UNC SCHOOL OF GOVERNMENT

# 2019 Guardianship Proceedings for Appointed Counsel

January 24, 2019 / Chapel Hill, NC

Sponsored by UNC School of Government &
NC Office of Indigent Defense Services

# ELECTRONIC PROGRAM MATERIALS*

*This PDF file contains "bookmarks," which serve as a clickable table of contents that allows you to easily skip around and locate documents within the larger file. A bookmark panel should automatically appear on the left-hand side of this screen. If it does not, click the icon—located on the left-hand side of the open PDF document—that looks like a dog-eared page with a ribbon hanging from the top.

UNC SCHOOL OF GOVERNMENT

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*Co-sponsored by UNC School of Government*
*& NC Office of Indigent Defense Services*

**AGENDA**

| | |
|---|---|
| 8:00 to 8:45 am | Check-in |
| 8:45 to 9:00 am | Welcome and Program Overview<br>*Austine Long, Program Attorney, UNC School of Government, Chapel Hill, NC* |
| 9:00 to 9:45 am | **Adult Protective Services [45 min.]**<br>*Julia Petrasso, Attorney II, Pitt County Department of Social Services*<br>*Greenville, NC* |
| 9:45 to 10:45 am | **Identifying and Investigating an Elder Abuse Case [60 min.]**<br>*Timothy Heinle, Attorney, The Graham Nuckolls Conner Law Firm, PLLC*<br>*Greenville, NC* |
| 10:45 to 11:00 am | Break |
| 11:00 to 12:00 am | **Uniform Adult Guardianship and Protective Jurisdiction Act [60 min.]**<br>*Meredith Smith, Assistant Professor, UNC School of Government*<br>*Chapel Hill, NC* |
| 12:00 to 1:00 pm | Lunch *(provided in building)** |
| 1:00 to 2:15 pm | **Three Important Options: Interim and Limited Guardianship, and Mediation of Guardianship [75 min.]**<br>*Kate Mewhinney, Clinical Professor, Wake Forest University School of Law*<br>*Winston-Salem, NC*<br>*David McLean, Attorney*<br>*Greensboro, NC*<br>*Michelle C. Ball, Clerk of Superior Court*<br>*Smithfield, NC* |
| 2:15 to 3:15 pm | **Role of GAL Attorney in Guardianship Cases (Ethics) [60 min.]**<br>*Dori Dixon, Attorney, Schell Bray PLLC*<br>*Chapel Hill, NC* |
| 3:15 to 3:30 pm | Break *(light snack provided)* |
| 3:30 to 4:30 pm | **Working with Elderly Clients in Guardianship Cases [60 min.]**<br>*Margaret Drickamer, MD, UNC School of Medicine*<br>*Chapel Hill, NC* |

**CLE Hours: 6.00** (Includes 1.0 hour of ethics/professional responsibility)

*IDS employees may not claim reimbursement for lunch.

# Pitt County DSS Legal Department

**Adult Services Legal Cases under Order since include:**
- 2015/2016- 31.
- 2016/2017-46.
- 2017/2018-65.
- 2018 (only 5 months into the fiscal year) we already have **66** under order.
- We currently serve as Guardian of the Person for over **145 individuals** in our community

In child support enforcement alone this year, which is five months, the DSS legal team has gotten **3547 cases under order**. These include: orders for arrest; purge orders; show cause orders; and contempt orders.

## Adult Services

**Legal Team Professionals:**
Two full time attorneys
Two part time attorneys
Three full time paralegals
One part time paralegal

### Guardianships Hearings- conducted in front of the clerk of courts weekly

- Guardian of the Person
- Guardian of the Estate
- General Guardian
- Interim Guardian
- Petitions
- Notices
- Medical
- Orders

### Adult Protective Services Hearings- conducted in front of the district court judge

- APS Orders
- Emergency APS Orders
- Ex Parte APS Orders
- Freeze & Inspect
- Petitions
- Notices
- Medical
- Orders

## Child Welfare

### 7B Court Proceedings- Conducted in front of the district court judge weekly

- Adjudications
- Dispositions

We currently have over **233 children** in custody. This requires petitions, timely hearings, orders and permanence in each case designated by statutory time frames.

- Review Hearings
- Permanency Hearings
- Termination of Parental Rights

## Child Support

### Establishment Court:
Paternity, Medical, Child Support Bi-Monthly

- Complaints
- Motions
- Defaults
- Notices
- Orders
- UIFSA

### Enforcement Court:
Enforcement of Child Support Orders- conducted weekly

- Show Causes
- Defendant Motions
- Orders for Arrest
- Recalls
- Jail Releases
- Notice of Hearings
- Orders
- UIFSA

In 2017, the Child Support Legal Team processed legal referrals for **1828** cases for establishment alone. This requires the following be drafted and served: complaints; motions; notices; defaults; and orders. This also requires that each and every motion and complaint be heard in front of a small district court judge. We have 236 cases pending now that require alias and pluries to be issued every 60 days, in order to ensure our clients don't lose their right to back support while service is pending.

*(TYPE OR PRINT IN BLACK INK)*

**STATE OF NORTH CAROLINA**

**In The General Court Of Justice**

_____ County

# AFFIDAVIT TO OBTAIN ADMINISTRATIVE INSPECTION WARRANT FOR PARTICULAR CONDITION OR ACTIVITY

I, _____, being
*(name and position)*

duly sworn and examined under oath, state under oath that there is probable cause for believing that there is

_____
*(describe condition, object, activity, or circumstance which the search is intended to check or reveal)*

at the property owned or possessed by _____

and described as follows: _____

_____
*(precisely describe the property to be inspected)*

The facts which establish probable cause to believe this are: _____

*Signature Of Applicant*

*Name Of Applicant (Type Or Print)*

**SWORN AND SUBSCRIBED TO BEFORE ME:**

*Date*

*Signature*

☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*
☐ *Magistrate* ☐ *District Court Judge* ☐ *Superior Court Judge*

**IMPORTANT:** ***Attach the Affidavit to the WARRANT if not on reverse side.***




(Over)

*(TYPE OR PRINT IN BLACK INK)*

**STATE OF NORTH CAROLINA**

In The General Court Of Justice

_____ County

# ADMINISTRATIVE INSPECTION WARRANT FOR PARTICULAR CONDITION OR ACTIVITY

G.S. 15-27.2; 58-79-1

**TO ANY LAWFUL OFFICIAL EMPOWERED TO CONDUCT THE INSPECTION AUTHORIZED BY THIS WARRANT:**

The applicant named on the accompanying affidavit, which is hereby incorporated by reference, being duly sworn, has stated to me that there is a condition, object, activity, or circumstance legally justifying an inspection of the property described in that affidavit. I have examined this applicant under oath or affirmation and have verified the accuracy of the matters in the affidavit establishing the legal grounds for this Warrant. YOU ARE HEREBY COMMANDED TO INSPECT THE PROPERTY DESCRIBED IN THE ACCOMPANYING AFFIDAVIT.

This inspection is authorized to check or reveal the conditions, objects, activities, or circumstances indicated in the accompanying affidavit.

This Warrant must be served upon the owner or possessor of the property described in the accompanying affidavit. If the owner or possessor is not present on the property at the time of inspection and you have made reasonable but unsuccessful efforts to locate the owner or possessor, you may instead serve it by affixing this Warrant or a copy to the property.

THIS WARRANT MAY BE EXECUTED ONLY BETWEEN THE HOURS OF 8:00 A.M. AND 8:00 P.M. AND ONLY WITHIN 24 HOURS AFTER IT WAS ISSUED. IT MUST BE RETURNED WITHIN 48 HOURS AFTER IT WAS ISSUED. HOWEVER, IF THIS WARRANT IS ISSUED PURSUANT TO A FIRE INVESTIGATION AUTHORIZED BY G.S. 58-79-1, IT MAY BE EXECUTED AT ANY TIME WITHIN 48 HOURS AFTER IT IS ISSUED. IT MUST BE RETURNED WITHOUT UNNECESSARY DELAY AFTER ITS EXECUTION OR AFTER 48 HOURS FROM THE TIME IT WAS ISSUED IF IT WAS NOT EXECUTED.

| *Date* | *Time* ☐ AM ☐ PM |
|---|---|
| *Signature* | |
| ☐ *Deputy CSC* ☐ *Magistrate* | ☐ *Assistant CSC* ☐ *District Court Judge* ☐ *Clerk Of Superior Court* ☐ *Superior Court Judge* |

## OFFICER'S RETURN

I certify that this WARRANT was executed on the date and time shown below.

| *Date Of Execution* | *Signature Of Inspecting Official* |
|---|---|
| *Time Of Execution* ☐ AM ☐ PM | *Name Of Inspecting Official (Type Or Print)* |

## CLERK'S ACCEPTANCE

This WARRANT has been returned to this office on the date and time shown below.

| *Date Of Return* | *Signature* |
|---|---|
| *Time Of Return* ☐ AM ☐ PM | ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* |

**IMPORTANT:** ***Attach the Affidavit to the WARRANT if not on reverse side.***

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

In The General Court Of Justice
District Court Division

| **IN THE MATTER OF:** | | |
|---|---|---|
| *Name And Address Of Respondent (Caretaker)* | **PETITION TO ENJOIN INTERFERENCE WITH PROTECTIVE SERVICES** G.S. 108A-104 | |
| *Name And Address Of Petitioner* | *Name And Address Of Attorney For Petitioner* | |
| *Telephone Number Of Petitioner* | *Telephone Number of Petitioner's Attorney* | *State Bar No.* |
| *Name And Address Of Disabled Adult* | | |

The petitioner is the representative of the director of the county department of social services authorized to file this petition pursuant to G.S. 108A-14(a)(14) and G.S. Chapter 108A, having sufficient knowledge to believe that the adult in need of protective services is disabled as defined in G.S. 108A-101(d), has consented to protective services, and the caretaker has refused to allow the services to be provided, and shows the Court:

1. The disabled adult:
   - ☐ is a resident of this county or can be found in this county.
   - ☐ is a disabled adult _____ years of age or a lawfully emancipated minor _____ years of age present in the state of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
   - ☐ is in need of protective services based on the following specific facts:

   - ☐ has consented to the provision of protective services based on the following specific facts:

2. That the respondent is a caretaker in relation to the disabled adult based on the following specific facts:

3. That the respondent has refused to allow the provision of protective services based on the following specific facts:



(Over)

4. That delay in providing essential services will likely result in: .

5. Names, addresses and telephone numbers of others with an interest in the proceedings:

| *Name And Address* | *Name And Address* |
|---|---|
| *Interest In Proceeding* | *Interest In Proceeding* |
| *Telephone Number* | *Telephone Number* |
| *Name And Address* | *Name And Address* |
| *Interest In Proceeding* | *Interest In Proceeding* |
| *Telephone No.* | *Telephone No.* |

Wherefore, the petitioner prays:

☐ 1. That the Court enter an order directing the respondent to cease obstructing or interfering with the provision of protective services.

☐ 2. That the Court issue an immediate ex parte order directing the respondent to cease such obstruction or interference.

☐ 3. For such other and further relief as the Court deems just and proper.

**VERIFICATION**

Being first duly sworn, I say I have read this petition and that the same is true to my knowledge, except as to those matters alleged upon information and belief, and as to those, I believe them to be true.

| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | | *Date* |
|---|---|---|
| *Date* | *Signature Of Person Authorized To Administer Oaths* | *Signature Of Petitioner* |
| ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* | | ☐ *Director* ☐ *Director's Authorized Representative* |
| ☐ *Notary* | *Date Commission Expires* | |
| **SEAL** | *County Where Notarized* | |

**STATE OF NORTH CAROLINA**

File No.

_____ County

In The General Court Of Justice
District Court Division

**IN THE MATTER OF:**

*Name And Address Of Respondent (Caretaker)*

*Name And Address Of Disabled Adult*

# ORDER TO ENJOIN INTERFERENCE WITH PROTECTIVE SERVICES (Consenting Disabled Adult)

G.S. 108A-104

*Name And Address Of Petitioner*

*Name And Address Of Attorney For Petitioner*

*Telephone Number Of Petitioner*

*Telephone Number of Petitioner's Attorney*

*State Bar No.*

## FINDINGS

This matter coming on for hearing and being heard on the Petition to Enjoin Interference with Protective Services pursuant to G.S. 108A-104 on the date below, the Court finds by clear, cogent and convincing evidence that:

1. The Disabled Adult named above is:
   - ☐ A resident of this county or can be found in this county.
   - ☐ A disabled adult _____ years of age or a lawfully emancipated minor _____ years of age present in the State of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
   - ☐ Is currently in need of protective services and has consented to the provision of protective services by the petitioner.
2. The respondent is the caretaker of the above named Disabled Adult and is unwilling to arrange for the necessary essential services, and is refusing to allow the provision of such services.
3. Reasonable attempts have been made to secure from the respondent, the caretaker of the above named Disabled Adult, consent to the provision of necessary essential services by the petitioner, and that said attempts have been unsuccessful.

## CONCLUSIONS OF LAW

Based on the findings, the Court concludes that:

1. This matter is properly before the Court and the Court has subject matter and personal jurisdiction.
2. The petitioner is authorized to bring this action pursuant to G.S. 108A-104 and has met the requirements for this order to be entered.
3. This order is in the best interest of the Disabled Adult.

## ORDER

It is ORDERED that:

☐ 1. The respondent is enjoined from interfering with the provision of protective services to the above named Disabled Adult who has consented to the provision of protective services as herein ordered.

☐ 2. Any law enforcement agency having jurisdiction in _____ County is hereby ordered and directed to assist the petitioner in carrying out this order, to wit, by accompanying the petitioner to the residence of the above named Disabled Adult who has consented to the provision of protective services.

☐ 3. Any law enforcement agency having jurisdiction in _____ County is hereby ordered and directed to assist the petitioner in carrying out this order, and assisting with transporting the above named Disabled Adult who has consented to the provision of protective services, from her/his place of residence for the purpose of obtaining all needed essential services.

☐ 4. Any law enforcement agency having jurisdiction in _____ County is hereby ordered and directed to assist the petitioner in returning the above named Disabled Adult who has consented to the provision of protective services, to her/his place of residence.

(Over)

☐ 5. Any law enforcement agency having jurisdiction in _____ County is authorized and directed to take any such measures or actions as may be necessary to enforce this order.

☐ 6. The attorney for the petitioner is directed to mail copies of the order to the petitioner, the above named Disabled Adult, the respondent and any law enforcement agency.

☐ 7. This matter is dismissed.

☐ 8. Other:

| *Date* | *Name Of Presiding District Court Judge* | *Signature Of Presiding District Court Judge* |
|---|---|---|
| | | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

In The General Court Of Justice
District Court Division

| IN THE MATTER OF: | |
|---|---|
| *Name And Address Of Respondent* | **PETITION FOR ORDER TO INSPECT FINANCIAL RECORDS AND TO FREEZE ASSETS** |
| *Name And Address Of Caretaker* | G.S. 108A-106(f); 53B-4(11); 53B-5 |
| *Name And Address Of Petitioner* | *Name And Address Of Attorney For Petitioner* |
| *Telephone Number Of Petitioner* | *Telephone Number of Petitioner's Attorney* / *State Bar No.* |

The petitioner is the director of the county department of social services authorized to file this petition pursuant to 108A-14(a)(14) and 108A-106(f), having sufficient knowledge to believe that a factual basis exists that invokes the jurisdiction of this Court, and therefore shows the Court that:

1. The respondent is
   - ☐ A resident of this county or can be found in this county.
   - ☐ A disabled adult _____ years of age or a lawfully emancipated minor _____ years of age present in the state of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
2. The respondent lacks the capacity to consent to protective services and no other person is able or willing to arrange for protective services based on the following:

3. The respondent's financial assets are being exploited by her/his caretaker based on the following:

4. There is a reason to believe that the respondent's financial assets are in need of immediate protection. The basis for this belief is:

5. The specific financial records requested are:


(Over)

6. The respondent's financial accounts include, but may not be limited to accounts at:

| *Name And Address Of Financial Institution* | *Name And Address Of Financial Institution* |
|---|---|
| *Name And Address Of Financial Institution* | *Name And Address Of Financial Institution* |

Petitioner prays the Court to order, pursuant to G.S. 108A-106(f):

1. The respondent's financial assets be frozen and not withdrawn, spent or transferred without prior order of this Court.
2. The financial institutions with assets belonging to respondent make respondent's specified financial records available for inspection by the petitioner.

## VERIFICATION

Being first duly sworn, I say I have read this petition and that the same is true to my knowledge, except as to those matters alleged upon information and belief, and as to those, I believe them to be true.

| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | | *Date* |
|---|---|---|
| *Date* | *Signature Of Person Authorized To Administer Oaths* | *Signature Of Petitioner* |
| ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* | | ☐ *Director* ☐ *Director's Authorized Representative* |
| ☐ *Notary* | *Date Commission Expires* | |
| **SEAL** | *County Where Notarized* | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

In The General Court Of Justice
District Court Division

**IN THE MATTER OF:**

*Name And Address Of Respondent*

*Name And Address Of Petitioner*

# NOTICE OF ORDER TO AUTHORIZE INSPECTION OF FINANCIAL RECORDS AND TO FREEZE ASSETS

G.S. 53B-5, -7, 108A-106(f)

**To The Respondent:**

The director of the county department of social services filed a petition with the _____ County District Court and obtained an Order to Authorize Inspection of Financial Records and to Freeze Assets in your accounts(s). A Copy of the order is attached to this notice.

This order was sought because of the information and belief that you were being financially exploited by your caretaker. This order was obtained to stop the financial exploitation. Please read the order carefully to understand what the Court has ordered.

This notice is being served on you as required by G. S. 1A-1, Rule 4(j) of the North Carolina Rules of Civil Procedure. The following statement is required to be submitted to you prior to the inspection of your financial records:

*"Records or information held by the financial institution named in the attached process are being sought by government authority in accordance with the North Carolina Financial Privacy Act. You may have rights under the act to challenge access to the records or information. You must, however, act within 10 days from the date this notice was served on you to make a challenge in court or the records or information will be made available. You may wish to employ an attorney to represent you and protect your rights."*

You have 10 days from the day you receive this notice to file a motion with the Superior Court to quash or modify the order. You must also send a copy of the motion to the financial institution(s) named in the attached order and to the petitioner named above. If you do not do so, the inspection of your financial records will proceed.

| *Date* | *Name Of County DSS Attorney* | *Signature Of County DSS Attorney* |
|---|---|---|
| | | |

**RETURN OF SERVICE**

I certify that this Notice and a copy of the Order to Authorize Inspection of Financial Records and to Freeze Assets were received and served as follows:

| *Date Served* | *Time Served* ☐ AM ☐ PM | *Name Of Respondent* |
|---|---|---|
| | | |

☐ By personally delivering the same to the person named above.

☐ By certified mail. (**NOTE:** See Affidavit of Service.)

☐ By leaving the same at the dwelling house or usual place of abode of the person named above with a person of suitable age and discretion then residing therein.

*Name And Address Of Person With Whom Copies Left*

☐ The person was NOT served for the following reason. _____

_____

| *Date Received* | *Name (Type Or Print)* |
|---|---|
| *Date Of Return* | *Signature* |
| | *Title* |

AOC-CV-778, New 2/12

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

In The General Court Of Justice
District Court Division

| **IN THE MATTER OF:** | |
|---|---|
| *Name And Address Of Respondent* | **ORDER TO AUTHORIZE INSPECTION OF FINANCIAL RECORDS AND TO FREEZE ASSETS** |
| *Name And Address Of Caretaker* | G.S. 108A-106(f), 53B-4(11) -5, -7, |
| *Name And Address Of Petitioner* | *Name And Address Of Attorney For Petitioner* |
| *Telephone Number Of Petitioner* | *Telephone Number of Petitioner's Attorney* / *State Bar No.* |

**FINDINGS**

This matter coming on to be heard and being heard on the Petition for Order to Freeze Assets and Authorize Inspection of Financial Records filed through the authority of the director of the county department of social services pursuant to G.S. 108A-106(f), the Court finds:

1. The respondent:
   - ☐ is a resident of this county or can be found in this county.
   - ☐ is a disabled adult _____ years of age or a lawfully emancipated minor _____ years of age present in the State of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
   - ☐ is in need of protective services in that: _____ _____.
   - ☐ lacks the capacity to consent to the provision of protective services as those terms are defined, and there is no other person currently able or willing to arrange for protective services.
   - ☐ is unable to properly handle his/her financial affairs.
   - ☐ is unable to resist financial exploitation.
2. There is reasonable cause to believe the respondent is being financially exploited by her/his caretaker.
3. The purpose of this order is to protect the respondent's financial assets, which there is a reasonable cause to believe are in need of immediate protection. .
4. Access to the financial records of respondent are sought pursuant to G.S. 53B-4(11) with reasonable specificity set out below:

5. That the respondent's bank account(s) are located at:

| *Name And Address Of Financial Institution* | *Name And Address Of Financial Institution* |
|---|---|
| *Name And Address Of Financial Institution* | *Name And Address Of Financial Institution* |

## CONCLUSIONS OF LAW

Based on the findings of fact, the Court concludes that:

1. This matter is properly before the Court and the Court has subject matter and personal jurisdiction.
2. Petitioner filed this petition under the authority granted in G.S. 108A-106(f).
3. The requirements of the Financial Privacy Act, Chapter 53B can and will be met.
4. The entry of this order is in the best interest of the respondent, who is the financial institution's customer.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. The above named financial institutions shall produce for inspection by the petitioner the following specified records:

   _____

   _____

2. The respondent's account(s) at the following financial institutions be frozen:

| *Name And Address Of Financial Institution* | *Name And Address Of Financial Institution* |
|---|---|
| | |
| *Name And Address Of Financial Institution* | *Name And Address Of Financial Institution* |
| | |

3. Petitioner shall give notice of inspection of financial records to the disabled adult and shall comply with the provisions of Chapter 53B.
4. Petitioner shall give notice of inspection of financial records to the disabled adult's financial institution(s) and comply with the provisions of Chapter 53B.
5. The monies in the above named accounts not be withdrawn, spent or transferred without prior approval of this Court.
6. The customer has the right within ten (10) days after service of the court order to appear and show cause in Superior Court why this inspection should not be done any time up to the time of the inspection.
7. That this order shall expire ten (10) days after the examination of the records, unless this Court for good cause shown extends it.

| *Date* | *Name Of Presiding District Court Judge* | *Signature Of Presiding District Court Judge* |
|---|---|---|
| | | |

**STATE OF NORTH CAROLINA**

File No.

_____ County

In The General Court Of Justice
District Court Division

| IN THE MATTER OF: | PETITION FOR ORDER AUTHORIZING<br>☐ PROTECTIVE SERVICES<br>☐ EMERGENCY SERVICES<br>☐ EX PARTE EMERGENCY SERVICES<br>AND APPOINTMENT OF GUARDIAN AD LITEM<br>G.S. 108A-105, -106, 1A-1, Rule 17 |
|---|---|
| *Name And Address Of Respondent* | |
| *Name And Address Of Petitioner* | *Name And Address Of Attorney For Petitioner* |
| *Telephone Number Of Petitioner* | *Telephone Number of Petitioner's Attorney* / *State Bar No.* |

The petitioner is the representative of the director of the county department of social services authorized to file this petition pursuant to G.S. 108A-14(a)(14) and G.S. Chapter 108A, Article 6, having sufficient knowledge to believe that the respondent is in need of protective services, alleges that:

1. The respondent is
   - ☐ A resident of this county or can be found in this county.
   - ☐ A disabled adult _____ years of age or a lawfully emancipated minor _____ years of age present in the state of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
2. The respondent is in need of protective services due to physical or mental incapacity and unable to obtain essential services and is without a willing, able and responsible person to perform or obtain essential services as shown by the following facts:

3. The respondent lacks the capacity to consent to the provision of protective services as shown by the following specific facts:

4. Names, addresses and telephone numbers of respondent's caretaker(s):

| *Name And Address* | | *Name And Address* | |
|---|---|---|---|
| *Telephone Number* | *Relationship To Respondent* | *Telephone Number* | *Relationship To Respondent* |

5. Names, addresses and telephone numbers of others who may be able to testify to the facts supporting the petition and other persons known to have an interest in this proceeding:

| *Name And Address* | | *Name And Address* | |
|---|---|---|---|
| *Telephone Number* | *Relationship To Respondent* | *Telephone Number* | *Relationship To Respondent* |



(Over)

| Name And Address | | Name And Address | |
|---|---|---|---|
| Telephone Number | Relationship To Respondent | Telephone Number | Relationship To Respondent |

6. Petitioner, based on the allegations in the petition, asks the Court to appoint an attorney guardian ad litem to represent the respondent in this matter pursuant to G.S. 1A-1, Rule 17.

Petitioner prays the Court to hear this matter and to issue an order authorizing the provision of protective services with the petitioner authorized to provide, obtain and/or consent to essential services on behalf of the respondent.

## PETITION FOR EMERGENCY SERVICES

**NOTE:** *Do not complete unless an emergency as defined in G.S. 108A-106 exists that requires action before the Protective Services Petition as described in G.S. 108A-105 can be heard.*

The petitioner, having sufficient knowledge to believe that an emergency exists, prays the Court for an Order for Emergency Services, and shows the court:

1. The respondent is a disabled adult due to _____, is in need of protective services, and lacks the capacity to consent; and
2. The petitioner has been unable to locate any other person authorized by law or order who is available and willing to consent to or arrange for emergency services; and
3. An emergency exists as shown by the following facts:

## PETITION FOR EX PARTE EMERGENCY SERVICES

1. An emergency exists that creates a substantial likelihood the respondent may suffer irreparable injury or death if emergency protective services are not provided immediately.
2. The petitioner, in addition to the information provided above, provides the following information to show that such an emergency exists:

3. The petitioner prays the court for an ex parte emergency order.

## VERIFICATION

Being first duly sworn, I say I have read this petition and that the same is true to my knowledge, except as to these matters alleged upon information and belief, and as to those, I believe them to be true.

| SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME | | Date |
|---|---|---|
| Date | Signature Of Person Authorized To Administer Oaths | Signature Of Petitioner |
| ☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court | | ☐ Director ☐ Director's Authorized Representative |
| ☐ Notary | Date Commission Expires | |
| SEAL | County Where Notarized | |

**STATE OF NORTH CAROLINA**

File No.

_____ County

In The General Court Of Justice
District Court Division

| IN THE MATTER OF: | |
|---|---|
| *Name And Address Of Respondent* | **ORDER AUTHORIZING PROTECTIVE SERVICES**<br>G.S. 108A-101(i), -105 |
| *Name And Address Of Petitioner* | *Name And Address Of Attorney For Petitioner* |
| *Telephone Number Of Petitioner* | *Telephone Number of Petitioner's Attorney* / *State Bar No.* |

## FINDINGS

This matter comes on for hearing on the Petition for Order Authorizing Protective Services filed under the statutory authority of the director of the county department of social services. Based on the record, testimony and other evidence presented to the Court, the Court makes the following findings of fact by clear, cogent and convincing evidence:

1. The respondent is
   - ☐ A resident of this county or can be found in this county.
   - ☐ A disabled adult _____ years of age or a lawfully emancipated minor _____ years of age present in the State of North Carolina and is physically or mentally incapacitated as defined in G.S. 108A-101(d).
2. The petition was filed on *(date)* _____ and respondent was served pursuant to G.S. 1A-1, Rule 4(j) on *(date)* _____.
3. The respondent is in need of protective services due to physical or mental incapacity and unable to obtain essential services and is without a willing, able and responsible person to perform or obtain essential services. The respondent is in need of protective services in that: _____
   _____.
4. The respondent lacks the capacity to consent to the provision of protective services.

## CONCLUSIONS OF LAW

Based on the findings of fact, the Court concludes that:

1. This matter is properly before the Court and the District Court has jurisdiction over the subject matter and over the respondent.
2. Respondent is a disabled adult in need of protective services and lacks the capacity to consent to such services as required by G.S. 108A-105.
3. It is in the best interest of the respondent that this order be entered.

## ORDER

It is ORDERED:

1. That _____ is authorized to provide or consent to, without further orders of the Court, the essential services set out in G.S. 108A-101(i).
2. That this order shall remain in effect for 60 days unless:
   a. Protective services are no longer needed;
   b. The respondent regains capacity to consent to the provision of protective services;
   c. A guardian of the person or general guardian has qualified; or
   d. For good cause shown the Court extends the order for up to 60 additional days at the end of which time the order expires.
3. This Matter shall be reviewed, unless previously dismissed, without further notice to the parties on *(date)* _____ at *(time)*_____ in Courtroom _____ to determine whether a petition should be filed for guardianship pursuant to G.S. Chapter 35A.

| *Date* | *Name Of Presiding District Court Judge* | *Signature Of Presiding District Court Judge* |
|---|---|---|
| | | |

(Over)

## ORDER EXTENDING SERVICES

For good cause shown, it is further ordered that the time frame of 60 days in the above order is extended for up to an additional 60 days to meet the conditions necessitating the order. In any event this order shall terminate on the earliest of the following:

☐ Protective services are no longer needed; or

☐ The respondent regains capacity to consent to provision of protective services; or

☐ The expiration date, if any, *(date)* _____ ordered by the court; or

☐ A guardian of the person or general guardian has qualified; or

☐ The petition is dismissed by the Court; or

☐ 60 days from the date of this ORDER EXTENDING SERVICES.

| *Date* | *Name Of Presiding District Court Judge* | *Signature Of Presiding District Court Judge* |
|---|---|---|
| | | |

UNC SCHOOL OF GOVERNMENT

SOCIAL SERVICES LAW BULLETIN NO. 46 | NOVEMBER 2016

# New Rules for Adult Guardianship Proceedings: Applying the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (G.S. Chapter 35B) in North Carolina

**Meredith Smith**

## I. Introduction

Dottie is an elderly widow who has lived her entire life in Iowa. She has two adult children, Eddie, who lives nearby, and Linda, who lives in North Carolina. Linda decides to take Dottie to North Carolina and place her in a nursing home. Linda then files a petition with a court in North Carolina to have her mother adjudicated incompetent and to be appointed her mother's *general guardian*.[1] Eddie files a similar petition with a court in Iowa. Which state's court has jurisdiction to enter an order regarding Dottie's competency and to appoint a guardian—North Carolina's or Iowa's?

Bob lives in North Carolina. A few years ago, a North Carolina court adjudicated Bob incompetent and appointed a county department of social services (DSS) to serve as Bob's *guardian of the person*[2] and a private attorney as his *guardian of the estate*.[3] Bob recently moved to New York to live with his daughter and her family. While Bob's daughter was unable to serve as his guardian at the time of his adjudication, DSS now feels that Bob's best interests will be served by living in New York with his daughter as his general guardian. How does DSS go about seeking transfer of the case from North Carolina to New York?

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1. North Carolina law defines "general guardian" as "a guardian of both the estate and the person." Chapter 35A, Section 1202(7) of the North Carolina General Statutes (hereinafter G.S.).

2. A "guardian of the person" means "a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward." G.S. 35A-1202(10). "Ward" means "a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction." *Id.* § 1202(15).

3. A "guardian of the estate" means "a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward." G.S. 35A-1202(9).

Cindy is the guardian of the person for her 22-year-old daughter, Mary, who is currently undergoing treatment for substance abuse and bipolar disorder. Cindy and Mary live in Virginia, where Mary's guardianship case is being administered. Cindy wants Mary to get in-patient treatment at UNC-Chapel Hill. However, the UNC facility will not accept Mary as a patient without proof of Cindy's authorization to act on Mary's behalf in North Carolina. What could Cindy do to obtain such authorization?

On June 30, 2016, North Carolina Governor Pat McCrory signed Session Law (hereinafter S.L.) 2016-72, also known as the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (or UAGPPJA, pronounced, familiarly, as "you-ah-gap-jah"), to provide answers to questions like these.[4] UAGPPJA is not intended to change the established system for adjudicating an adult incompetent and appointing a guardian under Chapter 35A of the North Carolina General Statutes (hereinafter G.S.).[5] S.L. 2016-72 created a new G.S. Chapter 35B that is intended to resolve jurisdictional issues in incompetency and guardianship proceedings that involve or potentially involve North Carolina and another state[6] or foreign country.[7] It is modeled after, and has similarities to, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).[8]

## A. The Purposes of UAGPPJA

Below are the four main purposes of UAGPPJA.

1. **Initial Filing**. Prevent jurisdictional disputes between the courts of different states over the initial filing of an incompetency and guardianship proceeding.
2. **Transfer**. Establish a procedure for transferring adult guardianship cases from one state to another.

4. S.L. 2016-72.

5. G.S. 35B-1(c). Under North Carolina law, adjudication of incompetency and appointment of a guardian are two separate proceedings resulting in two separate orders. The incompetency proceeding is initiated by a petition filed by a petitioner against a respondent, who is the alleged incompetent person. *Id.* § 35A-1105. The proceeding is treated as a special proceeding. *In re* Winstead, 189 N.C. App. 145, 146 (2008). At the hearing on the petition, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that the respondent is incompetent. *Id.* § 35A-1112. In contrast, the guardianship proceeding is initiated by an application and is in the nature of an estate matter. *Winstead*, 189 N.C. App. at 151. During the guardianship proceeding, the court's role shifts to a more protective/oversight posture that considers the respondent's best interests. The court has the duty to inquire and to receive evidence necessary to determine the needs and best interests of the respondent. *Id.* § 35A-1212(a).

6. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States. G.S. 35B-2(18).

7. G.S. 35B-1(b); *id.* § 35B-4 (providing that a North Carolina court may treat a foreign country as if it were a state for purposes of applying certain sections of UAGPPJA, including those that cover the initial filing and transfer of guardianship cases but not including the law's registration provisions).

