

## **GUARDIANSHIP ISSUES FOR THE PUBLIC GUARDIAN**

The purpose of this manuscript is to assist public guardians, their designees and their agency attorneys in the decision-making process for wards. This does not constitute an opinion of the Attorney General.

### **I. Limited Guardianship**

#### **A. Law**

##### **1. G.S. § 35A-1212(a)**

a. The clerk shall . . . determine: (1) The nature and extent of the needed guardianship;

b. If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so.

##### **2. G.S. § 35A-1215(b)**

a. If the clerk orders a limited guardianship as authorized by G.S. § 35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which the ward was entitled before the ward was adjudged incompetent.

b. Any order of limited guardianship shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians.

#### **B. Public Policy -- G.S. § 35A-1201(a)(5)**

1. Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent.

2. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

#### **C. Benefits**

1. Limited Guardianship is the deprivation of rights through a tailored guardianship order that matches the particular disabilities of the individual.

2. Prosthesis Analogy: In fitting a prosthesis the surgeon makes every effort to conserve the remaining natural functions. If the knee is bad, replace it, not the whole leg. The artificial knee will function a little differently, but may have some advantages the old knee did not have.

3. Sets out specific powers and duties of a guardian so that no more decisionmaking power is assumed than is justified by the actual mental, physical, or adaptive limitations of the individual.

4. Better for the emotional health of the ward and better for promoting guidelines and accountability for the guardian.

5. Self-reliance, autonomy, and independence will be promoted, perhaps contributing to the ward's ability to re-establish his or her functional capacity.

6. Specifically enumerating the duties and powers of the guardian provides a guide for the court and others in evaluating and monitoring the performance of the guardian, as well as a road map for the guardian to use in determining what the guardian can or cannot do in carrying out assigned responsibilities.

E. Motion to Modify Guardianship--AOC-E-415

1. Add to the rights and privileges

2. Limit the rights and privileges

II. Restoration to Competency

A. Law: G.S. § 35A-1130

1. Guardian, ward or other interested person may file a petition as a motion in the cause,

2. Setting forth facts tending to show that the ward is competent,

3. With the Clerk for partial or full restoration of the ward's competency

B. Burden of Proof: G.S. § 35A-1130(d): Preponderance of the Evidence, *see Brandis and Broun on NC Evidence* § 41

1. Not quantity, but quality and convincing force of the evidence.

2. Means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

3. Different from standard to adjudicate: clear, strong, convincing: Pattern Jury Instruction, NCPI--Civil 101.11 “You shall interpret and apply the words ‘clear,’ ‘strong’ and ‘convincing’ in accordance with their commonly understood and accepted meanings in everyday speech.”

#### C. Full Restoration Order

1. If the clerk finds by a preponderance of the evidence that the ward is competent, the clerk will enter an order restoring the ward to competency.

2. Ward may then handle own affairs, enter into contracts, control and sell his property, and exercise all rights as if he had never been adjudicated incompetent

#### D. Alternative to Full Restoration Order

1. Clerk may find ward able to make some decisions and change guardianship to limited.

2. Limited guardianship permits ward to have input into or to make certain decisions such as housing and medical care as designated by the clerk.

### III. Less Restrictive Alternatives to Guardianship

N.C. Gen. Stat. § 35A-1101(7) -- “‘Incompetent adult’ means an adult or emancipated minor who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.”

A legal instrument that can accomplish the amount of assistance an individual needs, short of an adjudication of incompetence, would be less intrusive and possibly a better outcome for the individual.

#### A. Power of Attorney

1. A power of attorney is a document that lets the “principal” choose a trusted person or organization to handle his financial, legal or health care matters if he is unavailable or unable to manage them for himself.

2. The principal may designate a person or an organization to act on his behalf.
3. The person or organization chosen is referred to as the “attorney-in-fact” or “agent.”
4. A power of attorney must be signed by the person granting the authority and that person must be mentally competent at the time of the signing in order to make the document legally binding.
5. All powers of attorney terminate on the death of the principal.

