



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

Meredith Smith

Guardianship¹ is the legal process through which a person or entity² is appointed by the court to make decisions on behalf of another person who lacks capacity. Before the court may appoint a guardian, two proceedings must be initiated before the clerk of superior court:

1. an *incompetency proceeding* initiated by a petition filed by a petitioner³ against a respondent, who is the alleged incompetent person, and
2. a *guardianship proceeding* initiated by an application filed by an applicant (usually also the petitioner) who seeks to be appointed as the respondent's general guardian, guardian of the estate, or guardian of the person.⁴

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

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

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

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

4. G.S. 35A-1105; 35A-1210. "Guardian of the estate means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward." G.S. 35A-1202(9). "Guardian of the person means a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward." G.S. 35A-1202(10). "General guardian means a guardian of both the estate and the person." G.S. 35A-1202(7).

The clerk of superior court or an assistant clerk⁵ presides over both proceedings as the judge and has the authority to determine questions of evidence, initiate contempt proceedings,⁶ and enter orders.

Incompetency Proceeding

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

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

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

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

If the clerk⁹ finds that the petitioner did not meet the requisite burden of proof, then the clerk must dismiss the incompetency proceeding.¹⁰ If the clerk finds that the petitioner has presented sufficient evidence to meet the burden of proof, then the clerk enters an order that the respondent is (1) incompetent or (2) incompetent to a limited extent.¹¹ The clerk may include in the order findings on the nature and extent of the respondent’s incompetence.¹² Following an adjudication of incompetence, the clerk must appoint a guardian or transfer the matter to another county for the appointment of a guardian in that county.¹³ A respondent who is adjudicated incompetent has the right to a qualified, responsible guardian.¹⁴

Guardianship Proceeding

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

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

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

7. G.S. 35A-1112.

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

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

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

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

12. *Id.*

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

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

15. G.S. 35A-1214.

1. The nature and extent of the needed guardianship, including whether a limited guardianship may be appropriate
2. The assets, liabilities, and needs of the respondent
3. Who can most suitably serve as the guardian or guardians for the respondent¹⁶

Given the overlap in witness testimony and other evidence, some clerks will allow the parties to present evidence on the issue of incompetency and guardianship during the same hearing. However, because the clerk's duty changes between the two proceedings and a determination of incompetency must occur before a guardian may be appointed, some clerks prefer to hear the incompetency matter first before proceeding to the question of guardianship. Regardless of whether the clerk hears the matters simultaneously or sequentially, if the clerk finds that a respondent is incompetent or incompetent to a limited extent, the clerk enters two orders: an order adjudicating incompetence¹⁷ and a second order appointing a guardian.¹⁸

The Multidisciplinary Evaluation

A multidisciplinary evaluation (MDE) is an important tool that assists the clerk in both the incompetency and guardianship proceedings.¹⁹ A well-prepared MDE can be critical to carrying out the purposes of Chapter 35A of the North Carolina General Statutes (hereinafter G.S.), particularly in those cases involving complicated mental health disorders, developmental disabilities, and substance abuse. Much of Chapter 35A is designed around the premise that a clerk has access to an MDE when other evidence is conflicting or otherwise deficient regarding a person's capacity and guardianship needs.

An MDE is defined as an evaluation that contains current (1) medical, (2) psychological, and (3) social work evaluations, *as directed by the clerk*.²⁰ The MDE may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders.²¹ The statutory definition of an MDE contemplates a dynamic and multifaceted evaluation that covers various areas of a respondent's cognitive and functional capacity.

16. G.S. 35A-1212(a).

17. This is typically done using Administrative Office of the Courts (AOC) form SP-202, available at www.nccourts.org.

18. This is typically done using AOC form E-406, available at www.nccourts.org.

19. G.S. 35A-1111(e); 35A-1212(b).

20. G.S. 35A-1101(14).

21. *Id.*

Ordering the MDE

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

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

A "designated agency" is the state or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order.²⁴ A designated agency includes, without limitation:

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

In practice, clerks most frequently name county departments of social services and local management entities/managed care organizations (LME/MCOs) as the designated agency on the MDE order to prepare, cause to be prepared, or assemble the MDE. LME/MCOs tend to be called on when complicated questions arise related to the respondent's mental health, developmental disabilities, or substance abuse. Private providers, including private psychologists, psychiatrists, and other private clinicians, do not clearly fall within the statutory definition of designated agency.