8. A version of the UCCJEA was adopted in North Carolina in 1999 as G.S. Chapter 50A.

3. **Registration**. Provide a uniform national system for registration and enforcement of out-of-state adult guardianship orders.
4. **Cooperation among courts in different states**.[9] Facilitate cooperation and communication between courts in different states.[10]

UAGPPJA is a product of the Uniform Law Commission and has been adopted by all but a handful of states.[11] It is effective, as adopted in North Carolina, on December 1, 2016.[12] The provisions related to determining jurisdiction for an initial filing apply to all new incompetency and adult guardianship proceedings **filed on or after that date**.[13] However, the provisions of UAGPPJA applicable to transfer and registration of orders apply to all cases in North Carolina as of December 1, 2016, **regardless of when they were filed**.[14]

UAGPPJA does not apply to minor guardianships because those are already covered, in part, under North Carolina's version of the UCCJEA.[15] Similarly, UAGPPJA does not apply to adult protective services proceedings pertaining to disabled or older adults brought under G.S. Chapter 108A or to domestic violence and civil no-contact proceedings under G.S. Chapters 50B and 50C.[16]

The N.C. Administrative Office of the Courts (AOC), through the Estates and Special Proceedings Forms Subcommittee, revised two incompetency forms in response to this new law. Table 1, below, lists the revised forms, available as of December 1, 2016.

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9. This bulletin covers the three main areas of UAGPPJA: initial filings, transfer, and registration. It does not address in any great detail provisions related to communication and cooperation between courts. Those provisions are found in G.S. 35B-5, -6, and -7.

10. G.S. 35B-1(d).

11. The Uniform Law Commission maintains a website with an up-to-date list of states that have enacted UAGPPJA. *See* Uniform Law Commission, *Adult Guardianship and Protective Proceedings Jurisdiction Act*, www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act (last visited Oct. 31, 2016). As of the date of this bulletin, Florida, Kansas, Michigan, Texas, Wisconsin, and the U.S. Virgin Islands have not adopted UAGPPJA. The bulletin specifically focuses on those situations where the states involved in the initial filing, transfer, and registration analysis have each adopted UAGPPJA. UAGPPJA as adopted in G.S. Chapter 35B does not limit its application to those instances when both states have adopted the uniform law. When dealing with a non-UAGPPJA state, a North Carolina court applies the relevant provisions as they relate to this state's actions. However, because the non-UAGPPJA state may have a different process, it requires a case-by-case analysis of how the two sets of laws fit together to determine which court has jurisdiction to act, whether the case may be transferred, and whether registration is possible.

12. S.L. 2016-72, § 4.

13. *Id.*

14. *Id.*

15. G.S. 35B-3(1). *See also* G.S. Chapter 50A. The UCCJEA applies to "child custody proceedings," which include proceedings where legal custody, physical custody, or visitation of the child is an issue. G.S. 50A-102(4). This likely includes minor guardianship proceedings under Article 5 of G.S. Chapter 35A and, specifically, guardianship of the person or general guardianship proceedings.

16. G.S. 35B-3(2) and (3).

**Table 1. Incompetency and Guardianship Forms Revised as a Result of UAGPPJA**

| Form Number | Form Name |
|---|---|
| SP-200 | Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian |
| SP-202 | Order on Petition for Adjudication of Incompetence |

## II. New Terminology

One key difference between UAGPPJA as adopted in North Carolina under G.S. Chapter 35B and existing G.S. Chapter 35A is the terminology used in the two chapters. To create a common language among states that enact UAGPPJA, G.S. Chapter 35B retains the terminology adopted by the Uniform Law Commissioners and refers to two types of proceedings:

1. guardianship proceedings and
2. protective proceedings.

The terms "guardianship proceeding", "guardianship order", and "incapacitated person" as used in G.S. Chapter 35B relate to proceedings for a guardian of the person and a general guardian.[17] In contrast, the terms "protective proceedings", "protective orders", and "protected persons" as used in G.S. Chapter 35B pertain to proceedings for a guardian of the estate, a general guardian, and to other orders related to management of an adult's property entered pursuant to G.S. Chapter 35A.[18] Table 2 discusses these terms.

**Table 2. The Relationship between Terminology in G.S. Chapters 35A and 35B**

| Term in G.S. Chapter 35B | Relation to Terminology in G.S. Chapter 35A |
|---|---|
| Guardianship Proceeding | Judicial proceeding seeking an order for the appointment of a guardian of the person or a general guardian |
| Guardianship Order | Order appointing a guardian of the person or a general guardian |
| Incapacitated Person | Adult for whom a guardian of the person or a general guardian has been appointed (the ward) |
| Protective Proceeding | Judicial proceeding seeking an order for the appointment of a guardian of the estate or a general guardian |
| Protective Order | Order appointing a guardian of the estate or a general guardian, or another order related to a person's property under G.S. Chapter 35A |
| Protected Person | Adult for whom a guardian of the estate or a general guardian has been appointed (the ward) |

17. G.S. 35B-2(7), (6), and (8).
18. G.S. 35B-2(15), (14), and (13).

# III. Initial Filing of the Incompetency Petition: Deciding Which State May Act

One purpose of UAGPPJA is to limit jurisdiction to adjudicate incompetency and appoint a guardian for an adult to the most appropriate state. UAGPPJA, as adopted in G.S. Chapter 35B, now provides the exclusive jurisdictional basis for the clerk of superior court[19] in North Carolina to adjudicate the incompetency of an adult and to appoint a guardian for that person.[20] Effectively, G.S. Chapter 35B is now a gatekeeper to G.S. Chapter 35A proceedings pertaining to adults.

For all new incompetency proceedings filed in North Carolina on or after December 1, 2016, the petitioner should allege that, and the clerk must determine whether, North Carolina has jurisdiction to adjudicate incompetence and to appoint a guardian of the estate, guardian of the person, or general guardian.[21] The clerk must ensure that jurisdiction is proper at the beginning of any hearing before getting into the substantive issues of incompetency and guardianship. If the clerk fails to ensure that jurisdiction is proper, it is possible that the clerk's orders related to incompetency and/or guardianship could be held void if it is later found that the clerk lacked jurisdiction.[22] The parties may not consent to subject matter jurisdiction if it is otherwise improper, nor may they waive any jurisdictional deficiency.[23] The court may only exercise jurisdiction in an incompetency and adult guardianship proceeding if it exists under G.S Chapter 35B. The better practice is for the clerk to make findings of fact to support a conclusion of law in the clerk's final incompetency and guardianship orders that the court has subject matter jurisdiction.

## A. When Does North Carolina Have Jurisdiction to Adjudicate Incompetency and Appoint a Guardian?

G.S. Chapter 35B establishes a waterfall provision giving jurisdictional priority first to the respondent's home state, then to a *significant-connection state*,[24] and finally to an "other" state when no home state or significant-connection state is appropriate or exists.[25] See Figure 1, below.

A flowchart summarizing the process for determining whether North Carolina may and should exercise jurisdiction in a particular case may be found in Appendix A, "Does North Carolina Have Jurisdiction to Enter an Incompetency and Adult Guardianship Order?"

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19. For purposes of G.S. Chapter 35B, the word "court" means the clerk of superior court to the same extent the clerk has original jurisdiction over incompetency and adult guardianship proceedings under G.S. Chapter 35A. G.S. 35B-2(2). *See also id.* §§ 35A-1103(a); -1203(a). Furthermore, an assistant clerk is authorized to perform all the duties and functions of the elected clerk of superior court, and any act of an assistant clerk "is entitled to the same faith and credit" as that of the elected clerk. *Id.* § 7A-102(b).

20. G.S. 35B-16.

21. *See* revised AOC forms SP-200 and SP-202.

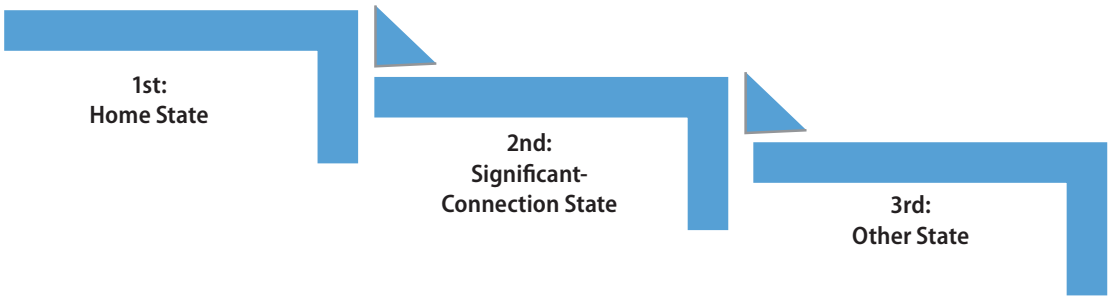
22. *See* State *ex rel.* Hanson v. Yandle, 235 N.C. 532, 535 (1952) (citations omitted) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment . . . and a void judgment may be attacked whenever and wherever it is asserted . . . .").

23. *In re* T.R.P., 360 N.C. 588 (2006).

24. See *infra* section III.A.2.b for a definition of this term.

25. G.S. 35B-17

**Figure 1. Jurisdictional Priority under G.S. Chapter 35B**




### 1. Home State Preferred

As noted above, the highest jurisdictional priority in the statute goes to the respondent's home state. A key factor in the jurisdictional analysis is the fact that a respondent can only have one home state. It is possible that a respondent will not have a home state if the respondent moved frequently prior to the filing of the petition, but there can never be more than one.

North Carolina has jurisdiction to adjudicate incompetency and enter a guardianship order if North Carolina is the respondent's home state. However, if another state is the respondent's home state, it impacts the authority of a North Carolina court to hear the case if a petition is filed here. Therefore, it is important to determine whether the respondent has a home state at all, even if that state is not North Carolina.

#### *a. When Is a State the Home State?*

There are two steps to determining whether a respondent has a home state. Both are based on the respondent's physical presence in a state but they have different "*lookback" periods*:[26] the first step has a six-month lookback, while the second step has a twelve-month lookback. Each step is described in more detail below. Note that neither step requires an analysis of the respondent's domicile or residence. The only thing that matters for purposes of determining the respondent's home state is the length of physical presence in a state.

##### i. Physical Presence Initial Lookback Period: Six Months Immediately Before the Petition for Adjudication of Incompetency Is Filed

To determine the respondent's home state, if in fact there is one, the clerk must initially determine whether the respondent was **physically present** in any state for the six months immediately preceding the date the petition for adjudication of incompetence was filed.[27] When evaluating the six-month period, the court should not take into account any periods of "temporary absence".[28] Although not defined in the statute, a *temporary absence* includes short trips away from the state for vacations, visits with family and friends, business trips, and short-term health care treatment. If the respondent was physically present in one state for six months immediately preceding the petition, that state is the respondent's home state.

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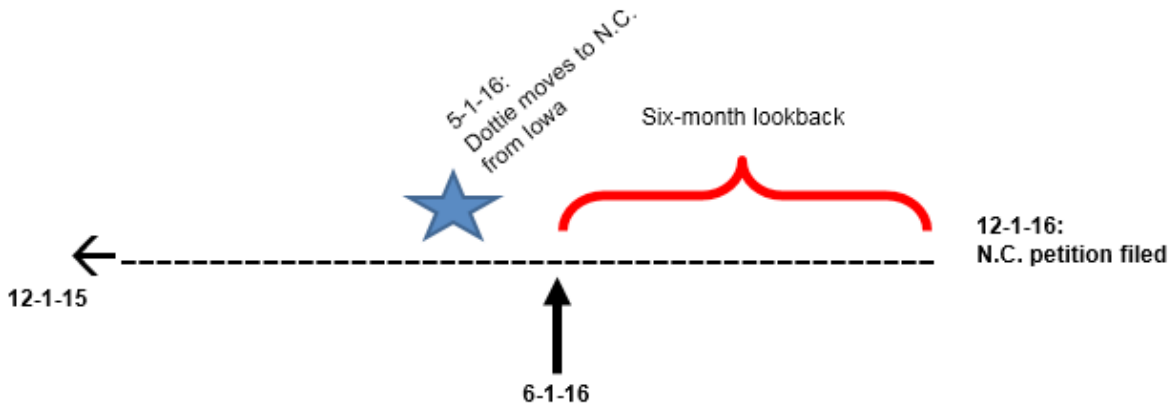
26. A "lookback period" is the period of time prior to and including the date the petition for adjudication of incompetency is filed; the court examines this period to determine whether jurisdiction is proper based on the physical presence of the respondent.

27. G.S. 35B-15(a)(2). Petitioners typically use the AOC form petition for adjudication, SP-200, available at www.nccourts.org/Forms/Documents/707.pdf.

28. G.S. 35B-15(a)(2).

**Figure 2. Timeline of Dottie's Case (1)**




***Dottie***

In Dottie's case, as described at the beginning of this bulletin, the clerk needs to know the date that Dottie, the respondent, moved to North Carolina from Iowa and then must compare that date with the date that Linda, the petitioner/daughter, filed the incompetency/general guardianship petition. If Dottie moved to North Carolina in May 1, 2016, and was physically present in North Carolina until Linda filed the petition on December 1, 2016, then North Carolina would be Dottie's home state (see Figure 2, above). As the home state, North Carolina has jurisdiction to proceed with the case over all other states.[29] North Carolina may, however, choose to decline jurisdiction as discussed in section III.A.4, below.

North Carolina's position as home state ensures that it will have jurisdiction to hear Dottie's case even if another petition is filed in a different state before a petition is filed in North Carolina. For example, if Dottie's son, Eddie, filed a competing petition in Iowa, a state that has also enacted UAGPPJA, an Iowa court would not have jurisdiction to later hear Dottie's case and would have to dismiss or stay the case given the pending proceeding in North Carolina, Dottie's home state.

#### ii. Physical Presence Secondary Lookback Period: Twelve Months Before the Petition for Adjudication of Incompetency Is Filed

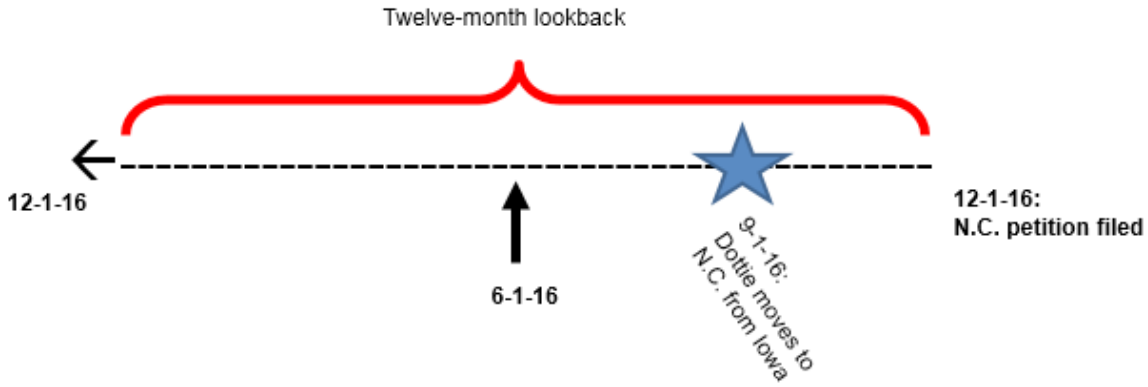
If the respondent was not physically present in any one state for six consecutive months immediately prior to the filing of the petition for adjudication of incompetence, the clerk must look back twelve months to determine whether the respondent was physically present in any one state for at least six consecutive months during the twelve-month period immediately prior to the filing of the incompetency petition.[30] If the respondent was physically present in any one state for six consecutive months during that time period, that state is the respondent's home state. This provision is intended to allow a home state to exercise jurisdiction to adjudicate incompetence and appoint a guardian for up to six months *after* a person physically moves to

29. G.S. 35B-17(1).
30. G.S. 35B-15(a)(2).

another state.[31] When evaluating this time period, the court should not take into account any periods of temporary absence.[32]

Thus, in our example, if Dottie moved to North Carolina from Iowa on September 1, 2016, and Linda filed the petition on December 1, 2016, Dottie's home state would be Iowa (see Figure 3, below). This is because Dottie was not physically present in one state for six consecutive months during the initial six-month lookback period before the filing of the petition in North Carolina (6-1-16 to 12-1-16). Once the court moves to the second step of the analysis, it would determine that Dottie was physically present in another state, Iowa, for at least six consecutive months (12-1-15 to 9-1-16) during the twelve-month lookback period.

**Figure 3. Timeline of Dottie's Case (2)**




However, if a petition is filed here and North Carolina is not the respondent's home state, as is the case shown above, or if the respondent does not have a home state, North Carolina may still have jurisdiction to act. Alternative bases for jurisdiction exist when North Carolina is a significant-connection or other state, or when special jurisdiction exists, as discussed in sections III.A.2, 3, and 5, respectively, below.

### 2. Significant-Connection State

If North Carolina is not the respondent's home state, a North Carolina court may still have jurisdiction to hear an incompetency and guardianship case if North Carolina is a significant-connection state.[33] This is true even if the respondent has a home state. While a respondent may only have one home state, if any, it is possible for him or her to have multiple significant-connection states. There are three steps to determine whether North Carolina has jurisdiction to act as a significant-connection state.

31. Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (2007), Prefatory Note at 3 (2015) (hereinafter *UAGPPJA*), www.uniformlaws.org/shared/docs/adult_guardianship/UAGPPJA_2011_Final%20Act_2015feb4.pdf.

32. G.S. 35B-15(a)(2). See *supra* section III.A.1.a.i for a discussion of what may constitute a temporary absence.

33. G.S. 35B-17.

#### *a. Is a Petition Pending in Another State?*

If, at the time the petition is filed in North Carolina, a petition for an order adjudicating incompetence or for the appointment of a guardian is pending in the respondent's home state or in a significant-connection state, a North Carolina court has jurisdiction to hear the case only if special jurisdiction exists or the other court declines jurisdiction in favor of North Carolina.[34] North Carolina lacks jurisdiction if there is a prior pending petition in the respondent's home state or in another significant-connection state even if North Carolina is also a significant-connection state. If the petitioner knows of a proceeding pending in another state, it would be important to include information about that proceeding in the petition filed in North Carolina. The clerk may also inquire about such pending proceedings at the hearing. If the North Carolina petitioner fails to notify the court that a proceeding is pending in another state, it is likely that another person notified of the North Carolina proceeding will inform the North Carolina court of the prior pending petition in another state.[35]

If a petition is pending in the respondent's home state or in another significant-connection state, the clerk must stay the proceeding and communicate with the court in the other state to determine whether that court intends to decline jurisdiction in favor of North Carolina as a more appropriate forum.[36] The clerk may allow the parties to participate in the communication[37] and must make a record of any such communication.[38] If the other state has jurisdiction as the home state or as a significant-connection state and does not decline to act, then the clerk must dismiss the North Carolina petition.[39]

#### *b. Is North Carolina a Significant-Connection State?*

If no petition is pending in another state at the time the North Carolina petition is filed, the petitioner may allege that, and then the clerk must analyze whether, North Carolina **is a significant-connection state**.[40] A significant-connection state is a state

- that is not the respondent's home state,
- that the respondent has a significant connection to beyond mere physical presence, and
- in which substantial evidence concerning the respondent is available.[41]

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34. Note: If an order adjudicating incompetence and appointing a guardian exists in another state, a person may be seeking to transfer the order to North Carolina. In those instances, a North Carolina court does have jurisdiction and should follow the procedure set forth *infra* section IV.

35. If a petition for adjudication of incompetence or an application for appointment of a general guardian or a guardian of the person or for issuance of a protective order is brought in North Carolina and North Carolina is not the home state on the date the petition was filed, then notice of the petition must also be given to persons entitled to notice had the proceeding been brought in the respondent's home state, and such notice must be given in the manner it would be given in North Carolina. G.S. 35B-22.

36. G.S. 35B-23(2); -5(a) (providing that a North Carolina court may communicate with a court in another state concerning a proceeding under G.S. Chapter 35B). The statute does not specify "a particular means of communication." *UAGPPJA*, Section 104, Comment. Communication may occur through electronic means, including email. *Id.* See *infra* section III.A.4.a for what constitutes a more appropriate forum.

37. G.S. 35B-5(a).

38. *Id.* The statute is silent as to what type of record the court must make. The comment to UAGPPJA suggests that the record may include an electronic recording of a telephone call, a memorandum summarizing a conversation, and email communications. *UAGPPJA*, Section 104, Comment.

39. G.S. 35B-23(2).

40. G.S. 35B-17(2).

41. G.S. 35B-15(a)(3).

A respondent may have multiple significant-connection states. In determining whether North Carolina is a significant-connection state, the petitioner should present evidence on the following subjects for the clerk to consider:

- the location of the respondent's family and other persons required to be notified of the proceedings;
- the length of time the respondent was physically present in North Carolina and the duration of any absences;
- the location of the respondent's property; and
- the extent to which the respondent has ties to a particular state, including voting registration, tax return filings, vehicle registration, driver's license, social relationships, and receipt of services.[42]

#### *c. May North Carolina Exercise Jurisdiction as a Significant-Connection State?*

If the clerk determines that North Carolina is a significant-connection state, then the clerk must find, based on the evidence presented, that one of the following is also true to exercise jurisdiction:

- the respondent does not have a home state; or
- the respondent's home state declined to exercise jurisdiction because North Carolina is a more appropriate forum; or
- before the clerk enters a final order adjudicating incompetency and appointing a guardian, all of the following are true:
  - a petition is not filed in the respondent's home state,[43]
  - an objection to the North Carolina court's jurisdiction is not filed by a person entitled to notice; and
  - the clerk determines that North Carolina is an appropriate forum based on the factors described in section III.A.4.a, below.[44]

If one of the above are true, North Carolina is a significant-connection state, and no prior petition is filed in the respondent's home state or in another significant-connection state, then North Carolina has jurisdiction to proceed with the case and to enter an incompetency and guardianship order as a significant-connection state. Under such circumstances, if the respondent has a home state, notice of the North Carolina petition must be given to any person entitled to notice of the proceeding in the respondent's home state.[45] Notice is required to be given in the same manner as notice is required to be given in North Carolina.[46] Before proceeding with the substantive incompetency and guardianship hearing as a significant-connection state, the clerk should confirm that the petitioner provided such notice if the respondent has a home state.

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42. G.S. 35B-15(b).

43. If a petition is filed in the respondent's home state before the clerk enters the final order adjudicating incompetency and appointing a guardian, the clerk must stay the proceeding and communicate with the court in the other state to determine whether that court intends to decline jurisdiction in favor of North Carolina as a more appropriate forum. G.S. 35B-23(2). If the home state does not decline to act, then the clerk must dismiss the North Carolina petition. *Id.* If a petition is filed after the clerk enters final orders adjudicating incompetence and appointing a guardian, the home state has no jurisdiction to act and must dismiss the proceeding. *Id.* § 35B-19.

44. G.S. 35B-17(2).

45. G.S. 35B-22.

46. *Id.*

Applying the above rules to Dottie's case, assume that she moved to North Carolina immediately before Linda filed the petition here and that, therefore, Iowa remained her home state. Linda stated in her petition that no other petition was pending when she filed her petition in North Carolina. North Carolina may be a significant-connection state, notwithstanding Dottie's short presence in this state, if there is evidence that Dottie has family in North Carolina, including Linda; that Dottie moved all her tangible property here; that Dottie registered her car and obtained a driver's license here; that Dottie has many friends in North Carolina because she vacationed here all her life; and there is other information supporting her ties to the state.

Under those circumstances, North Carolina would have jurisdiction to act if the clerk determined that there is no other prior pending proceeding and that this state is a significant-connection state and an appropriate forum. This is true even though Dottie has a home state. However, if Eddie (1) files a petition in Iowa, Dottie's home state, at any time before the clerk in North Carolina enters a final order adjudicating incompetence and appointing a guardian and (2) notifies the clerk in North Carolina of the Iowa petition, the clerk here must stay the proceeding and communicate with the court in Iowa to discuss which court will proceed with the case. This is because jurisdiction is lost if a petition is later brought in the respondent's home state before the entry of a final order in a significant-connection state.[47] As a result of Eddie's Iowa petition, Iowa would have jurisdiction to act as Dottie's home state unless it declined in favor of North Carolina as a more appropriate forum. If Iowa does not decline jurisdiction, the clerk must dismiss the North Carolina proceeding despite the fact that the clerk determined North Carolina is a significant-connection state and an appropriate forum.

If, instead of filing a petition in Iowa and before the clerk enters a final order adjudicating Dottie's competency and appointing a guardian, Eddie raises an objection before the clerk to North Carolina's jurisdiction, the clerk should examine whether there is a more appropriate forum to hear the case, such as Iowa. If the clerk determines that Iowa is a more appropriate forum in response to Eddie's objection, the clerk may enter an order declining jurisdiction as set forth in section III.A.4, below.

#### 3. Other State

Even if North Carolina is not a home state or a significant-connection state, a North Carolina court may exercise jurisdiction in another limited instance—when it is what is known as an "other" state. In such cases, North Carolina has jurisdiction to act in response to a petition filed here where

1. the respondent's home state and all other significant connection states decline jurisdiction because North Carolina is the more appropriate forum and
2. jurisdiction in North Carolina is consistent with the United States and the North Carolina Constitutions.[48]

If a petitioner alleges that North Carolina has jurisdiction on this basis, the petitioner should also present evidence that any home state and all significant-connection states have declined jurisdiction. If a court declines jurisdiction, there is no requirement under G.S. Chapter 35B

47. *UAGPPJA*, Section 209, Comment.
48. G.S. 35B-17(3).

that the court enter an order to that effect. However, it may be a best practice for a court to do so to create a record of the court's decision to decline jurisdiction. The North Carolina court could also communicate with the state that declined jurisdiction to confirm that the state did in fact do so.[49] The clerk shall make a record of any such communication.[50]

If the respondent has a home state and North Carolina is an "other" state, notice of the North Carolina petition must be given to any person entitled to notice of the proceeding had a proceeding been brought in the respondent's home state.[51] Notice is required to be given in the same manner as notice is required to be given in North Carolina.[52] Before proceeding with the substantive incompetency and guardianship hearing as an "other" state, the clerk should confirm that the petitioner provided such notice if the respondent has a home state.

In Dottie's case, North Carolina may fall under this "other" category if Linda moved Dottie to North Carolina only a few days before Linda filed the petition. North Carolina would not be Dottie's home state and may not yet be a significant-connection state. However, as discussed further in section III.A.4.a, below, Iowa may decline jurisdiction in favor of North Carolina if, for example, Dottie expressed a preference for living in North Carolina with Linda; Dottie will live permanently at home with Linda; Dottie has no other property in Iowa; and no abuse, neglect, or exploitation of Dottie has occurred or is likely to occur.[53] Once Iowa declines jurisdiction, provided there are no significant-connection states that also must decline jurisdiction, a North Carolina court may have jurisdiction to act if Dottie is physically present and served in North Carolina. If necessary, the North Carolina court could use the cooperation and testimony provisions in G.S. 35B-6 and -7 to obtain information relevant to the North Carolina proceeding from witnesses, documents, and other evidence located out of state.[54] These provisions include, but are not limited to, the ability of a North Carolina court to request a court in another state to hold an evidentiary hearing; order a person to produce evidence or give testimony; order an evaluation of the respondent; and issue an order for the release of information, including protected health information.[55]

#### 4. North Carolina's Authority to Decline Jurisdiction

If North Carolina has jurisdiction to act either as the home state, as a significant-connection state, or as an "other" state, North Carolina may decline jurisdiction and not hear the case if the North Carolina court determines that (1) another state is a more appropriate forum or (2) North Carolina acquired jurisdiction through unjustifiable conduct.[56]

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49. G.S. 35B-5.

50. G.S. 35B-5(a).

51. G.S. 35B-22.

52. *Id.*

53. These are the factors a court would apply to determine that North Carolina is a more appropriate forum under G.S. 35B-20.

54. Note: The provisions related to cooperation between courts and testimony from other states apply to any incompetency and guardianship proceeding in North Carolina, not just when North Carolina exercises "other" jurisdiction.

55. G.S. 35B-6.

56. G.S. 35B-20; -21.

***a. More Appropriate Forum***

Even though North Carolina has jurisdiction to act, a court may decline to exercise jurisdiction if the court decides that another state is a more appropriate forum.[57] The clerk must consider all relevant factors in deciding whether there is a more appropriate forum, including

- any expressed preference of the respondent;
- whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- the length of time the respondent was physically present in or was a legal resident of this or another state;
- the distance of the respondent from the court in each state;
- the financial circumstances of the respondent's estate;
- the nature and location of relevant evidence;
- the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- the familiarity of the court of each state with the facts and issues in the proceeding; and
- if an appointment was made, the court's ability to monitor the conduct of the guardian.[58]

If a proceeding is properly before the court in North Carolina but the clerk determines that another state is a more appropriate forum, the clerk may either dismiss or stay the proceeding.[59] The clerk may also enter any order the clerk determines is just and proper, including the condition that a petition for the appointment of a general guardian or a guardian of the person or for the issuance of a protective order be filed promptly in another state.[60]

In Dottie's case, if she moved to North Carolina in May 2016 and was physically present in this state until Linda filed the incompetency/guardianship petition on December 1, 2016, then North Carolina is Dottie's home state under the first step of the home state definition. This is because she was physically present in North Carolina for the six consecutive months immediately preceding the petition. North Carolina would have jurisdiction to hear the case. However, a North Carolina court may decide to decline to exercise jurisdiction in favor of Iowa as the more appropriate forum if, for example, Dottie expresses a desire to move back to Iowa and she still has many friends, family, and medical providers in Iowa. In that instance, the North Carolina court is allowed, but not required, to enter an order staying the proceeding and directing Linda to promptly file a petition in Iowa. A similar analysis would apply if Dottie was from a foreign country. A North Carolina court may decline jurisdiction because a foreign country is a more appropriate forum.[61]

***b. Unjustifiable Conduct***

A North Carolina court with jurisdiction to hear a case may also decline to exercise jurisdiction at any time, including after appointing a guardian of the person or a general guardian or after issuing a protective order, if the court determines that jurisdiction was obtained by unjustifiable

57. G.S. 35B-20.
58. G.S. 35B-20(c).
59. G.S. 35B-20(b).
60. *Id.*
61. G.S. 35B-4; *UAGPPJA*, Section 103, Comment.

conduct.[62] "Unjustifiable conduct" is not defined in G.S. Chapter 35B. According to the comments accompanying UAGPPJA, this ambiguity and flexibility was intentional.[63] The provision is intended to address the problem of "granny snatching," which is when someone uproots an adult who may lack capacity from his or her home, moves the adult to another state, and seeks to be appointed as his or her guardian. Typically, this happens when the petitioner wants to gain control of the adult's financial resources. The adult is in an unfamiliar place away from family and from other evidence material to the guardianship proceeding. In this situation, the adult may be more likely to suffer abuse, neglect, or exploitation. In these and other instances, the court could decline to exercise jurisdiction if it appears that the court obtained jurisdiction because of unjustifiable conduct. The unjustifiable conduct does not have to be by a party or, specifically, by the petitioner who filed the case.[64]

The "unjustifiable conduct" concept affords the court the authority to "fashion an appropriate remedy" when it has inappropriately acquired jurisdiction."[65] In addition to or in lieu of declining jurisdiction, the court may exercise jurisdiction for the limited purpose of ensuring the health, safety, and welfare, or protecting property, of the respondent.[66] This includes staying the proceeding until a guardianship petition is filed in another state with jurisdiction and then declining jurisdiction.[67] In spite of finding unjustifiable conduct, a North Carolina court may decide to proceed with the case after considering certain factors identified in G.S. 35B-21(a)(3).

If a party committed the unjustifiable conduct that resulted in a North Carolina court having jurisdiction over the case, the court may assess reasonable expenses, including attorneys' fees and court costs, against that party.[68]

#### 5. Special Jurisdiction in the Case of an Emergency or Property Located in North Carolina

If a North Carolina court lacks jurisdiction because it is not a home state, a significant-connection state, or an "other" state, the court still has jurisdiction to act in case of an emergency related to the ward's person or when the person's real or tangible personal property is located in North Carolina.[69] This is known as *special jurisdiction*.

##### *a. Appointment of Guardian of the Person in an Emergency*

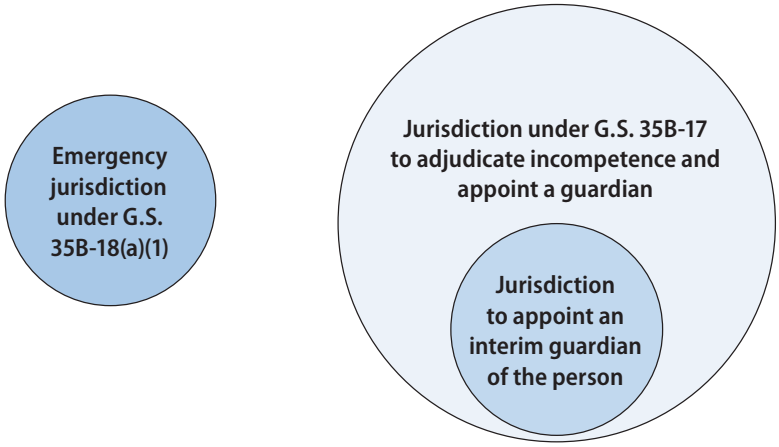
A North Carolina court otherwise lacking jurisdiction has special jurisdiction to appoint a guardian of the person in the event of an emergency for a respondent who is physically present in North Carolina.[70] "Emergency" is defined as a circumstance that will likely result in substantial harm to a respondent's health, safety, or welfare, and for which an appointment of a guardian of the person is necessary because there is no other person who has the authority and is willing to act on the respondent's behalf.[71] If a petition is filed and the clerk finds that the respondent is physically present in North Carolina and that an emergency exists, then the clerk

62. G.S. 35B-21(a).
63. *UAGPPJA*, Section 207, Comment.
64. *Id.*
65. *Id.*
66. G.S. 35B-21(a)(2).
67. *Id.*
68. G.S. 35B-21(b).
69. G.S. 35B-18.
70. G.S. 35B-18(a)(1).
71. G.S. 35B-15(a)(1).

may enter an order appointing a guardian of the person for a term not exceeding ninety days based on this special jurisdiction.[72] The emergency appointment should not be converted into a "de facto permanent appointment."[73] It is an appointment for a limited time in a temporary location.[74] The emergency proceeding must be dismissed if a petition is later filed in the respondent's home state and the home state requests that North Carolina dismiss the emergency proceeding, regardless of whether the request is before or after the appointment.[75]

For example, if a person is in a car accident while driving through North Carolina that results in her incapacity, a North Carolina court could appoint a guardian of the person to make medical decisions on behalf of the injured person in North Carolina. In the order appointing the emergency guardian of the person, the court should make findings as to whether the respondent has an agent under health care power of attorney authorized to act in North Carolina or another person authorized to make medical decisions on the person's behalf. An emergency only exists if the respondent lacks an authorized and willing surrogate decision maker. In the absence of an emergency, the court lacks the special jurisdiction to appoint a guardian of the person.

