharge and shall continue to ensure that the ward's needs are met until the clerk officially appoints a successor. The guardian shall attend the hearing to modify the guardianship, if physically able.
 3. A general guardian who wishes to resign as guardian of the estate but continue as guardian of the person of the ward may apply for partial resignation as provided in subsections 1 and 2 above. [G.S. § 35A-1292(b)]
 - a) If the clerk is satisfied that the general guardian has fully accounted as guardian of the estate, the clerk may accept the resignation as guardian of the estate, discharge the general guardian as guardian of the estate, and issue letters of appointment as guardian of the person. [G.S. § 35A-1292(b)]
 - b) A general guardian who is discharged as guardian of the estate and his sureties remain liable for all matters connected with the guardianship before discharge. [G.S. § 35A-1292(b)]
 4. There may be circumstances when the guardian has failed his or her responsibility in some manner yet the clerk feels that the guardian is entitled to a commission. In those cases, the clerk may allow the guardian to resign so that a commission can be paid. However, if the guardian has misused funds so that he or she is unable to file a satisfactory final account, the clerk should not allow the guardian to resign.
- C. Appointment of a successor guardian.
1. Upon the removal, death, or resignation of a guardian, the clerk must appoint a successor guardian following the same procedure and criteria applicable to the initial appointment of a guardian. [G.S. § 35A-1293] (See section IV at page 86.15 for appointment of a guardian for an incompetent person and section V at page 86.22 for appointment of a guardian for a minor.)
 2. A successor guardian has all the statutory powers and duties applicable to the type of guardianship created (presumably the same

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as the predecessor) unless the clerk specifies otherwise in the order of appointment.

3. A successor guardian will need to execute a bond in the same manner as the initial guardian. (See section VI at page 86.27 on bonds.)

D. Remedies against a former guardian for failure to account.

1. If a general guardian or guardian of the estate is removed, resigns, or stops serving without making a full and proper accounting, the successor guardian, or clerk if there is no successor guardian, **must**:
 - a) Initiate a proceeding to compel an accounting (see section X.D.4 at page 86.47); **and**
 - b) Serve the surety or sureties on the previous guardian's bond with notice of the proceeding. [G.S. § 35A-1294(a)]
2. A successor guardian can recover reasonable attorney fees and expenses incurred in bringing any proceeding to compel an accounting. [G.S. § 35A-1265(a)]

E. Remedies against a former guardian for conversion or other acts of misconduct. Remedies include:

1. A civil suit against the former guardian;
2. An action against the former guardian and any sureties on the bond pursuant to G.S. § 35A-1234, with any surety named as a party; or
3. Referring the matter to the district attorney for appropriate action, including possible prosecution for embezzlement pursuant to G.S. § 14-90.

F. Appointment of a receiver.

1. After discharge of a guardian and before a successor guardian has been appointed, the clerk may act as receiver or appoint a receiver to manage the ward's estate, under the direction of the clerk, until a successor guardian is appointed. [G.S. § 35A-1294(b)]
 - a) The accounts of the receiver must be returned, audited, and settled as the clerk may direct.
 - b) The receiver's fee includes amounts for his or her time, trouble, and responsibility as the clerk determines is reasonable and proper.
2. When a successor guardian is appointed following the appointment of a receiver, the successor guardian may apply by motion, on notice, to the clerk for an order directing the receiver to pay over all money, estate and effects of the ward. [G.S. § 35A-1294(c)]
 - a) If no successor guardian is appointed, the ward has the same remedy against the receiver on becoming 18 or otherwise emancipated if the ward is a minor or on being restored to competence if the ward is an incompetent person.

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- b) In the event of the ward's death, the ward's executor, administrator, or collector and the heir or personal representative of the ward have the same remedy against the receiver.

XIII. Transfer to A Different County

- A. Statutory provision for transfer. At any time before or after appointing a guardian for a minor or an incompetent person the clerk may, for good cause, upon a motion filed in the cause or on the court's own motion, order that the matter be transferred to a different county. [G.S. § 35A-1205]
 - 1. Caution: The clerk should be aware that if he or she enters an adjudication order, and then transfers the matter to another county for appointment of a guardian, there will be a period of time during which the incompetent person will be without a guardian to make important decisions. Some clerks appoint an interim guardian in this situation before transferring the matter.
- B. Effect timing of transfer has on venue.
 - 1. Following an adjudication of incompetence, if a transfer is sought **before** a guardian is appointed for an incompetent person, the clerk is limited by G.S. § 35A-1112(e) to transferring the matter to a county having proper venue under G.S. § 35A-1103, which would be any county in which the incompetent person:
 - a) Resides;
 - b) Is domiciled;
 - c) Is an inpatient in a treatment facility; or
 - d) Is present, if residence or domicile cannot be determined.
 - 2. It is not clear from G.S. §§ 35A-1112(e) and –1205 whether transfers in incompetency cases **after** appointment of a guardian are limited to counties having proper venue as listed in G. S. § 35A-1103. It is good practice to check with the clerk in the transferee county before entering an order of transfer.
- C. Duties of transferring clerk. The transferring clerk must:
 - 1. Enter a written order directing the transfer under such conditions as the clerk specifies;
 - 2. Send the order of transfer, and all original papers, documents and orders from the guardianship and the incompetency proceeding to the clerk of the transferee county, keeping a copy of the original file; and
 - 3. Close the file with a copy of the transfer order and any order adjudicating incompetence or appointing a guardian. [G.S. § 35A-1205]
- D. Duty of transferee clerk. The transferee clerk must docket and file the papers in the estates division as a basis for jurisdiction in all subsequent proceedings. [G.S. § 35A-1205]