B. General Power of Attorney G.S. § 32A-1 to 32A-43

1. A general power of attorney authorizes the attorney-in-fact to act on the principal’s behalf in a variety of different situations.
2. A general power of attorney is usually used to allow the attorney-in-fact to handle all of the principal’s affairs when he is unable to handle them. For example, when you are traveling or when you are physically or mentally unable to handle your affairs. But, it terminates when the principal becomes incompetent.
3. A general power of attorney is commonly used to allow another person to handle the following types of transactions for the principal:
- Banking transactions
  - Entering safety deposit boxes
  - Buying and selling property
  - Purchasing life insurance
  - Settling claims
  - Entering into contracts
  - Exercising stock rights
  - Buying, managing or selling real estate
  - Filing tax returns
  - Handling matters related to government benefits

C. Limited Power of Attorney

1. A limited power of attorney, sometimes referred to as a special power of attorney, authorizes the attorney-in-fact to act on the principal’s behalf only in specific situations.

2. A limited power of attorney allows the principal to give only specific powers to the person or organization he appoints as his attorney-in-fact. For example, the principal could authorize someone to sell a specific item for him, such as a house.

D. Durable Power of Attorney G.S. § 32A-8 to 32A-14

1. Definition. N.C. Gen. Stat. § 32A-8 “This power of attorney shall not be affected by my subsequent incapacity or mental incompetence,” or “This power of attorney shall become effective after I become incapacitated or mentally incompetent.”

2. The intent of the principal is that the authority conferred shall be exercisable notwithstanding the principal’s subsequent incapacity or mental incompetence.

3. Registration. N.C. Gen. Stat. § 32A-9(b). The instrument may be registered either before or after incompetence, but needs to be registered to be effective.

4. Relation of Attorney-in-Fact to Guardian: N.C. Gen. Stat. § 32A-10(a) “If, following execution of a durable power of attorney, a court . . . appoints a . . . guardian of the principal’s person or estate, . . . the attorney-in-fact is accountable to the fiduciary as well as to the principal.”

5. AOC guidance suggests that the guardian may terminate or revoke without a court proceeding. (AOC memo 10/8/07)

E. Springing Power of Attorney

1. An alternative to creating a durable power of attorney is a springing power of attorney.

2. The power granted under this designation does not come into effect until the principal becomes disabled.

3. There must be a formal determination of disability before the power of attorney can be accepted and used.

4. A springing power might require that two doctors examine the principal and confirm that he is disabled.

F. Health Care Power of Attorney G.S. § 32A-15 to 32A-27

1. Powers: N.C. Gen. Stat. § 32A-19

a. A health care power of attorney allows the principal to appoint someone to make health care decisions for her when she lacks the capacity to make and communicate health care decisions.

b. The principal may authorize the attorney in fact without limitation, the power to authorize withholding or discontinuing life-prolonging measures

c. The principal may authorize the attorney in fact without limitation, the power to give or withhold mental health treatment.

2. Effective: N.C. Gen. Stat. § 32A-20 “A health care power of attorney shall become effective when and if the physician or, in the case of mental health treatment, physician or eligible psychologist as defined in G.S. 122C-3(13d), designated by the principal determine in writing that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal, and shall continue in effect during the incapacity of the principal.”

3. Revocation: N.C. Gen. Stat. § 32A-20 “. . . revoked by the death of the principal. A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions.

4. Effect of Guardianship: N.C. Gen. Stat. § 32A-22

a. “If, following the execution of a health care power of attorney, a court of competent jurisdiction appoints a guardian of the person of the principal, or a general guardian with powers over the person of the principal, the guardian may petition the court, after giving notice to the health care agent, to suspend the authority of the health care agent during the guardianship. “

b. “The court may suspend the authority of the health care agent for good cause shown, provided that the court’s order must direct whether the guardian shall act consistently with the health care power of attorney or whether and in what respect the guardian may deviate from it. “

c. The guardian shall act consistently with G.S. § 35A-1201(a)(5) which provides: “Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.”

d. “A principal may nominate, by a health care power of attorney, the guardian of the person of the principal if a guardianship proceeding is thereafter commenced.”

e. “The court shall make its appointment in accordance with the principal’s most recent nomination in an unrevoked health care power of attorney, except for good cause shown.”

