INCOMPETENCY DETERMINATIONS

I. Introduction

A. Nature and purpose of an incompetency proceeding.

1. In an incompetency proceeding, a person called a petitioner seeks to have another person, called a respondent, declared incompetent so that a guardian may be appointed to look after the respondent's property or personal affairs or both.

2. The clerk or jury must determine whether there is **clear, cogent and convincing evidence** that respondent lacks sufficient capacity to manage his or her affairs or communicate important decisions concerning his or her person, family, or property.

3. Chapter 35A only requires proof of respondent's inability to do or communicate certain things and does **not** require proof that such lack of capacity is caused by any particular cause or condition.

a) Although the definitions of "incompetent adult" and "incompetent child" refer to certain medical conditions, lack of capacity may be shown without evidence that respondent suffers from any of those conditions.

b) Evidence that respondent suffers from any of those conditions does not, by itself, prove incompetency.

4. Initiating an incompetency proceeding is a serious matter as an adjudication of incompetency results in an individual's loss of rights. Since the respondent's right to liberty or control of property is at stake, statutory procedure must be carefully followed. [*In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).]

5. It may be helpful to have materials on hand that explain the procedure to potential petitioners.

a) See the informational sheet attached as Appendix I at page 85.25.

b) Handouts may be available from other agencies such as the pamphlet titled "Guardianship Of Incompetent Adults in North Carolina" DHHS-6226.

B. Other procedures are available that are **not** incompetency determinations.

1. Civil commitment proceedings under G.S. Chapter 122C. This proceeding is for persons who are allegedly mentally ill or are substance abusers and is entirely different from, and in no way has an effect on, incompetency proceedings under Chapter 35A. [G.S. § 122C-203]

2. Protection of disabled adults under G.S. Chapter 108A. These provisions are for the protection of abused, neglected, or exploited disabled adults. [G.S. § 108A-99 *et seq.*]

3. Powers of attorney under G.S. Chapter 32A. Chapter 32A provides for a general power of attorney, a durable power of attorney and a health care power of attorney. [G.S. §§ 32A-1; 32A-8; 32A-15]

4. Administration of funds owed to an incapacitated adult under G.S. § 7A-111 is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35A. [G.S. § 7A-111(d)] See Clerk's Administration of Funds Owed to Minors and Incapacitated Adults, Estates, Guardianships and Trusts, Chapter 88.

C. General Statutes Chapter 35A establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, G.S. Chapter 35A does not interfere with the authority to appoint a guardian ad litem under G.S. § 1A-1, Rule 17. [G.S. § 35A-1102]

1. A will may not create a guardianship for an adult heir who has not been declared incompetent pursuant to G.S. Chapter 35A. [*In re Efird*, 114 N.C. App. 638, 442 S.E.2d 381 (1994) (provision in will that named two of testator's children as "testamentary guardians" of their disabled sister cannot operate to appoint a guardian).]

2. For procedures to administer veterans' guardianships, see Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

D. Clerk's jurisdiction.

1. The clerk in each county has original jurisdiction over incompetency proceedings. [G.S. § 35A-1103(a)] **An incompetency proceeding is not to be transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised.** [G.S. § 1-301.2(g)]

2. An incompetency proceeding is the only instance in which the clerk may preside over a jury trial. (See Appendix IV at page 85.35 for jury trial procedures.)

3. If the clerk has an interest in the proceeding, direct or indirect, the superior court judge residing or presiding in the district is vested with jurisdiction. [G.S. § 35A-1103(d)]

E. An incompetency proceeding is a special proceeding. [G.S. § 1-301.2(g)(1); Rule of Recordkeeping 7.1]

F. Following an adjudication of incompetence, the clerk must appoint a guardian for the respondent, which is an estate proceeding. (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

G. Definitions.

1. **Incompetent adult** is defined as an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make

or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury or similar cause or condition. [G.S. § 35A-1101(7)]

A civil commitment proceeding under G.S. Chapter 122C is entirely different from, and in no way has an effect on, incompetency proceedings under Chapter 35A. [G.S. § 122C-203]

2. **Incompetent child** is defined as a minor who is at least 17 ½ years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. [G.S. § 35A-1101(8)] **(The procedure for appointing a guardian for a minor who is *not* incompetent under this definition is discussed in Guardianship, Estates, Guardianships and Trusts, Chapter 86.)**

3. Definitions for **autism, cerebral palsy, epilepsy, inebriety, mental illness, and mental retardation** are set out in G.S. § 35A-1101.

II. Procedures for Adjudicating Incompetence

A. Venue.

1. Venue is in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility. [G.S. § 35A-1103(b)]

2. If the respondent's county of residence or domicile cannot be determined, venue is in the county where the respondent is present. [G.S. § 35A-1103(b)]

3. If incompetency proceedings involving the respondent are brought in more than one county in which venue is proper, venue is in the county in which proceedings were commenced first. [G.S. § 35A-1103(c)]

4. The clerk, on motion of a party or the clerk's own motion, may order a change of venue upon finding that no hardship or prejudice to the respondent will result. [G.S. § 35A-1104]

B. Petition.

1. Who may file.

a) Any person, including any State or local human services agency, may file a petition for an adjudication of incompetence. [G.S. § 35A-1105]

b) A professional who deals with the respondent may file the petition. Examples include a staff member from social

services or an institution where the person is hospitalized or is being treated.