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XIV. Ancillary Guardians

- A. Definition. An ancillary guardian is a person appointed guardian by the court, through the authority of a guardian in another state, for a nonresident ward having property (real or personal) in North Carolina. [G.S. § 35A-1280]
- B. Venue. Venue for the appointment of an ancillary guardian for a nonresident minor or incompetent person, who has a guardian of the estate or general guardian in the state of his or her residence, is in:
1. Any county in which is located real estate in which the nonresident has an ownership or other interest; or
 2. Any county in which the nonresident owns or has an interest in personal property. [G.S. § 35A-1204(c)]
- C. Appointment.
1. The clerk has authority to appoint an ancillary guardian upon petition and proof satisfactory to the clerk that:
 - a) The nonresident owns or has an interest in real or personal property located in the clerk's county; and
 - b) The nonresident is incompetent or a minor; and
 - c) A guardian of the estate, a general guardian, or comparable fiduciary has been appointed and is still serving as such in the nonresident's state; and
 - d) The nonresident does not have a guardian in North Carolina. [G.S. § 35A-1280(a)]
 2. Proof of the ward's minority or incompetence and of the guardian's appointment in the ward's state of residence may be conclusively shown by a certified or exemplified copy of letters of appointment or other official court record appointing a guardian in the ward's state, providing that the letters or record show:
 - a) That the guardianship is still in effect in the ward's state of residence; and
 - b) The ward's minority or incompetency still exists. [G.S. § 35A-1280(c)]
- D. Bond.
1. Even though bond is not required by statute, the clerk should require an ancillary guardian to furnish a bond while administering the ward's property in this state.
 2. When the ward's property is to be removed to the residence of the ward, see G.S. § 35A-1281(c) for the applicable bond requirement and Proceeding by Foreign Guardian to Remove Ward's Property from State, Special Proceedings, Chapter 122.

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- E. Notification of appointment. Upon appointing an ancillary guardian, the clerk must notify the appropriate court in the county of the ward's residence and the guardian in the state of the ward's residence. [G.S. § 35A-1280(d)]
- F. Powers and duties of the ancillary guardian.
 - 1. Except as otherwise ordered by the clerk or provided by statute, an ancillary guardian has all the powers, duties, and responsibilities with respect to the nonresident ward's estate in North Carolina as guardians otherwise appointed have. [G.S. § 35A-1280(b)]
 - 2. An ancillary guardian must annually:
 - a) File an account with the clerk in the county in which the ward's real or personal property is located; and
 - b) Remit to the guardian in the state of the ward's residence any net rents or proceeds of sale of the ward's property. [G.S. § 35A-1280(b)]
- G. Removal of the ward's property from the state.
 - 1. G.S. § 35A-1281 sets out a procedure for the removal of a nonresident ward's property from this state without the appointment of an ancillary guardian.
 - 2. See Proceeding by Foreign Guardian to Remove Ward's Property from State, Special Proceedings, Chapter 122.

XV. Public Guardians

NOTE: This section is only applicable to those counties in which the clerk has appointed a public guardian.

- A. Appointment.
 - 1. The clerk may appoint a public guardian to serve in the clerk's county for a term of 8 years. [G.S. § 35A-1270]
 - a) The public guardian does not have to be an attorney or a resident of the county of administration.
 - b) Some counties have more than one public guardian.
 - 2. The public guardian must take an oath or affirmation to faithfully and honestly perform his or her duties. The oath must be signed by the public guardian and filed in the clerk's office. [G.S. § 35A-1270]
 - 3. Not every clerk appoints a public guardian.
 - a) Many clerks do not appoint a public guardian because, as a practical matter, the commissions would be negligible and because there are no funds for payment of bond premiums.
 - b) Many clerks appoint private attorneys to handle low asset cases.
 - 4. Practice tip. Since many cases assigned to a public guardian have little or no assets, a public guardian may have to pay the required

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bond premium out of his or her own funds. Because of this, the clerk should:

- a) Consider on occasion sending a high asset case to a public guardian; and
- b) Consider other options besides appointment of a public guardian.

B. Bond.

1. The public guardian must enter into bond with 3 or more sureties approved by the clerk in the sum of \$6,000 payable to the State of North Carolina, conditioned faithfully to perform the duties of the office and obey all lawful orders of the superior or other courts. Whenever the aggregate value of the real and personal estate belonging to the public guardian's several wards exceeds one-half of the bond required, the clerk must require the public guardian to increase the bond to cover at least double the aggregate amount under his or her control as guardian. [G.S. § 35A-1271]
2. It is the practice in some counties for the public guardian to post a bond in each individual case.

C. Letters of guardianship. [G.S. § 35A-1273]

1. Issuance. The public guardian must apply for and obtain letters of guardianship:
 - a) When a period of 6 months has elapsed from the discovery of any property belonging to any minor or incompetent person without guardian; or
 - b) When any person entitled to letters of guardianship requests in writing that the clerk issue letters to the public guardian.
2. Revocation of letters in a particular case. Upon written application requesting revocation of letters by any person entitled to qualify as guardian, the clerk must revoke the letters of the public guardian if the clerk finds sufficient cause for revocation. [G.S. § 35A-1273(2)]

D. Powers and duties of the public guardian.

1. A public guardian has the same powers and duties, is subject to the same liabilities, and is entitled to the same compensation as other guardians. [G.S. § 35A-1272]
2. The public guardian can act for minors or incompetent adults.
3. A public guardian can serve as guardian for any number of wards. (This is in contrast with the 5 ward limitation on guardians under the Veterans' Guardianship Act. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.)

E. Removal of a public guardian.

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1. There is no specific provision in Chapter 35A, Article 11 (the article dealing with public guardians) that addresses removal of a public guardian.
 2. The clerk may remove a public guardian for any of the reasons specified in G.S. § 35A-1290 for the removal of a regular 35A guardian. See section XII at page 86.52.
 3. If the clerk is dissatisfied with a public guardian's performance but the conduct does not warrant removal, it would be acceptable for the clerk to appoint another public guardian and not assign the original public guardian any more cases.
 4. For revocation of letters in a particular case, see G.S. § 35A-1273(2), discussed in section XV.C at page 86.60.
- F. Additional references.
1. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87, regarding special provisions when a public guardian is appointed guardian for a VA ward.
 2. See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88, regarding public guardian's receipt and disbursement of funds owed to minors.