G. Advanced Instruction for Mental Health Treatment

1. An additional, nonexclusive method for an individual to exercise the right to consent to or refuse mental health treatment when the individual lacks sufficient understanding or capacity to make or communicate mental health treatment decisions. N.C. Gen. Stat. § 122C-71

2. A declaration of instructions, information, and preferences regarding the principal’s mental health treatment and states that the principal is aware that the advance instruction authorizes a mental health treatment provider to act according to the instruction. N.C. Gen. Stat. § 122C-72

3. 2 witnesses to the instrument must believe the principal is of sound mind when he signs.

H. Representative or Protective Payee -- 42 U.S.C. § 405(j)

1. This is a person appointed to manage Social Security, Veterans’ Administration, Railroad Retirement, public assistance or other state or federal benefits or entitlement program payments on behalf of an individual.

2. The representative or protective payee acts much like an attorney-in-fact, but for the limited purpose of a particular program.

I. Revocable Trust -- G.S. § 36C-1-103 definitions

1. A trust is an arrangement where one person manages property for the benefit of another person.

2. The person who manages the property is called a trustee.

3. The person for whom the property is managed is called the beneficiary.

4. The trust agreement which is created by the person establishing the trust directs how the trustee is to act.

J. Living Will -- G.S. § 90-321

1. Written declaration by person who is of sound mind that expresses a desire of the declarant that life-prolonging measures not be used to prolong the declarant's life:

a. "If the declarant has an incurable or irreversible condition that will result in death within a relatively short period of time; or

b. The declarant becomes unconscious and, to a high degree of medical certainty, will never regain consciousness; or

c. The declarant suffers from advanced dementia or any other condition resulting in the substantial loss of cognitive ability and that loss, to a high degree of medical certainty, is not reversible."

2. General guardian or guardian of the person may not revoke a declaration of desire for natural death executed by the ward. G.S. § 35A-1208(b).

K. Natural Death in Absence of Living Will---§ 90-322. Procedures for natural death in the absence of a declaration

1. Physician determines a person lacks capacity to make or communicate health care decisions and the person will never regain that capacity; and

a. That the person has an incurable or irreversible condition that will result in the person's death within a relatively short period of time; or

b. Is unconscious and, to a high degree of medical certainty, will never regain consciousness; and

c. A vital bodily function of the person could be restored or is being sustained by life-prolonging measures

2. General guardian or guardian of the person may authorize the withholding or withdrawal of life-prolonging measures under the circumstances specified in G.S. § 90-21.13 and, this power coexists with the Health Care POA because the health care agent "shall have the right to exercise the authority to the extent granted in the health care power of attorney and to the extent provided in G.S. § 32A-19(b) unless the Clerk has suspended the authority of that health care agent in accordance with G.S. § 35A-1208(a)."

#### IV. Ward's Rights and Privileges Affected by Adjudication

A. Generally: order appointing general guardian deprives the ward of his right to make decisions affecting most areas of his life. There are exceptions to the general rule such that



some rights are clearly retained, some are certainly lost, and the status of others depends upon the facts and circumstances.

*See* G.S. § 35A-1241 (explaining the powers and duties of a guardian of the person) and G.S. § 1251 (explaining the powers and duties of a guardian of the estate).

B. Right to file a legal action seeking restoration of legal capacity. Retain. *See* G.S. § 35A-1130.

C. Right to Vote. Retain. May register to vote and vote in all state elections in which he would otherwise be qualified to vote. 41 N.C. Atty. Gen. Op. 85 (1973).

D. Right to Testify as a Witness. Depends.

1. Is competent to testify as a witness in a lawsuit if he understands the nature of his oath to tell the truth, had the capacity to observe the matters about which he will testify, and has the capacity to remember and relate what he observed. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

2. G.S. § 8C-1, Rule 601. *See also State v. Crooks*, 2002 N.C. App. LEXIS 2133 (2002) (applying this rule in holding that the trial court did not abuse its discretion by allowing an allegedly incompetent witness to testify).

a. General rule. -- Every person is competent to be a witness except as otherwise provided in these rules.

b. Disqualification of witness in general. -- A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

E. Right to Litigate Independent of the Guardian. Lose. Must defend by general or testamentary guardian or guardian ad litem. *Hood v. Holding*, 205 N.C. 451, 453, 171 S.E. 633, 634 (1933); G.S. § 1A-1, Rule 17(b)(2). *See Granville v. Yeddo*, 2009 N.C. App. LEXIS 1332 (2009) (holding that a general guardian, guardian of the estate, or guardian *ad litem* may initiate an action on behalf of a ward but a guardian of the person may not do so).