*Interim guardian of the person cases distinguished.* Note that special jurisdiction in an emergency is different from the court's authority to appoint an interim guardian of the person under G.S. 35A-1114. An interim guardian of the person appointment occurs as part of and pursuant to a motion filed in the underlying G.S. Chapter 35A incompetency proceeding.[76] To appoint an interim guardian of the person, the North Carolina court must first have jurisdiction as a home state, as a significant-connection state, or as an "other" state. By contrast, the special jurisdiction in an emergency provision discussed above applies when such jurisdiction does not exist.




72. *Id.*
73. *UAGPPJA*, Section 204, Comment.
74. *Id.*
75. G.S. 35B-18(b).
76. G.S. 35A-1114(a) (emphasis added) (stating that *"[a]t the time of or subsequent to the filing of a petition [for adjudication of incompetence,]* the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian").

Note that AOC forms SP-200, Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian; SP-202, Order on Petition for Adjudication of Incompetence; and E-406, Order on Application for Appointment of Guardian, are not appropriate to use in the event the court is exercising special jurisdiction in an emergency. As of the date of this bulletin, there is no AOC published form petition or order for a person seeking such an appointment.

#### *b. Issuance of a Protective Order for Real and Tangible Property in North Carolina*

A North Carolina court that lacks jurisdiction as a home state, as a significant-connection state, or as an other state also has special jurisdiction to issue a "protective order" related to real or tangible personal property located in North Carolina.[77] As discussed earlier, the term "protective order" has a specific meaning in this context. The term refers to an order appointing a guardian of the estate or a general guardian, or to another order related to the management of an adult's property entered pursuant to G.S. Chapter 35A.[78] This jurisdiction may serve as a basis for the appointment of an ancillary guardian under G.S. 35A-1280 to manage a nonresident ward's real and tangible property located in North Carolina, for a special proceeding to remove a nonresident's tangible personalty from the state under G.S. 35A-1281, or for the appointment of an interim guardian of the estate under G.S. 35A-1114.

## IV. Transfer of Cases to and from North Carolina

The second major purpose of UAGPPJA is to provide a process for transferring an existing case in or out of the state. It is intended to address scenarios like Bob's, described at the start of this bulletin, where a person under guardianship permanently moves or has a significant connection to another state. In Bob's case, his guardian of the person, the county department of social services, determined that it was in his best interests to move from North Carolina to live in New York with his daughter and for his daughter to serve as his guardian there. The transfer provisions do not apply when a guardian seeks to take some limited action in a state on behalf of a nonresident ward. In those cases, registration, which is discussed in section V, below, and not transfer, of the case would be appropriate.

The process for transferring Bob's case out of North Carolina is set forth in G.S. 35B-30. A flowchart providing a step-by-step guide to the "transfer out" process is found in Appendix B. The process for transferring a case from another state to North Carolina is set forth in G.S. 35B-31. A flowchart providing a step-by-step guide to the "transfer in" process is found Appendix C. S.L. 2016-72 repealed the existing process for transferring cases into North Carolina under G.S. 35A-1113.

77. G.S. 35B-18(a)(2). This does not include intangible property such as bank accounts. *See UAGPPJA*, Section 204, Comment.

78. G.S. 35B-2(14).

## A. Transferring a Case Out of North Carolina

A case may be transferred out of North Carolina only upon the petition of the guardian of the person, the guardian of the estate, or the general guardian.[79] A petition for transfer is a request to transfer both the incompetency (special proceeding (SP)) and the guardianship (estate proceeding (E)) cases.[80] The guardian must serve a copy of the petition by first-class mail[81] on any person who is entitled to notice of the original incompetency and guardianship proceedings.[82] This includes the ward; any next of kin; the ward's attorney or guardian ad litem, if appointed by the clerk;[83] other parties of record, including any guardian other than the petitioner; and anyone else designated by the clerk.[84]

On the clerk's motion or on the motion of the petitioner or any person entitled to notice of the proceeding, the clerk must hold a hearing on the petition for transfer.[85] If no one moves for a hearing but there is an indication that the petition for transfer is contested, it is best practice for the clerk, on the clerk's own motion, to hold a hearing. However, the clerk may decide the matter summarily, meaning without a hearing.[86] In the absence of a motion for a hearing, it is not clear from the statute when the clerk may decide the matter summarily after service of the petition on the requisite persons. It is also not clear by what date a person entitled to notice would need to move for a hearing after service of the petition for transfer. Finally, the petition is not required to be verified, and, therefore, is not under oath. If the clerk proceeds summarily, the clerk should wait a reasonable time before entering a provisional order granting the transfer petition to allow notified persons time to file an objection to transfer.

79. G.S. 35B-30(a).

80. *Id.*

81. The statute does not specify how the petition must be served. *See generally* G.S. 35B-30. Because the petition is filed in an existing proceeding, it is likely that service by first-class mail or other service in compliance with Rule 5 of the N.C. Rules of Civil Procedure is sufficient.

82. G.S. 35B-30(b).

83. Given that service is required on the ward's attorney or guardian ad litem (GAL), it raises the question as to whether a GAL must be appointed when a petition to transfer is filed. G.S. 35A-1217 provides that the clerk shall appoint a GAL to represent a ward in a guardianship proceeding if the ward has been adjudicated incompetent and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the GAL are pursuant to rules adopted by the N.C. Office of Indigent Defense Services (IDS). G.S. 35A-1217. Therefore, unless prohibited by IDS rules, it would be logical for the clerk to appoint a GAL in response to a petition to transfer if the clerk determines that the ward's interests are not adequately represented. Automatic appointment of a GAL in every case may create unnecessary expense where the petition for transfer is uncontested or where the ward's interests are otherwise adequately represented.

84. G.S. 35A-1109; -1211.

85. G.S. 35B-30(c).

86. *Id. See also UAGPPJA*, Article 3, General Comment.

Furthermore, before entering a provisional order authorizing transfer of the incompetency and guardianship case, the clerk must find, based on the evidence presented, that

- the other state will likely accept the transfer;[87]
- the ward is physically present in or is reasonably expected to move permanently to the other state, or, if the guardian is a guardian of the estate, the ward has a *significant connection*[88] to the other state;
- no objection to transfer has been made, or, if an objection has been made, the objecting party failed to establish that transfer would be contrary to the interests[89] of the ward; and
- plans for the ward's care and services in the other state are reasonable and sufficient, if the ward has a guardian of the person, or adequate arrangements will be made for the management of the ward's property, if the ward has a guardian of the estate.[90] If the ward has a general guardian, the clerk must find both reasonable and sufficient plans for care and services and adequate arrangements for property.[91]

If the clerk makes these findings, then the clerk must enter a provisional order granting the petition to transfer and directing the guardian to petition for transfer in the other state.[92] The clerk may enter a final order confirming transfer once the clerk receives and approves a final accounting from the guardian of the estate or the general guardian and receives a copy of the provisional order accepting transfer from the other state.[93]

Returning to Bob's case, either the county department of social services (DSS), as Bob's guardian of the person, or the private attorney, as Bob's guardian of the estate, could petition to transfer the case to New York. If either of them petition, the clerk considers transfer of the incompetency proceeding along with the entire guardianship, both the guardianship of the person and of the estate. The statute does not state expressly that a guardianship may not be split. However, if transfer is granted, it seems reasonable to transfer both the guardianship of the person and of the estate along with the incompetency proceeding in order to avoid conflicting courts with dueling authority, an essential purpose of UAGPPJA.[94]

If DSS believes that transferring the case to New York so that Bob's daughter may serve as guardian there is in Bob's best interests, DSS should first file a motion to remove itself as the guardian of the person and to appoint Bob's daughter as his guardian of the person on the basis that doing so is in the best interests of Bob. This is because one of the criteria the receiving

87. If the county department of social services (DSS) is serving as guardian of the person, guardian of the estate, or general guardian in North Carolina and initiates the transfer of a case from North Carolina, one of the findings the accepting state must make is that the guardian is eligible for appointment in the accepting state. G.S. 35B-31(d)(2). A North Carolina DSS is not eligible for appointment in another state. One solution to this dilemma is discussed further in the example set forth at the end of this subsection.

88. This, term for purposes of transfer, is defined in G.S. 35B-15(b) and described *supra* section III.A.2.b.

89. *See UAGPPJA*, Article 3, General Comment (stating that the term "interests" was chosen over "best interests" to reflect the strong autonomy values in modern guardianship law).

90. G.S. 35B-30(d) and (e).

91. G.S. 35B-30(f).

92. G.S. 35B-30(d), (e), and (f).

93. The provisional order accepting transfer from the other state must be issued in accordance with provisions similar to G.S. 35B-31 in the other state, which governs accepting a transfer of a case from another state.

94. G.S. 35B-1(d)(1).

court must find before entering an order authorizing transfer is that the guardian is eligible for appointment under that state's laws.[95] A North Carolina DSS would not be eligible for appointment in New York. Therefore, before seeking to transfer the case, DSS or Bob's daughter could file a motion to remove DSS and appoint Bob's daughter as the guardian of the person, and then the daughter could file a petition to transfer the case to New York. See Appendix B, "Transfer of an Existing Incompetency and Adult Guardianship Case from North Carolina to Another State."

## B. Transferring a Case to North Carolina

To transfer a guardianship from another state to North Carolina, the general guardian, guardian of the person, or guardian of the estate files a petition for transfer in North Carolina, along with a certified copy of the other state's provisional order of transfer.[96]

A copy of the petition and the order is served on those persons entitled to notice of the original incompetency and guardianship proceeding in North Carolina *and* in the transferring state.[97] Notice must be given in the same manner as notice is required in those original proceedings in North Carolina.[98] This likely means that the following parties must be served in the following manner based on North Carolina service requirements:

- the ward/respondent by personal service;
- the next-of-kin by first-class mail;
- the ward's counsel or guardian ad litem, if appointed,[99] pursuant to Rule 4 of the N.C. Rules of Civil Procedure;[100]
- the other parties of record, including any guardian that is not the petitioner, and any other persons required to be noticed in the transferring state by first-class mail; and
- anyone else designated by the clerk by first-class mail.[101]

The petitioner should identify in the petition to accept transfer whether the transferring state's laws require notice to any other person in addition to those listed who are noticed under North Carolina law.[102] The clerk should confirm that service has been made on such other persons if there are any additional persons whom the other state requires to be noticed that North Carolina law does not.

95. G.S. 35B-31(d)(2).
96. G.S. 35B-31(a).
97. G.S. 35B-31(b).
98. *Id.*
99. It may be unnecessary to appoint a guardian ad litem (GAL) for purposes of making a decision on whether to accept transfer, given that the court is charged with accepting the transfer *unless* the guardian is ineligible for appointment or a person entitled to notice files an objection and establishes that the transfer will be contrary to the interests of the ward. Otherwise, the court's decision to accept transfer is not discretionary. Therefore, it may be good practice, when a petition to accept transfer is filed, to wait and see whether or not there is an objection to the transfer before appointing a GAL in response to a petition accepting transfer.
100. G.S. 1A-1, Rule 4.
101. G.S. 35A-1109; -1211.
102. G.S. 35B-31(b).

On the clerk's motion or on the motion of the petitioner or any person entitled to notice of the proceeding, the clerk must hold a hearing on the petition to accept transfer.[103] However, the clerk may decide the matter summarily.[104] As discussed in the previous section on transfer of a proceeding out of North Carolina, the clerk should wait a reasonable time after the petition is filed before entering a provisional order accepting transfer without a hearing to ensure that there are no objections.

The court must enter a provisional order accepting transfer unless (1) an objection is made to the transfer and the objector establishes that the transfer would be contrary to the interests[105] of the ward or (2) the general guardian, guardian of the estate, or guardian of the person is ineligible for appointment in North Carolina.[106] Once the North Carolina court enters a provisional order accepting transfer, the court has the authority to appoint a general guardian, a guardian of the estate, or a guardian of the person in North Carolina.[107] The court then enters a final order accepting transfer once it receives a copy of the final order from the other state granting transfer.[108] By entering a final order accepting transfer from another state, the North Carolina court recognizes that state's adjudication of incompetency and appointment of the guardian.[109]

Within ninety days from the date the clerk enters the final order accepting transfer of the guardianship to North Carolina, the clerk must determine whether the guardianship needs to be modified to comply with North Carolina law.[110] This may include, for example, requiring a bond or modifying a bond amount. It is advisable for the clerk to schedule a status hearing and to notice the guardian of the hearing so that he or she may appear before the court to go over North Carolina requirements to file accountings and status reports, if required, and to take the oath and receive North Carolina letters of appointment.[111] Once the case is transferred to North Carolina, the clerk may also consider any other motions pertaining to the adult's capacity or guardianship, including whether limited guardianship or restoration are appropriate. See Appendix C, "Transfer of an Existing Incompetency and Adult Guardianship Case to North Carolina from Another State."

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103. G.S. 35B-31(c).

104. *Id. See also UAGPPJA*, Article 3, General Comment. The statute does not state how long the court must wait after service before summarily entering a provisional order accepting transfer.

105. *See UAGPPJA*, Article 3, General Comment (stating that the term "interests" was chosen over "best interests" to reflect the strong autonomy values in modern guardianship law).

106. G.S. 35B-31(d). This may include, for example, whether or not the guardian is eligible to be bonded if the guardian is a guardian of the estate or a general guardian. The transferring state may not have required a bond.

107. G.S. 35B-18(a)(3).

108. The final order granting transfer from the other state must be issued in accordance with provisions similar to those found in G.S. 35B-30, which govern transferring a case from another state.

109. G.S. 35B-31(g). The purpose of this provision is to eliminate "the need to prove the case in the second state from scratch, including proving the respondent's incapacity and choice of guardian. . . ." *See UAGPPJA*, Article 3, General Comment. It does not prohibit the accepting court from modifying the guardianship to a limited guardianship or restoring the person's competency if a motion for either is later brought before the court.

110. G.S. 35B-31(f).

111. The court may find it necessary to appoint a guardian ad litem (GAL) in connection with this hearing to allow the GAL to make recommendations to the court about whether the guardianship needs to be modified to conform to the laws of North Carolina.

# V. Registration

The purpose of registration is to facilitate the enforcement of guardianship orders from other states.[112] The types of scenarios that typically invoke registration issues are when a nonresident of North Carolina owns real or personal property here or when he or she seeks some sort of medical or other personal care service in North Carolina. The nonresident is incapacitated and a guardian has been appointed on his or her behalf in another state. The guardian and the ward have no intention of moving to North Carolina, thus transfer of the case is inapplicable. However, the guardian does want to exercise some decision-making authority in North Carolina, either with respect to the person or to the property of the ward.

## A. Process to Register an Out-of-State Order in North Carolina

On and after December 1, 2016, a guardian of the person, a guardian of the estate, or a general guardian[113] appointed in another state may register an out-of-state order in North Carolina.[114] Registration is available whether the guardianship is full or limited.[115] G.S. 35B-36 prescribes the process for registering a guardianship of the person order. G.S. 35B-37 sets forth the process for registering a general guardianship order or a "protective order."

The guardian commences the registration process by giving notice to the court that appointed the guardian of his or her intent to register the order. The guardian obtains certified copies of the order appointing the guardian and letters of office[116] from the court, as well as the copy of any bond.[117] Authenticated copies are not required.[118]

Next, the guardian files certified copies of the other state's letters and the order and a copy of the bond, if any, in North Carolina, and the North Carolina court files the copies as a foreign judgment.[119] If the order is an order for a guardian of the person, it may be filed by the guardian of the person in any appropriate county.[120] For example, a county where a ward seeks treatment or other health care. If the order is an order for a guardian of the estate or for a general guardian, then the documents may be filed in any county where the ward has property.[121]

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112. *UAGPPJA*, Article 4, General Comment.

113. Keep in mind that different terminology may be used. A guardian of the person in another state may simply be a "guardian", while a guardian of the estate may be a "conservator".

114. G.S. 35B, Article 4.

115. *Id.*

116. Under North Carolina law, whenever a guardian is duly appointed and qualified, the clerk must issue the guardian "letters of appointment" signed and sealed by the clerk. G.S. 35A-1206. Generally, letters specify the type of guardian appointed and the nature and extent of the guardian's authority. *Id.* In other states, letters of appointment may be called "letters of office" or referred to by some other term.

117. G.S. 35B-36; -37.

118. *UAGPPJA*, Article 4, General Comment.

119. G.S. 35B-36; -37. A guardian of the person may not register an order in North Carolina if a petition for the adjudication of incompetence and an application for the appointment of a guardian of the person is pending in North Carolina. G.S. 35B-36. Similarly, a guardian of the estate or a general guardian may not register an order in North Carolina if a petition for the adjudication of incompetence and an application for the appointment of a guardian of the estate is pending in North Carolina. *Id.* § 35B-37.

120. G.S. 35B-36.

121. G.S. 35B-37.

## B. Effect of Registration in North Carolina

Registration of an out-of-state guardianship order in North Carolina gives the guardian the authority to exercise all powers in North Carolina authorized in the order appointing the guardian from the other state, unless an action is prohibited by the laws of North Carolina.[122]

The most significant impact of the new registration provisions will be on the enforcement of out-of-state guardianship orders pertaining to a person. These provisions address situations like the one described at the start of this bulletin involving Cindy and her daughter, Mary, who live in Virginia. A Virginia court adjudicated Mary incompetent and appointed Cindy as her guardian. That court retains jurisdiction over the case. Cindy wants Mary to receive mental health treatment at a facility in North Carolina. Mother and daughter do not intend to move to North Carolina and do not want to permanently transfer the case here. However, the North Carolina care provider refuses to recognize an out-of-state guardianship order. By registering the order in North Carolina, Cindy, as the guardian, would have the authority to exercise all powers authorized by the out-of-state order and not prohibited under North Carolina law, including making certain health care decisions. If a third-party refuses to recognize any validly registered order in North Carolina, the court may grant any relief available under North Carolina law to enforce the registered order.[123]

The impact of the new registration provisions is less significant with respect to guardianships involving property. The legislation expressly preserved the existing provisions in G.S. Chapter 35A applicable to ancillary guardianship under G.S. 35A-1280 and removal of personalty from the state under G.S. 35A-1281.[124] As a result, registering a protective order or an order related to the nonresident ward's property in North Carolina does not eliminate the obligation

- to seek the appointment of an *ancillary guardian*[125] in North Carolina when a nonresident ward has real or personal property in North Carolina that will remain in the state[126] or
- to initiate a special proceeding by petition to remove personal property of a nonresident ward from North Carolina.[127]

Because these requirements were retained in North Carolina law, registration of an out-of-state order appointing a guardian to manage a nonresident ward's property will often be redundant. This is in part because registration of the order in North Carolina does not appear necessary for the North Carolina court to obtain jurisdiction over those proceedings. A North

122. G.S. 35B-38(a).

123. G.S. 35B-38(b).

124. S.L. 2016-72, § 3.

125. An ancillary guardian is person appointed guardian by a North Carolina court, through the authority of a guardian in another state, for a nonresident ward having real or personal property in North Carolina. G.S. 35A-1280; Ann M. Anderson & Joan G. Brannon, North Carolina Clerk of Superior Court Procedures Manual vol. II, pt. VI, ch. 86, p. 58 (UNC School of Government, 2012). Once appointed in North Carolina, an ancillary guardian has all the powers, duties, and responsibilities over the ward's estate, including the obligation to post a bond, as a guardian appointed in North Carolina. G.S. 35A-1280(b).

126. S.L. 2016-72, § 3; G.S. 35A-1280. The requirements for ancillary guardianship are described in Anderson & Brannon, *supra* note 125, at vol. II, pt. VI, ch. 86, pp. 58–59, § XIV.

127. S.L. 2016-72, § 3; G.S. 35A-1281. The requirements of this process are more fully described in Anderson & Brannon, *supra* note 125, at vol. II, pt. VII, ch. 122, pp. 1, 4.

Carolina court always has special jurisdiction to issue an order with respect to real or tangible personal property located in North Carolina.[128]

One area that is not redundant: registration of an order that is the other state's equivalent of a general guardianship order appears to now provide the general guardian appointed by another state with the authority to maintain actions and proceedings in North Carolina on behalf of the incapacitated person.[129] If the general guardian initiating or defending an action is not a resident of North Carolina, the guardian is subject to conditions imposed upon nonresident parties by North Carolina law.[130]

## Conclusion

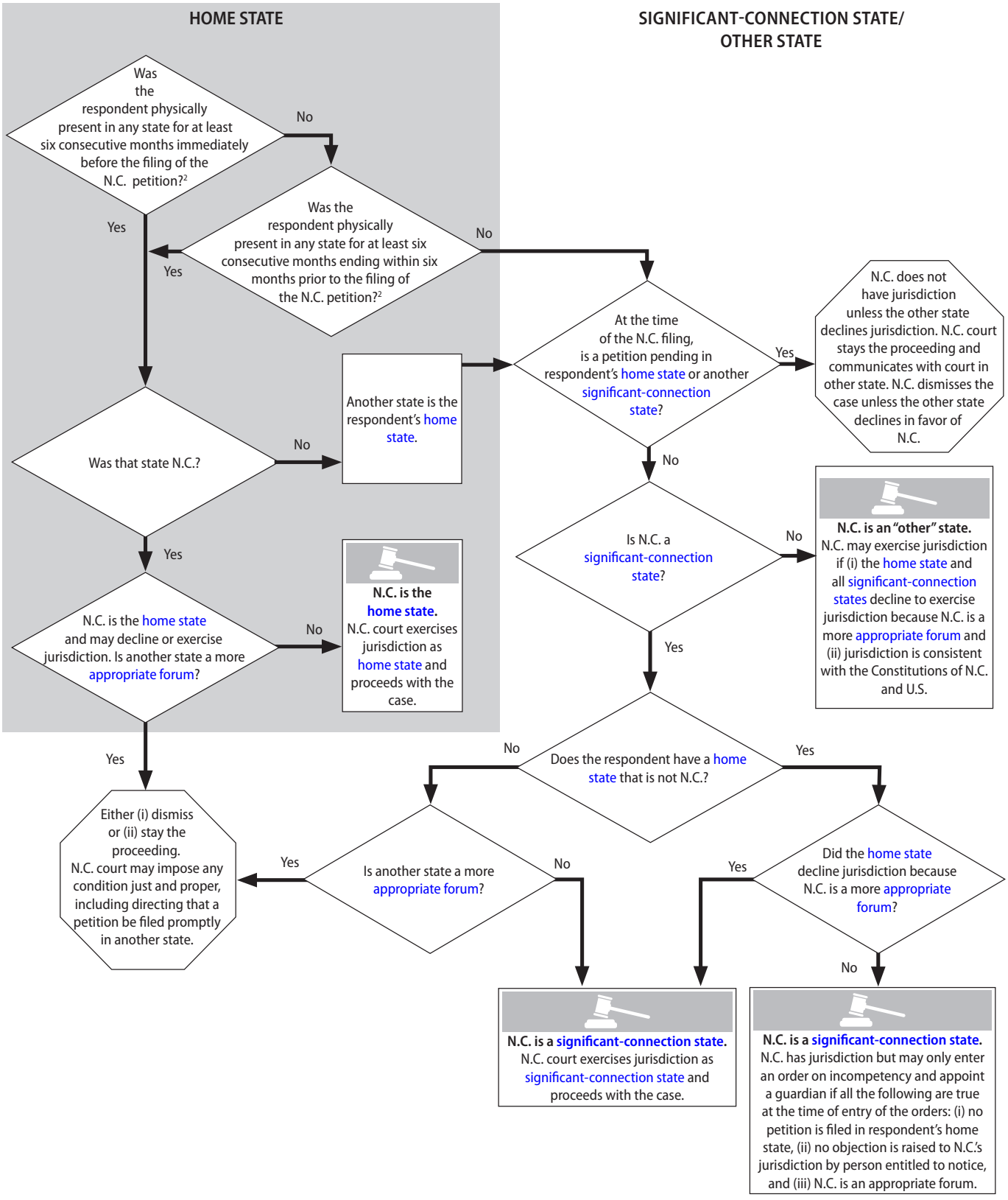
UAGPPJA is now a part of North Carolina law in the form of a new G.S. Chapter 35B. In addition to creating a framework for court communication and cooperation, it serves as a gatekeeper to the courts' authority under G.S. Chapter 35A to adjudicate incompetence and appoint guardians in North Carolina in the first instance. It also provides a means to transfer certain cases to and from North Carolina. Finally, UAGPPJA sets forth a mechanism to register out-of-state orders in North Carolina when a nonresident guardian seeks to take some action with respect to the ward's person or property located in North Carolina. This bulletin provides an overview for each of these new processes. There will likely be additional information as new forms and rules of recordkeeping are created and other administrative aspects of implementing this new law play out.

128. G.S. 35B-18(a)(2).

129. *See* G.S. 35B-38(a); 1A-1, Rule 17(b)(1) and (2) (providing that a general or testamentary guardian "within this State" has the authority to sue or defend on behalf of an incompetent person).

130. G.S. 35B-38(a).

# Appendix A. Does North Carolina Have Jurisdiction to Enter an Incompetency and Adult Guardianship Order?[1] (G.S. Chapter 35B, Article 2)




Notes:
1. This flowchart does not cover an N.C. court's authority to exercise special jurisdiction.
2. The court does not take into account periods of temporary absence.

## Definitions/Explanation of Terms Used in Appendix A

**Home State (G.S. 35B-15(a)(2)).** The state where the respondent was physically present, including periods of temporary absence, for at least six consecutive months immediately prior to the filing of the petition; or, if none, the state in which the respondent was physically present, including periods of temporary absence, for at least six consecutive months ending within the six months prior to filing of the petition.

**Temporary Absence.** Temporary absence is not defined in G.S. Chapter 35B but includes short-term out-of-state travel for most purposes (e.g., vacation, business, or visits with family or friends).

**Significant-Connection State (G.S. 35B-15(a)(3) and (b)).** A state, other than the home state, with which the respondent has a significant connection other than mere physical presence and in which substantial evidence concerning respondent is available. To determine significant connection, the court shall consider

- the location of the respondent's family and of other persons required to be notified of the proceedings;
- the length of time the respondent was physically present in North Carolina and the duration of any absence;
- the location of the respondent's property; and
- the extent to which the respondent has ties to a particular state, including voting registration, tax return filings, vehicle registration, driver's license, social relationships, and receipt of services.

**Appropriate Forum (G.S. 35B-20).** To determine whether a state is an appropriate forum, the court shall consider all relevant factors, including but not limited to the following:

- any expressed preference of the respondent;
- whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation;
- the length of time the respondent was physically present in or was a legal resident of this or another state;
- the distance of the respondent from the court in each state;
- the financial circumstances of the respondent's estate;
- the nature and location of relevant evidence;
- the ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence;
- the familiarity of the court of each state with the facts and issues in the proceeding; and
- if an appointment was made, the court's ability to monitor the conduct of the guardian.

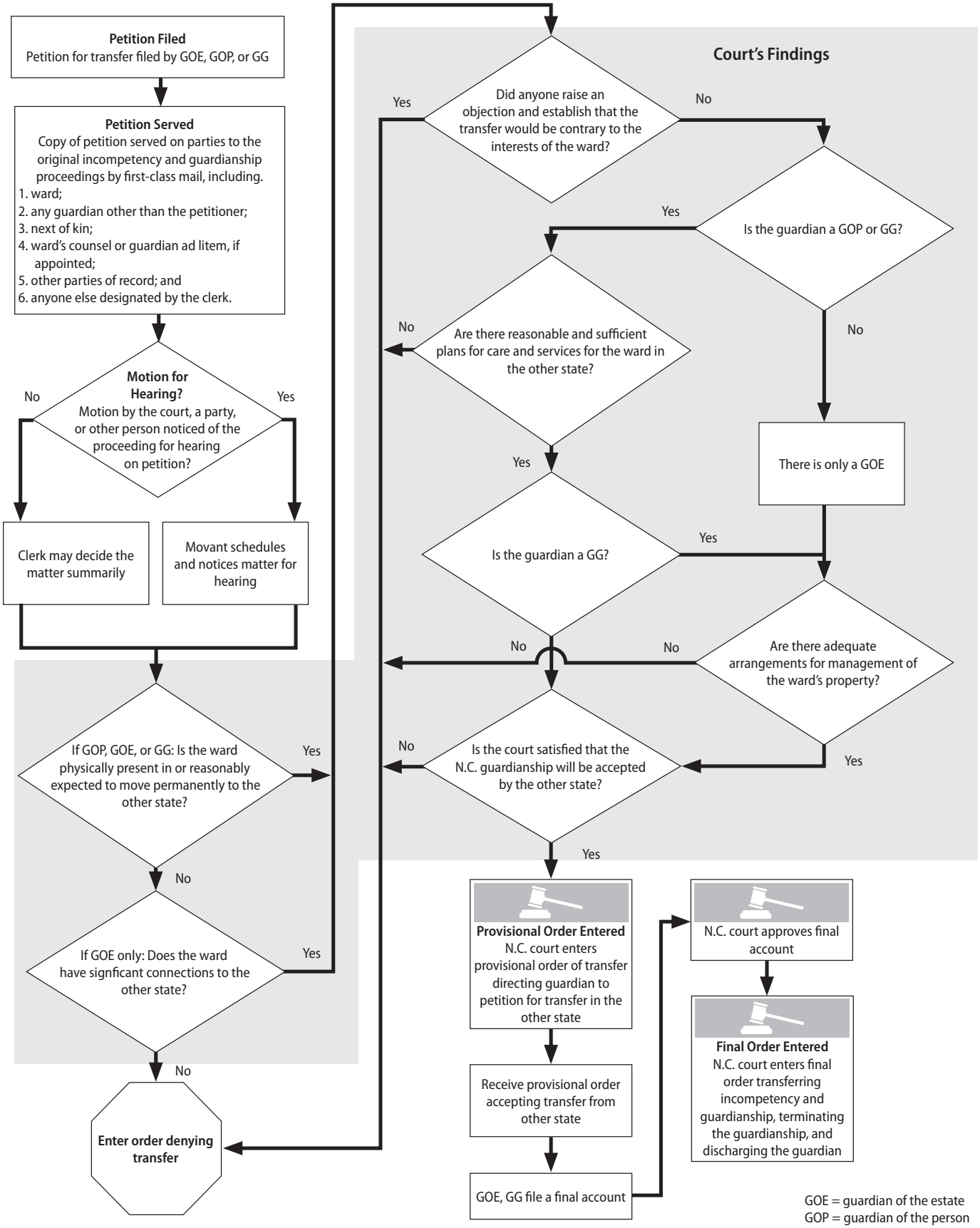
**Special Jurisdiction (G.S. 35B-18).** A court that lacks jurisdiction as a home state, significant-connection state, or "other" state has special jurisdiction to

1. appoint a guardian of the person for up to ninety days if an *emergency* exists and the respondent is present and served in North Carolina (G.S. 35B-18(a)(1)) and

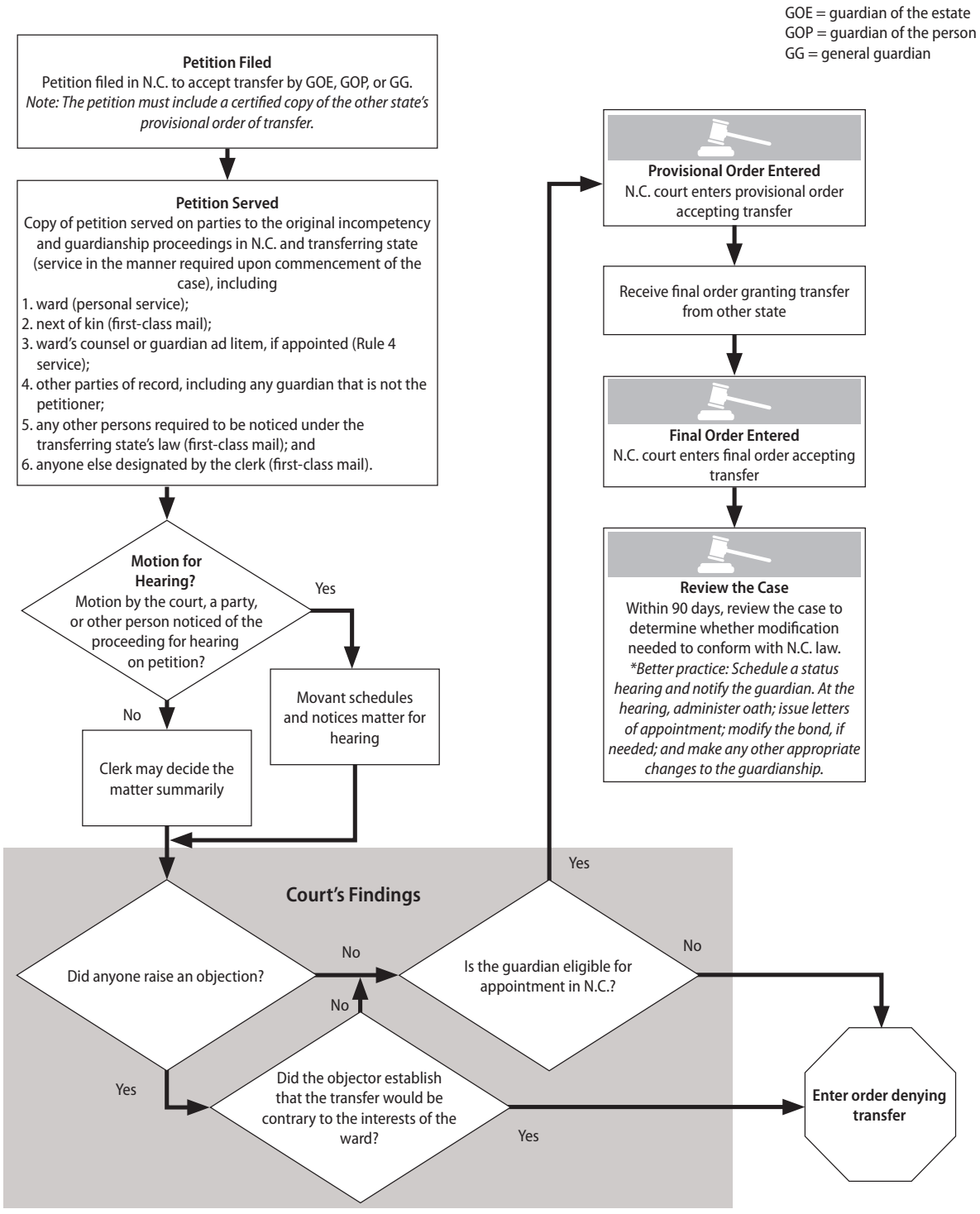
2. issue a protective order with respect to real or tangible personal property located in N.C. (G.S. 35B-18(a)(2))

An emergency in this context is a circumstance that likely will result in substantial harm to a respondent's health, safety, or welfare, and for which the appointment of a guardian of the person is necessary because no other person has authority and is willing to act on the respondent's behalf. G.S. 35B-15(a)(1).