XVI. Standby Guardians for Minor Children

NOTE: This procedure is not for use by an able-bodied person or to short circuit a custody proceeding.

- A. Definition. A standby guardian is a person appointed pursuant to G.S. § 35A-1373 or designated pursuant to G.S. § 35A-1374 to become either guardian of the person or general guardian of a minor upon the death or incapacity of the minor's parent or guardian. [G.S. § 35A-1370(11)]
1. A "designator" is the biological or adoptive parent, the guardian of the person, or the general guardian of a minor child, who suffers from a progressive chronic or irreversible fatal illness. [G.S. § 35A-1370(5)] **A "designator" is relevant when the appointment is by written designation.**
 2. A "petitioner" is a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological parent, the adoptive parent, the guardian of the person, or the general guardian of a minor child. [G.S. § 35A-1370(10)] **A "petitioner" is relevant when the appointment is by petition.**
 3. "Debilitation" is a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child. [G.S. § 35A-1370(3)]
 4. "Incapacity" is a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and

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consequences of decisions concerning the care of one's minor child, and a consequent inability to make these decisions. [G.S. § 35A-1370(8)]

- B. Jurisdiction. The clerk has original jurisdiction for the appointment of a standby guardian, **except** when:
1. A district court has assumed jurisdiction over the minor in a child custody dispute under Chapter 50 or in an abuse, neglect, or dependency proceeding under Chapter 7B; or
 2. A court in another state has assumed jurisdiction under a comparable statute. [G.S. § 35A-1371; G.S. § 35A-1273(d)]
- C. Two methods of appointment. There are two methods of appointing a standby guardian: appointment by petition discussed in section D below (G.S. § 35A-1373) and appointment by written designation discussed in section XVI.E at page 86.66 (G.S. § 35A-1374). Both require petitions before the clerk, but the time for filing of each petition is different.
- D. Appointment by petition. [G.S. § 35A-1373]
1. For an overview of the process, see the time line attached as Appendix III.
 2. Filing the petition. The petitioner files a petition with the clerk in the county in which the minor resides or is domiciled at the time of filing.
 - a) PETITION FOR APPOINTMENT OF STANDBY GUARDIAN FOR MINOR (AOC-E-209) may be used.
 - b) This is a not a special proceeding. [Rule of Recordkeeping 7.1] It initiates an estate proceeding.
 - (1) Applicable fees should be collected. [G.S. § 7A-307]
 - (2) Note that a petition filed by a general guardian or guardian of the person appointed under G.S. Chapter 35A shall be treated as a motion in the cause in the original guardianship. [G.S. § 35A-1373(a)]
 3. Notice. [G.S. § 35A-1373(c)]
 - a) A copy of the petition and written notice of the hearing must be served upon any biological or adoptive parent of the minor who is not a petitioner, and on any other person the clerk may direct, including the minor child.
 - (1) Since the clerk must make a finding as to their fitness, the clerk may wish to give notice to the proposed standby guardian and alternate, if any.
 - (2) AOC-E-209 requests information about other persons known to have an interest in the proceeding.

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The clerk should cause service to be given to those persons, if any.

- b) NOTICE OF HEARING (AOC-E-211) may be used.
 - c) Service is made pursuant to **Rule 4**, unless the clerk directs otherwise.
 - d) The sheriff may not demand fees in advance.
 - e) Parties may waive their right to notice of the hearing. AOC-E-209 contains a waiver section.
4. Guardian ad litem.
- a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child. [G.S. § 35A-1379(a)] [Note: The state does not pay for the services of the guardian ad litem. If a cost is involved, it must be borne by the parties.]
 - b) The guardian ad litem has the duty to:
 - (1) Investigate the facts, the needs of the minor child and the available family resources; and
 - (2) Protect and promote the best interests of the minor child. [G.S. § 35A-1379(b)]
 - c) The clerk may order the guardian ad litem to determine the fitness of the proposed standby guardian and alternate, if any. [G.S. § 35A-1379(c)]
5. Hearing.
- a) The petitioner's presence at the hearing is not required if he or she is medically unable to appear, unless the clerk determines that the petitioner is able with reasonable accommodation to appear and that the interests of justice require the petitioner's presence. [G.S. § 35A-1373(e)]
 - b) The clerk is to receive evidence necessary to find that:
 - (1) The petitioner suffers from a progressive chronic or irreversible fatal illness;
 - (2) The best interests of the minor child will be promoted by the appointment of a standby guardian; and
 - (3) The standby guardian and alternate, if any, are fit to serve. [G.S. § 35A-1373(f)]
6. Order.
- a) If the clerk makes the foregoing findings, the clerk must enter an order appointing the standby guardian named in the petition as standby guardian of the person or standby general

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guardian and shall issue letters of appointment. [G.S. § 35A-1373(f)]

(1) ORDER ON PETITION FOR APPOINTMENT OF STANDBY GUARDIAN FOR MINOR (AOC-E-409) may be used.

(2) LETTERS OF APPOINTMENT STANDBY GENERAL GUARDIAN (AOC-E-411) or LETTERS OF APPOINTMENT STANDBY GUARDIAN OF THE PERSON (AOC-E-412) may be used.

(a) AOC-E-411 and AOC-E-412 are issued at the same time as the order but are not immediately effective. See subsection 7 below.

(b) AOC-E-411 and AOC-E-412 provide that they are not effective until the standby guardian receives a writing that sets out the occurrence of the event that triggers his or her authority. A triggering event can take place at the same time as the hearing. See subsection 7 immediately below.