F. Right to Serve as the Guardian of Another Individual. Lose. *See* G.S. § 35A-1290(c)(1) "It is the clerk's duty to remove a guardian [if] [t]he guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competence."

G. Right to Sue for Divorce. Lose. *See* G.S. § 50-5.1 (explaining grounds for absolute divorce in cases of incurable insanity), G.S. § 50-22 (discussing the right of a general

guardian to bring an action on behalf of an incompetent spouse), and *Scott v. Scott*, 336 N.C. 284 (1994) (explaining the meaning of incurable insanity and distinguishing it from “severe and persistent mental illness” and incompetence).

1. Spouse of a person who is determined to be incurably insane pursuant to G.S. § 50-5.1 can bring an action for divorce. Spouses must have been separated for three years and, if the incurably insane spouse has “insufficient income and property to provide for his or her own care and maintenance,” the sane spouse must provide for the care and maintenance of the insane spouse for that spouse’s lifetime. In a divorce action brought under this section, a guardian defends the incurably insane spouse.

2. Guardian may not sue for divorce on behalf of ward. G.S. § 50-22 (“A general guardian for an incompetent spouse may commence, defend or maintain any action authorized by this Chapter [Chapter 50: Divorce and Alimony]; however, the court shall not enter a decree of absolute divorce in such an action filed by the guardian on behalf of the incompetent spouse”). *See also Freeman v. Freeman*, 34 N.C. App. 301 (1977) (articulating the rule that “a suit for divorce is so personal and volitional that it cannot be maintained by a guardian on behalf of an incompetent”).

3. Whether guardian *ad litem* can sue has not been determined in NC.

4. If you are the guardian of a married person be on the lookout for abuse, exploitation, neglect.

5. Divorce terminates a legal status; annulment establishes that a marital status never existed; if person is incompetent at time of marriage, can get annulment. *See* section H(6) below on the ward’s right to marry.

H. Right to Marry. Depends.

1. G.S. § 51-2: generally all unmarried persons of 18 years+ may marry

2. Adjudication of incompetency not conclusive on issue of later capacity to marry and does not bar party from entering a contract to marry. *Geitner v. Townsend*, 67 N.C. App. 159, 162, 312 S.E.2d 236, 238 (1984).

3. Mental capacity of party at the precise time when marriage is celebrated controls validity or invalidity. *Geitner*, 67 N.C. App. at 162.

4. Test is capacity of the person to understand special nature of contract of marriage and duties and responsibilities which it entails, which is to be determined from the facts and circumstances of each case. *Geitner*, 67 N.C. App. at 162 (1984) (*citing Ivery v. Ivery*, 258 N.C. 721, 732 (1963)).

5. You must be able to answer the questions regarding age, marital status, and intention to marry; if you can do this the register of deeds shall issue a license for marriage. G.S. § 51-8.

6. Guardian may ask court to declare marriage void (annulment) if he has evidence the ward did not have the capacity to understand marriage contract; burden of proof is on the one seeking invalidity. *Geitner*, 67 N.C. App. at 163 (1984) (holding that a guardian contesting the validity of a marriage on the grounds that the ward lacked the mental capacity and understanding sufficient to contract a valid marriage had the burden of persuasion).

7. Concerns:

- a. exploitation of assets; liability if something happens to ward/spouse/others;
- b. continued eligibility for public assistance benefits—medicaid SA, SSI;
- c. how to make decisions in best interest of ward who has spouse/partner

I. Right to Contract. Depends.

1. Theoretically lose ability to contract, but in NC adjudication of incompetency becomes merely a presumption of incapacity to contract in a subsequent proceeding brought to void a contract. *See In re Will of Maynard*, 64 N.C. App. 211, 225, 307 S.E.2d 416, 426 (1983) (stating that “where a person has been declared incompetent to manage his affairs, and a guardian appointed, the person is presumed to lack mental capacity to manage his affairs, and this presumption is conclusive as to parties and privies to the guardianship proceedings and rebuttable as to all others”). (*See also* Section H above on a ward’s right to marry.)