# Appendix B. Transfer of an Existing Incompetency and Adult Guardianship Case from North Carolina to Another State (G.S. 35B-30)



# Appendix C. Transfer of an Existing Incompetency and Adult Guardianship Case to North Carolina from Another State (G.S. 35B-31)



# Some Q&A on UAGPPJA

More than two months have passed since the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) went into effect in North Carolina. I've blogged about this topic a couple of times before. If you are just tuning in to this new law, you can read more about UAGPPJA here and here. I'd like to use the post today to go through some questions I've received since the December 1, 2016 effective date. The questions are divided up according to the three main areas of the law: initial filings, transfer, and registration. The stories you are about to read are true; names have been changed to protect the innocent.*

## Initial Filings: G.S. 35B, Article 2

**Jane recently returned to NC after living and working in Maine for the last 10 years. She moved to NC with her adult son, John. Jane and John have been physically present in NC for only two months, but Jane wants to file a petition here to have John adjudicated incompetent and an application to be appointed as his guardian. Does Jane have to wait until John has been physically present in NC for six months before filing the petition here?**

No. Although NC is not John's home state, it does not preclude Jane from filing a petition in NC and alleging NC has jurisdiction over John's case as a significant connection or other state. Despite the fact that John recently moved here, NC may have jurisdiction to act if, for example, John has a significant connection to NC other than mere physical presence and substantial evidence concerning John is available here. G.S. 3B-15(a)(3).

The Petition for Adjudication of Incompetence and Application for Appointment of Guardian (SP-200) was revised in response to UAGPPJA to obtain information from the petitioner that will be helpful to the court in determining whether it has jurisdiction to act. However, it may not be comprehensive for purposes of determining whether NC is a significant connection or other state. Therefore, if Jane intends to file in NC and allege NC has jurisdiction to act as a significant connection state, Jane may want to attach an addendum to the petition making the basis for jurisdiction clear and along with other information related to John's connection to NC – such as voting registration, vehicle registration, social relationships, and receipt of services. G.S. 35B-15(b).

**Lisa files form SP-200 in NC alleging her father, Bob, is incompetent and needs a guardian. Bob lived his entire life in NC and owns real and personal property here. Lisa recently moved Bob to a nursing facility in Tennessee near where she lives. Due to his deteriorating condition, it is unlikely that Bob will be able to return to live at his home and he will likely stay in Tennessee. Given the petition is already filed in NC and NC has jurisdiction as a significant connection state, does the NC court have to adjudicate incompetence and appoint a guardian in NC?**

No. The NC court could decline to exercise jurisdiction in favor of a more appropriate forum – such as Tennessee. Even where an NC court has jurisdiction to act as a home state, significant connection state, or other state, the court may decline to exercise jurisdiction if another state is a more appropriate forum. The NC court would look at all relevant factors to determine whether another state is a more appropriate forum, including the specific factors set forth in in G.S. 35B-20(c) such as the express preferences of the respondent, the nature and location of the evidence, and the ability of the court to monitor the guardian if appointed by an NC court.

In Bob's case, if the NC court determines Tennessee is a more appropriate forum, the court must dismiss or stay the proceeding. G.S. 35B-20(b). The court may also impose any condition that the court considers just and proper, including that a petition for the appointment of a guardian is filed in Tennessee if, for example, it appears that Bob is in need of assistance of a guardian. *Id.*

## Transfer: G.S. 35B, Article 3

**Is there a form petition for transfer to or from NC?****

No. The N.C. Administrative Office of the Courts may adopt forms in the future. However, no forms related to transfer of a case to or from NC are available at this time.

**When will the court hold a hearing in response to a petition for transfer to or from NC?**

If the guardian or a person entitled to notice of the transfer files a motion requesting a hearing on the petition, the court must hold a hearing. G.S. 35B-30(c); G.S. 35B-31(c). However, if no one entitled to notice requests a hearing, the court may decide the matter summarily (without a hearing). *Id.*

The court may elect, on the court's own motion, to hold a hearing on the petition. *Id.* The court will likely hold a hearing when an objection to transfer is filed or when the petition for transfer does not contain adequate information for the court to make the requisite findings to enter a provisional order of transfer. For example, if the court reviews a petition for transfer of a guardianship of the person to another state and determines that it lacks information satisfactory to the court concerning plans for care and services for the ward in the other state, the court may, on its own motion, hold a hearing on the petition. G.S. 35B-30(d).

**How long after a transfer petition is filed before the court will enter a provisional order of transfer?**

The transfer statutes, G.S. 35B-30 (out of NC) and G.S. 35B-31 (to NC), do not specify how long the court must wait after a petition for transfer is filed before entering a provisional order authorizing

transfer. The court may determine a reasonable amount of time after confirming service on those entitled to notice – it is likely that the court will want to ensure anyone who receives notice has an adequate time to file a motion requesting a hearing and/or raise objections to the transfer. Given the expedited nature of incompetency and guardianship proceedings, my guess is that a reasonable amount of time may be anywhere from 10 to 30 days from completed service. *See, e.g.* G.S. 35A-1108(a).

**I am a guardian and I want to transfer a guardianship from California to NC. The ward already resides in NC and has for many years. Should my first stop be an NC courthouse to file something?**

No. The guardian first needs to file a petition in the state that currently has jurisdiction over the guardianship – in this example, California. Once California enters a provisional order of transfer, the guardian then obtains a certified copy of the provisional order of transfer from the California court and files it along with a petition for transfer in NC.

**May the guardian file a petition for transfer to or from NC by mail?**

Yes, the guardian may mail the petition to the office of the clerk of superior court in the appropriate county in NC or file it in person.

## Registration: G.S. 35B, Article 4

**Tom owns real property in NC and lives in Georgia. Donna was appointed as Tom's general guardian by a Georgia court and wants to sell Tom's NC real property. Is registration of the Georgia order in NC sufficient to give Donna the authority to sell Tom's NC real property?**

No. UAGPPJA as enacted in NC did not repeal the requirements for ancillary guardianship – in fact, it specifically retained them. See S.L. 2016-72, Sec. 3 ("Nothing in this act shall be construed to otherwise affect the requirements for seeking an ancillary guardianship under G.S. 35A?1280 or for petitioning the court for the removal of personalty from the State under G.S. 35A?1281.")

Therefore, the effect of registration does not change anything in NC for Donna who seeks to sell Tom's NC real property. She will still need to apply for ancillary guardianship by petition under GS 35A-1280 and then as the ancillary guardian file a special proceeding to sell the real property under GS 35A-1301.

**An NC court adjudicated Alexis incompetent and appointed Caleb as her guardian of the person. Caleb plans to register the NC guardianship of the person order in another state. Does NC have a form Caleb may file with the NC court to give notice of his intent to register**

**the NC guardianship in another state?**

No. A guardian of the person, guardian of the estate, and general guardian must give notice of his or her intent to register an NC order in another state. G.S. 35B-36; G.S. 35B-37. However, there is no form notice available at this time. A simple statement notifying the NC court of the intent to register and the name of the state of registration will likely suffice. *Id.*

*Bonus points to anyone who can name the source of this quote (without Google). Leave your answer in the comments below.

** This, by far, has been the number one question received.

***- Update as of 8/1/2017**: The NC Administrative Office of the Courts published new forms in July of 2017 related to G.S. Chapter 35B and UAGPPJA. They include the following:*

- AOC-E-350 *(Petition To Transfer Incompetency Proceeding And Guardianship To Another State)*
- AOC-E-351 *(Provisional Order On Petition To Transfer Incompetency Proceeding And Guardianship To Another State)*
- AOC-E-352 *(Final Order On Petition To Transfer Incompetency Proceeding And Guardianship To Another State)*
- AOC-E-355 *(Petition To Accept Guardianship On Transfer From Another State)*
- AOC-E-356 *(Provisional Order On Petition To Accept Guardianship On Transfer From Another State)*
- AOC-E-357 *(Final Order On Petition To Accept Guardianship On Transfer From Another State)*
- AOC-E-359 *(Statements In Support Of Registration [ ] Guardianship Of The Person Order [ ] General Guardianship/Protective Order* From Another State)*

**STATE OF NORTH CAROLINA**

File No.

_____ County

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

**NOTE TO PETITIONING GUARDIAN:** *"Nothing in [the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act of 2016] shall be construed to otherwise affect the requirements for seeking an ancillary guardianship under G.S. 35A-1280 or for petitioning the court for the removal of personalty from the State under G.S. 35A-1281." Session Law 2016-72, Section 3.*

**IN THE MATTER OF**

*Name And Current Address Of Adult Ward*

*County Of Residence Of Adult Ward* | *Date Of Birth*

# PETITION TO TRANSFER INCOMPETENCY PROCEEDING AND GUARDIANSHIP TO ANOTHER STATE

G.S. 35B-30

*Name, Street Address, PO Box, City, State And Zip Code Of Petitioning Guardian*

☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian*

*Telephone No. Of Petitioning Guardian*

*Petitioning Guardian's Relationship To Ward*

*Name, Street Address, PO Box, City, State And Zip Code Of Co-Guardian (if applicable)*

☐ *Also A Petitioning Guardian*

☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian*

*Name, Street Address, PO Box, City, State And Zip Code Of Petitioning Guardian's Attorney*

*Telephone No. Of Petitioning Guardian's Attorney* | *State Bar No.*

The undersigned requests that the Court transfer the incompetency proceeding and the existing guardianship to the state of _____ *(hereinafter, the "Other State")*.

In support of this Petition, the undersigned states:

1. Transfer is proper in that the ward: *(check all that apply)*
   - ☐ is physically present in the Other State.
   - ☐ is reasonably expected to move permanently to the Other State.
   - ☐ *(For guardian of the estate or general guardian, only)* has a significant connection to the Other State in that:

     *(See G.S. 35B-15(b) for factors to establish significant connection.)* _____
     _____
     _____
     _____
     _____.

2. The Other State will likely accept the transfer because: _____
   _____
   _____
   _____.

(Over)

3. These additional facts support this petition to transfer:
*(Be specific and attach additional pages as needed.)*

a. If guardian of the person or general guardian, describe plans for care and services for the ward in the Other State: _____
_____
_____.

b. If guardian of the estate or general guardian, describe arrangements for the management of the ward's property in the Other State:
_____
_____.

c. Any other relevant facts supporting petition to transfer: _____
_____
_____.

4. The ward's next of kin, if any, and other persons known to have an interest in the proceeding are:

| | |
|---|---|
| *Name And Address* | *Name And Address* |
| *Telephone No.* | *Telephone No.* |
| *Relationship To Ward Or Interest In Proceeding* | *Relationship To Ward Or Interest In Proceeding* |
| *Name And Address* | *Name And Address* |
| *Telephone No.* | *Telephone No.* |
| *Relationship To Ward Or Interest In Proceeding* | *Relationship To Ward Or Interest In Proceeding* |
| *Date* | *Date* |
| *Name Of Petitioning Guardian (type or print)* | *Name Of Petitioning Guardian (type or print)* |
| *Signature Of Petitioning Guardian* | *Signature Of Petitioning Guardian* |
| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** |
| *Date* / *Signature Of Person Authorized To Administer Oaths* | *Date* / *Signature Of Person Authorized To Administer Oaths* |
| ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* | ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* |
| ☐ *Notary* / *Date Commission Expires* | ☐ *Notary* / *Date Commission Expires* |
| **SEAL** / *County Where Notarized* | **SEAL** / *County Where Notarized* |

**STATE OF NORTH CAROLINA**

File No.

_____ County

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

| IN THE MATTER OF | PROVISIONAL ORDER ON PETITION TO TRANSFER INCOMPETENCY PROCEEDING AND GUARDIANSHIP TO ANOTHER STATE |
|---|---|
| *Name And Current Address Of Adult Ward* | G.S. 35B-30 |
| *Name And Address Of Petitioning Guardian*<br>☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian* | *Name And Address Of Co-Guardian (if applicable)*<br>☐ *Also A Petitioning Guardian*<br>☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian* |

1. ☐ This matter coming to be heard before the undersigned upon:
   - ☐ the Court's own motion,
   - ☐ request of the guardian,
   - ☐ request of the ward,
   - ☐ request of the following other person required to be notified of the petition: _____

   _____,

   and upon hearing and reviewing the evidence, the Court makes the following Findings of Fact:
2. ☐ Based on matters of record and other competent evidence that satisfies the Court that the requirements of Chapter 35B have been met, the Court, without a hearing, makes the following Findings of Fact:

## FINDINGS OF FACT

1. This Court has jurisdiction over this matter and the parties.
2. The ward ☐ was ☐ was not present.
3. The guardian ☐ was ☐ was not present.
   ☐ The guardian was represented by _____.
4. Also present were:

   _____

   _____

   _____

   _____.
5. The petitioning guardian(s) petitioned the court to transfer the incompetency proceeding and the guardianship referenced above to the state of _____ *(hereinafter, the "Other State")*.
6. This Court ☐ is ☐ is not satisfied that the referenced guardianship of the ward will be accepted by the court of the Other State. (**NOTE TO CLERK:** *A provisional order granting a petition to transfer should not be issued if the court is not satisfied that the guardianship will be accepted by the court of the other state.*)
7. Facts relevant to the ward's connection with the Other State:
   - ☐ a. The ward is physically present in or is reasonably expected to move permanently to the Other State.
   - ☐ b. The ward is neither physically present in nor reasonably expected to move permanently to the Other State, and
     - ☐ 1. the guardianship sought to be transferred to the Other State is only a guardianship of the estate and the ward has a significant connection to the Other State in consideration of the factors in G.S. 35B-15(b).
     - ☐ 2. the guardianship sought to be transferred to the Other State is either a guardianship of the person or a general guardianship. (**NOTE TO CLERK:** *If Finding 7.b.2 is checked, a provisional order granting a petition to transfer should not be issued.*)
     - ☐ 3. the guardianship sought to be transferred to the Other State is a guardianship of the estate, and the ward does not have a significant connection to the Other State in consideration of the factors in G.S. 35B-15(b). (**NOTE TO CLERK:** *If Finding 7.b.3 is checked, a provisional order granting a petition to transfer should not be issued.*)

(Over)

8. As to the proposed transfer of the incompetency and guardianship proceedings:
   - ☐ a. An objection to the transfer has not been made.
   - ☐ b. An objection to the transfer has been made, but the objector has not established that the transfer would be contrary to the interests of the ward.
   - ☐ c. An objection to the transfer was made and the objector has established that the transfer would be contrary to the interests of the ward. (**NOTE TO CLERK:** *If Finding 8.c is checked, a provisional order granting a petition to transfer should not be issued.*)

9. As to plans and arrangements concerning the ward:
   - ☐ a. *(if a guardianship of the person is sought to be transferred)* The plans for care and services for the ward in the Other State are reasonable and sufficient.
   - ☐ b. *(if a guardianship of the estate is sought to be transferred)* Adequate arrangements will be made for management of the ward's property.
   - ☐ c. *(if a general guardianship is sought to be transferred)* The plans for care and services for the ward in the Other State are reasonable and sufficient, and adequate arrangements will be made for management of the ward's property.
   - ☐ d. *(if a guardianship of the person or a general guardianship is sought to be transferred)* The plans for care and services for the ward in the Other State are not reasonable and sufficient. (**NOTE TO CLERK:** *If Finding 9.d is checked, a provisional order granting a petition to transfer should not be issued.*)
   - ☐ e. *(if a guardianship of the estate or a general guardianship is sought to be transferred)* Adequate arrangements will not be made for management of the ward's property. (**NOTE TO CLERK:** *If Finding 9.e is checked, a provisional order granting a petition to transfer should not be issued.*)

## CONCLUSION

Based on the evidence presented and any testimony given, the Court CONCLUDES that a provisional order to transfer this incompetency proceeding and this guardianship to the Other State ☐ shall ☐ shall not issue.

## ORDER

- ☐ A provisional order is issued granting the petition to transfer the incompetency proceeding and guardianship of the person and the petitioning guardian shall petition for acceptance of the guardianship of the person in the Other State.
- ☐ A provisional order is issued granting the petition to transfer the incompetency proceeding and guardianship of the estate and the petitioning guardian shall petition for guardianship of the estate in the Other State.
- ☐ A provisional order is issued granting the petition to transfer the incompetency proceeding and general guardianship and the petitioning guardian shall petition for general guardianship in the Other State.
- ☐ The petition is denied.

(**NOTE:** *A guardianship shall never be partially transferred, e.g., transfer guardianship of the person but not guardianship of the estate.*)

| *Date* | *Name (type or print)* | *Signature* | ☐ *Assistant CSC*<br>☐ *Clerk Of Superior Court* |
|---|---|---|---|
| | | | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

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

| **IN THE MATTER OF** | **FINAL ORDER ON PETITION TO TRANSFER INCOMPETENCY PROCEEDING AND GUARDIANSHIP TO ANOTHER STATE** |
|---|---|
| *Name And Current Address Of Adult Ward* | G.S. 35B-30(g) |
| *Name And Address Of Petitioning Guardian*<br>☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian* | *Name And Address Of Co-Guardian (if applicable)*<br>☐ *Also A Petitioning Guardian*<br>☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian* |

## FINDINGS OF FACT

The Court finds the following facts:

The petitioning guardian(s) indicated above petitioned the court to transfer the incompetency proceeding and guardianship of the above-named ward to the state of _____ *(hereinafter, the "Other State")*.

This Court issued a provisional order of transfer on _____.

This Court has received from *(list the specific court within the Other State to which this proceeding is to be transferred)* _____

_____

a provisional order accepting that transfer, and that order is found by this Court to be issued under provisions similar to G.S. 35B-31.

☐ The guardianship sought to be transferred is a guardianship of the estate or a general guardianship and the undersigned Clerk of Superior Court finds that the final account for settlement of the above estate was filed under oath and has been audited and approved.

## ORDER

Based on the foregoing findings, it is ORDERED confirmed that the incompetency proceeding and guardianship of the above-named ward is transferred to the court of the Other State and it is further ORDERED that the incompetency proceeding and guardianship under the laws of the State of North Carolina and with respect to the above-named ward are now terminated.

| *Date* | *Name (type or print)* | *Signature* | ☐ *Assistant CSC*<br>☐ *Clerk Of Superior Court* |
|---|---|---|---|
| | | | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

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

**IN THE MATTER OF**

*Name And Current Address Of Adult Ward*

*County And State Of Residence Of Adult Ward* | *Date Of Birth*

# PETITION TO ACCEPT GUARDIANSHIP ON TRANSFER FROM ANOTHER STATE

**NOTE TO PETITIONER:** *Consult Chapters 35A and 35B of the North Carolina General Statutes and AOC-SP-850 for the roles and responsibilities of guardians in North Carolina.*

G.S. 35B-31

*Name, Street Address, PO Box, City, State And Zip Code Of Petitioner*

*County And State Of Residence Of Petitioner* | *Telephone No. Of Petitioner*

*Petitioner's Relationship To Ward*

*Name, Street Address, PO Box, City, State And Zip Code Of Petitioner's Attorney*

*Telephone No. Of Petitioner's Attorney* | *State Bar No.*

*Name, Street Address, PO Box, City, State And Zip Code Of Co-Petitioner (if applicable)*

*County And State Of Residence Of Co-Petitioner* | *Telephone No. Of Co-Petitioner*

*Name And Address Of Appointing Court Of Other State*

The petitioner(s) requests that the Court accept the proceeding on transfer from the state of _____ _____ as a:

☐ guardianship of the person.
**NOTE TO PETITIONER:** *"Guardian of the person" has the same meaning as in G.S. 35A-1202. For purposes of Chapter 35B and this form, the term is limited to guardians of the person for adults.*

☐ guardianship of the estate.
**NOTE TO PETITIONER:** *"Guardian of the estate" has the same meaning as in G.S. 35A-1202. For purposes of Chapter 35B and this form, the term is limited to guardians of the estate for adults.*

☐ general guardianship.
**NOTE TO PETITIONER:** *"General guardian" has the same meaning as in G.S. 35A-1202. For purposes of Chapter 35B and this form, (i) the term is limited to general guardians for adults and (ii) the general guardian shall have the same authority to act as a guardian of the person and a guardian of the estate.*

In support of this Petition, the undersigned states:

1. The type of appointment in the transferring state is: _____ _____.
2. The current appointee(s) is/are:

*Name(s) And Address(es) Of Current Appointee(s)*

3. The transferring state is transferring the guardianship to North Carolina under provisions similar to G.S. 35B-30 and a certified copy of the provisional order of transfer is attached to this petition.



(Over)

4. The ward's next of kin, if any, and other persons known to have an interest in the proceeding are:

| *Name And Address* | *Name And Address* |
|---|---|
| *Telephone No.* | *Telephone No.* |
| *Relationship To Ward Or Interest In Proceeding* | *Relationship To Ward Or Interest In Proceeding* |
| *Name And Address* | *Name And Address* |
| *Telephone No.* | *Telephone No.* |
| *Relationship To Ward Or Interest In Proceeding* | *Relationship To Ward Or Interest In Proceeding* |

5. Under the laws of the transferring state, the following persons would be entitled to notice of a petition for the adjudication of incompetence or the application for the appointment of a guardian of the person or general guardian or issuance of a protective order:

| *Name And Address* | *Name And Address* |
|---|---|
| *Telephone No.* | *Telephone No.* |
| *Relationship To Ward Or Interest In Proceeding* | *Relationship To Ward Or Interest In Proceeding* |
| *Name And Address* | *Name And Address* |
| *Telephone No.* | *Telephone No.* |
| *Relationship To Ward Or Interest In Proceeding* | *Relationship To Ward Or Interest In Proceeding* |

6. I am eligible for appointment as guardian in North Carolina and I meet the qualifications of G.S. 35A-1230 and G.S. 35A-1213 in that:

_____

_____

_____.

*(Set forth the facts and circumstances that establish your eligibility for appointment as a guardian in the State of North Carolina. Pay special attention to the general requirements of G.S. 35A-1230 regarding the bonding requirements for a guardian of the estate and a general guardian, and G.S. 35A-1213 regarding the requirements for a nonresident to be appointed as guardian for a North Carolina resident.)*

| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | | *Date* |
|---|---|---|
| *Date* | *Signature Of Person Authorized To Administer Oaths* | *Name Of Petitioning Guardian (type or print)* |
| ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* | | *Signature Of Petitioning Guardian* |
| ☐ *Notary* | *Date Commission Expires* | |
| **SEAL** | *County Where Notarized* | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

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

| **IN THE MATTER OF** | |
|---|---|
| *Name And Current Address Of Adult Ward* | **PROVISIONAL ORDER ON PETITION TO ACCEPT GUARDIANSHIP ON TRANSFER FROM ANOTHER STATE**<br>G.S. 35B-31 |
| *Name And Address Of Petitioner* | *Name And Address Of Co-Petitioner (if applicable)* |

☐ This matter coming to be heard before the undersigned upon:
- ☐ the Court's own motion,
- ☐ request of the guardian,
- ☐ request of the ward,
- ☐ request of the following other person required to be notified of the petition: _____
_____,

and upon hearing and reviewing the evidence, the Court makes the following Findings of Fact:

☐ Based on matters of record and other competent evidence that satisfies the Court that the requirements of Chapter 35B have been met, the Court, without a hearing, makes the following Findings of Fact:

## FINDINGS OF FACT

1. This Court has jurisdiction over this matter and the parties.
2. The ward ☐ was ☐ was not present.
3. The petitioner ☐ was ☐ was not present.
   ☐ The petitioner was represented by _____.
4. The co-petitioner ☐ was ☐ was not present.
   ☐ The co-petitioner was represented by _____.
5. Also present were:
   _____
   _____
   _____
   _____.
6. The petitioner(s) indicated above petitioned the court to accept the proceeding on transfer from the state of _____
   _____ as a
   - ☐ guardianship of the person.
   - ☐ guardianship of the estate.
   - ☐ general guardianship.
7. A certified copy of the other state's provisional order of transfer ☐ was ☐ was not included with the petition.
   (**NOTE TO CLERK:** *A provisional order granting a petition to accept the transfer of a guardianship should not be issued if a certified copy of the other state's provisional order of transfer is not included with the petition.*)
8. As to the proposed transfer to the State of North Carolina:
   - ☐ a. An objection to the transfer has not been made.
   - ☐ b. An objection to the transfer has been made, but the objector has not established that the transfer would be contrary to the interests of the ward.
   - ☐ c. An objection to the transfer was made and the objector has established that the transfer would be contrary to the interests of the ward.
     (**NOTE TO CLERK:** *If Finding 8.c is checked, a provisional order granting a petition to accept the transfer of a guardianship should not be issued.*)

(Over)

9. As to the petitioner's eligibility for appointment as guardian in the State of North Carolina:

☐ a. The petitioner is eligible for appointment as a

☐ general guardian, ☐ guardian of the estate, or ☐ guardian of the person.

☐ b. The petitioner is ineligible for appointment as a

☐ general guardian, ☐ guardian of the estate, or ☐ guardian of the person.

(**NOTE TO CLERK**: *If Finding 9.b is checked, a provisional order granting a petition to accept the transfer of a guardianship should not be issued.*)

10. *(if applicable)* As to the co-petitioner's eligibility for appointment as guardian in the State of North Carolina:

☐ a. The co-petitioner is eligible for appointment as a

☐ general guardian, ☐ guardian of the estate, or ☐ guardian of the person.

☐ b. The co-petitioner is ineligible for appointment as a

☐ general guardian, ☐ guardian of the estate, or ☐ guardian of the person.

(**NOTE TO CLERK**: *If Finding 10.b is checked, a provisional order granting a petition to accept the transfer of a guardianship should not be issued.*)

## CONCLUSION

Based on the evidence presented and testimony given, the Court CONCLUDES that a provisional order granting the petition to accept transfer ☐ should ☐ should not issue.

## ORDER

It is ORDERED that:

☐ a provisional order is issued granting the petition to accept guardianship on transfer from the state listed above.

☐ the petition is denied.

| *Date* | *Name (type or print)* | *Signature* | ☐ *Assistant CSC*<br>☐ *Clerk Of Superior Court* |
|---|---|---|---|
| | | | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

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

| **IN THE MATTER OF** | **FINAL ORDER ON PETITION TO ACCEPT GUARDIANSHIP ON TRANSFER FROM ANOTHER STATE** |
|---|---|
| *Name And Current Address Of Adult Ward* | G.S. 35B-31 |
| *Name And Address Of Petitioner* | *Name And Address Of Co-Petitioner (if applicable)* |

## FINDINGS OF FACT

The Court finds the following facts:

The petitioner(s) indicated above petitioned the Court to accept the guardianship of the above-named ward on transfer from the state of _____.

A provisional order was issued by this Court on _____.

This Court has received from *(list the specific court within the other state from which this proceeding is being transferred)* _____

_____

a final order transferring the proceeding to this State and that order is found by this Court to be issued under provisions similar to G.S. 35B-30.

## ORDER

Based on the foregoing findings, it is ORDERED confirmed that the guardianship of the above-named ward is transferred to this Court from the court of the other state and it is further ORDERED that appropriate letters of appointment shall issue for each guardian named above when he/she properly qualifies to serve.

(**NOTE TO CLERK:** *Not later than 90 days after issuance of a final order accepting transfer, the court shall determine whether the general guardianship, guardianship of the person, or guardianship of the estate needs to be modified to conform to the law of this State. G.S. 35B-31(f).*)

| *Date* | *Name (type or print)* | *Signature* | ☐ *Assistant CSC*<br>☐ *Clerk Of Superior Court* |
|---|---|---|---|
| | | | |

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

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

**IN THE MATTER OF**

*Name And Current Address Of Adult Ward*

# STATEMENTS IN SUPPORT OF REGISTRATION

☐ **GUARDIANSHIP OF THE PERSON ORDER**
☐ **GENERAL GUARDIANSHIP/PROTECTIVE ORDER***

## FROM ANOTHER STATE

***NOTE:** For purposes of this form, "protective order" is an order appointing a guardian of the estate, or other order related to management of the ward's property.*

G.S. 35B-36 to -38

*Name And Address Of Guardian Filing For Registration*

☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian*

*Name And Address Of Other Guardian For Ward (if applicable)*

☐ *Of The Estate* ☐ *Of The Person* ☐ *General Guardian*

*State In Which Guardianship Order/Protective Order Entered*

*Date Guardianship Order/Protective Order Entered In Other State*

*Name And Address Of Appointing Court Of Other State*

**Registration Of Guardianship Of The Person Order From Another State**

☐ Pursuant to G.S. 35B-36, the undersigned guardian is filing for North Carolina registration of a guardianship of the person order concerning the above-named ward and in support of this filing, states the following:

1. I have been appointed guardian of the person for the above-named ward in the state listed above.
2. A petition for the adjudication of incompetence of the above-named ward is not pending in North Carolina.
3. An application for the appointment of a guardian of the person for the above-named ward is not pending in North Carolina.
4. I have given notice to the appointing court listed above of my intent to register the guardianship of the person order in the State of North Carolina. Notice was given as follows: _____
   _____.
5. Attached to this Statements In Support Of Registration form are certified copies of the guardianship order and letters of office from the appointing court listed above. I tender these documents to the Clerk of Superior Court, with a request that they be registered as a foreign judgment and with such costs and fees as the Clerk of Superior Court shall require for the same.
6. Registration is appropriate in this county.

**Registration Of Protective Order/General Guardianship From Another State**

**NOTE:** *Registration of a protective order or general guardianship does not eliminate the obligation to (i) seek the appointment of an ancillary guardian under G.S. 35A-1280 when a nonresident ward has real or personal property in North Carolina that will remain in the state or (ii) initiate a special proceeding by petition under G.S. 35A-1281 to remove personal property of a nonresident ward from North Carolina. Session Law 2016-72, Section 3.*

☐ Pursuant to G.S. 35B-37, the undersigned guardian is filing for North Carolina registration of a ☐ protective order ☐ general guardianship concerning the above-named ward and in support of this filing, states the following:

1. I have been appointed ☐ guardian of the estate ☐ general guardian for the above-named ward in the state listed above.
2. A petition for the adjudication of incompetence of the above-named ward is not pending in North Carolina.
3. An application for the issuance of a protective order for the above-named ward is not pending in North Carolina.
4. I have given notice to the appointing court listed above of my intent to register the ☐ protective order ☐ general guardianship in the State of North Carolina. Notice was given as follows: _____
   _____.
5. Attached to this Statements In Support Of Registration form are certified copies of the order, letters of office, and any bond from the appointing court listed above. I tender these documents to the Clerk of Superior Court, with a request that they be registered as a foreign judgment and with such costs and fees as the Clerk of Superior Court shall require for the same.
6. Property belonging to the ward is located in this county.

| *Date* | *Name Of Guardian Filing For Registration (type or print)* | *Signature Of Guardian Filing For Registration* |
|---|---|---|
| | | |

(Over)

**TO WHOM IT MAY CONCERN:** *(pertains to guardianships and orders for adult wards who have attained 18 years of age)*
**Upon registration of a general guardianship, guardianship of the person, or protective order from another state, the general guardian, guardian of the person, or guardian of the estate may exercise in this State all powers authorized in the order of appointment except as prohibited under the laws of this State, including maintaining actions and proceedings in this State and, if the general guardian, guardian of the person, or guardian of the estate is not a resident of this State, subject to any conditions imposed upon nonresident parties. G.S. 35B-38(a).**

**NOTE TO CLERK:** *If certified copies are requested, complete a Certificate of True Copy.*

## CERTIFICATE OF TRUE COPY

I certify that the attached copies of the documents described below are true and accurate copies of the originals now on file in this office.

Name And Description Of Attached Documents:

_____

_____

_____

_____

Witness my hand and the seal of the Superior Court.

| *Date* | *Name (type or print)* | *Signature* | ☐ *Deputy CSC* ☐ *Asst. CSC* ☐ *Clerk Of Superior Court* | **SEAL** |
|---|---|---|---|---|
| | | | | |

# GUARDIANSHIP MEDIATION

CLINICAL PROFESSOR KATE MEWHINNEY
WAKE FOREST UNIVERSITY SCHOOL OF LAW
THE ELDER LAW CLINIC

## WHY BOTHER?

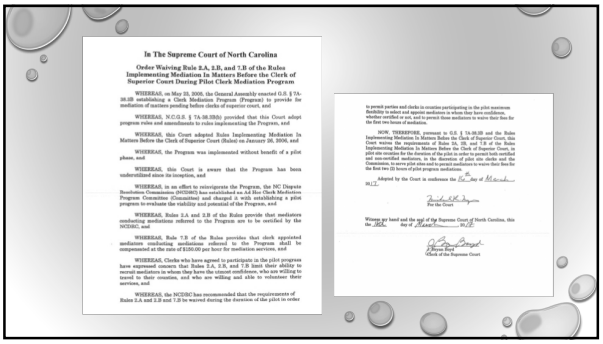
- MEDIATION IS PRIVATE AND VOLUNTARY, AND MAY HELP PRESERVE RESPONDENT'S DIGNITY.
- MORE TIME TO "GET THINGS OFF YOUR CHEST." ALSO, MORE FLEXIBLE SOLUTIONS!
- MAY HELP PRESERVE FAMILY RELATIONSHIPS.
- AVOID BINARY DECISION, SINCE CAPACITY ISN'T ALWAYS A BINARY ISSUE.
- MIGHT BE LESS EXPENSIVE THAN A GUARDIANSHIP DISPUTE INVOLVING MANY LAWYERS.