7. Commencement of the standby guardian's authority.

a) The standby guardian's authority is effective only upon receipt of a writing that sets out the occurrence of a triggering event.

(1) Triggering events are:

(a) A determination of the death or incapacity of the petitioner;

(b) A determination of the debilitation of the petitioner and the petitioner's consent; or

(c) The written consent of the petitioner in the form prescribed in G.S. § 35A-1373(l). [G.S. § 35A-1373(g)]

(2) A triggering event can take place at the same time as the hearing.

b) Bond requirement. The commencement of the authority of a general guardian appointed pursuant to the petition procedure **triggers the requirement that he or she furnish a bond, unless the petitioner waived bond.** [G.S. § 35A-1380; see section VI at page 86.27.] A resident guardian of the person is not required to post bond. [G.S. § 35A-1380; § 35A-1230]

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- c) The commencement of the standby guardian's authority pursuant to a determination of incapacity or debilitation, or pursuant to written consent, does not of itself divest the petitioner of any parental or guardianship rights. It confers upon the standby guardian concurrent authority over the minor child. [G.S. § 35A-1377]
- 8. Oath. Even though there is no statutory requirement or provision for the standby guardian to take an oath, the clerk should administer an oath in the standard manner. See Oaths of Office, Introduction, Chapter 14.
- 9. Filing within 90 days. The standby guardian must file the determination or consent that triggers the standby guardian's authority with the clerk who entered the order within 90 days of receipt. [G.S. § 35A-1373(i) – (k)] **Filing is not a prerequisite to the standby guardian's authority.**
- 10. Rescission, revocation and renunciation.
 - a) The **clerk** may rescind an order for standby guardianship if before the commencement of the authority the clerk finds that the requirements for the original order are no longer satisfied. [G.S. § 35A-1373(h)]
 - b) The **petitioner** may revoke a standby guardianship by executing a written revocation, filing it with the clerk who entered the order, and promptly providing a copy to the standby guardian. [G.S. § 35A-1373(m)]
 - c) A **person appointed standby guardian** may renounce the appointment before commencement of his or her authority by executing a written renunciation, filing it with the clerk who entered the order, and promptly providing a copy to the petitioner. The clerk is to issue letters to the alternate standby guardian, if any. [G.S. § 35A-1373(n)]
- 11. Effect of a custody dispute. [G.S. § 35A-1373(d)]
 - a) If at or before the hearing on the petition, any parent entitled to notice presents to the clerk a written claim for custody, the clerk must stay further proceedings pending the filing of a custody complaint under Chapter 50.
 - b) If a custody complaint is filed, the clerk must dismiss the standby guardian petition.
 - c) If a custody complaint is not filed within 30 days after the claim is presented, the clerk proceeds with a hearing on the appointment of the standby guardian as guardian of the person or general guardian under G.S. § 35A-1373.
- 12. Determination of incapacity or debilitation. [G.S. § 35A-1375]
 - a) If requested by the petitioner, designator, or standby guardian, the determination of incapacity or debilitation of

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the petitioner or designator must be made by the petitioner's or designator's attending physician.

- b) The physician is to provide a copy to the standby guardian if he or she is known to the physician.
 - c) The standby guardian is to inform the petitioner that the standby guardian's authority to act has commenced and of the possibility of a future suspension of the standby guardian's authority pursuant to G.S. § 35A-1376. [G.S. § 1375(d)]
13. Same powers, duties, and bond requirements as other 35A guardians.
- a) A guardian of the person or general guardian appointed pursuant to a written petition has all the powers, duties, and responsibilities of a guardian appointed under the other provisions of Chapter 35A. [G.S. § 35A-1378]
 - b) The accounting requirements of Article 10 of Chapter 35A, discussed in section X at page 86.45, apply to a general guardian appointed in a standby guardianship proceeding. [G.S. § 35A-1381]
 - c) The bond requirements of Article 7 of Chapter 35A, discussed in section VI at page 86.27, apply to a guardian of the person or general guardian appointed pursuant to the petition procedure in G.S. § 35A-1373 except that:
 - (1) If the bond requirement is waived in writing by the petitioner (it is good practice to note on the letters "NO BOND"); and
 - (2) A general guardian appointed pursuant to the petition procedure in G.S. § 35A-1373 is not required to furnish a bond until a triggering event has occurred. [G.S. § 35A-1380]
- E. Appointment by written designation. [G.S. § 35A-1374]
- 1. For an overview of the process, see the time line attached as Appendix III.
 - 2. The written designation.
 - a) A designator may designate a standby guardian by signing a written designation in the presence of 2 witnesses at least 18 years of age, other than the standby guardian or alternate standby guardian. [G.S. § 35A-1274(a)]
 - b) The standby guardian and alternate, if any, must sign the designation. [G.S. § 35A-1374(a)]
 - c) The written designation must identify the designator, the minor child, the person designated to be standby guardian, and alternate, if any, and indicate that the designator intends

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for the standby guardian, or alternate, to become the minor child's guardian in the event that the designator either:

- (1) Becomes incapacitated;
 - (2) Becomes debilitated and consents to the commencement of the standby guardian's authority;
 - (3) Dies before commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or
 - (4) Consents to the commencement of the standby guardian's authority. [G.S. § 35A-1374(b)]
- d) There is no AOC form.
3. Effect of the written designation.
- a) Appointment of a standby guardian is complete upon proper execution of a designation. This means that the person is a standby guardian and has authority to act on behalf of the minor immediately upon the occurrence of a triggering event, **even without a petition to the clerk**.
 - b) This is different than the petition procedure described in section XVI.D at page 86.62 where the appointment of a standby guardian is accomplished **only** after entry of an order by the clerk.
4. Commencement of the standby guardian's authority. [G.S. § 35A-1374(c)]
- a) The standby guardian's authority is effective:
 - (1) Upon receipt of a written determination of the death or incapacity of the designator;
 - (2) Upon receipt of a written determination of the debilitation of the designator and the designator's consent; or
 - (3) Upon written consent of the designator in the form prescribed in G.S. § 35A-1373(l). [G.S. § 35A-1373 (g)]
 - b) Bond requirement. The commencement of the authority of a general guardian appointed pursuant to the petition procedure **triggers the requirement that he or she furnish a bond, unless the petitioner waived bond**. [G.S. § 35A-1380; see section VI at page 86.27.] A resident guardian of the person is not required to post bond. [G.S. § 35A-1380; § 35A-1230]
 - c) The commencement of the standby guardian's authority pursuant to a determination of incapacity or debilitation, or pursuant to written consent, does not of itself divest the