2. Person has mental capacity sufficient to contract if he knows what he is about. *Matthews v. James*, 88 N.C. App. 32, 35 (1987)

3. Test is ability to understand nature of the act and its scope and effect—not that person should be able to act wisely or drive a good bargain, but be in possession of his faculties so as to enable him to know what he is doing. *Matthews*, 88 N.C. App. at 35.

4. Contract is not void.

5. Can be voidable if you prove ward lacked capacity at time he entered into contract, but if person seeking enforcement of the contract shows the following, he may well win:

- a. seller was ignorant of ward's mental incapacity;
- b. had no notice of incapacity, including that which would have put a reasonable person on notice;
- c. he paid a fair and full consideration;
- d. took no unfair advantage;
- e. complaining party has not, or is unable to restore the consideration.

J. Right to Make Will. Depends.

1. Fact of adjudication raises a rebuttable presumption that one lacks sufficient testamentary capacity to execute a valid will because the first requirement is to be of sound mind. *In re Will of Maynard*, 64 N.C. App. 211, 224-25, 307 S.E.2d 416, 426-27 (1983) (As to testamentary capacity, a person for whom a guardian has been appointed is [rebuttably] presumed "in the absence of proof to the contrary" to lack testamentary capacity.) However, "neither an adjudication of incompetency, nor the appointment of a guardian is conclusive on the question of testamentary capacity" *Maynard*, 64 N.C. App. at 226-27.

2. Test for "sound mind" a/k/a capacity

- a. Presumption maybe overcome by showing: whether ward comprehends natural object of her bounty, *i.e.*, knows who natural heirs would be, *e.g.*, can't leave spouse out
- b. Understands the kind, nature and extent of her property, *i.e.* knows what assets she has
- c. Knows the manner in which she desires her act to take effect, *i.e.*, knows how she wants to distribute those assets
- d. Realizes the effect her act will have upon her estate, *i.e.*, knows the impact of the distribution of the assets
- e. Whether ward is free from the influence of delusions—insane delusion is sufficient to invalidate a will in NC if it has "no foundation in fact and is the product of the testator's diseased mind"

3. NOTE: If your ward has capacity to make a will, you should question the need for a full guardianship.

4. Make sure there is no undue influence, especially a beneficiary of the will.

5. NOTE: guardian is prohibited from writing or amending a ward's will.

6. Wills Deposited with Clerks of Court.

a. If will is there, testator's attorney, testator or authorized agent may inspect it. Not a public document.

b. If ward has a will, contents may have significant impact on decisions the guardian may make concerning that ward's real and/or personal property.

c. If you know there is a will, check with clerk.

d. If will is in your possession or someone else's, ask clerk for instructions on what to do about will and whether it should be deposited with clerk.

e. Guardian of person will need to coordinate with guardian of estate, if there is one, if there is a will.

f. Guardian of estate required to handle the sale of ward's property, if needed.

g. If no guardian of estate, guardian of person should petition the clerk for the appointment of a guardian of the estate to handle these matters.

h. Guardian of person is responsible for taking reasonable care of ward's personal property, some or all of which may be bequeathed to persons named in a ward's will.

K. Right to Hold a Drivers License. Depends. *See* G.S. § 20-17.1 Revocation of License of Mental Incompetents, Alcoholics and Habitual Users of Narcotic Drugs.

1. "If a person has been adjudicated incompetent under Chapter 35A of the General Statutes, in making an inquiry into the facts, the Commissioner shall consider the clerk of court's recommendation regarding whether the incompetent person should be allowed to retain his or her driving privilege."

2. “Unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons and property, he shall revoke such person’s driving privilege.”

3. “Provided that if such person requests, in writing, a hearing, he shall retain his license until after the hearing, and if the revocation is sustained after such hearing, the person whose driving privilege has been revoked under the provisions of this section, shall have the right to a review by the review board as provided in G.S. § 20-9(g)(4) upon written request filed with the Division.”

4. “If any person shall be adjudicated as incompetent . . . , the clerk of the court in which any such adjudication is made shall forthwith send a certified copy of abstract thereof to the Commissioner.”

L. Serve as a Juror. Lose. See N.C. Gen. Stat. § 9-3

“All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, . . . and who have not been adjudged non compos mentis [not of sound mind].”