## WHAT IS IN THE MANUSCRIPT?

- AOC FORMS YOU ARE MOST LIKELY TO USE FOR THESE MEDIATIONS.
- THE ENABLING STATUTE.
- THE RULES IMPLEMENTING THE PROGRAM.
- A BROCHURE FOR THE PUBLIC ABOUT THE MEDIATION OPTION.
- RULES ON BECOMING A CERTIFIED GUARDIANSHIP MEDIATOR.
- CITATIONS TO RESOURCES.

## PILOT PROGRAM TO INCREASE G/SHIP MEDIATION

- 4 COUNTIES: ASHE, BUNCOMBE, MECKLENBURG, AND WAKE.
- N.C. SUPREME COURT ALLOWED THE MODIFICATION OF THE CLERK PROGRAM RULES 2.A, 2.B, AND 7.B. (MARCH 2017)
- THESE CLERKS MAY ASSIGN NON-CERTIFIED MEDIATORS AND RULE PERMITS MEDIATORS TO WAIVE THEIR FEES FOR THE FIRST TWO HOURS.
- DURATION IS TWO YEARS. DRC WILL EVALUATE DATA TO DETERMINE ITS NEXT STEP WITH THE CLERK PROGRAM. PREVIOUSLY: 16/YR IN 100 COUNTIES! NOW: 23.



In The Supreme Court of North Carolina

**Order Waiving Rule 2.A, 2.B, and 7.B of the Rules Implementing Mediation In Matters Before the Clerk of Superior Court During Pilot Clerk Mediation Program**

WHEREAS, on May 31, 2000, the General Assembly enacted G.S. § 7A-38.3B establishing a Clerk Mediation Program (Program) to provide for mediation of matters pending before clerks of superior court, and

WHEREAS, N.C.G.S. § 7A-38.3B(b) provided that this Court adopt program rules and amendments to rules implementing the Program, and

WHEREAS, this Court adopted Rules Implementing Mediation In Matters Before the Clerk of Superior Court (Rules) on January 26, 2006, and

WHEREAS, the Program was implemented without benefit of a pilot phase, and

WHEREAS, this Court is aware that the Program has been underutilized since its inception, and

WHEREAS, in an effort to reinvigorate the Program, the NC Dispute Resolution Commission (NCDRC) has established an Ad Hoc Clerk Mediation Program Committee (Committee) and charged it with establishing a pilot program to evaluate the viability and potential of the Program, and

WHEREAS, Rules 2.A and 2.B of the Rules provide that mediators conducting mediations referred to the Program are to be certified by the NCDRC, and

WHEREAS, Rule 7.B of the Rules provides that clerk appointed mediators conducting mediations referred to the Program shall be compensated at the rate of $150.00 per hour for mediation services, and

WHEREAS, Clerks who have agreed to participate in the pilot program have expressed concern that Rules 2.A, 2.B, and 7.B limit their ability to recruit mediators in whom they have the utmost confidence, who are willing to travel to their counties, and who are willing and able to volunteer their services, and

WHEREAS, the NCDRC has recommended that the requirements of Rules 2.A and 2.B and 7.B be waived during the duration of the pilot in order to permit parties and clerks in counties participating in the pilot maximum flexibility to select and appoint mediators in whom they have confidence, who are willing to travel, and who will permit those mediators to waive their fees for the first two hours of mediation,

NOW, THEREFORE, pursuant to G.S. § 7A-38.3B and the Rules Implementing Mediation In Matters Before the Clerk of Superior Court, this Court waives the requirements of Rules 2A, 2B, and 7.B of the Rules Implementing Mediation In Matters Before the Clerk of Superior Court, in pilot site counties for the duration of the pilot in order to permit both certified and non-certified mediators, as set out in the Rules of the NCDRC or the Commission, to serve pilot sites and to permit mediators to waive their fees for the first two (2) hours of pilot program mediations.

Adopted by the Court in conference this the 21st day of March, 2017.

For the Court

Witness my hand and the seal of the Supreme Court of North Carolina, this the 28th day of March, 2017.

Clerk of the Supreme Court

## YOU MUST TELL PARTIES ABOUT MEDIATION & DISCUSS W/ EACH OTHER.

- CLERK MAY ORDER MEDIATION ON OWN MOTION OR ON MOTION OF A PARTY.
- WHO MUST ATTEND?
  - NAMED PARTIES
  - THOSE INTERESTED PARTIES WHO THE CLERK SPECIFIES. (E.G. – A NEIGHBOR WITH KNOWLEDGE, A RELATIVE, A FIDUCIARY, ETC.).
- RULES 1(B) AND 4

## IF A PARTY, FIDUCIARY OR INTERESTED PERSON MOVES FOR MEDIATION

- THE OTHERS HAVE FIVE (5) DAYS TO FILE WRITTEN OBJECTIONS.
- CLERK RULES ON THE MOTION W/O A HEARING.
- RULE 1(C)(3).

## BEFORE THE MEDIATION….

- A DRC-DRAFTED EXPLANATORY BROCHURE SHALL BE SERVED WITH THE CLERK'S ORDER.
- THOSE REQUIRED TO ATTEND CAN MOVE TO DISPENSE W/ MEDIATION, FOR GOOD CAUSE.
- PETITIONER MAY NOT TAKE A VOLUNTARY DISMISSAL AFTER MEDIATION IS ORDERED.
- RULE 1 (C)(4-6)

## WHO MAY MEDIATE?

- MEDIATORS CERTIFIED IN DISTRICT OR SUPERIOR COURT WHO HAVE TAKEN ADDITIONAL 10-HOUR TRAINING APPROVED BY THE N.C. DISPUTE RESOLUTION COMMISSION (DRC).
- 133 INDIVIDUALS ARE CERTIFIED. WWW1.AOC.STATE.NC.US/MEDIATORPUBLIC/LOGIN.DO
- IF PARTIES DON'T SELECT MEDIATOR, CLERK PICKS FROM THE LIST (INCLUDES NON-ATTORNEYS).
- RULE 2

## SOME OF THE MEDIATOR'S DUTIES

- ARRANGE LOCATION AND GIVE NOTICE; CLERK'S ORDER SETS DEADLINE.
- DETERMINE IF AN IMPASSE SHOULD BE DECLARED OR IF NON-PARTIES MAY PARTICIPATE.
- CONTROL MEDIATION AND DISCLOSE FACT OF PRE-MEDIATION PRIVATE COMMUNICATIONS.
- RULES 3, 4 AND 6.

## FAILURE TO ATTEND MEDIATION

- MAY RESULT IN SANCTIONS, IF W/O GOOD CAUSE.
- MAY INCLUDE FINES, ATTORNEYS FEES, MEDIATOR FEES, EXPENSES AND LOSS OF EARNINGS.
- CLERK'S RULING ON SANCTIONS IS REVIEWABLE BY SUPERIOR COURT.
- RULE 5.

## MEDIATOR COMPENSATION

- MAY BE SET BY AGREEMENT.
- WHEN ORDERED BY CLERK, PARTIES SHALL PAY $150/HOUR + ADMIN. FEE OF $150.
- FEE PAID IN SHARES AS DETERMINED BY CLERK.
- DUE ON COMPLETION OF MEDIATION.
- PARTY MAY MOVE COURT FOR FINDING OF INDIGENCE.
- RULE 7 AND G.S. 1-110(A).

## FINALIZING MEDIATED AGREEMENT

- PARTIES MUST SIGN THE AGREEMENT, BUT IT'S **NOT BINDING** ON THE CLERK. IS OFFERED INTO EVIDENCE; CLERK CONSIDERS "FOR A JUST AND FAIR RESOLUTION OF THE MATTER."
- EVIDENCE OF STATEMENTS MADE AND CONDUCT OCCURRING IN A MEDIATION WHERE AN AGREEMENT IS REACHED **IS ADMISSIBLE IN GUARDIANSHIP AND ESTATE MATTERS.**
- ALL WRITTEN AGREEMENTS REACHED IN SUCH MATTERS **SHALL INCLUDE** THIS LANGUAGE IN A PROMINENT PLACE:
  - "THIS AGREEMENT IS NOT BINDING ON THE CLERK BUT WILL BE PRESENTED TO THE CLERK AS AN AID TO REACHING A JUST RESOLUTION OF THE MATTER."

## AVOIDABLE* GUARDIANSHIP ADJUDICATIONS

- FAMILY DISAGREEMENTS ABOUT $$. (E.G.: POAS, REVOCATIONS, GIFTS, REVISED WILLS, ETC.)
- MISUNDERSTANDINGS ABOUT CAPACITY ISSUES OR MISDIRECTION FROM NON-LAWYERS.
- FEAR ABOUT ELDER'S SAFETY AND LACK OF KNOWLEDGE OR RESOURCES ABOUT OPTIONS.

* I.E. – MAY BE APPROPRIATE FOR MEDIATION

## WHEN ISN'T MEDIATION APPROPRIATE?

- WHERE THERE'S A GREAT POWER DIFFERENTIAL BETWEEN THE PARTIES THAT CANNOT BE OVERCOME OR COMPENSATED FOR BY THE INVOLVEMENT OF A PROXY OR ADVOCATE.
- HISTORY OF FAMILY ABUSE, ELDER ABUSE, FINANCIAL EXPLOITATION, SUBSTANCE ABUSE, OR HISTORY OF INTIMIDATION.

## GUIDANCE FROM SCHOOL OF GOV'T

- UNCONTESTED PROCEEDINGS
- MATTERS INVOLVING ONLY QUESTIONS OF LAW (E.G., JURISDICTION)
- MATTERS REQUIRING IMMEDIATE JUDICIAL ACTION (E.G., INTERIM GUARDIAN)
- ALLEGED CRIMINAL ACTIVITY OR DOMESTIC ABUSE BY A PARTY
- PARTY EXHIBITING HOSTILE OR VOLATILE BEHAVIOR
- COERCION OR INTIMIDATION OF VULNERABLE PARTY
  - [JOHN SAXON, NC INSTITUTE OF GOV'T., NC GUARDIANSHIP MANUAL 2008, SEC. 8.2.]

## ROLE OF G/A/L IN MEDIATION

- ACT IN RESPONDENT'S "BEST INTERESTS"
- ADVOCATE FOR RESPONDENT'S WISHES
- MAY BE A LIMITED ROLE, IF THE RESPONDENT IS BEING ASSISTED BY AN ATTORNEY
- LIKELY TO ACT AS A RESOURCE ON PROBLEM-SOLVING OPTIONS

## CAN RESPONDENT PARTICIPATE?

- CAN HE MAKE AND COMMUNICATE RESPONSIBLE DECISIONS?
- MEDIATOR NEEDS TO BE AWARE OF A.D.A.-TYPE MEDIATION PROTOCOLS
- SHOULD GEAR THE PROCESS TO THE NEEDS OF RESPONDENT.
- THIS CAN AFFECT TIMETABLE, SETTING, SPEED, ETC.

## ASSESSING CAPACITY TO PARTICIPATE

- UNDERSTANDS WHAT IS BEING DISCUSSED?
- UNDERSTAND WHO THE PARTIES ARE?
- UNDERSTAND ROLE OF MEDIATOR?
- LISTEN TO AND COMPREHEND THE STORY OF THE OTHER PARTY?
- GENERATE OPTIONS FOR A SOLUTION?
- EXPRESS A CONSISTENT OPINION OR POSITION?
- MAKE AND KEEP AN AGREEMENT? [CTR. FOR SOCIAL GERONTOLOGY]

## A FEW ISSUES AND POSSIBLE SOLUTIONS

## HE'S JUST NOT SAFE!

- **CONCERN:** SAFETY OF OLDER PERSON AT HOME

- **POSSIBLE RESPONSES:**
  - DEVELOP PLAN FOR FAMILY SHARING OF COSTS/TIME OF CAREGIVING.
  - MEDICAL ALARM SYSTEM;
  - ADULT DAY CENTER;
  - GERIATRIC CARE MANAGER (AGING LIFE CARE SPECIALIST).

## IT'S NOT POSSIBLE FOR FAMILY TO HELP MORE

- **CONCERNS:**
  - CHILDREN LACK ABILITY, $$, OR WILLINGNESS TO HELP PARENT MORE AT HOME
  - FAMILY WANTS "PEACE OF MIND" BY PUTTING HER IN A FACILITY.
- **POSSIBLE RESPONSES** [NEXT SLIDE]

## POSSIBLE RESPONSES

- THE RIGHT TO LIVE IN UNSAFE OR UNSANITARY CONDITIONS ISN'T TAKEN AWAY IF PERSON IS OLD OR CHILDREN ARE CONCERNED.
- SELF-NEGLECT IS ALLOWED IF COMPETENT.
- HOWEVER, IMPAIRED PERSON NEEDS TO BE ADVISED OF RISKS, INCLUDING G/SHIP.
- MAY NEED A GERIATRIC ASSESSMENT (COVERED BY MEDICARE) OR A MULTI-DISCIPLINARY EVAL. (35A-1111)

## CONCERN: WHO MAKES HEALTH CARE DECISIONS

**RESPONSES:**

- HCPOA BY IMPAIRED PERSON.
- INFORM FAMILY OF RISK THAT COURT WILL APPOINT A NON-RELATIVE. (DSS WORKER IS A BUSY PERSON WHO KNOWS LESS ABOUT THE RESPONDENT THAN FAMILY DOES.)
- OPTION OF "COOLING OFF PERIOD" DURING WHICH THE AGENCY/DSS MAKES DECISIONS AND THEN MAY AGREE TO TRANSFER GUARDIANSHIP OF PERSON TO A FAMILY MEMBER.
- "FAMILY AGREEMENT" ON MED DECISION-MAKER AND/OR LAYING OUT PROCESS FOR FAMILY INPUT.

## CONCERN: WHO MAKES $$ DECISIONS

- POA OR "AGENCY" ACCOUNT AT A FINANCIAL INSTITUTION
- TRANSPARENCY CAN BE PROVIDED FOR W/ MONTHLY STATEMENTS GOING TO ALL PARTIES
- INFORM FAMILIES OF COSTS AND DELAYS INHERENT IN GUARDIANSHIP OF ESTATE
- "ECCENTRICITY" IS NOT GROUNDS FOR ADJUDICATION OF INCOMPETENCY.
- UNDOING "BAD" DECISIONS? DOES DOCTRINE OF UNDUE INFLUENCE APPLY?

## MEDIATION: A NEW TOOL TO HELP CLIENTS

- TALK TO YOUR CLERK ABOUT IT AND YOUR INTEREST IN TRYING IT
- NOT A PANACEA
- FIND A KNOWLEDGEABLE AND CERTIFIED GUARDIANSHIP MEDIATOR
- PRE-GUARDIANSHIP (PRE-FILING) IS ALSO AN OPTION
- HELP PRESERVE DECISION-MAKING POWER OF ELDERS AND DISABLED PEOPLE, WHILE IMPROVING CHANCES OF MAINTAINING FAMILY RELATIONSHIPS.

*THANK YOU!*

*KATE MEWHINNEY*

# Mediation of Guardianship Matters Before the Clerk

**Clinical Professor Kate Mewhinney**[1]


Mediation offers an informal way for disputing parties to try to resolve their differences in private. Unfortunately, in our state's guardianship system, many laymen and lawyers are unaware that there is a mediation option. Lawyers particularly need to understand this option because they are required to inform their clients in guardianship matters about it:

> "[C]ounsel, upon being retained to represent a party to a matter before the clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy."[2]

Besides lack of knowledge, what are the other reasons that the Clerks' mediation program is underutilized? There is a "party pay" rule where the parties must pay the mediator's fees, absent proof of indigency. Clerks may be leery of a dispute resolution mechanism they may not themselves have used or may feel that they are already equipped to resolve complicated matters

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[1] Prof. Mewhinney is a Certified Specialist in Elder Law by the N.C. State Bar and the National Elder Law Foundation, and a Certified Superior Court Mediator with additional certification to mediate matters before the Clerk of Court. She is managing attorney of the Elder Law Clinic at WFU School of Law, where she handles about twenty guardianship cases each year. These include serving as guardian ad litem, representing petitioners or, in restoration cases, representing the ward. To learn more about the Elder Law Clinic, see http://elder-clinic.law.wfu.edu. For its semi-annual newsletter, contact eclinic@wfu.edu.

[2] Rule 1.B of the Rules Implementing Mediation in Matters Before the Clerk of Superior Court [hereinafter referred to as "the Rules."]. A copy of the Rules is appended as Appendix C.

without this process.[3] Lastly, the logistics of scheduling a mediation settlement conference can be daunting, particularly if it involves an impaired respondent and unrepresented family members.

The N.C. Dispute Resolution Commission (DRC) implemented the Clerk mediation program back in 2006, but it never gained a lot of traction. The program was started without the benefit of a pilot program to work out the kinks. So, the DRC recently created an ad-hoc committee to gather information about the viability of this mediation program. The Supreme Court granted a waiver, for purposes of the pilot, to Rule 2 requiring certified mediators to conduct the mediations, as well as a waiver of the administrative fee and the first two hours of the mediator's fee.[4] The pilot was implemented in four counties: Mecklenburg, Buncombe, Wake, and Ashe. In prior years, the highest number of clerk mediations was 13 – for all 100 counties. Since the pilot program was implemented, we have had 23 reported mediations.

Despite these challenges, I am confident that our state – which has a strong history of mediation – can improve our use of guardianship mediation. Our courts will be challenged to provide compassionate conflict resolution options as the number of impaired elders in our state climbs.

**The appendices to this manuscript are:**

A: AOC forms you are most likely to use for these mediations.

B: The enabling statute.

C: The rules implementing the program.

D: A brochure for the public about the mediation option,

E: Rules on becoming a certified guardianship mediator.

Please let me know what your experiences are as you request mediation or participate in guardianship mediation conferences. My address is mewhinka@wfu.edu. Thank you!

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[3] Note, though, that even if the parties reach an agreement in mediation, this agreement is not binding on the Clerk. G.S. § 7A-38.3B (i)(2).

[4] See Rules 2 and 8 of the Rules, in Appendix C. There are provisions for waiver of the mediator's fee if a party can show indigency. Rule 7.E.

## Mewhinney – Appendix A

# AOC forms available for Clerks Mediation Program

(Copies are appended of only AOC-G-300 to 305)

- **AOC-G-300 - Motion For An Order To Mediate Matter Before The Clerk**
- **AOC-G-301 - Order Regarding Mediation In Matters Before Clerk Of Superior Court**
- **AOC-G-302 - Designation Of Mediator In Matter Before Clerk Of Superior Court**
- **AOC-G-303 - Report Of Mediator In Clerk Program Mediation**
- **AOC-G-304 - Order For Apportionment of Mediator Fee in Matters Before the Clerk of Superior Court**
- **AOC-G-305 - Motion And Order For Show Cause**

* * *

- AOC-G-306T - Petition And Order For Relief From Obligation To Pay All Or Part Of Mediator's Fee In Clerk Mediation Program
- AOC-G-307 - Order Of Contempt For Non-Payment Of Mediator's Fees
- AOC-DRC-05 - Dispute Resolution Commission Complaint Form
- AOC-DRC-10 - Application For Certification To Conduct Guardianship And Estate Mediations
- AOC-DRC-20 - Notice Of Withdrawal/Disqualification Of Mediator And Order For Substitution Of Mediator

**STATE OF NORTH CAROLINA**

_____ County

File No.

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

| Name Of Petitioner | **MOTION FOR AN ORDER TO MEDIATE MATTER BEFORE THE CLERK OF SUPERIOR COURT** |
|---|---|
| Name Of Petitioner's Attorney(s) | |
| **VERSUS** | |
| Name Of Respondent/Decedent | |
| Name Of Respondent's/Decedent's Attorney(s) | G.S. 7A-38.3B; Rule 1.C(3) of the Rules Implementing Mediation in Matters Before the Clerk of Superior Court |

The below-named Person/Entity moves the Clerk of Superior Court to order that a mediation be held in this matter for the following reasons:

In accordance with Rule 1.C(3), this motion has been filed by a party, interested person or fiduciary in this matter and served in accordance with Rule 5 of the NC Rules of Civil Procedures on non-moving parties, interested persons, and fiduciaries designated by the Clerk of Superior Court or identified by the petitioner in the pleadings, as evidenced by the completed "Certificate of Service." Objections to the Motion may be filed in writing within five (5) days after date of service.

**SIGNATURE**

| Date | Name Of Person/Entity Filing Motion | Signature Of Person/Entity Filing Motion |
|---|---|---|
| | | |

**NOTE TO CLERK:** *The clerk may order mediation using "Order Regarding Mediation In Matters Before The Clerk Of Superior Court" (AOC-G-301).*

Original-Clerk Copy-Mediator Copy-Petitioner Copy-Respondent
(Over)

AOC-G-300, Rev. 7/14

## CERTIFICATE OF SERVICE

I, the undersigned, certify that on the date noted below I mailed by first class mail a copy of the Motion For An Order To Mediate Matter Before The Clerk Of Superior Court to non-moving parties, interested persons, and fiduciaries either designated by the Clerk or identified by the petitioner in the pleadings. The address(es) given below is/are the last known address(es) of the person(s) listed.

| | |
|---|---|
| *Name And Address Of Person 1* | *Name And Address Of Person 2* |
| *Name And Address Of Person 3* | *Name And Address Of Person 4* |
| *Name And Address Of Person 5* | *Name And Address Of Person 6* |
| *Name And Address Of Person 7* | *Name And Address Of Person 8* |

| | | |
|---|---|---|
| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | | *Date Of Mailing* |
| *Date* | *Signature* | *Date Of Certification* |
| ☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* | | *Signature Of Person/Entity Filing Motion* |
| ☐ *Notary* | *Date My Commission Expires* | *Name Of Person/Entity Filing Motion* |
| **SEAL** | *County Where Notarized* | |

AOC-G-300, Side Two, Rev. 7/14

**STATE OF NORTH CAROLINA**

_____ County

File No.

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

| Name Of Petitioner | **ORDER REGARDING MEDIATION IN MATTERS BEFORE CLERK OF SUPERIOR COURT** |
|---|---|
| Name Of Petitioner's Attorney(s) | G.S. 7A-38.3B; Rules 1 and 2 of the Rules Implementing Mediation In Matters Before The Clerk Of Superior Court |
| | Deadline For Completion Of Mediation / Hearing Date |
| **VERSUS** | |
| Name Of Respondent/Decedent | Name And Address Of Interested Persons, Non-Party Participants, and Fiduciaries (Attach Copy of Certificate of Service) |
| Name Of Respondent's/Decedent's Attorney(s) | Name And Address Of Attorney(s), If Applicable |

A mediation ☐ is ☐ is not ordered in this matter.

If ordered, the mediation shall be completed before the deadline shown above and the following persons or entities shall attend:

_____

_____

_____

_____

**Agreement, if reached, to be submitted to Clerk:** ☐ **Yes** ☐ **No**

Within _____ days after the date of this Order, the parties may, by agreement, select a certified mediator to conduct their mediation and shall notify the clerk of their selection or their failure to agree on a certified mediator. Notice shall be on form AOC-G-302. (Fillable form at http://www.nccourts.org/Forms/FormSearch.asp)

As an aid to mediator selection, the NC Dispute Resolution Commission maintains a list of certified Clerk Program Mediators on its website: *www.nccourts.org/Courts/CRS/Councils/DRC/. (You may search for mediators by name of mediator or by county. Once a mediator's name appears on your screen, click on it for a complete contact and availability listing.)*

A mediator selected by agreement of the parties shall be compensated at a rate agreed upon between the mediator and the parties. The mediator's fee shall be paid as provided for in Rule 7.C. A court-appointed mediator shall be compensated at the rate of $150 per hour for time spent in the mediation, to be billed in quarter hour segments. In addition, a $150 administrative fee shall be paid at the time of the appointment, pursuant to Rule 7.B.

All persons required by Rule 4.A(1) to attend the mediation shall be physically present unless such physical presence is excused pursuant to the agreement of all parties and persons required to attend and the mediator or by an order of the Clerk, upon motion of a party and with notice to all parties and persons required to attend and the mediator.

The mediator shall schedule the date, time, and location of the mediation and timely notify all attorneys and unrepresented parties. The conference shall be completed by the deadline for completion set forth above and the mediator shall report the results on form AOC-G-303 to the Court within ten (10) days after the mediation is completed.

A timely motion to dispense with mediation may be filed pursuant to Rule 1.C(5).

| Date | Signature Of Clerk |
|---|---|
| Name Of Clerk (Type Or Print) | ☐ Assistant CSC ☐ Clerk Of Superior Court |

Original-Clerk Copy-Petitioner Copy-Respondent Copy-Mediator Copy-Other Ordered Persons/Entities

AOC-G-301, Rev. 7/14

**STATE OF NORTH CAROLINA**

_____ County

*File No.*

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

*Name Of Petitioner*

*Name And Address Of Petitioner's Attorney (Or Pro Se Petitioner)*

*Telephone No.* | *FAX No. (if applicable)*

*Petitioner's Attorney Email Address (Or Pro Se Petitioner's Email Address)*

**VERSUS (IN THE MATTER OF:)**

*Name Of Respondent/Decedent*

*Name And Address Of Respondent/Decedent's Attorney (Or Pro Se Respondent/Party)*

*Telephone No.* | *FAX No. (if applicable)*

*Respondent's Attorney's Email Address (or Pro Se Respondent's Email Address)*

# DESIGNATION OF MEDIATOR IN MATTER BEFORE CLERK OF SUPERIOR COURT

**NOTICE:**

Fill out only one of the two Sections, **sign below**, and return to the Clerk of Superior Court within _____ days after the date of the Order for Mediation and distribute copies as noted below.

G.S. 7A-38.3B; Rules 2 and 8 of Rules Implementing Mediation In Matters Before Clerk Of Superior Court

*Deadline For Completion Of Mediation* | *Hearing Date*

**Agreement, if reached, to be submitted to Clerk.** ☐ **Yes** ☐ **No**

☐ **SECTION 1 - NOTICE OF SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT**

The above named matter was referred to mediation. The parties have selected the mediator named below who has agreed to serve in this matter and is eligible to serve pursuant to the Rules of the Clerk Mediation Program. If this is an estate or guardianship matter, the mediator has completed at least ten hours training in mediating estate and guardianship matters and is certified to mediate estate and guardianship matters.

*Name And Address Of Certified Mediator*

*Telephone No.*

*FAX No. (if applicable)*

*Mediator's Email Address*

The parties and the mediator have agreed upon the mediator's rate of compensation as follows: *(specify all terms of the compensation agreement.)*

_____

_____

_____

**NOTE:** *As an aid to mediator selection, the NC Dispute Resolution Commission maintains a list of mediators available to conduct mediations in matters referred by the Clerk at www.ncdrc.org. Click on "List of Mediators" from the left-hand menu, then click on "Clerk Program Mediators." You may select either a certified Superior Court or Family Financial Mediator. If you are seeking a mediator for an estate or guardianship matter, you must select a mediator with estate and guardianship mediation training. You may search for mediators by name or by county. Once a mediator's name appears on your screen, click on it for a complete contact and availability listing.*

Original - Clerk Copy - Petitioner Copy - Respondent Copy - Mediator
Copy - Other Persons/Entities Ordered to Attend Mediation

(Over)

AOC-G-302, Rev. 12/09

☐ **SECTION 2 - MOTION FOR CLERK APPOINTMENT OF CERTIFIED MEDIATOR**

1. The above named matter was referred to mediation and the parties had _____ days to select a certified mediator.
2. After a full and frank discussion, the parties have been unable to agree upon the selection of a certified mediator.
3. Pursuant to Rule 2.B. of the Rules of Clerk Mediation Program, the petitioner moves the Clerk of Superior Court to appoint:
   a. ☐ a Certified Superior Court or Family Financial Mediator; or
   b. ☐ because this is an estate or guardianship matter, a mediator who has completed estate and guardianship mediation training and is certified to mediate such matters.

**SIGNATURE**

| *Date* | *Name Of Party/Entity or Attorney Filing Designation* | *Signature Of Party or Attorney/Entity Filing Designation* |
|---|---|---|
| | | |

**ORDER OF APPOINTMENT**

The parties having reported their failure to agree upon the selection of a mediator, or the parties having failed to timely notify the Clerk of their selection after this matter was ordered to mediation, the Clerk appoints the following to conduct this mediation:

☐ a Certified Superior Court or Family Financial Mediator.

☐ a mediator who has completed estate and guardianship mediation training and is certified to mediate estate and guardianship matters.

| *Name And Address Of Mediator* | *Telephone No.* |
|---|---|
| | *FAX No.* |
| *Mediator's Email Address* | |

**NOTICE TO MEDIATOR:** *The mediator shall be responsible for reserving a place and making arrangements for the mediation and giving timely notice to all attorneys and unrepresented parties of the time and location of the mediation. The mediation shall be completed by the completion deadline set forth above, and the mediator shall report the results of the conference to the Clerk within ten (10) days after the mediation is completed if the agreement is to be submitted to the clerk.*

| *Date* | *Signature Of Clerk* |
|---|---|
| *Name Of Clerk (Type Or Print)* | ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* |

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date a copy of the foregoing Designation of Mediator in the matter before the Clerk of Superior court was served on the above-selected mediator and the parties at the addresses below by placing a copy of the same in the United States Mail, postage prepaid. *(Please provide names and addresses for the mediator and parties served in the spaces below. Attach additional sheets if necessary.)*

| *Mediator* | *Party Or Attorney* |
|---|---|
| *Party Or Attorney* | *Party Or Attorney* |
| *Party Or Attorney* | *Party Or Attorney* |
| *Party Or Attorney* | *Party Or Attorney* |

| *Date* | *Name Of Party/Entity (Type Or Print)* | *Signature Of Party/Entity Or Party/Entity's Attorney* |
|---|---|---|
| | | |

AOC-G-302, Side Two, Rev. 12/09

**STATE OF NORTH CAROLINA**

File No.

_____ County

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

Name Of Petitioner

**VERSUS**

Name Of Respondent/Decedent

Name And Address Of Mediator

# REPORT OF MEDIATOR IN CLERK PROGRAM MEDIATION

G.S. 7A-38.3B; Rule 6.B(4) of the Rules Implementing Mediation in Matters Before the Clerk of Superior Court

Telephone No. Of Mediator

1. The undersigned mediator reports the following results of a mediation ordered in this case:
   a. Mediation ☐ was held. ☐ was not held.
   b. If held, date mediation was completed: _____
   c. If not held, the reasons were: _____
2. If the matter was reported settled prior to or during a recess of the mediation, provide the name(s) of the person(s) who reported the matter settled: _____
3. Names of parties, attorneys, interested persons, fiduciaries, or others who attended the conference:
   _____
   _____
   _____
4. The participants reached an: ☐ agreement on all issues. ☐ agreement on some issues. ☐ impasse.
5. If the matter was settled and is resolved by the agreement, the following document is to be filed:
   a. ☐ consent judgment. ☐ voluntary dismissal with prejudice. ☐ voluntary dismissal without prejudice.
   b. Name, address, and telephone number of party or attorney who is to file the closing document:
      Name: _____ Telephone number: (_____) _____ - _____
      Address: _____
   c. Date by which closing document will be filed: _____
      ***NOTE:** Closing documents shall be filed within 10 days or before expiration of the mediation deadline, whichever is longer. Rule 4.B(1).*
   d. Signature of party or attorney who will file closing document: _____
      ***NOTE:** A signature is required above only if the case settles during mediation and the party/attorney is present.*
6. If an agreement or partial agreement was reached in an estate, guardianship or other matter requiring Clerk review, the written agreement or partial agreement is attached to this report and offered to the Clerk pursuant to Rule 4.B(2).

## MEDIATOR'S FEE

| | Court-Appointed Mediator | Party-Selected Mediator |
|---|---|---|
| ADMINISTRATIVE FEE (CMP RULE 7.B *or as privately agreed with party-selected mediator*) | $ 150.00 | $ |
| MEDIATION FEE (CMP RULE 7.B): *($150.00 per hour for time spent in conference for court-appointed mediator, billed in quarter hour segments, or privately set fee for party-selected mediator.)* Total Time Spent in Mediation: _____ Hours _____ Minutes | $ | $ |
| POSTPONEMENT/CANCELLATION FEE (CMP RULE 7.F *or as privately agreed with party-selected mediator*) | $ | $ |
| Out-of-Pocket Or Other Agreed Upon Fees *(not applicable to Clerk-appointed Mediator)* | $ | $ |
| **TOTAL FEE** | $ | $ |

Original-Clerk Copy-Petitioner Copy-Respondent Copy-Other Ordered Persons/Entities
(Over)

AOC-G-303, Rev. 10/14

All fees of the mediator have been paid, except as follows:

| Name Of Party Owing Balance | Address Of Party | Amount Of Balance |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |
| | | $ |

☐ No mediator or other fees have been apportioned or paid. Mediator, therefore, advises the Clerk of the need for apportionment of all fees above, pursuant to Rule 7.C.

☐ **Name of any person(s)/entity(ies) filing Petition For Relief From Obligation To Pay Mediator's Fee:**
*(Please attach Petition for Relief.)*

I have submitted this Report to the Clerk as required within ten (10) days after conclusion of mediation.

| *Date* | *Name Of Mediator (type or print)* | *Signature Of Mediator* |
|---|---|---|
| | | |

**STATE OF NORTH CAROLINA**

_____ County

File No.