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designator of any parental or guardianship rights. It confers upon the standby guardian concurrent authority over the minor child. [G.S. § 35A-1377]

5. Oath. Even though there is no statutory requirement or provision for the standby guardian to take an oath, the clerk should administer an oath in the standard manner. See Oaths of Office, Introduction, Chapter 14.
6. Petition for appointment of a guardian. The standby guardian, or alternate, must initiate a proceeding to be appointed guardian of the person or general guardian of the minor child by filing a petition with the clerk of the county in which the minor child resides or is domiciled. [G.S. § 35A-1374(d)]
 - a) The petition must be filed within 90 days of the event that triggers the standby guardian's authority to act, or the standby guardian's authority to act lapses, only to recommence upon filing of the petition. [G.S. § 35A-1374(e)]
 - b) STANDBY GUARDIAN'S PETITION FOR APPOINTMENT AS GUARDIAN OF THE PERSON OR GENERAL GUARDIAN (AOC-E-210) may be used.
 - c) This is a not a special proceeding. [Rule of Recordkeeping 7.1] It initiates a new estate proceeding.
 - (1) Applicable fees should be collected. [G.S. § 7A-307]
 - (2) Note that a petition by a general guardian or guardian of the person appointed under G.S. Chapter 35A shall be treated as a motion in the cause in the original guardianship. [G.S. § 35A-1373(a)]
7. Supporting documentation. The petition shall include copies of documentation showing the relevant triggering event. [G.S. 35A-1374(f)]
8. Notice. [G.S. § 35A-1374(g)]
 - a) A copy of the petition and written notice of the hearing must be served upon any biological or adoptive parent of the minor who is not a designator, and on any other person the clerk may direct, including the minor child.
 - (1) Since the clerk must make a finding as to their fitness, the clerk may wish to give notice to the proposed standby guardian and alternate, if any.
 - (2) AOC-E-210 requests information about other persons known to have an interest in the proceeding. The clerk should cause service to be given to those persons, if any.

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- b) NOTICE OF HEARING (AOC-E-211) may be used.
 - c) Service is made pursuant to **Rule 4**, unless the clerk directs otherwise.
 - d) The sheriff may not collect fees in advance.
 - e) Parties may waive their right to notice of the hearing. AOC-E-210 contains a waiver section.
9. Guardian ad litem.
- a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child. [G.S. § 35A-1379(a)] [Note: The state does not pay for the services of the guardian ad litem. If a cost is involved, it must be borne by the parties.]
 - b) The guardian ad litem has the duty to:
 - (1) Investigate the facts, the needs of the minor child and the available family resources; and
 - (2) Protect and promote the best interests of the minor child. [G.S. § 35A-1379(b)]
 - c) The clerk may order the guardian ad litem to determine the fitness of the proposed standby guardian and alternate, if any. [G.S. § 35A-1379(c)]
10. Hearing.
- a) The clerk is to receive evidence necessary to find that:
 - (1) The person was duly designated as a standby guardian or alternate standby guardian;
 - (2) There (i) has been a determination of incapacity; (ii) has been a determination of debilitation and the designator has consented to commencement of the standby guardian's authority; (iii) the designator has consented to that commencement or (iv) the designator has died, confirmed by a death certificate or funeral home receipt;
 - (3) The best interests of the minor child will be promoted by the appointment of the person designated as standby guardian, or alternate, as guardian of the person or general guardian of the minor child;
 - (4) The standby guardian and alternate, if any, are fit to serve as guardian of the person or general guardian; and

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- (5) If the petition is by the alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve. [G.S. § 35A-1374(i)]
11. Order. If the clerk makes the foregoing findings, the clerk must enter an order appointing the standby guardian named in the petition as guardian of the person or general guardian and shall issue letters of appointment. [G.S. § 35A-1373(f)]
- a) ORDER ON STANDBY GUARDIAN'S PETITION FOR APPOINTMENT AS GUARDIAN OF MINOR (AOC-E-410) may be used but provides that letters are to be issued when the person qualifies.
12. Revocation and renunciation. The designator may revoke a standby guardianship:
- a) By notifying the standby guardian in writing of the intent to revoke the standby guardianship before filing of the guardianship petition; or
- b) Where the guardianship petition has already been filed, by filing a written revocation with the clerk in the office where the petition was filed and promptly providing the standby guardian with a copy. [G.S. § 35A-1374(j)]
13. Effect of a custody dispute. [G.S. § § 35A- 1374(h)]
- a) If at or before the hearing associated with the procedure, any parent entitled to notice presents to the clerk a written claim for custody, the clerk must stay further proceedings pending the filing of a custody complaint under Chapter 50.
- b) If a custody complaint is filed, the clerk must dismiss the standby guardian petition.
- c) If a custody complaint is not filed within 30 days after the claim is presented, the clerk proceeds with a hearing on the appointment of the standby guardian as a guardian of the person or general guardian under G.S. § 35A-1374.
14. Determination of incapacity or debilitation. [G.S. § 35A-1375]
- a) If requested by the petitioner, designator, or standby guardian, the determination of incapacity or debilitation of the petitioner or designator must be made by the petitioner's or designator's attending physician.
- b) The physician is to provide a copy to the standby guardian if he or she is known to the physician.
- c) The standby guardian is to inform the petitioner or designator that the standby guardian's authority to act has commenced.
15. Same powers, duties, and bond requirements as other 35A guardians.