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

Preparing the MDE

Timeline

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

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

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

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

25. *Id.*

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

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

Contents

The completed MDE must

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

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

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

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

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

28. *Id.*

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

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

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

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

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

Paying for the MDE

Once an MDE is completed, the clerk has the authority to enter an order regarding who is required to pay the costs of an MDE.³⁴ The clerk is required to assess the costs as follows:

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

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

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

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

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

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

Appendix G

Guidelines For Multidisciplinary Evaluations

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

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

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

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

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

Gross vision (letter or symbol chart)

Without glasses: R L

With glasses, if worn: R L

Unusual behaviors:

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

III. Impression

Summary of abnormal findings and medical impression:

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

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

Examiner:

Address:

PSYCHOLOGICAL EVALUATION GUIDELINES

- I. Intellectual Assessment—This should be done with a standard evaluation instrument. The Wechsler Adult Intelligence Scale (WAIS) is the test of choice, especially for those mildly and moderately retarded citizens with good skills. The Wechsler Memory Scale can be used to test for short term memory. Other generally accepted intellectual instruments can be used such as the Slosson Intellectual Test-R, the Bender Motor Gestalt Test and Beck Depression Scale.
- II. Behavioral Assessment—A standard evaluation instrument should also be used for this assessment. The Vineland Adaptive Behavior Skills (Interview Edition) assesses adaptive and maladaptive behaviors. Domains include communication, socialization and daily living skills. Forms are available from the American Guidance Services, Inc., Circle Pines, Minnesota 55014-1796. The AAMD Adaptive Behavior Scale is another excellent instrument for assessing adaptive behavior. (Manual and Forms are available from AAMD, 5101 Connecticut Avenue, N. W., Washington, D.C. 20015.)
- III. General Interview—In addition to the formal assessments, the psychologist should conduct a personal interview, lasting from 20-40 minutes. The following general areas should be assessed during the interview:
 - A. Ability to relate, to answer direct questions and to respond to the interviewer.
 - B. Activity level, distractibility.
 - C. General coordination, posture and balance.
 - D. Orientation to other persons, time and place.
 - E. Speech and language.

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

SOCIAL WORK EVALUATION GUIDELINES

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

I. Environmental Aspects

- A. Residence
 - 1. Current Residence—(i.e., location; type; supervision; household members, length of residence; household responsibilities; appropriateness of physical facilities and supervision; adjustment to environment.)
 - 2. Previous Residences—if less than 1 year in current residence (i.e., brief history; see item above.)
- B. Employment
 - 1. Current Employment—(i.e., location, employer, supervision; supervisor; job responsibilities; salary; work behavior; length of employment; appropriateness of job; facility and supervision.)
 - 2. Previous Employment—(i.e., brief history, see item above.)
- C. Training and Education
 - 1. Current Training and Education—(i.e., program, location, supervisor or teacher; skills developed; behavior; achievements; length of program; appropriateness of training program.)
 - 2. Previous Training and Education—(i.e., brief history; see item above.)
- D. Transportation
 - 1. Current Transportation—(i.e., primary means of transportation, frequency, limitations, needs, appropriateness of transportation means.)
 - 2. Previous Transportation—(i.e., brief history; see item above.)

II. Financial Aspects

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

III. Social Aspects

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

IV. Community Aspects

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

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

VI. Summary of Impression

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

MULTIDISCIPLINARY EVALUATION CONFERENCE GUIDELINES

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

- I. Competency—Describe the competency of the individual, including specific areas of competency (i.e., individual can decide and/or perform autonomously) and incompetency (i.e., individual cannot decide and/or perform autonomously.) For areas of incompetency, describe the extent to which the client can decide and/or perform and the amount of assistance needed. Description of areas of competency and incompetency should address the following categories: (1) self-care (2) residence (3) employment (4) financial management (5) medical and health care (6) mental health and social services (7) education and training (8) legal assistance.
- II. Guardianship—Describe appropriate guardianship—either complete, person, estate or limited. If limited guardianship, describe specific power and limits of guardian in each specific category identified in item II. Describe specific duties of the guardian and specific issues to be reviewed in six months. Describe impressions of potential guardians.