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

| Name Of Respondent/Decedent | **ORDER FOR APPORTIONMENT OF MEDIATOR FEE IN MATTERS BEFORE THE CLERK OF SUPERIOR COURT** |
|---|---|
| **VERSUS** | G.S. 7A-38.3B; Rule 7.C of the Rules Implementing Mediation in Matters Before the Clerk of Superior Court |
| Name And Address Of Mediator | |

**FINDINGS OF FACT**

1. The above-named mediator has advised the Clerk of the need for apportionment of the following fees:
   a. Amount due for mediation services (CMP Rules 7.A and 7.B)..... $_____
      Total time spent in mediation: _____ hours, _____ minutes at $_____ per hour.
   b. Amount due for administrative fee (CMP Rule 7.B)..... $_____
   c. Amount due for postponement fee (CMP Rule 7.F)..... $_____
   d. Amount due for out-of-pocket expenses or other agreed upon fees *(not applicable to Clerk-appointed Mediator)*..... $_____
      Total amount due mediator..... $_____
2. The named parties, interested persons, and fiduciaries listed below were ordered to attend the mediation.

| NAME OF PARTY/INTERESTED PERSON/FIDUCIARY | ADDRESS OF PARTY/INTERESTED PERSON/FIDUCIARY |
|---|---|
| A. | |
| B. | |
| C. | |
| D. | |

3. The following named parties and interested persons have been found to be indigent and relieved of their obligations to pay any of the mediator's fees.

| NAME OF PARTY/INTERESTED PERSON/FIDUCIARY | ADDRESS OF PARTY/INTERESTED PERSON/FIDUCIARY |
|---|---|
| A. | |
| B. | |
| C. | |
| D. | |

4. For the following reasons, it is justifiable for the estate/trust/fiduciary of _____ _____ to pay some or all of the mediator's fees.

Original-Clerk Copy-Petitioner Copy-Respondent Copy-Mediator
(Over)

AOC-G-304, Rev. 10/14

## CONCLUSIONS OF LAW

1. Based upon the foregoing findings of fact, the Clerk concludes as a matter of law that the following named parties, interested persons, and fiduciaries shall have responsibility for paying the fees:

| NAME OF PARTY/INTERESTED PERSON/FIDUCIARY | ADDRESS OF PARTY/INTERESTED PERSON/FIDUCIARY |
|---|---|
| A. | |
| B. | |
| C. | |
| D. | |

☐ 2. Based on the foregoing findings of fact, the Court concludes that the payment of the costs of mediation by the estate, trust, or fiduciary is justified.

## ORDER

It is hereby ordered that the following person(s) or entities pay the costs of mediation as allocated below:

| NAME | AMOUNT OWED |
|---|---|
| 1. | $ |
| 2. | $ |
| 3. | $ |
| 4. | $ |
| *Date* | *Signature* |
| *Name (type or print)* | ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* |

## CERTIFICATE OF SERVICE

The undersigned mediator hereby certifies that on this date, a copy of the foregoing Order For Apportionment Of Mediator Fee In Matters Before The Clerk Of Superior Court was served on the parties or attorneys named below, at the addresses specified, by placing a copy of the same in the United States Mail, postage prepaid.

| | |
|---|---|
| *Name And Address Of Party Or Attorney* | *Name And Address Of Party Or Attorney* |
| *Name And Address Of Party Or Attorney* | *Name And Address Of Party Or Attorney* |
| *Name And Address Of Party Or Attorney* | *Name And Address Of Party Or Attorney* |

| *Date* | *Name Of Mediator* | *Signature Of Mediator* |
|---|---|---|
| | | |

AOC-G-304, Side Two, Rev. 10/14

**STATE OF NORTH CAROLINA**

File No.

_____ County

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

| Name Of Plaintiff(s)/Petitioner(s) | **MOTION AND ORDER FOR SHOW CAUSE HEARING** |
|---|---|
| **VERSUS** | |
| Name Of Defendant(s)/Respondent/Decedent | G.S. 5A-23, 7A-38.3B; Rule 5 of the Rules Implementing Mediation in Matters Before the Clerk of Superior Court |

## MOTION

The undersigned mediator moves the Court to order the persons or entities named below to appear before the Court to show cause why he/she/they should not be held in contempt for failure to pay the mediator's fees as ordered by the Clerk in an Order Regarding Mediation In Matters Before The Clerk Of Superior Court dated _____.

The undersigned mediator is ☐ **Clerk-appointed.** ☐ **Party-selected.**

1. a. Amount due for mediation services (CMP Rules 7.A and 7.B)..... $_____

   Total time spent in mediation: _____ hours, _____ minutes at $_____ per hour.

   b. Amount due for administrative fee (CMP Rule 7.B)..... $_____

   c. Amount due for postponement fee (CMP Rule 7.F)..... $_____

   d. Amount due for out-of-pocket expenses or other agreed upon fees *(please specify below)*

   _____..... $_____

   **TOTAL** amount due Mediator..... $_____

2. The persons or entities named below have failed to timely pay the above fees:

| NAME OF PERSON/ENTITY OWING FEES | ADDRESS OF PERSON/ENTITY | TOTAL AMOUNT OWED |
|---|---|---|
| | | $ |
| | | $ |
| | | $ |

| **SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME** | | *Name And Address Of Mediator* | |
|---|---|---|---|
| *Date* | *Signature Of Person Authorized To Administer Oaths* | | |
| ☐ *Notary* | *Date My Commission Expires* | *Telephone No. Of Mediator* | |
| **SEAL** | *County Where Notarized* | *Signature Of Mediator* | *Date* |

## ORDER ALLOWING SHOW CAUSE HEARING

The above motion for a Show Cause Hearing ☐ is denied ☐ is allowed. The undersigned Clerk/Assistant Clerk finds that there is probable cause to believe that the mediator's fees have not been paid. You are ordered to appear in person at the date, time, and place indicated below to show cause why you should not be held in civil contempt for failure to pay mediator's fees as ordered by the Clerk. If the Clerk finds you in civil contempt, you may be committed to jail for as long as such civil contempt continues. You may be entitled to have counsel represent you at the hearing. You may hire your own counsel. If you are found to be indigent, the Clerk will appoint counsel for you, unless you waive the right to counsel.

| *Date Of Hearing* | *Time Of Hearing* ☐ AM ☐ PM | *Date* | *Name Of Clerk (Type Or Print)* |
|---|---|---|---|
| *Location Of Hearing* | | *Signature* | ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* |

Original-File
(Over)

AOC-G-305, Rev. 8/14

## RETURN OF SERVICE

I certify that this Motion and Order was received and served as follows:

| *Date Served* | *Name Of Alleged Contemnor* |
|---|---|
| | |

☐ By personally delivering to the alleged contemnor named above a copy of this Motion and Order.

☐ By leaving a copy of this Motion and Order at the dwelling house or usual place of abode of the contemnor named above with a person of suitable age and discretion residing therein.

| *Name Of Person With Whom Copy Left* |
|---|
| |

| *Address Where Copy Delivered Or Left* |
|---|
| |

| *Date Accepted* | *Name Of Person Who Served Motion And Order* | *Signature Of Person Who Served Motion And Order* |
|---|---|---|
| | | |

☐ Other manner of service *(specify)*:

☐ Alleged contemnor WAS NOT served for the following reason:

| *Date Received* | *Date Of Return* | *County* |
|---|---|---|
| | | |

| *Service Fee* | | *Signature Of Deputy Sheriff Making Return* |
|---|---|---|
| $ | ☐ *Paid* ☐ *Due* | |
| | | *Name Of Deputy Sheriff* |
| | | |

AOC-G-305, Side Two, Rev. 8/14

## Mewhinney – Appendix B

# State Statutes Allowing Mediation of Several Matters before the Clerk, including Guardianship

### § 7A-38.3B. Mediation in matters within the jurisdiction of the clerk of superior court.

(a) Purpose. - The General Assembly finds that the clerk of superior court in the General Court of Justice should have the discretion and authority to order that mediation be conducted in matters within the clerk's jurisdiction in order to facilitate a more economical, efficient, and satisfactory resolution of those matters.

(b) Enabling Authority. - The clerk of superior court may order that mediation be conducted in any matter in which the clerk has exclusive or original jurisdiction, except for matters under Chapters 45 and 48 of the General Statutes and except in matters in which the jurisdiction of the clerk is ancillary. The Supreme Court may adopt rules to implement this section. Such mediations shall be conducted pursuant to this section and the Supreme Court rules as adopted.

(c) Attendance. - In those matters ordered to mediation pursuant to this section, the following persons or entities, along with their attorneys, may be ordered by the clerk to attend the mediation:

(1) Named parties.

(2) Interested persons, meaning persons or entities who have a right, interest, or claim in the matter; heirs or devisees in matters under Chapter 28A of the General Statutes, next of kin under Chapter 35A of the General Statutes, and other persons or entities as the clerk deems necessary for the adjudication of the matter. The meaning of

"interested person" may vary according to the issues involved in the matter.

(3) Nonparty participants, meaning any other person or entity identified by the clerk as possessing useful information about the matter and whose attendance would be beneficial to the mediation.

(4) Fiduciaries, meaning persons or entities who serve as fiduciaries, as that term is defined by G.S. 36A-22.1, of named parties, interested persons, or nonparty participants.

Any person or entity ordered to attend a mediation shall be notified of its date, time, and location and shall attend unless excused by rules of the Supreme Court or by order of the clerk. No one attending the mediation shall be required to make a settlement offer or demand that it deems contrary to its best interests.

(d) Selection of Mediator. - Persons ordered to mediation pursuant to this section have the right to designate a mediator in accordance with rules promulgated by the Supreme Court implementing this section. Upon failure of those persons to agree upon a designation within the time established by rules of the Supreme Court, a mediator certified by the Dispute Resolution Commission pursuant to those rules shall be appointed by the clerk.

(e) Immunity. - Mediators acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice, except that mediators may be disciplined in accordance with procedures adopted by the Supreme Court pursuant to G.S. 7A-38.2.

(f) Costs of Mediation. - Costs of mediation under this section shall be borne by the named parties, interested persons, and fiduciaries ordered to attend the mediation. The rules adopted by the Supreme Court implementing this section shall set out the manner in which costs shall be paid and a method by which an opportunity to participate without cost shall be afforded to persons found by the clerk to be unable to pay their share of the costs of mediation. Costs may only be assessed against the estate of a decedent, the estate of an adjudicated or alleged incompetent, a trust corpus, or against a fiduciary

upon the entry of a written order making specific findings of fact justifying the taxing of costs.

(g) Inadmissibility of Negotiations. - Evidence of statements made or conduct occurring during a mediation conducted pursuant to this section, whether attributable to any participant, mediator, expert, or neutral observer, shall not be subject to discovery and shall be inadmissible in any proceeding in the matter or other civil actions on the same claim, except in:

(1) Proceedings for sanctions pursuant to this section;
(2) Proceedings to enforce or rescind a written and signed settlement agreement;
(3) Incompetency, guardianship, or estate proceedings in which a mediated agreement is presented to the clerk;
(4) Disciplinary hearings before the State Bar or the Dispute Resolution Commission; or
(5) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in mediation.

As used in this section, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

(h) Testimony. - No mediator or neutral observer shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to the mediation in any civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the matter except to attest to the signing of any agreements reached in mediation, and except in:

(1) Proceedings for sanctions pursuant to this section;
(2) Disciplinary hearings before the State Bar or the Dispute Resolution Commission; or

(3) Proceedings for abuse, neglect, or dependency of a juvenile, or for abuse, neglect, or exploitation of an adult, for which there is a duty to report under G.S. 7B-301 and Article 6 of Chapter 108A of the General Statutes, respectively.

(i) Agreements. - In matters before the clerk in which agreements are reached in a mediation conducted pursuant to this section, or during one of its recesses, those agreements shall be treated as follows:

(1) Where as a matter of law, a matter may be resolved by agreement of the parties, a settlement is enforceable only if it has been reduced to writing and signed by the parties against whom enforcement is sought.

(2) In all other matters before the clerk, including guardianship and estate matters, all agreements shall be delivered to the clerk for consideration in deciding the matter.

(j) Sanctions. - Any person ordered to attend a mediation conducted pursuant to this section and rules of the Supreme Court who, without good cause, fails to attend the mediation or fails to pay any or all of the mediator's fee in compliance with this section and the rules promulgated by the Supreme Court to implement this section, is subject to the contempt powers of the clerk and monetary sanctions. The monetary sanctions may include the payment of fines, attorneys' fees, mediator fees, and the expenses and loss of earnings incurred by persons attending the mediation. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order, making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with G.S. 1-301.2 and G.S. 1-301.3, as applicable, and thereafter by the appellate courts in accordance with G.S. 7A-38.1(g).

(k) Authority to Supplement Procedural Details. - The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with rules adopted by the Supreme Court implementing this section. (2005-67, s. 1; 2008-194, s. 8(b); 2015-57, s. 2; 2017-158, s. 26.7(c).)

**Mewhinney – Appendix C**

# Rules Implementing Mediation in Matters Before the Clerk of Superior Court

CLERK RULE 1 EFFECTIVE APRIL 1, 2014

## RULE 1. INITIATING MEDIATION IN MATTERS BEFORE THE CLERK

**A. PURPOSE OF MANDATORY MEDIATION.** These Rules are promulgated pursuant to N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the clerk's jurisdiction. The procedures set out here are designed to focus the parties' attention on settlement and resolution rather than on preparation for contested hearings and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily either prior to or after the filing of a matter with the clerk.

**B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.** In furtherance of this purpose, counsel, upon being retained to represent a party to a matter before the clerk, shall discuss the means available to the parties through mediation and other settlement procedures to resolve their disputes without resort to a contested hearing. Counsel shall also discuss with each other what settlement procedure and which neutral third party would best suit their clients and the matter in controversy.

**C. INITIATING THE MEDIATION BY ORDER OF THE CLERK.**

(1) **Order by The Clerk of Superior Court.** The clerk of superior court of any county may, by written order, require all persons and entities identified in Rule 4 to attend a mediation in any matter in which the clerk has original or exclusive jurisdiction, except those matters under N.C.G.S. Chapters 45 and 48 and those matters in which the jurisdiction of the clerk is ancillary.

(2) **Content of Order.** The order shall be on a North Carolina Administrative Office of the Courts (NCAOC) form and shall:

(a) require that a mediation be held in the case;
(b) establish deadlines for the selection of a mediator and completion of the mediation;
(c) state the names of the persons and entities who shall attend the mediation;
(d) state clearly that the persons ordered to attend have the right to select their own mediator as provided by Rule 2;
(e) state the rate of compensation of the court appointed mediator in the event that those persons do not exercise their right to select a mediator pursuant to Rule 2; and

(f) state that those persons shall be required to pay the mediator's fee in shares determined by the clerk.

(3) **Motion for Court Ordered Mediation.** In matters not ordered to mediation, any party, interested persons or fiduciary may file a written motion with the clerk requesting that mediation be ordered. Such motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the North Carolina Rules of Civil Procedure (N.C.R.Civ.P.) on non-moving parties, interested persons and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of the service of the motion. Thereafter, the clerk shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) **Informational Brochure.** The clerk shall serve a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process and the operations of the Commission along with the order required by Rule 1.C(1) and 1.C(3).

(5) **Motion to Dispense With Mediation.** A named party, interested person or fiduciary may move the clerk of superior court to dispense with a mediation ordered by the clerk. Such motion shall state the reasons the relief is sought and shall be served on all persons ordered to attend and the mediator. For good cause shown, the clerk may grant the motion.

(6) **Dismissal of Petition For the Adjudication of Incompetence.** The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after mediation is ordered.

## RULE 2. DESIGNATION OF MEDIATOR

**A. DESIGNATION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may designate a mediator certified by the Commission by agreement within a period of time as set out in the clerk's order. However, the parties may only designate mediators certified for estate and guardianship matters pursuant to these Rules for estate or guardianship matters.

The petitioner shall file with the clerk a Designation of Mediator within the period set out in the clerk's order; however, any party may file the designation. The party filing the designation shall serve a copy on all parties and the mediator designated to conduct the mediation. Such designation shall state the name, address and telephone number of the mediator designated; state the rate of compensation of the mediator; state that the mediator and persons ordered to attend have agreed upon the designation and rate of compensation; and state under what rules the mediator is certified. The notice shall be on a NCAOC form.

**B. APPOINTMENT OF MEDIATOR BY THE CLERK.** In the event a Designation of Mediator is not filed with the clerk within the time for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified pursuant to these Rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability or whether they are an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his/her duties associated with those appointments. A refusal to accept an appointment in a county designated by the mediator may be grounds for removal from said county's court appointment list by the Commission or by the clerk of that county.

The Commission shall furnish to the clerk of each county a list of those superior court mediators requesting appointments in that county who are certified in estate

and guardianship proceedings, and those certified in other matters before the clerk. Said list shall contain the mediators' names, addresses and telephone numbers and shall be provided electronically through the Commission's website at www.ncdrc.org. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

C. **MEDIATOR INFORMATION DIRECTORY.** The Commission shall maintain for the consideration of the clerks of superior court and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of those mediators who are certified pursuant to these Rules. Said directory shall be maintained on the Commission's website at www.ncdrc.org.

D. **DISQUALIFICATION OF MEDIATOR.** Any person ordered to attend a mediation pursuant to these Rules may move the clerk of superior court of the county in which the matter is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

## RULE 3. THE MEDIATION

A. **WHERE MEDIATION IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, the mediator shall be responsible for reserving a neutral place in the county where the action is pending and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, *pro se* parties, and other persons required to attend.

B. **WHEN MEDIATION IS TO BE HELD.** The clerk's order issued pursuant to Rule 1.C(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation pursuant to Rule 6.B(5) and shall conduct the mediation before that date unless the date is extended by the clerk.

C. **EXTENDING DEADLINE FOR COMPLETION.** The clerk may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation of the parties or upon suggestion of the mediator.

D. **RECESSES.** The mediator may recess the mediation at any time and may set times for reconvening which are prior to the deadline for completion. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation.

E. **THE MEDIATION IS NOT TO DELAY OTHER PROCEEDINGS.** The mediation shall not be cause for the delay of other proceedings in the matter, including the completion of discovery, the filing or hearing of motions or the hearing of the matter, except by order of the clerk of superior court.

## RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATIONS

### A. ATTENDANCE.

(1) Persons ordered by the clerk to attend a mediation conducted pursuant to these Rules shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.B or an impasse has been declared. Any such person may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference:

(a) By agreement of all persons ordered to attend and the mediator, or
(b) By order of the clerk of superior court, upon motion of a person ordered to attend and notice of the motion to all other persons ordered to attend and the mediator.

(2) Any person ordered to attend a mediation conducted pursuant to these Rules that is not a natural person or a governmental entity shall be represented at the mediation by an officer, employee or agent who is not such person's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the matter.

(3) Any person ordered to attend a mediation conducted pursuant to these Rules that is a governmental entity shall be represented at the mediation by an employee or agent who is not such entity's outside counsel and who has authority to decide on behalf of such entity whether and on what terms to settle the matter; provided, however, if under law proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation pursuant to these Rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in the mediation at the discretion of the mediator.

(6) Persons ordered to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for mediation sessions before the completion deadline and shall keep the

mediator informed as to such problems as may arise before an anticipated session is scheduled by the mediator.

**B. FINALIZING AGREEMENT.**

**(1)** If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. The parties shall designate a person who will file a consent judgment or one or more voluntary dismissals with the clerk and that person shall sign the mediator's report. If agreement is reached in such matters prior to the mediation or during a recess, the parties shall inform the mediator and the clerk that the matter has been settled and, within 10 calendar days of the agreement being reached, file a consent judgment or voluntary dismissal(s).

**(2)** In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at mediation, the persons ordered to attend shall reduce its terms to writing and sign it along with their counsel, if any. Such agreements are not binding upon the clerk but they may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible pursuant to N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent place in the document:

> "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

**C. PAYMENT OF MEDIATOR'S FEE.** The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

**D. NO RECORDING.** There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.

## RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATION OR PAY MEDIATOR'S FEE

Any person ordered to attend a mediation pursuant to these Rules who fails without good cause to attend or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.3B and the Rules promulgated by the Supreme Court of North Carolina (Supreme Court) to implement that section, shall be subject to contempt powers of the clerk and the clerk may impose monetary sanctions. Such monetary sanctions may include, but are not limited to, the payment of fines, attorney fees, mediator fees, expenses and loss of earnings incurred by persons attending the mediation.

A person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all persons ordered to attend. The clerk may initiate sanction proceedings upon his/her own motion by the entry of a show cause order. If the clerk imposes sanctions, the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court in accordance with N.C.G.S. § 1-301.2 and N.C.G.S. § 1-301.3, as applicable, and thereafter by the appellate courts in accordance with N.C.G.S. § 7A-38.1(g).

CLERK RULE 6 EFFECTIVE APRIL 1, 2014

## RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

### A. AUTHORITY OF MEDIATOR.

(1) **Control of the Mediation.** The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by Standards of Professional Conduct for Mediators (Standards) promulgated by the Supreme Court.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to, during and after the mediation. The fact that private communications have occurred with a participant before the conference shall be disclosed to all other participants at the beginning of the mediation.

### B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

- **(a)** The process of mediation;
- **(b)** The costs of the mediation and the circumstances in which participants will not be taxed with the costs of mediation;
- **(c)** That the mediation is not a trial, the mediator is not a judge, and the parties retain their right to a hearing if they do not reach settlement;
- **(d)** The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;
- **(e)** Whether and under what conditions communications with the mediator will be held in confidence during the conference;
- **(f)** The inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.3B;
- **(g)** The duties and responsibilities of the mediator and the participants; and
- **(h)** That any agreement reached will be reached by mutual consent and reported to the clerk as provided by rule.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of Mediation.**

(a) The mediator shall report to the court on a NCAOC form within five days of completion of the mediation whether or not the mediation resulted in a settlement or impasse. If settlement occurred prior to or during a recess of a mediation, the mediator shall file the report of settlement within five - days of learning of the settlement and, in addition to the other information required, report who informed the mediator of the settlement.

(b) The mediator's report shall identify those persons attending the mediation, the time spent in and fees charged for mediation, and the names and contact information for those persons designated by the parties to file such consent judgment or dismissal(s) with the clerk as required by Rule 4.B. Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

(c) Mediators who fail to report as required pursuant to this Rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and Holding the Mediation.** It is the duty of the mediator to schedule the mediation and conduct it prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. Deadlines for completion of the mediation shall be strictly observed by the mediator unless said time limit is changed by a written order of the clerk of superior court.

## RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY ORDER OF THE CLERK.** When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $150 that is due upon appointment.

C. **PAYMENT OF COMPENSATION.** In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement the mediator's fee shall be paid in equal shares by the parties unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares as determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or a guardianship or against a fiduciary or interested person upon the entry of a written order making specific written findings of fact justifying the taxing of costs.

D. **CHANGE OF APPOINTED MEDIATOR.** Parties who fail to select a certified mediator within the time set out in the clerk's order and then desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee the $150 one time, per case administrative fee, any other amount due and owing for mediation services pursuant to Rule 7.B, and any postponement fee due and owing pursuant to Rule 7.F, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

E. **INDIGENT CASES.** No person ordered to attend a mediation found to be indigent by the clerk for the purposes of these Rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk of superior court to attend may move the clerk for a finding of indigence and to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation or if the parties do not settle their matter, subsequent to its conclusion. In ruling upon such motions, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the matter and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's

request. Any mediator conducting a mediation pursuant to these Rules shall waive the payment of fees from persons found by the court to be indigent.

**F. POSTPONEMENTS.**

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with mediation once the mediator has scheduled a date for a session of the mediation. After mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation session may be postponed by the mediator for good cause beyond the control of the movant only after notice by the movant to all persons of the reasons for the postponement and a finding of good cause by the mediator. A postponement fee shall not be charged in such circumstance.

(3) Without a finding of good cause, a mediator may also postpone a scheduled mediation session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed or if the request is within two business days of the scheduled date the fee shall be $300. The person responsible for it shall pay the postponement fee. If it is not possible to determine who is responsible, the clerk shall assess responsibility. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B. A mediator shall not charge a postponement fee when the mediator is responsible for the postponement

(4) If all persons ordered to attend select the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

**G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.** Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services or any postponement fee) or willful failure of a party contending indigent status to promptly move the clerk of superior court for a finding of indigency, shall constitute contempt of court and may result, following notice and a hearing, in the imposition of any and all lawful sanctions by the superior court pursuant to N.C.G.S. § 5A.

## RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Commission may receive and approve applications for certification of persons to be appointed as clerk of court mediators.

**A.** For appointment by the clerk as mediator in all cases within the clerk's jurisdiction except guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs;

**B.** For appointment by the clerk as mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by the Commission for either the superior or district court programs and complete a course, at least 10 hours in length, approved by the Commission pursuant to Rule 9 concerning estate and guardianship matters within the clerk's jurisdiction;

**C.** Submit proof of qualifications set out in this section on a form provided by the Commission;

**D.** Pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and

**E.** Agree to accept, as payment in full of a party's share of the mediator's fee, the fee ordered by the clerk pursuant to Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the above qualifications or has not faithfully observed these Rules or those of any county in which he or she has served as a mediator or the Standards. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

## RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

**A.** Certified training programs for mediators seeking certification pursuant to these Rules for estate and guardianship matters within the jurisdiction of the clerk of superior court shall consist of a minimum of 10 hours instruction. The curriculum of such programs shall include:

**(1)** Factors distinguishing estate and guardianship mediation from other types of mediations;
**(2)** The aging process and societal attitudes toward the elderly, mentally ill and disabled;
**(3)** Ensuring full participation of respondents and identifying interested persons and nonparty participants;
**(4)** Medical concerns of the elderly, mentally ill and disabled;
**(5)** Financial and accounting concerns in the administration of estates and of the elderly, mentally ill and disabled;
**(6)** Family dynamics relative to the elderly, mentally ill and disabled and to the families of deceased persons;
**(7)** Assessing physical and mental capacity;
**(8)** Availability of community resources for the elderly, mentally ill and disabled;
**(9)** Principles of guardianship law and procedure;
**(10)** Principles of estate law and procedure;
**(11)** Statute, rules and forms applicable to mediation conducted under these Rules; and
**(12)** Ethical and conduct issues in mediations conducted under these Rules.

The Commission may adopt Guidelines for trainers amplifying the above topics and set out minimum time frames and materials that trainers shall allocate to each topic. Any such Guidelines shall be available at the Commission's office and posted on its website.

**B.** A training program must be certified by the Commission before attendance at such program may be used for compliance with Rule 8.B. Certification need not be given in advance of attendance. Training programs attended prior to the promulgation of these Rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this Rule.

**C.** To complete certification, a training program shall pay all administrative fees established by the NCAOC in consultation with the Commission.

## RULE 10. PROCEDURAL DETAILS

The clerk of superior court shall make all those orders just and necessary to safeguard the interests of all persons and may supplement all necessary procedural details not inconsistent with these Rules.

## RULE 11. DEFINITIONS

**A.** The term, clerk of superior court, as used throughout these Rules, shall refer both to said clerk or assistant clerk.

**B.** The phrase, NCAOC forms, shall refer to forms prepared by, printed and distributed by the NCAOC to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the NCAOC. Proposals for the creation or modification of such forms may be initiated by the Commission.

## RULE 12. TIME LIMITS

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the N.C.R.Civ.P.

**Mewhinney – Appendix D**

# Brochure about the
# Clerks' Mediation Option

Please share this with others and to ask your Clerk to make it available to parties.

www.nccourts.gov/programs/clerk-mediation-program/about-clerk-mediation-program.

administrative fee of $150.00. No person found to be indigent by the Clerk shall be required to pay a share of the mediator's fee. For purposes of the Rule, multiple parties represented by the same attorney will be considered as "one" share.

***Q: How do I find a mediator?***

**A:** Lists of trained, certified mediators, including those who are specially trained in mediating estate and guardianship matters, are available through the Dispute Resolution Commission. The list may be viewed at www.ncdrc.org. Click on "List of Mediators" from the left-hand menu.

***Q: What if I prefer to have a hearing before the Clerk and do not want to mediate?***

**A:** If there is some compelling reason why your case should not be mediated, you may ask the Clerk to rescind his/her order. However, do not be too quick to reject the mediation process. Even in situations where parties seem hopelessly at odds, a skillful mediator can sometimes find a way to break the log jam and get parties talking.

***Q: What if I don't like the outcome?***

**A:** Not every matter can be mediated successfully. If you do not agree with a proposed resolution, let your mediator know and simply do not sign any agreement offered. You should not feel pressured.

***Q: What if I have a complaint about my mediator's conduct?***

**A:** You may address your concerns to the mediator in the hope of resolving them amicably. You or your attorney may also file a complaint with the Dispute Resolution Commission which regulates the mediators who serve this program.

***Q: How do I learn more?***

**A:** Contact the Dispute Resolution Commission at (919) 890-1415 or visit its web site at www.ncdrc.org.



# MEDIATION IN MATTERS PEN G BEFORE CLERKS OF SUPERIOR COURT

**This Brochure is Brought to You By:**
**The N.C. Dispute Resolution Commission**
**P.O. Box 2448**
**Raleigh, NC 27602**
***(919) 890-1415***
***www.ncdrc.org***

3/2014

## *Introduction*

If you are reading this brochure, it is likely that a Clerk of Superior Court has referred a dispute in which you are involved to mediation. In making the referral, the Clerk is asking a mediator to sit down with you and the other parties and individuals involved in the matter to discuss your concerns and disagreements and to consider ways to resolve them. Mediation can be a beneficial process whether your dispute involves an estate, guardianship, boundary disagreement, or other matter pending before the Clerk. You may be wondering why your dispute has been referred to mediation and what the process is all about.

## *Why Mediation?*

The North Carolina court system has several years of experience with mediation. Mediation programs have been implemented to help resolve disputes filed in our State's district, superior, and appellate courts. All of these programs were initially started as pilots, and, during their pilot phases, were carefully studied and their settlement rates monitored. Such programs were found not only to help expedite the settlement of disputes, but to make the litigation process less stressful for those involved. Mediation programs also help judges better allocate their time and save tax dollars in that disputes which settle earlier require less attention from court staff. Given the success that mediation enjoyed in the trial and appellate courts, legislation was adopted in 2005 to establish a program to provide for mediation of matters pending before Clerks.

## *What Happens During A Mediation?*

Mediation is not like a hearing or trial. You will not have to testify and your mediator will not decide the outcome of your dispute. Rather s/he will conduct a discussion during which you and the others involved will search for a mutually agreeable solution to your conflict. Though less formal than a trial or hearing, a mediation is still a legal proceeding conducted with decorum and guided by rules.

Your mediator will meet with you and others involved in your dispute, including any attorneys, guardian *ad litem,* or representatives of any state or other agencies. The mediator will explain the ground rules for the discussion and will ask the attorneys or parties to describe the dispute from their respective points of view. The mediator will then start negotiations. At some point, the mediator will likely separate the group and meet individually with each party and his or her attorney in what is known as a "caucus". A caucus provides an opportunity for a mediator to speak frankly and gives the parties and others an opportunity to share information in confidence with the mediator.

The mediator's ultimate goal is to help the parties resolve the dispute themselves. In order to help parties reach an agreement, a mediator will try to open channels of communication, inject reason into the discussion, encourage each side to see the dispute through the eyes of the other, and carry proposals between the parties.

### *What Happens If We Reach Agreement?*

If parties are able to reach an agreement in mediation, it may be possible to reduce it to writing and conclude the matter by filing a dismissal or consent judgment with the Clerk. In some types of disputes, including estate and guardianship matters, agreements reached in mediation must be presented to the Clerk for review. The Clerk may approve the agreement and conclude the matter or seek further information from those involved. Even when no agreement results from mediation, the process can still be beneficial. Lines of communication may be opened and momentum toward resolution generated.

Often, matters filed with Clerks involve delicate situations and families under stress. Is Mom no longer capable of caring for herself? Will my siblings and I still be speaking when Dad's estate is finally settled? Though mediation is not always successful, the process holds out the hope that those involved in such difficult disputes will be able to come together in an effort to fully discuss the conflict, to collaboratively and creatively explore their options, and to assume responsibility for finding a resolution which meets the needs of all participants.



## ANY QUESTIONS ???

***Q: Who attends the mediation?***

**A:** *All named parties to the dispute must attend the mediation. The Clerk may order others to attend, including those with some stake in the outcome or those who have relevant information to share. If you have an attorney, s/he will also be present. In a guardianship matter, it is especially important that the person whose capacity to care for him or herself is in question appear and participate in the proceeding.*

***Q: If I live outside North Carolina, can I participate by telephone?***

**A:** *The mediation process works best when parties appear in person and most mediators will discourage participation by telephone. Important nonverbal communication through eye contact, body language, and tone are lost when a party participates by phone. Nevertheless, if travel to this State poses a real hardship, you may raise the issue with your mediator or the Clerk.*

***Q: Will I have an opportunity to speak at the mediation?***

**A:** The mediation process is designed to give all participants an opportunity to discuss and to share ideas for addressing their concerns and settling their disagreements. However, if you are not comfortable speaking and you have an attorney, s/he may speak for you. You will not be put under oath and asked to testify at mediation.

***Q: I am disabled. Will the building where the mediation is held be accessible to me?***

**A:** You should notify your mediator of your limitations and of any accessibility issues, such as the need for wheel chair ramps. You may want to suggest some possible places to hold the mediation. Parties or other participants who need deaf or language interpreters or other assistance should also let the mediator know. If you function better early in the day due to health concerns or medications, advise the mediator of that as well.

***Q: How much will mediation cost?***

**A:** If you, the other party or parties, and your attorneys agree upon a mediator, the mediator's fee will be arrived at by agreement with the mediator. If you and the other party cannot agree on who should mediate your dispute, the Clerk will appoint a mediator. Rule 7.B. of the *North Carolina Supreme Court's Rules Implementing Mediation In Matters Before the Clerk of Superior Clerk* provides for court-appointed mediators to be compensated at the rate of $150.00 per hour for mediation services plus a one time,

**Mewhinney – Appendix E**

# DRC Guidelines Amplifying Rules for Certification of 10-Hour Clerk Mediation Training

Check the N.C. Dispute Resolution Commission site for approved training organizations. The program lasts ten hours and covers a wide range of issues that commonly arise in guardianships. The appended training guidelines are at www.nccourts.gov/assets/inline files/ClerkTrainerguidelines_2018.pdf?k23d_IjKWl3nhR48dg041uT5S8N_uS5q.

DRC Guidelines Amplifying Rules for Certification of
10-Hour Clerk Mediation Training

(Adopted by the Dispute Resolution Commission on August 25, 2006.)