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- a) A standby guardian designated pursuant to a written designation and a guardian of the person or general guardian appointed pursuant to the standby guardianship provisions have all the powers, duties, and responsibilities of a guardian appointed under the other provisions of Chapter 35A. [G.S. § 35A-1378]
 - b) The accounting requirements of Article 10 of Chapter 35A, discussed in section X at page 86.45, apply to a general guardian appointed in a standby guardianship proceeding. [G.S. § 35A-1381]
 - c) The bond requirements of Article 7 of Chapter 35A, discussed in section VI at page 86.27, apply to a guardian of the person or general guardian appointed pursuant to a written designation as set out in G.S. § 35A-1374 unless the designator waived the bond requirement in writing. [G.S. § 35A-1380] If the bond requirement has been waived, it is good practice to note on the letters “NO BOND.”
- F. Restoration of capacity. [G.S. § 35A-1376]
1. If the petitioner or designator is subsequently restored to capacity or ability to care for the child, the authority of the standby guardian is suspended.
 2. The attending physician shall provide a copy of the determination of restored capacity or ability to the standby guardian, if known to the physician. The determination of restored capacity must include the physician’s opinion regarding the cause and nature of the restoration of capacity or ability.
 3. If the standby guardian has been appointed as guardian of the person or general guardian, the standby guardian must, and the petitioner or designator may, file a copy of the determination of restored capacity or restoration with the clerk who entered the guardianship order.
 4. Even though the standby guardian’s authority to act is suspended, any order appointing the standby guardian as guardian of the person or general guardian remains in full force and effect. Authority to act shall recommence upon the standby guardian’s receipt of a subsequent determination of a triggering event.
- G. Termination. [G.S. § 35A-1382] The standby guardianship continues until the child reaches 18 unless sooner terminated by:
1. Order of the clerk who appointed the standby guardian;
 2. Revocation or renunciation pursuant to Article 21; or
 3. Order of the district court granting custody of the minor child to any other person.

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XVII. Guardian of Children of Service Personnel

- A. Appointment. When a person serving in the Armed Forces of the United States has made an allotment or allowance to his or her child or other minor dependent, the clerk in the county of the minor's residence may act as temporary guardian, or appoint some suitable person to act as temporary guardian, when:
1. The other parent of the child or minor dependent, or other person designated in the allowance or allotment to receive and disburse moneys for the benefit of the minor dependent, dies or becomes mentally incompetent; and
 2. The person serving in the Armed Forces is reported as missing in action or as a prisoner of war and is unable to designate another person to receive and disburse the funds. [G.S. § 35A-1228]
- B. Limited purpose of the temporary guardianship. The temporary guardianship is limited to receiving and disbursing allotments and allowance funds for the benefit of the minor dependent. [G.S. § 35A-1228]

XVIII. Commissions for Guardians

- A. Allowance.
1. The clerk allows commissions to the guardian for management of the ward's estate in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors pursuant to G.S. §§ 28A-23-3 and -4. [G.S. § 35A-1269] (See Commissions and Attorney Fees of the Personal Representative, Estates, Guardianships and Trusts, Chapter 75.)
 2. The clerk should **not** allow the maximum 5% commission on all principal amounts received by the guardian at the beginning of the guardianship.
 - a) The 5% commission on principal received should be pro-rated over the years of the guardianship, i.e., until a minor reaches 18 or over an incompetent's life expectancy based on mortuary tables.

EXAMPLE USING AWARD OF 5%: Minor age 10 at inception of guardianship. Guardian to serve 8 years. If corpus is \$20,000, commissions allowable years 1 through 8 as follows:

5% of commissionable receipts
5% of commissionable disbursements
1/8 of 5% of \$20,000 corpus.
 - b) Pro-rating commissions on principal assets over the lifetime of the guardianship ensures a reserve in the event that one or more successor guardians are appointed. [*Walton v. Erwin*,

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36 N.C. 136 (1840) (stating that the court can allow but five per cent to **all** guardians of the same minor).]

3. Case law.
 - a) General rule is that a guardian who fulfills his or her obligations is allowed a commission.
 - (1) Guardian who had filed required reports, acted in good faith, with due diligence and exercised sound business judgment entitled to a commission. [*Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).]
 - (2) Guardian allowed commission over objection as reasonable commissions are allowed as a general rule except in cases of fraud or gross negligence. [*Whitford v. Foy*, 65 N.C. 265 (1871).]
 - b) Commissions have been allowed even when the guardian has failed his or her responsibility in some manner.
 - (1) Guardian who failed to separately account for estate and guardian accounts but nevertheless fulfilled obligations “with unusual success” allowed commission. [*McNeill v. Hodges*, 83 N.C. 504 (1880).]
 - (2) Guardians who have violated a fiduciary duty by using the ward’s property in the guardian’s business allowed commissions. [*Fisher v. Brown*, 135 N.C. 198, 47 S.E. 398 (1904) (guardian made regular returns over life of guardianship and charged himself legal rate of interest); *Carr v. Askew*, 94 N.C. 194 (1886) (guardian made annual returns for 13 years during which time he and the sureties were “perfectly responsible”); *but see Burke v. Turner*, 85 N.C. 500 (1881) (holding to the contrary).]
 - c) Commission will not be allowed to a guardian who fails to file required accounts.
 - (1) Where a guardian keeps no account, the general rule is that the guardian will not be allowed commissions. [*Topping v. Windley*, 99 N.C. 4, 5 S.E. 14 (1888).]
4. Practice tip.
 - a) There may be circumstances when the guardian has failed his or her responsibility in some manner yet the clerk feels that the guardian is entitled to a commission. In those cases, the clerk may allow the guardian to resign so that a commission can be paid.