## V. Liability

### A. Negligence.

1. The essence of negligence is behavior creating an unreasonable danger to others. W. Prosser, *Handbook of the Law of Torts* § 31 (5th ed. 1984).

2. “To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.” *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 232, 311 S.E. 2d 559, 564 (1984).

3. “The standard of due care is always the conduct of a reasonably prudent person under the circumstances.” *Watson v. Stallings*, 270 N.C. 187, 193, 154 S.E. 2d 308, 312 (1967).

4. “Although the standard remains constant, the proper degree of care varies with the circumstances.” *Id.*

B. Proximate cause.

1. “A cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.” *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. at 233, 311 S.E. 2d at 565 (citations omitted).

2. “Foreseeability is a requisite of proximate cause. To establish foreseeability, the plaintiff must prove that defendant, in the exercise of reasonable care, might have foreseen that its actions would cause some injury. The defendant must exercise ‘reasonable prevision’ in order to avoid liability. The law does not require a defendant to anticipate events which are merely possible but only those which are reasonably foreseeable. *Bolkhir v. North Carolina State University*, 321 N.C. 706, 709 (N.C. 1988).

C. Guardian’s Duty in general.

1. Ward is absolutely entitled to have a qualified and responsible guardian.

2. Relationship is fiduciary, a broad term for someone who has a duty to act for the benefit of someone else.

3. Guardian must subordinate his personal interests to that duty in the event that there is a conflict.

4. Guardian acts for the sole benefit of the ward--not for any other persons, other than the ward’s dependent spouse and children.

5. Good faith and due diligence are the guiding principles for decision-making and require the use of prudence, discretion and intelligence.

D. Duties of the guardian of the person. G.S. § 35A-1241:

1. “is entitled to custody of the person of the guardian’s ward and shall make provision for the ward’s care, comfort, and maintenance, and shall, as appropriate to the ward’s needs, arrange for the ward’s training, education, employment, rehabilitation or habilitation. The guardian of the person shall take reasonable care of the ward’s clothing, furniture, vehicles, and other personal effects that are with the ward.”

2. “may establish the ward’s place of abode within or without this State. In arranging for a place of abode, the guardian of the person shall give preference to places within this State over places not in this State if in-State and out-of-State places are substantially

equivalent. The guardian also shall give preference to places that are not treatment facilities. If the only available and appropriate places of domicile are treatment facilities, the guardian shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based.”

3. “The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority granted in the health care power of attorney unless the Clerk has suspended the authority of that health care agent in accordance with G.S. § 35A-1208. The guardian shall not, however, consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk in accordance with G.S. § 35A-1245. The guardian of the person may give any other consent or approval on the ward’s behalf that may be required or in the ward’s best interest. The guardian may petition the clerk for the clerk’s concurrence in the consent or approval.”

4. “A guardian of the person, if he has acted within the limits imposed on him by this Article or the order of appointment or both, shall not be liable for damages to the ward or the ward’s estate, merely by reason of the guardian’s: (1) Authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service, in a situation where the damages result from the negligence or other acts of a third person; or (2) Authorizing medical treatment or surgery for his ward, if the guardian acted in good faith and was not negligent.”

E. Specific duties of a general guardian or guardian of the estate. G.S. § 35A-1253:

1. “To take possession, for the ward's use, of all his estate.”

2. “To diligently endeavor to collect, by all lawful means, all bonds, notes, obligations, or moneys due his ward.”

3. “To pay income taxes, property taxes, or other taxes or assessments owed by the ward, out of the ward's estate, as required by law. If any guardian allows his ward's lands to be sold for nonpayment of taxes or assessments, he shall be liable to his ward for the full value thereof.”

4. “To observe the standard of judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property. If the guardian has special skills or is named as guardian on the basis of representations of special skills or expertise, to use those skills.”



5. “To obey all lawful orders of the court pertaining to the guardianship and to comply with the accounting requirements of this Subchapter.”

F. Issues:

1. Financial power of attorney not automatically revoked upon appointment of guardian of estate; guardian must take all steps to revoke POA as if he were the competent principal--POA must turn property over to guardian.