## Adult Guardianship and Estate Mediator Certification Training

*These Guidelines are intended to amplify Rules 8 and 9 of The Rules Implementing Mediation In Matters Before the Clerk of Superior Court (Rules) as they pertain to certification of adult guardianship and estate mediation training programs. All trainers seeking such certification should read Rules 8 and 9 carefully and review these Guidelines prior to submitting a training package to the Dispute Resolution Commission. Trainers seeking certification must submit a packet containing a detailed agenda identifying topics to be covered and trainers who will cover each topic listed. The agenda should set out time frames so that the Commission may determine the amount of time allocated to each topic as well as the number of hours for the total program. Training programs must total at least ten hours. Trainers must also submit to the Commission all materials they intend to distribute to participants as handouts, including copies of any articles or texts, and copies of any role-play scenarios or ethics case studies to be used. Any questions should be directed to the Commission's office at (919) 890-1415. Packets should be mailed to:*

**NC Dispute Resolution Commission**
**P. O. Box 2448**
**Raleigh, NC 27602**

**I. Time Frames.** The training agenda must total at least ten hours in duration, exclusive of breaks and a lunch period, except that a working lunch may count toward the ten-hour total. At least six hours of the training agenda shall address adult guardianship mediation issues and at least four hours shall address estate mediation issues. The training agenda must comply with the detailed curriculum and minimum durations set out in Rule 9 and subsection D of these Guidelines.

The ten-hours of instruction provided for in Rule 9 and discussed in these Guidelines is intended to be a minimum only. Trainers are encouraged, if they believe it is necessary in order to cover

all the topics listed in Rule 9 to provide training beyond the 10 hour minimum and to include an open forum, demonstrations and role plays that specifically address situations involving disputes in adult guardianship and estate matters. Trainers may also add additional topics that they wish to cover.

**II. Quality Control.** In order to assist the Commission in monitoring the effectiveness of this training, certified trainers must agree to provide the Commission with names and addresses of all training program participants within twenty days of completion of a training. Trainers should also advise participants that the Commission will be contacting them at intervals of six and twelve months following their training to seek feedback from them regarding how well their training equipped them to mediate adult guardianship and estate disputes. The information obtained will be used to further refine Rule 9 and these Guidelines. Trainers who have taught courses are invited to contact the Commission with any feedback regarding the Rule 9 requirements, these Guidelines, or any other suggestions for improving adult guardianship and estate mediator training or mediator effectiveness. The Commission reserves the right to have a Commission member or one of its staff in attendance at all or part of any training offered pursuant to these Rules.

**III. Number of Participants.** At no time shall the number of participants exceed 40. Trainers must provide sufficient numbers of faculty and other training staff to ensure that participants have a meaningful training experience, including individual attention and an opportunity to actively participate in discussion and role plays, if role plays are a part of the training. Trainers must ensure that the training site is spacious enough to accommodate participants and offer an environment substantially free of distractions and other impediments to learning. If role-plays are to be included as part of the program, sufficient space should be provided for break-out sessions. Drinks and snacks should be provided by the trainer or readily available at the training site.

**IV. Nature of the Training.** Individuals taking Adult Guardianship and Estate Mediator training will have already completed a Commission approved 40-hour course in superior court or family financial mediation. The 40-hour course shall have provided instruction in basic mediation theory and practice and afforded opportunities to observe demonstrations of superior court or family financial mediations and to participate in multiple role-plays. As such, it is expected that adult guardianship and estate training will focus more specifically on information relating to aging, ageism, mental illness, disabilities, family dynamics, principles of guardianship, elder/adult guardianship law, estate/trust law and the other topics listed in Rule 9. Though the focus of this training shall be largely on these substantive areas, trainers are encouraged to exercise their discretion in adding additional time beyond the ten hour minimum for demonstrations, role plays, further exploration of Rule 9 topics, or to add additional topics where trainers believe it is necessary to insure the effectiveness of their training and of the mediators who are attending.

The Commission intends that trainers have some discretion in determining the content of their training program. However, to insure that the Rule 9 curriculum is fully covered, trainers are

required to devote at least the following minimum amounts of time to each of the curriculum topics set forth in Rule 9 and to discuss at least the concepts mentioned below in association with each curriculum requirement listed:

**A. Factors Distinguishing Estate and Guardianship Mediations** -- (at least 10 minutes in duration). Brief discussion of some of the salient differences between adult guardianship and estate mediation and other types of mediation with which participants may be familiar, including superior and district court settlement conferences. Brief discussion of issues particularly relevant to adult guardianship and/or estate mediation: the need to insure that the respondent in an adult guardianship matter or all the heirs in an estate matter are present at the mediation, if possible, and included in discussions; the role of the Guardian *Ad Litem*; the potential need for the mediator to be more proactive relative to intake issues, *e.g.,* exploring accessibility concerns with respondents, making sure that all individuals with needed information are present at the mediation; and the need for the Clerk to approve agreements involving estates or adult guardianships.

**B. The aging process, societal attitudes toward the elderly, mentally ill, and disabled** -- (at least 45 minutes in duration). Exploration of some of the physical and mental changes typically associated with the aging process; societal attitudes toward aging and the elderly and toward those with mental illnesses or physical disabilities; discrimination against the elderly, mentally ill, or disabled; special problems and concerns of the elderly, mentally ill, or disabled, *e.g.,* fear of loss of autonomy, isolation, exploitation; communicating and working with the elderly, mentally ill, or disabled.

**C. Participation issues** -- (at least 45 minutes in duration). Discussion of the mediator's responsibility for intake and participation. (Are individuals with necessary information identified and notified of the mediation? Are they present at the mediation?); accessibility issues (identifying physical limitations that participants may have relative to participation, *e.g.,* need for wheel chair ramps, elevators, interpreters, effects of sun-downing); importance of involving respondents in adult guardianship matters in the discussion to the greatest extent possible; role of the guardian *ad litem (GAL).*

**D. Medical concerns** -- (at least 20 minutes in duration). Medical terminology, common diseases and conditions associated with aging, mental illness and disability, disease etiology, manifestations of illness and effects of medication. (It is the expectation of the Commission that prior to the training, participants will be provided with handouts and web site addresses that explore the matters listed above in this subsection. The Commission recognizes that in a ten-hour course it is impossible to go into any level of detail regarding medical issues and students should be advised that it is the expectation of the Commission and the trainer that they review these materials prior to the course and address any questions they may have to their trainers.)

**E. Financial concerns** -- (at least 20 minutes in duration). Financial needs associated with aging, mental illness and disability. Costs and fees associated with guardianships, estates, trust maintenance and brief discussion/ handout regarding tax concerns. Consequence of special needs trusts or testamentary trusts. Issues involving the transfer and/or leveraging of real property.

**F. Family dynamics** -- (at least 30 minutes in duration). Exploration of family dynamics and family stresses particularly as they relate to the care of an elderly, mentally ill, or disabled relative, or to the death of a family member; including undercurrents such as sibling rivalries, the grieving process, and red flags which could indicate neglect or abuse of an elderly, mentally ill or disabled relative. (It is the expectation of the Commission that prior to the training, participants will be provided with handouts, bibliographies and web site addresses that explore the matters listed in this subsection.)

**G. Capacity Issues** -- (at least 60 minutes in duration). Identifying triggers and situations that commonly lead families to petition for guardianship; indicators of self-neglect and of neglect, abuse, and financial exploitation by others; care needs and caregiver issues; activities of daily living (ADLs), *e.g.,* bathing, eating, toileting, dressing, and grooming and independent activities of daily living (IADLs), *e.g.,* shopping, house cleaning, money management, and meal preparation. Discussion of physical capacity and mental capacity as it relates to decision-making and autonomy.

**H. Availability of community resources** -- (at least 15 minutes in duration). Discussion of community, county, state, and federal resources and programs available to assist the elderly, mentally ill, and disabled; brief overview of relevant state/ federal Medicare and Medicaid provisions; brief discussion of long-term care insurance provisions. Red flags regarding property transfers and use of assets. Handouts are suggested.

**I. Adult guardianship law and procedure** -- (at least 1 hour in duration). Jurisdictional limitations on the Clerk in adult guardianship matters. Informal alternatives to adult guardianship, *e.g.*, family and community resources, social workers, and visiting nurses. Terminology, relevant statutes, and case law; legal standard for appointment of a guardian; discussion of competency and incompetency hearings; who can/should serve as a guardian or interim guardian; types of guardianships available, including interim and limited guardianships and guardianships of the person or estate; responsibilities of guardians; accountings; termination of guardianship/restoration of competency.

**J. Estate law and procedure** -- (at least 2 hours in duration). Jurisdictional limitations on the Clerk in estate matters. Terminology, relevant statutes, and case law. Estate planning documents including formal alternatives to guardianship, *e.g.,* last wills and testaments, trusts, powers of attorney and codicils. Who can serve as a personal representative/trustee; types of estates available, including summary administration and small estates; responsibilities of the personal representative/trustee; discovery of assets;

elective share; intestate succession; partition actions; insolvent estates, removal of a personal representative/trustee; closing of estates.

**K. Discussion of program Statutes, Rules, and Forms** -- (at least 25 minutes in duration).

**L. Ethical and conduct issues** -- (at least 30 minutes in duration). Discussion of statutes requiring the reporting of abuse, neglect or exploitation; confidentiality concerns; protecting the interests of absent respondents or heirs, need to safeguard against power imbalances during mediation. Inclusion of role-plays or case examples allowable.

**V. Ensuring the Quality of the Faculty**. An experienced, qualified faculty is essential to the success of any training program. It will not be sufficient for an applicant to provide a list of potential faculty members. Rather, an applicant must specify those individuals who will, in fact, serve as the primary faculty. The application must also include a resume for each primary faculty member.

While it may theoretically be possible for one individual to possess all the training, skills, and knowledge required for the Adult Guardianship and Estate Mediator Training Program, it is strongly encouraged that there be at least two primary trainers presenting the material. At least one member of the faculty should be educated in mediation theory and practice and have significant experience mediating in either North Carolina's superior and/or district court mediated settlement conference programs or equivalent experience mediating in the courts of another State. Another member should have experience as a geriatrician, social worker, or psychologist or have other professional experience working with the elderly, disabled, or mentally ill. This trainer should be knowledgeable about issues relating to the health care and psychological welfare of the elderly, mentally ill, and/or handicapped. There shall also be on the faculty a member(s) of the North Carolina State Bar who has experience practicing elder and estate law in this State or an attorney licensed in another State with experience practicing elder and estate law and who has familiarized him/herself with North Carolina statutes, law, and practice.

**VI. Ensuring a North Carolina Focus.** Applicants must demonstrate that the training will be focused on the particulars of North Carolina's program, statutes, rules, and Standards of Professional Conduct for Mediators. If role plays are utilized as part of the training, they shall reflect the approach to mediation that has evolved in North Carolina's courts, *i.e.,* they shall involve active participation of attorneys, the use of caucus sessions, and envision court-ordered participation. Handouts familiarizing attendees with guardianship/elder and estate law shall discuss North Carolina statutes and laws. Trainers who have been certified in North Carolina, but are conducting their training outside North Carolina, must provide those seeking certification in North Carolina with North Carolina handouts and must ensure that the legal portion of the training is taught by an attorney licensed in North Carolina or by an attorney licensed in another State with experience practicing elder and estate law and who has familiarized him/herself with North Carolina statutes, law, and practice.

**VII. Responsibility to Update Commission.** Following certification, all trainers shall advise the Commission immediately of any revisions to the agenda, changes in the identity of principal trainers, and any other significant revisions to the content of course notebooks or other handouts. Trainers shall not conduct any additional training sessions until the Commission has approved any such changes. Along with their annual certification renewal fees, trainers shall re-submit a current agenda for their program yearly. The Commission reserves the right at any time to seek additional information from trainers.

**VIII. Advertising and Registration Materials.** All materials advertising certified training programs to the public must identify the Dispute Resolution Commission as the body responsible for mediator certification in North Carolina. In addition, the materials must supply a telephone number for the Commission and direct interested parties to the Commission for further information regarding qualifications for certification. Such materials must also contain a disclaimer that successful completion of the program alone is not a guarantee of certification. Training taken in another State may be approved if the training is in substantial compliance with Rule 9 and these guidelines.

**IX. Videotaped Training.** Unlike the 40-hour Mediated Settlement Conference and Family Financial Settlement mediator training programs that are focused primarily on process, this training is focused largely on substantive estate and guardianship law and substantive information relating to issues such as the aging process and family dynamics. This substantive material lends itself more toward a lecture and panel presentation format rather than the demonstration/role-play approach that characterizes 40-hour training programs. Since "hands-on" participation is not a required element of this training, the Commission has determined that it may be offered on video-tape.

Trainers who offer a tape must encourage participants to watch the tape in its entirety and use available technologies in an effort to insure that they do, *e.g.*, imbedding a code at the end of the tape and requiring a viewer to report the code in order to receive credit. Trainers must also advise those purchasing or renting video-tapes that the Commission is very concerned about stale training and anticipates that viewers will watch the tape in its entirely within six months of purchase or rental and that those who apply after that period, may be denied certification. That certification may be denied if the applicant does not apply within six months, must be prominently noted in the material accompanying the tape.

Trainers who elect to offer a videotape may only offer it for a two-year period from the date the videotape is initially approved by the Commission. In order to offer a videotape beyond that time frame, a trainer must apply to the Commission and demonstrate that the videotape's content remains current.

# THE USE OF MEDIATION IN ADULT GUARDIANSHIP CASES

**Course Level: Intermediate**

**Writer: Mary F. Radford, J.D.**, adapted from articles and book chapters prepared by Mary F. Radford.

**Course Objectives: The guardian will:**

- become familiar with the advantages and disadvantages of using alternative forms of dispute resolution (ADR)
- will learn what mediation is and how it differs from other forms of ADR
- become familiar with the typical mediation process
- be exposed to the possible uses of mediation in the various stages of a guardianship
- be sensitized to the special considerations that a mediator must take into account in a guardianship mediation, including those relating to the adult ward's capacity to mediate; power imbalances; the choice of participants in the mediation; and confidentiality and privacy concerns

**Course Resources and Related Resources:**

*ADA Mediation Guidelines,* http://www.mediate.com/articles/adaltr.cfm

Gary, Susan N., *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship & Inheritance,* 32 Wake Forest Law Review 397 (1997).

Grey, Robert, *Mediation of Guardianship and Elder Law Cases*, http://www.mediate.com/articles/grey.cfm

Radford, Mary F., *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 Stetson Law Review 611 (Spring 2002).

Summit County, Ohio Court of Common Please – Probate Division, *Rule 98.1*, http://www.summitohioprobate.com/LocalRules/Rule981.htm

The Center for Social Gerontology, *Adult Guardianship Mediation Manual;*

Videos: *Adult Guardianship Mediation: An Introduction; Adult Guardianship Mediation: A Judge's Perspective*, available for purchase at http://www.tcsg.org/

*Uniform Mediation Act,* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm

Wood, Erica F., *Dispute Resolution and Dementia: Seeking Solutions,* 53 Georgia Law Review 785 (2001).

## THE USE OF MEDIATION IN ADULT GUARDIANSHIP CASES

Formal guardianship proceedings[1] can be painful and traumatic for all of the participants. The imposition of a guardianship and the choice of who will serve as guardian will have a momentous impact on the personal and financial future of the ward. Additionally, the appointment of a guardian can result in a substantial deprivation of the ward's basic rights, such as the right to consent to medical treatment, to choose where he or she lives, to enter into binding contracts, and to save or spend money. Thus, formal guardianship proceedings are designed to provide maximum protection for the individual for whom the guardianship is sought. These proceedings are typically structured to ensure that the adult receives notice of the pending guardianship proceeding; is evaluated by a neutral physician, psychologist or other evaluator; is allowed to be represented by a lawyer or other representative; is accorded the opportunity to be heard; and is encouraged to participate as fully as possible in the choice of guardian and the structuring of the guardianship. While the judges who handle guardianship cases are generally sensitive to the human drama involved in these proceedings, the courtroom remains a sterile and intimidating environment that leaves little space for creative decision-making or for protecting against the shattering of relationships that have already been worn thin by the emotional context in which a guardianship proceeding takes place.

[1] A formal guardianship proceeding is a judicial procedure in which a court determines whether to appoint a guardian to protect the personal or financial needs, or both, of an incapacitated adult. Although guardians and conservators may also be needed for minors, this training module will deal with the guardianships and conservatorships of adults. The term "guardian" will refer to guardians, conservators, committees, tutors, or others who are appointed by a court to act in a similar capacity.

Mediation offers an alternative form of resolving the disputes inherent in many guardianship cases. Mediation is a process whereby a neutral facilitator encourages the parties to work through their problems and structure their own solutions. The use of mediation in guardianship cases is still in a fledgling state. While there are many perceived advantages to using mediation in lieu of or as a supplement to formal guardianship proceedings, there remains some fear that the informality and creativity of mediation may undermine the protection of an individual's rights that is the underpinning of formal judicial guardianship proceedings. Additionally, questions persist as to how an individual whose capacity is at issue can engage effectively in a process that is dependent upon self-determination by the parties. This training module is designed to introduce those who are experienced in the field of guardianship to mediation and to the special considerations that must be taken into account when integrating mediation into a guardianship case.

## I) Alternative Forms of Dispute Resolution

### A) Why Seek Alternatives?

In the 1960s, as a general response to the cost, rigidity, inefficiency, and sterility of formal judicial proceedings of all types, a movement emerged to explore alternatives to formalized court proceedings. The umbrella term for the processes that developed from that movement is "alternative dispute resolution" (ADR). A simple exercise will illustrate why people perceive that informal, alternative methods of resolving disputes have many advantages over the formalized methods of dispute resolution that form the backbone of our judicial system.

**EXERCISE:** Jack and Jill are neighbors. Jack has put a great deal of money and effort into building a two-car garage next to his home. In the process of refinancing her house, Jill discovers that Jack has accidentally extended the garage beyond his own property line and on to her property. Jill has been angry at Jack for years because she doesn't like the fact that he only rarely mows his grass. Jack, on the other hand, often complains that Jill's teenage son drives at unsafe speeds in their neighborhood. Compare what could happen if Jack and Jill chose to resolve this dispute INFORMALLY rather than FORMALLY (that is, by going to court).

**FORMAL RESOULTION:** Jill can sue Jack and demand that he tear down the part of the garage that is on her property. The case will be focused only on that issue and will not address any of the other aspects of these neighbors' stressful relationship. The court proceeding will be open to the public. Jill and Jack will both need to hire lawyers and to incur other costs of litigation. Their case may not be placed on the court's calendar for months or even years to come. The outcome will be "all or nothing" and their relationship, already fragile, will possibly be irreparably broken, no matter who prevails in the lawsuit.

**INFORMAL RESOLUTION:** Jack and Jill, with or without the aid of a facilitator or of lawyers, may engage in a private, face-to-face discussion and negotiation about their options. It is possible that the discussion will be confrontational and ultimately fruitless. On the other hand, Jack and Jill may be able to get to the real root of their dissatisfaction with each other's behavior. They may forge creative solutions that deal with more than just the garage and at the same time work to preserve and perhaps even strengthen the relationship between them. Jill may be willing to accept a cash settlement instead of forcing Jack to tear down his new garage. The two may agree that Jack will mow his lawn more often and Jill will curtail her son's speeding. The negotiation will be handled on their schedules (rather than on the court's schedule) and will be far cheaper and more efficient than full-blown litigation.

Mediation is but one of the many forms of alternative dispute resolution that have developed over the past 50 years. These range from processes that exhibit many of the formalities of court procedures (such as arbitration) to processes that have no formalities whatsoever (such as private negotiation). The following sections describe mediation generally and compare and contrast it with formal court proceedings and with the two other most common forms of ADR: negotiation and arbitration.

**B) What Mediation is and What Mediation is Not**

Mediation is a process for dealing with disputes in which an impartial third party – the *mediator* – facilitates communication among the parties, promotes negotiation, and prompts the parties to engage in voluntary and creative problem-solving. Mediation is a widely-used form of ADR in areas of the law such as family law (divorce and child custody mediations), employment law, commercial relations, consumer law, and international law. Mediation can be quick, flexible, inexpensive, convenient, humane, and empowering. It allows parties to talk to each other in a setting that is confidential and secure and that encourages constructive behavior. Solutions that emerge can be more creative and better suited to individual needs than those that might be possible through traditional legal channels. Also, parties tend to adhere better to solutions they have designed themselves. There is generally high satisfaction among participants in mediation processes.

Mediation is typically thought to have these advantages over the formal adjudication of a dispute:

1) It is non-adversarial, stressing collaboration and cooperation over a "win-lose" approach;

2) It is flexible, allowing the parties to reach creative resolutions rather than predetermined and restricted outcomes;

3) It stresses self-determination by the parties rather than the imposition of a resolution from an outside authority;

4) It is efficient and usually less time-consuming and expensive than litigation;

5) It encourages parties to face the underlying root of lingering relationship problems rather than just the superficial aspects of the issue at hand; and

6) It is designed to strengthen or at least preserve important relationships (such as family relationships) rather than shatter them.

Mediation is sometimes better understood by describing it in contrast to other, more familiar dispute-resolution procedures.

Mediation is not *a court proceeding.*

- A court proceeding (trial, hearing, etc.) is a formal proceeding in which an appointed decision-maker (the judge) dictates the ultimate outcome of the case.
- The proceeding follows a rigid set of procedural rules.
- The parties appear in court at a time chosen by the court.
- The parties have no choice as to which judge will hear their case.
- The parties are usually better served if each is aided by an attorney.
- The parties and their attorneys must abide by the courtesy code of the court and some types of behavior (e.g., temper tantrums or emotional outbursts) are not tolerated.
- The proceeding is, by its nature, adversarial.
- The judge (and/or jury) may only admit certain types of evidence.
- The final decision is made by the judge, who is limited to a few strict legal alternatives.
- That decision is formalized in a written court order.
- The proceeding is open to the public.

- The costs include attorney's fees and court costs.

Mediation is not *arbitration*.

- An arbitration is a formal, non-judicial proceeding in which the parties submit their case to an impartial third party or panel.
- An arbitration usually is conducted in accordance with a set of procedural rules that resemble those of judicial proceedings.
- The parties, in conjunction with the arbitrator, choose the time and place of the arbitration.
- The parties also often engage in choosing one or more of the arbitrators.
- The parties are usually represented by attorneys.
- The parties' presentation of evidence may be restricted by the applicable rules of procedure.
- These rules may allow the arbitrator to rule that certain types of behavior (e.g., temper tantrums or emotional outbursts) are out of bounds.
- The final decision is made by the arbitrator and is usually presented formally and in writing.
- An arbitration may be public or private, according to the wishes of the parties.
- The costs include the arbitrator's fees (which often are split by the parties) as well as the fees of each party's attorney.

Mediation is not *negotiation*.

- A negotiation is an informal interaction in which the parties reach their own decisions without the aid of a formal decision-maker or a facilitator.

- The parties choose the time and location of the negotiation.
- Often the parties are each represented by attorneys but they need not be.
- There usually are no applicable procedural rules.
- The parties engage in face-to-face discussions about the matter at issue.
- The discussions may be adversarial and there are usually no ground rules that place certain behavior (e.g., temper tantrums and emotional outbursts) off limits.
- Each party is free to present any "evidence" that party would like to present.
- The final decision is made by the parties and there are no restrictions on the form the outcome will take.
- The parties may or may not memorialize their agreement in writing.
- A negotiation is almost always private.
- The costs usually only are the fees charged by the attorneys who participate in the negotiation.

<u>How does mediation compare to these other processes?</u>

- Mediation is an informal process, although the mediator and the parties themselves may agree to abide by a set of ground rules of their making.
- The parties to the mediation make their own decisions with the aid of the mediator as facilitator.
- The parties choose the time and place of the mediation.
- The parties choose the mediator.
- The parties may or may not be represented by attorneys.

- The parties' presentation of evidence is unrestricted except as agreed among themselves.
- The parties may agree that certain types of behavior (e.g., temper tantrums or emotional outbursts) are out of bounds or, alternatively, they may agree to allow venting of feelings within boundaries that they themselves set up.
- The parties may or may not reach a resolution of their dispute, but the mediation may still be of value as a means of bringing the parties to a clearer understanding of each other's positions.
- If the parties do reach a resolution, it is usually memorialized in writing.
- The mediation is confidential and private.
- The costs include the mediator's fee and the fees of any attorneys who participate in the process.

The hallmark of mediation is *self-determination.* The parties are not bound by formalized rules of procedure and evidence and they are not restricted to either-or, win-lose resolutions. The mediator has no authority to impose a decision or settlement on the parties, but rather is there solely to assist the parties in resolving the dispute in a way that is mutually agreeable. The parties are free to structure whatever solution serves them best or, alternatively, to reach no resolution at all. The mediation process is often more structured and organized than a private negotiation in that some of the roles of the mediator include keeping the parties on task and helping them to avoid unproductive behavior. At the same time, a skilled mediator will often offer an arena in which the venting of emotion, if appropriate, is neither prohibited nor discouraged.

## II. HOW MEDIATION WORKS

### A) The Mediation Process

There are many ways in which a mediation may proceed. However, mediations generally proceed in the following pattern:

1) First, the parties must agree to mediate or be ordered to do so by a court. In some cases, a court administrator or the mediator may perform an initial intake to determine in advance whether the case is an appropriate one for mediation. It is not uncommon in some types of mediation (e.g., family mediation) for the mediator to conduct individual, pre-mediation interviews of the parties. The intake process offers an opportunity to determine which persons should attend the mediation and whether all necessary parties are capable of participating. Attendance by all necessary parties is vital to the ultimate success of a mediation.

2) The initial mediation session usually begins with a description by the mediator of the process. The mediator may use this opportunity to reinforce the parties' commitment to resolving the issues before them. At this stage, the mediator suggests “ground rules” for the participants or lets them devise the ground rules themselves.

3) The next step involves issue identification. Each party gives that party's version of the problems at issue without interruption. The mediator provides a summary of each party's concerns after the party has spoken and then, after all have spoken, attempts to narrow the common issues raised.

4) After each party has explained his or her story, an exchange or dialogue may ensue. At this point, the parties are allowed to raise and discuss, in the mediator's presence, issues that arose when the other party spoke.

5) Following this exchange, the mediator typically encourages the parties to "brainstorm" as to potential options for resolution, emphasizing that no party needs to be committed to the ideas presented. The mediator may add some options that the parties have not raised.

6) The final step is for the parties, with the aid of the mediator, to structure mutually acceptable solutions. A written summary of the results is advisable.

At any point during the session, either party or the mediator may request a private meeting. This "caucus" gives the party an opportunity to raise sensitive issues or simply to vent emotions. The mediator informs the parties that nothing revealed in a caucus will be told to the other parties without permission. Mediators often will allow the other party to "caucus" also to dispel the notion that the mediator is partial to one or the other. Sometimes the bulk of the mediation occurs through private caucusing with the mediator acting as a "shuttle diplomat."

**B) Confidentiality and Privacy**

One of the major perceived advantages of mediation over litigation is the fact that the proceedings are private and confidential. Many states have adopted statutes or ADR rules that require that mediations and other ADR proceedings be kept confidential. In addition, at the outset of a mediation, the mediator will usually ask the parties to sign a confidentiality agreement. The confidentiality feature encourages the parties to be open and candid with each other without fear that whatever they say will at some later point be held against them in some more formalized setting. Confidentiality and privacy are important advantages for adults in adult guardianship cases in that these cases

often include personal, and sometimes embarrassing, information about the adult and the adult's family. As will be discussed later, however, adult guardianship cases raise special issues that challenge the traditional application of the confidentiality requirement.

> **EXERCISE:** Read the rules of privilege and confidentiality that appear in Sections 4-9 of the Uniform Mediation Act, http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm

### C) Styles of Mediation

Mediators have different styles of mediation, and the parties themselves may request that the mediator play varying roles. A distinction is often drawn between "evaluative" mediation and "facilitative" mediation. In general terms, an evaluative mediator offers the parties an assessment of their respective positions and may even predict for the parties what the probable outcome would be were they take their case to court. Although the parties themselves remain the ultimate decision-makers, they often look to the evaluative mediator to offer them some direction in terms of the outcome. On the other hand, a facilitative mediator focuses on maximizing the parties' abilities to structure their own resolutions with minimal input by the mediator. Some feel that, with facilitative mediation, the parties reach resolutions that are not only workable for the matter at issue, but also tend to preserve the parties' ability to work together in the future. In some mediations, the mediator may begin as a facilitative mediator but, at the parties' request, move to an evaluative mode. An adult guardianship case may often demand just such a flexible mix of styles. For example, in an adult guardianship case, a compelling reason for moving to an evaluative mode would be that a power imbalance exists between the parties and results in their structuring an agreement that

is patently unfair to the allegedly incapacitated adult. This may be an appropriate time for a mediator to insert his or her own opinion into the process to protect the interests of the weaker party.

## III. MEDIATION IN ADULT GUARDIANSHIP CASES

Guardianship cases typically (but not always) proceed through three or four stages. Mediation may be an appropriate mechanism for dealing with issues that arise in any of these stages.

### A. Pre-petition Stage

The pre-petition stage is the period of time that leads up to (or may lead up to) the filing of a petition for guardianship. During this period, the adult is showing signs of diminishing capacity (e.g., forgetfulness, physical and mental disorientation, unusual anxiety) and often engaging in atypical and sometimes disturbing behavior. As the need for assistance in both health-related and financial matters becomes more apparent, family members, caregivers, and friends often engage in informal and sometimes piece-meal strategies for coping with the consequences of the adult's changing state. Frequently the family members and others are proceeding without advice from attorneys, social workers, and other professionals, and sometimes the short-term coping mechanisms backfire.

Mediation may be a particularly suitable process during this stage for a number of reasons. First, mediation allows the parties to deal with the emotional aspects of a situation as well as with the legal issues. The initial phases of an adult's diminishing capacity are traumatic not only to him or her but also to those around him or her.

Feelings of helplessness and impending doom are shared by both the adult and those who love him or her. Worries about financial needs may be heightened as the need for some assistance in day-to-day living becomes more obvious. Repressed family struggles over control and "Mom always liked you best" are resurrected as the children vie to take care of (or to take over the care of) an ailing parent. Early non-judicial intervention in the form of mediation may not only offer the parties information about appropriate coping strategies, but may also help the parties to address tensions before they escalate into emotional combat.

The challenging question for those who advocate mediation at the pre-petition stage is not whether it will be effective, but rather whether the parties will know to use it. Because the general public remains basically unaware of the availability of mediation services, most families would not know to ask for this type of professional assistance. Pilot projects are underway throughout the United States to help parties realize the availability and benefits of mediation at this early stage. Some courts employ a "screening agent" -- that is, an individual who responds to initial inquiries about guardianship and who screens all petitions to divert those that are not appropriate guardianship cases. The screening agent can offer the parties the option of and information necessary to direct the parties to mediation.

> **Exercise:** Read Rule 98.1(f) of the Summit County, Ohio Court of Common Pleas - Probate Division, which allows an agency such as a mental health agency to file a motion to have the court refer the matter to mediation before a guardianship petition is filed.
> http://www.summitohioprobate.com/LocalRules/Rule981.htm

### B. Initial Petition Stage

In the pre-petition stage, it is often the case that one of the family members, caregivers or friends becomes so frustrated or so suspicious that he or she contacts an attorney about filing a petition for guardianship. A number of issues, both legal and emotional, are raised by the filing of the petition. Disputes may erupt between the adult and her children as to whether she needs a guardianship at all, or between family members as to who should serve as guardian, or among other friends and family members who do not necessarily want to become the adult's guardian, but who fear that they will be isolated from her.

The filing of the petition triggers a number of due-process guarantees for the adult for whom the guardianship is sought. Designed to be protective of the adult, these guarantees also have the potential of turning the guardianship proceeding into an adversarial process that may result in unintended trauma and expense for the adult and the other parties involved. In addition, at this stage, a number of outsiders will have joined the fray. In many states the adult will have her own attorney, or at least a visitor or guardian ad litem whose charge is to advocate for her wishes. Often, the individual who files for the guardianship will do so with the aid of an attorney. These attorneys will guard zealously the interests of their own clients, perhaps to the detriment of intra-family relationships.

Most formal guardianship proceedings revolve around two issues: 1) whether the adult is legally incapacitated and in need of a guardian; and 2) who will be appointed to serve as guardian. The ultimate decision on both of these issues is for the court, not for the parties themselves. However, mediation at this stage may be useful in bringing the parties to agreement in advance so that they can present a united position to the

court and work with the court to reach a constructive resolution. For example, the parties may explore whether there are alternatives for dealing with the ward's incapacity, such as powers of attorney or trusts. Also, while the court has the responsibility of appointing the guardian, if there is a dispute as to who should serve in that role, the parties may resolve that dispute in advance of the guardianship proceeding. Disputes over who should serve as guardian often mask more deeply-entrenched issues, such as a fear that one family member, if appointed, might isolate the ward from the rest of the family. In mediation, the parties can not only explore the root causes of this suspicion but perhaps also structure a framework for dealing with it, such as a plan for where the ward will reside and a visitation schedule.

**C. Ongoing Issues During the Guardianship**

The appointment of a guardian rarely resolves the conflicts that surround the adult's aging process. Throughout the guardianship, questions will be raised by family members and others as to the conduct of the guardian, including why certain investments were made or a certain nursing home was chosen, or even whether the guardian is being appropriately diligent about meeting the adult's needs. The court may challenge items on the guardian's annual accounting. The adult's condition may worsen, and the limited guardianship that was initially granted may need to be expanded. The adult may remain opposed to the concept of guardianship and its ensuing loss of freedom. Changing circumstances may force unforeseen decisions, such as a move out of state by the guardian who wants to take the adult with him or her. The guardian may be rendered unable to serve by an accident or illness, and a

successor guardian will need to be appointed. Unusual situations may occur, such as a case of spousal abuse that will warrant the adult's guardian filing for a separation or divorce on his or her behalf. And, as the adult nears death, often painful decisions must be made as to whether to continue life-prolonging but non-curative medical procedures.