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- (1) To qualify for resignation, the guardian must be able to file a final account. [G.S. § 35A-1292(a); see section XII.B at page 86.54.]
 - (2) If the guardian has misused funds so that he or she is unable to file a satisfactory final account, the clerk should not allow the guardian to resign. The clerk should consider removal, contempt, or other appropriate measures, as authorized.
- b) For a worksheet that allows the clerk to track commissions allowed over the life of a guardianship, see Appendix VI.
- B. Amount of commission.
1. The clerk has discretion to fix the amount of the commission provided that it does not exceed 5% of receipts and disbursements. [G.S. § 28A-23-3(a)]
 - a) A guardian is not automatically entitled to 5% of receipts and disbursements. The 5% limitation is a statutory **maximum**.
 - b) In determining the amount of the commissions, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. [G.S. § 28A-23-3(b)]
 - c) **It may be necessary to remind guardians that commissions and fees are awarded pursuant to the standard in subsection b above, and should not be paid until approved by the clerk.**
 2. Determining the rate of commission requires the clerk to exercise judicial discretion.
 - a) Commissions are given as compensation for the labor and care bestowed in the management of the ward's estate, for debts paid and money expended on the ward's account, and for the exercise of such skill and discretion as may be needed for the protection of the ward's interests. [*Burke v. Turner*, 85 N.C. 500 (1881).]
 - b) The commission allowed will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, and whether fees have been paid to counsel for assisting the guardian in management duties. The fact that fees have been paid to counsel for assistance in management of the guardianship may lessen the guardian's commission. [*Whitford v. Foy*, 65 N.C. 265 (1861).]
- C. Commissionable receipts.
1. Interest on loans made by a guardian from the estate of the ward pursuant to G.S. § 24-4 is commissionable.

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2. Receipt of funds by guardian from itself in another capacity is commissionable. [*Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).]
 - a) Distributive share of the ward transferred by the bank acting as administrator to itself as guardian was commissionable.
 - b) Cash transferred by the bank acting as administrator to itself as guardian was commissionable.
 - c) Interest paid by the bank on ward's commercial accounts was commissionable.
 3. Money received by the guardian from the sale of real property in which the ward inherited an interest was commissionable. [*Rose v. Bank of Wadesboro*, 217 N.C. 600, 9 S.E.2d 2 (1940).]
 4. See Commissionable Receipts Table attached as Appendix IV.
- D. Commissionable disbursements.
1. Expense of the guardian's bond is a lawful expense. [G.S. § 58-73-35]
 2. Payments for goods purchased for ward that were made to a firm in which the guardian was a principal were commissionable. [*Williamson v. Williams*, 59 N.C. 62 (1860).] For a case holding that such payments were not commissionable, see *Burke v. Turner*, 85 N.C. 500 (1881).
 3. Payment of the ward's debts and money expended on the ward's account are commissionable. [*Burke v. Turner*, 85 N.C. 500 (1881).]
 4. Disbursements for the support of a spouse are "chargeable to the estate of an incompetent." [*Cline v. Teich*, 92 N.C. App. 257, 374 S.E.2d 462 (1988).]
 5. See Commissionable Disbursements Table attached as Appendix V.
- E. Transactions not commissionable.
1. Guardian was not entitled to commissions on guardianship moneys received by him and used by the guardian in his own business. [*Burke v. Turner*, 85 N.C. 500 (1881).]
 2. Disbursements after the ward reaches majority (or has been restored to competency) are not commissionable. [*McNeill v. Hodges*, 83 N.C. 504 (1880).]
- F. Practice tips.
1. It is good practice to allow commissions only in conjunction with an accounting so there is documentation to support the order.
 2. The clerk should require the guardian to submit a petition for payment of commissions. The clerk should enter an order for the payment of commissions.

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APPENDIX I

GUARDIANSHIP GUIDELINES

Guardianship File No.: _____

Date of Appointment: _____

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

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

You must take an oath; and

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

INVESTMENTS

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

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

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

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

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

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

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

MANAGEMENT OF THE WARD'S ESTATE

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

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(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

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

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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

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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.

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APPENDIX III TIMELINE FOR APPOINTMENT OF A STANDBY GUARDIAN Appointment by Petition (G.S. 35A-1373)

INITIATION	SERVICE	HEARING	TRIGGERING EVENT OCCURS	WRITING FILED	TERMINATION
<p>Petitioner files petition for appointment of a standby guardian. [G.S. 35A-1373(a)] (AOC-E-209)</p> <p>Clerk appoints GAL, if available. [G.S. 35A-1379]</p>	<p>Service of petition and notice of hearing. [G.S. 35A-1373(c)]</p> <p>For event that will stay the process, see footnote 1 below.</p>	<p>If certain facts shown, clerk enters order (AOC-E-409) appointing SBG named in petition as standby guardian of the person or standby general guardian [G.S. 35A-1373(f)] with authority to commence upon any 1 of 4 triggering events.</p> <p>Clerk issues letters (AOC-E-411) or (AOC-E-412), effective on SBG's receipt of notification of 1 of 4 triggering events.</p> <p>SBG to serve without bond or furnishes bond immediately upon occurrence of a triggering event. (AOC-E-409)</p> <p>APPOINTMENT OF SBG COMPLETE. For renunciation or revocation before commencement of authority, see footnote 2 below.</p>	<p>Upon receipt of a writing setting out a triggering event, authority of SBG commences. [G.S. 35A-1373 (i)-(l)] SBG's authority is concurrent with that of petitioner (unless triggering event was petitioner's death.) [G.S. 35A-1377]</p> <p>Standby general guardian is authorized to receive, manage, administer property, estate and business affairs of the ward. (AOC-E-411)</p> <p>Standby guardian of the person is authorized to have custody, care and control of the ward. (AOC-E-412)</p> <p>SBG must post bond now, unless petitioner waived. [G.S. 35A-1380]</p> <p>Letters are effective with copy of writing setting out triggering event attached.</p>	<p>Within certain time limits as set in G.S. 35A-1373(i)- (l), SBG must file writing with clerk that sets out triggering event.</p>	<p>Standby guardianship continues until minor is 18 unless terminated by order of clerk or district court judge (for custody) or by revocation or renunciation. [G.S. 35A-1382] See footnote 2 below on revocation and renunciation.</p>