2. The law does not relieve the mentally deficient of liability (Restatement (Second) of Torts, § 895j). This policy is based upon the belief that those who have charge of them or their estates will be stimulated to look after them, keep them in order and see they do no harm. However, according to *N.C. Law of Torts*, Sec. 16-40, no North Carolina cases have been found adjudicating the liability of insane or mentally deficient defendants. But, it is advisable to be aware that a guardian may be liable to a third party if the guardian’s negligence or breach of duty with respect to the guardian’s care or custody of the ward results in the ward’s injuring another person or another’s property.

3. Statute of limitations. G.S. § 1-17 provides that “[a] person entitled to commence an action who is at the time the cause of action accrued either . . . (3) incompetent as defined in G.S. 35A-1101 (7) or (8) may bring his action within the time herein limited, after the disability is removed.” **Where a guardian is appointed, the limitations period begins to run from the time of the appointment.** *In re Estate of Owens*, 117 N.C. App. 118, 120-121, 450 S.E.2d 2, 4 (1994). Note: The appointment of a guardian only starts the statute of limitations on those claims that the guardian has the authority to assert on behalf of his ward. *Wilson by Hinn v. North Carolina*, 1997 U.S. Dist. LEXIS 1037 (D.N.C. 1997).

4. Guardian of the person may not settle claims. G.S. §35A-1251 expressly authorizes a guardian of the estate to settle claims for his ward. Section 35A-1241, by contrast, is silent in this regard. This statutory framework indicates that **the legislature did not intend to confer the power to settle claims on a guardian of the person.** *Wilson by Hinn v. North Carolina*, 1997 U.S. Dist. LEXIS 1037 (D.N.C. 1997).

5. G.S. § 105-207. Fiduciaries to pay taxes. “It shall be the duty of every guardian, executor, administrator with the will annexed, agent, trustee, receiver, or other fiduciary in whose care or control any property or estate, real or personal, may be, to pay the taxes thereon out of the trust funds in his hands, if any there be; and if he fails so to do he shall become personally liable for such taxes, and such liability may be enforced by an action against him in the name of the sheriff. If he permit such property to be sold by reason of his negligence to pay the taxes when he has funds in hand, he shall be liable to his ward, principal, or *cestui que* trust for all actual damages incident to such neglect. This section shall not have the effect of relieving the estates held in trust or under the control of fiduciaries from the lien of such taxes.”

*Blumenthal v. Lynch*, 315 N.C. 571, 578-579, 340 S.E.2d 358, 362 (1986); *also see* G.S. § 35A-1253.

6. Delegation by the Director to her designee:
  - a. be clear about what and to whom.
  - b. life threatening should go back to Director because he has governmental immunity and discretion.
  - c. sign your name on behalf of Director.
  - d. some facilities may not accept delegation.

G. How to Proactively Limit Liability

1. Consult with experts, including an attorney, on difficult decisions.
2. Seek the clerk of court's concurrence on difficult decisions involving care, comfort and maintenance of wards.
3. Document all information and consultations.
4. Act within the legal authority granted the guardian in the Order on Appointment of the Guardian.
5. Recognize the practical limitations of the guardian's responsibility.
6. Involve the ward, the ward's family members and others who know the ward.
7. Work to increase the understanding of the community and others who may not understand the guardian's role and responsibilities to the ward.
8. Work towards limiting the guardianship or restoring the ward's competence when the ward appears to no longer be incompetent.
9. Know exactly what your responsibilities are.
10. Exercise reasonable care in providing care, comfort and maintenance of the ward.
11. Use informed consent when making decisions on behalf of wards.

12. Be current on all activities involving the ward.
13. Have written procedures in place to facilitate decision making in the best interest of wards.
14. Get training.
15. Have working relationship with clerk of court.
16. Be willing to take healthy risks for the benefit of your ward without clouding every decision with concern for your professional or personal liability, and document, document, document.

H. Conclusion:

“The behavior of the reasonable prudent person against which the defendant’s conduct will be measured is an ideal; that of the ordinarily prudent, not the perfectly prudent, individual. The reasonable prudent person will neither neglect probable risks nor waste anxiety on events that are scarcely possible, but will order precaution by what is likely in the known course of things. The watchfulness of a reasonable prudent person increases as risks increase because the required degree of care varies with the circumstances. Since every person necessarily acts on appearances, one’s conduct in a given situation must be judged in the light of all the circumstances surrounding him at the time.” *N.C. Law of Torts* § 16.40.