Mediation in this stage may result in workable solutions that will not only resolve the immediate conflict, but will also open lines of communication that will help mitigate future conflicts. For example, an adult for whom a guardian of the property has been appointed does not automatically lose his or her freedom to engage in daily activities, such as grocery shopping, buying new clothing, or eating at a restaurant. The guardian, on the other hand, may perceive his or her role as one of maintaining a tight rein on the adult's finances. The adult may find it demeaning to have to ask the guardian for money before every shopping trip, while the guardian may fear that the adult's susceptibility to aggressive marketing will cause the adult to engage in frivolous spending. Mediation could help the parties reach a compromise on this matter, such as the weekly allowance of a certain sum of spending money to the adult. In addition to the advantage of an immediate resolution, the adult and the guardian will now realize that there is an avenue for facilitated communication between them that may ward off future, more formalized complaints by the adult or more unnecessarily restrictive measures by the guardian.

**D. Termination of the Guardianship**

It seems instinctively obvious that most guardianships of adults, particularly of elderly adults, will terminate only upon the death of the adult. At that point, the guardian may or may not continue to serve in some fiduciary capacity as the personal

representative of the adult's estate. Often the death of the adult will trigger disputes that no one wanted to raise while the adult was still alive.

Some guardianships will end due to the happier cause of the adult regaining enough capacity for a complete restoration of rights. The process of restoration will involve both a legal proceeding and an emotional process. Mediation may be helpful both in determining whether a restoration is in order and, if so, how the transition will be made.

## IV. MEDIATION IN ADULT GUARDIANSHIP CASES: SPECIAL CONSIDERATIONS

As noted above, a guardianship case is not a typical dispute between parties in that the only true focal point in a guardianship case is the best interest of the alleged incapacitated adult. The protections of this adult's interest that are built into a formal guardianship case must not be compromised in any related mediation proceedings. Consequently, mediation in guardianship cases entails special considerations that do not dominate most other mediations.

### 1. The Adult's Capacity to Mediate With or Without Representation

As noted above, self-determination is the hallmark of mediation. Yet the major party in a guardianship mediation is an individual whose very capacity to make her own decisions has been brought into question. Under what circumstances can this adult participate meaningfully and represent her own interests in a mediation?

To date, there exists no statutory or case law that defines "the capacity to mediate." Thus, the determination of whether the allegedly incapacitated adult has the capacity to participate in the mediation will be one that is personal to the mediator and

that must be made on a case-by-case basis. One valuable source for the mediator is a set of guidelines that has been developed by those who engage in mediation with disabled individuals. The *ADA Mediation Guidelines* provide as follows:

> The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. An adjudication of legal incapacity is not necessarily determinative of capacity to mediate.

The mediator may determine that, while the adult does not have the capacity to mediate on her own, she does have the capacity to participate with competent representation. The chosen representative may or may not be an attorney. It is crucial that the representative be familiar enough with the adult's values and past choices to be able to present those in the mediation. The representative's role is to speak *for* the adult, not *instead of* the adult.

**2. Power Imbalances and Freedom from Coercion**

Even if the mediator determines that the adult is capable of participating in the mediation, the mediator must pay special attention to the potential for the other participants to overpower the desires of the adult with diminishing capacity. The adult may be experiencing fear, confusion, and anxiety. She may have become dependent on one caretaker and be reluctant to alienate that individual. She is especially vulnerable to real or perceived threats by her family members to abandon her if she

favors one over the other. The mediator must remain alert to these power imbalances and take appropriate measures to neutralize them. In addition to ensuring that the adult has representation if needed, the mediator may take special care to allow the adult to speak without interruption, engage in frequent confidential caucuses with the adult, and be quick to communicate to the parties if he sees such imbalances at work.

A more subtle but equally dangerous challenge in a guardianship mediation is the tendency of family members, attorneys, other parties, and perhaps even mediators to try to structure a framework that is protective of the adult but that may not necessarily guard that adult's fundamental right to autonomy. It is very tempting for those involved in guardianship proceedings to promote what they perceive to be the adult's best interest even if that trammels the adult's basic desires and values. The parties usually do not do so with evil intent but rather under the misguided notion that they are in a better position than the adult herself to know what is right for her. For example, the adult may have expressed many times in the past a wish to remain in her own home rather than be moved to a nursing home. The family members may have compared the cost of home health care and nursing home care and determined that the latter is a far less costly. Before her capacity diminished, the adult had total freedom to choose to spend her money on the choice that she preferred, even if it proved to be more costly. The adult's diminished capacity is not an excuse for this autonomy to be compromised. In the mediation, the mediator should remain constantly aware that family members, acting with all of the best intentions, often tend to ignore the adult's most precious right – her freedom to choose.

### 3. Participants in the Mediation

Unlike a formal court proceeding, in which only the parties and those allowed by the judge to testify may participate, a mediation is typically open to all whose input and agreement is necessary to address the matters at issue. Many a beautifully-crafted mediation agreement has fallen apart later when some party who should have been included challenges the result. On the other hand, a mediation may become chaotic if too many people are part of the process. A guardianship mediation must definitely include the adult, the proposed guardian (or those who are vying for that position), and the individual who filed the petition. In addition, the mediator should determine who else can offer insight and input that will be relevant to the discussion. This would include family members, caretakers and companions, and maybe close friends of the adult (particularly if the adult's family members live in other towns and do not have frequent interactions with her). The mediator must remain cognizant of the fact that the presence of too many participants may cause the adult to feel that others are "ganging up" on her. In that case, the mediator may be able to ascertain in advance that one or two family members can represent adequately the wishes of a larger number. Finally, the mediator may suggest that an expert be included in the mediation, particularly one who is trained in psychology or social work or gerontology. Such an individual can offer valuable input to the parties. However, the mediator should make it clear that the experts will not be part of the actual decision-making process.

### 4. Confidentiality and Privacy Concerns

As noted above, mediations are not open to the public. The mediator will usually ask the parties to sign a confidentiality agreement before the mediation begins.

Potential problems may arise, however, if the mediators or one or more of the parties to the mediation discovers information about known or suspected elder abuse. Mediation statutes and guidelines throughout the states vary on whether this information must then be disclosed to the proper authorities. The general recommendation given in these sources is that the mediator and any participant may disclose threatening communications (as a threat to inflict bodily injury) or information about suspected abuse.

Another confidentiality issue that is peculiar to guardianship cases stems from the fact that a guardian ad litem who has been appointed by the guardianship court may participate in the mediation. Again state statutes differ in their treatment of guardians ad litem. However, the common view is that the guardian ad litem, as an appointee of the court, is charged with making a report to the court and with substantiating any recommendations made. This responsibility may clash with the guardian ad litem's ability to honor a confidentiality agreement. The parties to the mediation should be made aware of this conflict before the mediation begins. They may even write into the confidentiality agreement a limited exception for the guardian ad litem's report to the court.

## CONCLUSION

Mediation has several advantages over formal court adjudication. Among these advantages are: privacy, expediency, lower cost, and flexibility. There are many ways in which mediation may be integrated into the various stages of a guardianship. However, mediators of such cases must be alert to certain special considerations, including the adult's capacity to engage in a process that is grounded in self-

determination and the power imbalances and subtle coercion that may occur in a process that lacks a formalized protective structure. In most cases, mediation will serve as a helpful adjunct to the formalized guardianship proceedings rather than a replacement of those proceedings. When conducted properly, such mediation may have the added value of preserving family relationships that are endangered when the sensitive issues of a guardianship are confronted.

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The Role of Guardian Ad Litem in Guardianship Cases

Dori J. Dixon
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*"...the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but it is [also] somewhat different."* Orr v. Knowles, 337 N.W. 2d 699, 702(Neb.1983)

I. Appointment of Guardian Ad Litem
   a. N.C.G.S. §35A-1107
   b. Rule 17 of the North Carolina Rules of Professional Conduct

II. Requirements of GAL
   a. SHALL represent the respondent until the petition is dismissed or until a guardian is appointed;
   b. SHALL personally visit the respondent as soon as possible
   c. SHALL make every reasonable effort to determine the respondent's wishes
   d. SHALL present to the clerk the respondent's express wishes at all relevant stages of the proceeding
   e. SHALL consider the possibility of a limited guardianship
   f. SHALL make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship

III. GAL Express Authorization
   a. MAY make recommendations to the clerk concerning the respondent's best interests (35A-1107(b))
   b. MAY request a jury trial (35A-1110)
   c. MAY request the guardianship proceeding be closed to the public (35A-1112(a))

IV. GAL Implied Authorization
   a. Request a multidisciplinary evaluation of the respondent (35A-1111)
   b. Subpoena witnesses and documents, present testimony and documentary evidence, and examine and cross-examine witnesses (35A-1112)
   c. Give notice of appeal, on behalf of a respondent who has not retained counsel, from the court's orders adjudicating the respondent incompetent (35A-1115)

V. Zealous Advocate or Best Interest Standard?
   a. Best Interest
      i. Eyes of the Court

ii. Determine, represent, and protect the respondent's "best interest"
iii. GAL is primarily an investigator or officer of the court rather than respondent's attorney or a zealous advocate for the position voiced by the respondent
iv. GAL determines what is in the respondent's best interest using her own judgment and files a report with the court advocating what the GAL has decided is in the respondent's best interest

b. Best Interest - Responsibilities of GAL
   i. Conduct an independent and impartial investigation of the respondent's mental capacity, needs, and situation
   ii. Make recommendations to the court with respect to respondent's need for a guardian, suitability of the guardian, and respondent's best interests even if in conflict with respondent's expressed desires

c. Zealous Advocate
   i. Role of GAL is to act as a zealous advocate for the respondent
   ii. Must represent respondent in same manner as she would represent any client

d. Zealous Advocate – Responsibilities of GAL
   i. Advise the respondent of all the options as well as the practical and legal consequences of those options and the probability of success
   ii. Give advice in the language, mode of communication, and terms that the respondent is most likely to understand
   iii. Zealously advocate the course of action chosen by the respondent
   iv. Not required to advocate a respondent's wishes if they are patently absurd or pose an undue risk of harm

VI. Professional and Ethical Responsibilities of GAL

a. 2004 Formal Ethics Opinion
   i. Lawyer who is purely GAL and not attorney is not bound by:
      1. Confidentiality (Rule 1.6)
      2. Zealous Advocacy (Rule 1.3)
      3. Loyalty (Rules 1.7 -1.10)
      4. Evaluations for use by third persons (Rule 2.3)
   ii. Lawyer who is purely GAL and not attorney is bound by:
      1. Candor to the Court (Rule 3.3)
      2. Fairness to opposing party and counsel (Rule 3.4)
      3. Ex parte communications with and unlawful influence of judicial officials (Rule 3.5)
      4. Dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the admin. Of justice (Rule 8.4)
   iii. At a minimum a lawyer who is attorney and GAL must ensure that:

1. Respondent is not found incompetent in the face of insufficient evidence
2. Guardianship is not ordered if there are appropriate less restrictive alternatives
3. Appointed guardian is suitable
4. Appropriate limits are placed on the guardianship

iv. Confidentiality - Lawyer who is attorney and GAL is prohibited from revealing information about the respondent acquired during the attorney-client relationship unless the respondent gives informed consent to the disclosure and the disclosure is authorized under the RPC

b. Other Professional Responsibilities When Attorney and GAL
   i. Communication with client (Rule 1.4)
   ii. Competent legal representation (Rule 1.1)
   iii. Loyalty to a client and conflicts of interest (Rules 1.7-1.10)
   iv. Terminating legal representation (Rule 1.16)
   v. Undertaking evaluations for use by third parties (Rule 2.3)
   vi. The assertion of nonmeritorious claims or defenses (rule 3.1)
   vii. Dilatory practices and delaying litigation (Rule 3.2)
   viii. Candor towards the court (Rule 3.3)
   ix. *Ex parte* communications with judicial officials and unlawful attempts to influence judicial officials (Rule 3.5)
   x. Testifying as a witness at trial (Rule 3.7)
   xi. Making false statements of law or fact to others (Rule 4.1)
   xii. Communication with persons represented by counsel (Rule 4.2)
   xiii. Dealing with unrepresented persons Rule 4.3)
   xiv. Respect the rights of others (Rule 4.4)
   xv. Dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the administration of justice (Rule 8.4)
   xvi. Representing clients with diminished mental capacity (Rule 1.14)

VII. Rule 1.14 – Representing Persons With Diminished Capacity
   a. When a client's capacity to make decisions is diminished, the lawyer shall as far as reasonably possible, maintain a normal client-lawyer relationship
   b. Lawyer may take reasonably necessary protective action
   c. Rule 1.6 authorizes lawyer to reveal info only to extent necessary to protect client
   d. Attorney may represent alleged incompetent to oppose the adjudication of incompetence if:
      i. The respondent instructs the attorney to do so
      ii. The attorney determines that the respondent has sufficient capacity to oppose the guardianship

iii. Opposing the petition does not require the attorney to present a frivolous claim (1998 Formal Ethics Opinion 16)

e. Attorney may take emergency action to protect the client:
   i. Risk of Substantial Harm: substantial physical, financial, or other harm unless action is taken and cannot adequately act on their own.

VIII. Assessing a Client's Mental Capacity

a. Just because you don't agree with the decision, doesn't mean the person lacks capacity
   i. Ex: smoking is known to cause substantial harm to a person's health, yet the decision to smoke does not mean a person lacks capacity
b. Capacity is affected by countless variables: time, place, social setting, emotional, mental and physical states, etc.
c. Lawyer should take steps to optimize capacity
   i. Avoid meeting in the late afternoon
   ii. Use large print
   iii. Minimize background noise
   iv. Avoid legalese
d. Focus on decision-making *process* vs decisional *output*
   i. Is the respondent's reasoning process significantly impaired, not whether the respondent's decisions are, in an objective sense, reasonable.
   ii. Are the respondent's cognitive abilities at least minimally sufficient to make important decisions
e. Rule 1.14, GAL should consider and balance:
   i. Client's ability to articulate reasoning leading to a decision
   ii. Ability to appreciate the consequences
   iii. Substantive fairness
   iv. Consistency of decision with known long-term commitments and values

# Role of GAL in Guardianship Cases

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## What are the Roles and Responsibilities of the Guardian ad Litem?

*"...the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but it is [also] somewhat different."*

Orr v. Knowles, 337 N.W. 2d 699, 702(Neb.1983)

## Case Study – Jane Doe

- Respondent is completely bedridden
- Lives at home with husband and adult daughter, both of whom have limited capacity
- Petitioner insists on guardianship and plans to move respondent to SNF against her stated wishes

## Guardian ad Litem

- N.C.G.S. §35A-1107 requires the Clerk of Superior Court to appoint an attorney as the guardian ad litem for an allegedly incompetent respondent in a guardianship proceeding *unless* the respondent retains counsel
- N.C.G.S. §35A-1101(6) and §35A-1202(8) define GAL as a GAL appointed pursuant to Rule 17 of the NC Rules of Civil Procedure.

## Requirements of GAL under N.C.G.S. §35A-1107

- SHALL represent the respondent until the petition is dismissed or until a guardian is appointed;
- SHALL personally visit the respondent as soon as possible
- SHALL make every reasonable effort to determine the respondent's wishes
- SHALL present to the clerk the respondent's express wishes at all relevant stages of the proceeding
- SHALL consider the possibility of a limited guardianship
- SHALL make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship

## GAL Express Authorization

- MAY make recommendations concerning the respondent's best interests (35A-1107(b))
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## GAL Implied Authorization

- Request a multidisciplinary evaluation (35A-1111)
- Subpoena witnesses and documents, present testimony and documentary evidence, and examine and cross-examine witnesses (35A-1112)
- Give notice of appeal (35A-1115)

## Rule 17 NCRCP

- GAL must "defend" the incompetent respondent in the pending litigation (N.C.G.S. 1A-1, Rule 17(b)(2) and 17(d))
- Case law: Role of GAL is to protect an incompetent party's rights and interests in connection with the pending litigation

## Authority of GAL Under Rule 17

- Investigate all facts relevant to the pending proceeding
- Subpoena witnesses
- Do all other things that are required to protect the respondent's rights and interests
- Not required to manufacture a defense if none exists

## Authority of GAL Under Rule 17

- MAY waive right to jury trial
- MAY NOT waive, compromise, or settle the respondent's substantive legal rights or consent to the entry of a judgment against the respondent without investigation and approval by the court

## Rule 17

- Unlike 35A-1107, Rule 17 does not require GAL to be an attorney
  - Is the role of a lawyer appointed as GAL under Rule 17 different than that of a nonlawyer?
  - To what extent, if any, is a lawyer or nonlawyer required to act as a "zealous advocate"

## Attorney or GAL?

- N.C.G.S. §35A-1107 – the role of an attorney appointed to represent an allegedly incapacitated respondent is that of a guardian ad litem
- Nature and scope is not entirely clear

## "Zealous Advocate" or "Best Interest"

- Two competing models regarding the role of lawyers appointed to represent allegedly incompetent respondents
- Zealous Advocate vs. Best Interest

## Best Interest

- Eyes of the Court
- Determine, represent, and protect the respondent's "best interest"
- GAL is primarily an investigator or officer of the court rather than respondent's attorney or a zealous advocate for the position voiced by the respondent
- GAL determines what is in the respondent's best interest using her own judgment and files a report with the court advocating what the GAL has decided is in the respondent's best interest

## Best Interest – Responsibilities of GAL

- Conduct an independent and impartial investigation
- Make recommendations to the court
  - respondent's need for a guardian
  - suitability of the guardian
  - respondent's best interests even if in conflict with respondent's expressed desires

## Zealous Advocate

- Role of GAL is to act as a zealous advocate for the respondent
- Must represent respondent in same manner as she would represent any client

## Zealous Advocate – Responsibilities of GAL

- Advise the respondent of all the options as well as the practical and legal consequences of those options and the probability of success
- Zealously advocate the course of action chosen by the respondent
- Not required to advocate a respondent's wishes if they are patently absurd or pose an undue risk of harm

## Zealous Advocate vs Best Interest

- Zealous Advocate – lawyer's role as respondent's attorney
- Best Interest – lawyer's role as guardian ad litem
- Not always clear
  - Zealous Advocate does not always have to advocate client's position
    - Rule 1.14 allows a lawyer to make decisions on behalf of a client
  - Best Interest doesn't reflect the responsibilities of GAL

## Zealous Advocate vs Best Interest

- Lawyers choose the role they prefer
- Some choose safe role of investigator
- Some advocate for respondent's wishes without regard for "best interests"
- Some try to do both
- Is there a conflict between the duties of an attorney and that of a guardian ad litem?

## Professional and Ethical Responsibilities

- All lawyers governed by Rules of Professional Conduct
- Some rules apply only to client-lawyer relationship
- Other rules apply even when lawyer is acting in a non-professional capacity

## Professional and Ethical Responsibilities

- Do GALs have a client-lawyer relationship or are they acting in a "non-professional capacity"?

## 2004 Formal Ethics Opinion 11

- If another lawyer is appointed as the attorney, the lawyer GAL "does not have a client-lawyer relationship...and would not be governed by the Rules of Professional Conduct relating to duties owed to clients."

## 2004 Formal Ethics Opinion 11

- Lawyer who is purely GAL and not attorney is <u>not bound</u> by:
  - Confidentiality (Rule 1.6)
  - Zealous Advocacy (Rule 1.3)
  - Loyalty (Rules 1.7 -1.10)
  - Evaluations for use by third persons (Rule 2.3)

## 2004 Formal Ethics Opinion 11

- Lawyer who is purely GAL and not attorney <u>is bound</u> by:
  - Candor to the Court (Rule 3.3)
  - Fairness to opposing party and counsel (Rule 3.4)
  - Ex parte communications with and unlawful influence of judicial officials (Rule 3.5)
  - Dishonesty, fraud, deceit, misrepresentation, and conduct prejudicial to the admin. Of justice (Rule 8.4)

## 2004 Formal Ethics Opinion 11

- Lawyer who is appointed to act as a party's attorney and guardian ad litem must comply with the Rules of Professional Conduct that apply to client-lawyer relationships.
- Likely scenario is that lawyer who is appointed as the GAL for an unrepresented respondent is subject to the RPC that govern client-lawyer relationships

## Zealous Advocate?

- When lawyer has an attorney-client relationship with a client RPC generally requires lawyer to be a zealous advocate (See rules 1.2 and 1.3)

## Zealous Advocate

- Lawyer must:
  - Communicate with client
  - Explain the potential consequences and the legal options
  - Ascertain the client's wishes
  - Present evidence and arguments on behalf of the client
  - Take appropriate actions to protect client's rights and interests

## Zealous Advocate

- At a minimum a lawyer who is attorney and GAL must ensure that:
  - Respondent is not found incompetent in the face of insufficient evidence
  - Guardianship is not ordered if there are appropriate less restrictive alternatives
  - Appointed guardian is suitable
  - Appropriate limits are placed on the guardianship

## Confidential Information

- Lawyer who is attorney and GAL is prohibited from revealing information about the respondent acquired during the attorney-client relationship unless the respondent gives informed consent to the disclosure and the disclosure is authorized under the RPC (2004 Formal Ethics Opinion 11)

## Rule 1.14; Representing Persons With Diminished Capacity

- When a client's capacity to make decisions is diminished, the lawyer shall as far as reasonably possible, maintain a normal client-lawyer relationship
- Lawyer may take reasonably necessary protective action
- Rule 1.6 authorizes lawyer to reveal info only to extent necessary to protect client

## Rule 1.14; Representing Persons With Diminished Capacity

- Attorney may represent alleged incompetent to oppose the adjudication of incompetence if:
  - The respondent instructs the attorney to do so
  - The attorney determines that the respondent has sufficient capacity to oppose the guardianship
  - Opposing the petition does not require the attorney to present a frivolous claim (1998 Formal Ethics Opinion 16)

## Rule 1.14; Representing Persons With Diminished Capacity

- Attorney may take emergency action to protect the client:
  - Risk of Substantial Harm: substantial physical, financial, or other harm unless action is taken and cannot adequately act on their own.

## Assessing a Client's Mental Capacity

- Just because you don't agree with the decision, doesn't mean the person lacks capacity
  - Ex: smoking is known to cause substantial harm to a person's health, yet the decision to smoke does not mean a person lacks capacity

## Assessing a Client's Mental Capacity

- Capacity is affected by countless variables: time, place, social setting, emotional, mental and physical states, etc.
- Lawyer should take steps to optimize capacity
  - Avoid meeting in the late afternoon
  - Use large print
  - Minimize background noise
  - Avoid legalese

## Assessing a Client's Mental Capacity

- Focus on decision-making *process* vs decisional *output*
- Is the respondent's reasoning process significantly impaired, not whether the respondent's decisions are, in an objective sense, reasonable.
- Are the respondent's cognitive abilities at least minimally sufficient to make important decisions

## Assessing a Client's Mental Capacity

- GAL should consider respondent's:
  - Awareness
  - Comprehension
  - Reasoning
  - Deliberation
  - Understanding
  - Choice

## Assessing a Client's Mental Capacity

- Rule 1.14, GAL should consider and balance:
  - Client's ability to articulate reasoning leading to a decision
  - Ability to appreciate the consequences
  - Substantive fairness
  - Consistency of decision with known long-term commitments and values

## Assessing a Client's Mental Capacity Case Study – Jane Doe

- GAL meets with respondent in person and finds:
  - Respondent articulates wish to remain at home with family
  - Respondent understands and appreciates the potential risks of her choice
  - Respondent has ability to perceive and remember information

## Case Study – Jane Doe

- Petitioner:
  - Respondent is at risk of physical harm in her current environment and is in need of 24 hour SNF
  - No evidence is submitted regarding respondent's competency, other than concerns for her safety
  - Unwilling to consider less restrictive options – guardianship is all or nothing

## Summary Role and Responsibility of GAL

- If respondent is represented by separate counsel, GAL is not respondent's attorney and is not bound by rules governing client-attorney relations
- Lawyer who is attorney and GAL must:
  - Ensure that respondent is not found incompetent in the face of insufficient evidence
  - Guardianship not ordered where there are less restrictive alternatives
  - Appointed guardian is suitable
  - Appropriate limits are placed on the guardianship
  - Is governed by rules governing client-attorney relations

*"...the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but it is [also] somewhat different."*

Orr v. Knowles, 337 N.W. 2d 699, 702(Neb.1983)

THANK YOU!

**§ 35A-1107. Right to counsel or guardian ad litem.**

(a) The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of this Chapter. After being appointed, the guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship. (1987, c. 550, s. 1; 2000-144, s. 33; 2003-236, s. 3.)

Article 4.

Parties.

**Rule 17. Parties plaintiff and defendant; capacity.**

(a) Real party in interest. – Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Infants, incompetents, etc. –

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. – In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. – In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than

20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. – Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. – In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. – In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Session Laws 1981, c. 599, s. 1.

(7) Miscellaneous Provisions. – The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall

apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) Guardian ad litem for infants, insane or incompetent persons; appointment procedure. – When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being. – When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem. – Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a

guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

# LAWYER APPOINTED AS GUARDIAN-AD-LITEM

*Adopted: January 21, 2005*

*Opinion explores the role of a lawyer who is appointed guardian-ad-litem for respondent parent with diminished capacity.*

## Inquiry #1:

Attorney A is appointed guardian-ad-litem (GAL) for a respondent parent with diminished capacity in a Termination of Parental Rights (TPR) action. The parent is indigent and, pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), has also been appointed legal counsel, Attorney B. In In re Shepard, 03-212 (N.C. App. filed January 20, **2004**), the court of appeals held that, in a TPR action based upon parental "incapability," a parent's GAL, who is a lawyer but is not providing legal representation to the parent, "may testify as to the ward's parental capability, and ultimately against the interest of their ward as to the termination hearing."

The basis for the court's decision stems from the observation that the North Carolina State Bar's Rules of Professional Conduct do not appear to govern the conduct of a GAL who acts "purely as a guardian and not an attorney.". at 8. The court also suggested that the role of the GAL is to ensure that the parent receives procedural due process by helping to explain and execute his or her rights.

Is a lawyer, appointed solely as GAL for the parent, governed by the Rules of Professional Conduct?

## Opinion #1:

The court in Shepard recognized that some of the Rules of Professional Conduct create duties that are owed only in the professional client-lawyer relationship. For example, the confidentiality rule only applies when a lawyer has a client-lawyer relationship or has agreed to consider the formation of one. Scope, cmt. [4]. Conversely, there are other rules that apply although a lawyer is acting in a non-professional capacity. For example, a lawyer who commits fraud in a business transaction has violated Rule 8.4 by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Preamble, cmt. [3].

The GAL does not have a client-lawyer relationship with the parent, and therefore, would not be governed by the Rules of Professional Conduct relating to duties owed to clients. See RPC 249. Notwithstanding the above, it may be prudent for the GAL to explain fully to the parent, to the extent possible, his or her role in the litigation, specifically that the GAL is not acting as the parent's lawyer.

## Inquiry #2:

If the court appointed a lawyer to serve both as lawyer for the parent and as the parent's GAL, do the Rules of Professional Conduct require that the lawyer keep all communications confidential?

## Opinion #2:

Yes. A lawyer serving as both lawyer and GAL for a parent in a TPR action must comply with Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 generally prohibits a lawyer from revealing information acquired during the professional relationship unless the client gives informed consent or one of the exceptions allowing disclosure applies.

## Inquiry #3:

If the court appoints the same lawyer as counsel for the parent and as the parent's GAL, does the lawyer have a conflict of interest?

## Opinion #3:

The Shepard court acknowledged that there exists little guidance on the role or specific duties of a GAL, but suggested that the role of the GAL is guardian of the parent's procedural due process. Shepard, at 7. If the role of the GAL is limited to ensuring procedural due process for the parent by helping to explain and execute his or her rights, then this role is consistent with the role of a lawyer representing a client. Therefore, there is no conflict of interest in undertaking representation as both GAL and lawyer. The Ethics Committee takes no position at this time as to whether the GAL has additional responsibilities or whether an expanded role could result in a conflict of interest.

## Inquiry #4:

Assume the parent has separate appointed counsel. Under Shepard, how can the parent's GAL perform his duties with competence if the parent has been advised by her lawyer that she should not share confidential information with the GAL?

## Opinion #4:

The performance of the GAL's duties, as distinct from a lawyer's duties to a client, is not a matter upon which the Ethics Committee can opine.

## Inquiry #5:

Assume the facts in Inquiry #4. Can the parent's lawyer ever advise the client to confer candidly with the GAL under the Rules of Professional Conduct?

## Opinion #5:

Yes. In light of the Shepard decision, a lawyer should inform the parent, to the extent possible, that the GAL does not owe the parent a duty of confidentiality and that the GAL could be called upon to testify as to parental capability. Then, the lawyer must analyze each case and determine whether the parent's full disclosure to the GAL will accomplish the goals of the representation. If the lawyer believes full disclosure is appropriate under the circumstances, he or she may advise the client that he may be candid with the GAL. Likewise, a lawyer may reasonably conclude that full disclosure would not be in the parent's interests and may advise the client against it.

# RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

## Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

*Taking Protective Action*

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

*Disclosure of the Client's Condition*

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

*Emergency Legal Assistance*

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003

# REPRESENTATION OF CLIENT RESISTING AN INCOMPETENCY PETITION

*Adopted: January 15, 1999*

*Opinion rules that a lawyer may represent a person who is resisting an incompetency petition although the person may suffer from a mental disability, provided the lawyer determines that resisting the incompetency petition is not frivolous.*

## Inquiry #1:

Wife, who is elderly, was removed from the marital home. Husband, who is also elderly, contacted Attorney A because Husband did not understand why his wife was removed from the home. He asked Attorney A to investigate. Attorney A discovered that Wife was the subject of an involuntary incompetency proceeding. When Attorney A gained access to Wife, she indicated that she wanted Attorney A to represent her in resisting the involuntary incompetency petition. She repeatedly said that she wanted to go home to live with her husband.

Attorney A also learned that Husband was investigated by police relative to allegations of abuse and neglect of Wife. Attorney A met with Husband and told him that he could not represent Wife in resisting the incompetency petition and represent Husband in defending against an action in connection with Wife's care or treatment. Husband agreed that Attorney A's representation would be limited to representing Wife in resisting the incompetency petition and that Husband would be responsible for paying the legal fees for that representation. A written fee agreement memorializing this arrangement was executed. Although Wife was held in a hospital at this time, she continued to express unequivocally that she desired Attorney A to represent her.

When Attorney A visited Wife, he noticed abnormalities in her behavior but he also witnessed extended periods of apparent lucidity. She repeatedly told Attorney A she wanted to go home, that she did not want an appointed guardian, and that she did not want to be declared incompetent. Attorney A filed several motions in the incompetency proceeding, including a motion to remove the guardian and for a jury trial. At the incompetency hearing before the clerk, the attorney for the Department of Social Services (DSS) and the guardian ad litem who had been appointed for Wife by the clerk, contended that Attorney A had no "standing or authority" to pursue motions on behalf of Wife. They argued that Attorney A had a conflict of interest due to his initial representation of Husband and Husband's continued payment for the representation. The clerk found that Attorney A was without "standing or authority" to represent Wife and summarily denied all motions filed on Wife's behalf by Attorney A. Attorney A's motion to stay the incompetency proceeding was also denied.

During the incompetency hearing, Attorney A was not allowed to participate as counsel for Wife. Attorney A was called as a witness, however. Wife, when she testified, could not identify Attorney A as her lawyer. However, she expressed a desire to return home with her husband to

avoid becoming a ward of the state. At the close of the evidence, the clerk declared Wife incompetent and appointed the director of DSS to be her legal guardian.

Thereafter Attorney A filed a notice of appeal seeking a trial de novo in superior court on the issues of right to counsel, incompetency, and right to a jury trial. The attorney for DSS now contends that Attorney A has no authority to represent Wife because she has been adjudicated incompetent and only her legal guardian may make decisions about her legal representation. The DSS lawyer now demands that Attorney A provide the guardian with a copy of every document in Wife's legal file.

Does Attorney A have a conflict of interest because he initially represented Husband?

## Opinion #1:

No. The representation of Wife in the incompetency proceeding is not a representation that is adverse to the interest of Husband. Furthermore, Attorney A obtained the consent of Husband to represent only Wife in the incompetency proceeding. The exercise of Attorney A's independent professional judgment on behalf of Wife is not impaired by the prior representation of Husband. See Rule 1.7 and Rule 1.9.

## Inquiry #2:

Does it matter that Husband pays for the representation of Wife?

## Opinion #2:

No. Rule 1.8(f) of the Revised Rules of Professional Conduct permits a lawyer to accept compensation for representing a client from someone other than the client if the client consents after consultation; there is no interference with the lawyer's independent professional judgment or the attorney-client relationship; and the confidentiality of client information is protected.

## Inquiry #3:

Wife has been declared incompetent by the state and a guardian appointed to represent her interests. Does Attorney A have to treat Wife as incompetent and defer to the decision of the guardian relative to the representation of Wife?

## Opinion #3:

No. Wife is entitled to counsel of her own choosing particularly with regard to a proceeding that so clearly and directly affects her freedom to continue to make decisions for herself. Rule 1.14(a) provides as follows: "[w]hen a client's ability to make adequately considered decisions in

connection with the representation is impaired, whether because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation. However, if Attorney A has reason to believe that Wife is incapable of making decisions about her representation and is indeed incompetent, the appeal of the finding of incompetency may be frivolous. If so, Attorney A may not represent her on the appeal. See Rule 3.1 (prohibiting frivolous claims and defenses).

## Inquiry #4:

Once the guardian was appointed for Wife, did the guardian become Attorney A's client, or otherwise step into the shoes of Wife, such that Attorney A may only take directions from the guardian and not from Wife?

## Opinion #4:

No. Rule 1.14(a) quoted above indicates that a lawyer may represent a client under a mental disability. The lawyer owes the duty of loyalty to the client and not to the guardian or legal representative of the client, particularly if the lawyer concludes that the legal guardian is not acting in the best interest of the client.

## Inquiry #5:

Does Attorney A have to turn over Wife's legal file to Wife's appointed guardian?

## Opinion #5:

No. When a guardian is appointed for a client, a lawyer may turn over materials in the client's file and disclose other confidential information to the guardian if the release of such confidential information is consistent with the purpose of the original representation of the client or consistent with the express instructions of the client. See, e.g., RPC 206 (attorney for deceased client may release confidential information to the personal representative of the estate). However, where, as here, the release of confidential information to a guardian is contrary to the purpose of the representation, the lawyer must protect the confidentiality of the client's information and may not release the legal file to the guardian absent a court order. See Rule 1.6(d)(3).