

Legal Issues in Incompetency and Adult Guardianship Proceedings in light of COVID-19

April 15, 2020 Webinar

Follow Up Questions

(Submitted to Chat During the Webinar)

- 1. If the full incompetency and adult guardianship proceeding will not be held remotely and it is not an emergency may it go forward in person prior to June 1?**

From Meredith Smith: The [Chief Justice's April 2, 2020](#) order states that all superior and district court proceedings, including proceedings before the clerk, must be scheduled or rescheduled for a date no sooner than June 1, 2020 unless an exception applies. We discussed two exceptions applicable to incompetency and adult guardianship proceedings during the webinar (the proceeding is for the purpose of obtaining emergency relief or the proceeding will be conducted remotely). There are two other exceptions in the order. They are that

(i) the proceeding is necessary to preserve the right to due process of law, or

(ii) the senior resident superior court judge, chief business court judge, or chief district court judge determines that the proceeding can be conducted under conditions that protect the health and safety of all participants.

Exception (ii), for example, could be implemented through an administrative order entered by the senior resident or chief district court judge for your county or district. The administrative order could provide further guidance about which proceedings may go forward in person prior to June 1 under conditions that protect the health and safety of all participants. Clerks and others should refer to any local administrative order or other guidance from the senior resident superior court judge or chief district court judge about going forward with incompetency and adult guardianship proceedings in person, in non-emergency situations prior to June 1.

- 2. If the full incompetency and adult guardianship proceeding will not be held remotely and it is an emergency may it go forward in person prior to June 1?**

From Meredith Smith: There could be circumstances in which a full incompetency and guardianship proceeding falls under the emergency relief exception of the Chief Justice's April 2, 2020 order and thus the proceedings could go forward in person prior to June 1 under that exception. For example, if there has already been an interim guardianship in place and the time period (maximum 90 days) for the interim guardianship has run, then the circumstances necessitating the full incompetency and guardianship hearing could be interpreted to fall under the emergency relief exception of the Chief Justice's order and the proceeding could go forward in person prior to June 1.

- 3. Is the court required to conduct a remote hearing if all parties consent? Or could the court make a determination that it should be held in person?**

From Meredith Smith: The proceeding may not be conducted remotely without the consent of each party under Directive 3 of the Chief Justice’s April 2, 2020 order. If each party consents to conduct the proceeding remotely, it would seem to fall under the authority of the court conducting the proceeding to determine whether to accept the consent of the parties and ultimately to allow the proceeding to be held remotely. In making this decision, the court will need to consider the time sensitive nature of the proceeding and whether it falls under one of the other exceptions to the Chief Justice’s order allowing proceedings to go forward in person prior to June 1, such as it is a proceeding for emergency relief or it can be conducted in person in a way that protects the health and safety of all participants in accordance with an authorization, such as an administrative order, by the senior resident superior court judge or chief district court judge.

4. What if all parties want to attend in person, but the guardian ad litem cannot attend in person due to health issues (or a risk due to the virus), can the GAL attend by WebEx while everyone else attends in person?

From Timothy Heinle: [Chief Justice’s April 2, 2020](#), Emergency Directive 3, states that a “remote proceeding may not be conducted without the consent of each party.” The question becomes whether allowing one participant, i.e. the GAL, to appear remotely constitutes a “remote proceeding.”

- If no, allowing one participant to appear remotely does not equal a “remote proceeding,” the clerk may have the authority to allow it with the consent of the parties but it is not clear. Certain provisions related to incompetency and adult guardianship proceedings that allow for remote appearances do not apply to a GAL attorney. See G.S. 35B-7 (allowing remote testimony for an out of state witness); G.S. 8C-1, Rule 616 (allowing an individual with an intellectual or developmental disability who is competent to testify to testify by remote testimony in a civil proceeding or special proceeding if authorized by the court). Furthermore, if the GAL requests to appear remotely, the GAL should assess, and the Clerk may need to inquire about, the respondent’s capacity to consent to the GAL appearing remotely.
- If yes, allowing one participant to appear remotely constitutes a remote proceeding, then all parties must consent. The GAL should assess, and the Clerk may need to inquire about, the respondent’s capacity to consent to the GAL appearing remotely. If the respondent lacks capacity to consent, or if all parties do not consent, then the GAL will need to appear in person.

If the GAL does appear remotely, the GAL will need to ensure the ability to communicate with the respondent exists, including confidentially when necessary, and that the GAL is able to fulfill the responsibilities of being a GAL attorney while appearing remotely.

5. **If you record the remote proceeding via WEBEX and it gets recorded to the cloud do you then delete it from the cloud after you copy the disk?**

Answer from AOC: AOC is working on recordkeeping rules for WebEx recordings. AOC does not recommend deleting at this time.

6. **Regarding the April 13 order of the Chief Justice, for 10 day upset bid periods pertaining to the private sale of the real property of a Ward, are those also delayed until 6/1 or not?**

Answer from AOC: The April 13 order permits filings due to be filed or acts due to be done on or after 3/16/20 and by 6/1/20 to be deemed timely if the document is filed or the act is done by close of business on 6/1/20. Therefore, if the 10th day to place an upset bid falls on or after 3/16/20, then an upset bid would be deemed timely if filed by close of business on 6/1/20 and would restart the upset bid process. If a bid is not placed on 6/1 and the 10-day upset bid period has already previously expired, then the sale could be immediately confirmed. In a power of sale foreclosure, the sale would be confirmed as of the expiration of the 10th day. AOC issued updated guidance to clerks on this issue by email on 4/16/20.

7. **If someone needs an interim and they have been in the hospital here but came from out of state and we have an order for our county that says they have to quarantine for 14 days per that order what do we do if it's an interim?**

Answer from Timothy Heinle: I encourage anyone with a similar question to watch the webinar where I discuss at greater length whether a respondent must consent to a remote proceeding, or if the GAL can consent on their behalf. My position is that waiving an in-person hearing deals with a substantial legal right of the respondent, and only the respondent, not a GAL, can give the respondent's consent to a remote hearing.

Arguably, a court may find that in an emergency situation a GAL has the ability to waive a respondent's right to appear in person for a hearing, when there is cause to believe waiving that right is in the best interests of and for the protection of a respondent who seems to lack capacity. If the GAL does have that authority, it is likely lessened, or even nonexistent, when no emergency exists, or for full guardianship (rather than interim) hearings.

A GAL may object to moving forward with the respondent unable to be present for the hearing, and request that the hearing be continued until after June 1, or until restrictions are eased. If the GAL believes an emergency exists and that the respondent's best interests would be served by a 35A order, the GAL may request that an interim guardianship be granted. An interim guardianship could ensure the respondent's needs are met but would do so with a temporary order, and without a final determination on the respondent's competency.