1. If at or before hearing, a parent files a written claim for custody, proceeding is stayed. If custody complaint not filed within 30 days, clerk proceeds. [G.S. 35A-1373(d)]

2. Before commencement of SBG's authority: (1) Person appointed may renounce [G.S. 35A-1373(n)]; or (2) Clerk may revoke order of appointment if clerk finds requirements for appointment no longer satisfied. [G.S. 35A-1373(h)]

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Appointment by Designation (G.S. 35A-1374)

INITIATION	TRIGGERING EVENT OCCURS	PETITION TO BE APPOINTED GUARDIAN AND WRITING FILED	SERVICE	HEARING	TERMINATION
<p>Designator designates SBG in a written designation. [G.S. 35A-1374(a)]</p> <p>Designator sets out 1 or more triggering events.</p> <p>APPOINTMENT OF SBG COMPLETE IF EXECUTION PROPER.</p>	<p>Upon receipt of a writing setting out a triggering event, authority of SBG commences. [G.S. 35A-1374(c)]</p> <p>SBG's authority is concurrent with that of designator (unless triggering event was designator's death.) [G.S. 35A-1377]</p> <p>For revocation by the designator, see footnote 1 below.</p>	<p>Within 90 days of commencement of SBG's authority, SBG must file a petition to be appointed guardian of the person or general guardian. [G.S. 35A-1374(e)] (AOC-E-210)</p> <p>The petition shall include documentation of triggering event as set forth in G.S. 35A-1374(f).</p> <p>If not timely filed, SBG's authority lapses, to recommence only upon filing of the petition. [G.S. 35A-1374(e)]</p>	<p>Service of petition and notice of hearing. [G.S. 35A-1274(g)]</p> <p>Clerk appoints a GAL, if available. [G.S. 35A-1379]</p> <p>For event that will stay the process, see footnote 2 below.</p>	<p>If requirements of G.S. 35A-1374 met, clerk enters order appointing SBG as guardian of the person or general guardian. [G.S. 35A-1374(i)] (AOC-E-410)</p> <p>Clerk checks 1 of 4 triggering events set out in the order as having occurred and appoints a guardian or finds no triggering event has occurred and denies the petition.</p>	<p>Standby guardianship continues until minor is 18 unless terminated by order of clerk or district court judge (for custody) or by revocation or renunciation. [G.S. 35A-1382] See footnote 1 below on revocation.</p>

1. Before guardianship petition filed, designator may revoke by giving SBG written notice of intent to revoke. [G.S. 35A-1374(j)(1)] After guardianship petition filed, designator may revoke by filing written revocation with the clerk. [G.S. 35A-1374(j)(2)]
2. If at or before hearing, a parent files a written claim for custody, proceeding is stayed. If custody complaint not filed within 30 days, clerk proceeds. [G.S. 35A-1374(h)]

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APPENDIX IV

Commissionable Receipts Table

RECEIPT	COMMISSIONABLE	NOT COMMISSIONABLE
Any portion of rents, interest, dividends or other income that must be withheld for income tax purposes	✓ [G.S. 28A-23-3(f)]	
Insurance proceeds	✓	
Proceeds of real property sold to pay debts	✓ The full amount of proceeds is NOT commissionable. Commission computed only on proceeds actually applied to debts. [<i>In re Estate of Moore</i> , 160 N.C. App. 85, 584 S.E.2d 807 (2003).]	
Proceeds of sale of investments made by fiduciary	But profit is income to the estate and is commissionable.	✓ Investment basis already shown elsewhere on inventory and commissions already paid.
Receipts and disbursements representing mere changes in investment (repeated sale and purchase of investment asset)		✓
Rents	✓ This is different from rents in an estate that would go directly to heirs.	
Transfer of deposits from banking department of a bank to another department when bank is guardian	✓	
Value of all personal property received	✓ [G.S. 28A-23-3(a)] This includes intangible personal property such as investment accounts.	

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APPENDIX V

Commissionable Disbursements Table

DISBURSEMENTS	COMMISSIONABLE	NOT COMMISSIONABLE
Taxes	✓	
Payments of debts to creditors	✓	
Payments of debts from proceeds of real property sold to pay debts	✓ [G.S. 28A-23-3(b)]	
Purchase of investments		✓
Payments allowed by clerk as “reasonable sums for necessary charges and disbursements incurred in the management of the estate”		✓ This includes commissions to real estate agents for sales or rentals, attorney fees, fees to auctioneers, clerks, and costs of special advertising of sales of personal or real property, and accountant fees.
Regular distributions to the ward for living expenses	✓ Reimbursements are commissionable if they would be commissionable if paid from an estate.	
Reimbursement of guardian for certain expenses	✓ If clerk allows reimbursements above commissions, reimbursements are commissionable.	✓ No commission on commission.
Reinvestment of interest and dividends		✓

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APPENDIX VI WORKSHEET (GUARDIAN COMMISSIONS, ATTORNEY FEES AND BOND)

5%* of original receipts ÷ by ____ years (estimated life of account) = \$ _____
 maximum annual commissions on original receipts available.

Year	Original Receipts	Annual + Receipts	Annual + Expenditures	= Maximum Annual Commissions	Commissions Ordered	Commissions Cumulative Total

ATTORNEY FEES

Year	Attorney Fees Paid	Attorney Fees Cumulative Total

BOND CALCULATION

Year	Bond Required	Posted

*5% is maximum commission allowed.