2. Contents of the petition. G.S. § 35A-1106 sets out certain required information. PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200) may be used. It meets the requirements of G.S. § 35A-1106.

3. Next of kin. It is good practice for a clerk to review the contents of the petition and inquire as to whether the parties listed in the petition include the next of kin. See section II.F.5 at page 85.7.

   a) "Next of kin" has two meanings:

      (1) The person or persons most closely related by blood to a person. These individuals are sometimes referred to as "nearest of kin."

      (2) The person or persons entitled to inherit personal property from a decedent who has not left a will. [BLACK'S LAW DICTIONARY 1065 (7th ed. 1999)] This group is not necessarily confined to relatives by blood and may include a relationship existing by reason of marriage. This meaning is synonymous with "heirs."

   b) No case has construed "next of kin" in the context of an incompetency proceeding. A case construing the term in another context followed the first definition set out above. In *In re Estate of Bryant*, 116 N.C. App. 329, 447 S.E.2d 468 (1994), the court interpreted "next of kin" in G.S. § 28A-4-1 on priority of letters of administration to mean the decedent's blood relatives, without regard to their eligibility to take under the intestacy statute.

   c) At least one statute defines "next of kin" as synonymous with heirs. G.S. § 41-6.1 provides that a limitation to "next of kin" in a deed, will or other writing means those persons who would take by intestate succession, unless a contrary intention appears by the instrument.

4. Other procedures that may be requested in the petition.

   a) Appointment of a guardian. Generally an application for appointment of a guardian will be made at the same time and on the same form (AOC-SP-200) as a petition for adjudication of incompetence. See Guardianship, Estates, Guardianships and Trusts, Chapter 86.

   b) Appointment of an interim guardian.

      (1) When appropriate the petitioner may seek the appointment of an interim guardian at the same time

and on the same form (AOC-SP-200) as a petition for adjudication of incompetence.

(2) See section II.H at page 85.9 regarding procedures for the appointment of an interim guardian.

C. Right to counsel and appointment of a guardian ad litem.

1. Upon filing of a petition for incompetency, the clerk must appoint an attorney as guardian ad litem unless the respondent retains an attorney, in which event the clerk may discharge the guardian ad litem. [G.S. § 35A-1107]

a) The clerk has discretion whether to discharge the guardian ad litem.

b) A private attorney will be an advocate for the respondent's position. A guardian ad litem is to determine what is in the best interest of the respondent. **Because of this difference in the roles of retained attorneys and guardians ad litem, some clerks do not discharge a guardian ad litem even though a private attorney has been retained.**

2. NOTICE OF HEARING ON INCOMPETENCE/ MOTION IN THE CAUSE AND ORDER APPOINTING GUARDIAN AD LITEM (AOC-SP-201) may be used to appoint the guardian ad litem.

3. It is important to appoint a guardian ad litem in whom the clerk has the utmost confidence.

4. The clerk should not appoint a guardian ad litem based on the recommendation of the petitioner or the petitioner's attorney.

D. Right to jury trial.

1. The respondent has a right to a jury trial, by 12 jurors, upon his or her request, or by request of counsel or the guardian ad litem. [G.S. § 35A-1110] The petitioner has no statutory right to demand a jury trial.

a) Respondent's failure to request a jury trial constitutes a waiver of the right. [G.S. § 35A-1110]

b) If the respondent waives the right, the clerk may nevertheless require trial by jury by his or her own motion and order. [G.S. § 35A-1110]

2. A jury determines *only* the issue of incompetency and only hears evidence as to that question. The jury does not hear evidence regarding the appointment of a guardian and does not determine who will be appointed guardian.

3. If no jury trial is requested or ordered, the clerk should be aware that he or she will be making the incompetency determination. Due process requires an impartial decision-maker. To maintain impartiality, the clerk should limit communications with family members, parties and attorneys.

a) Communications that are made on behalf of only one party without notice to or consent of the other party are called *ex parte* communications. *Ex parte* communications generally should be avoided.

b) *Ex parte* communications between an attorney and a judge or hearing officer are governed by the Rules of Professional Conduct. In an adversary proceeding, a lawyer shall not communicate *ex parte* with a judge or other official except:

(1) In the course of official proceedings;

(2) In writing, if a copy is furnished simultaneously to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(3) Orally, upon adequate notice to opposing counsel or to the adverse party if he or she is not represented by a lawyer; or

(4) As otherwise permitted by law. [Rule of Professional Conduct 3.5(a)(3) and Comment 8]

4. See Appendix IV at page 85.35 for a summary of jury trial procedures and Appendix V at page 85.41 for sample jury instructions.

E. Scheduling the hearing on the petition. The hearing must be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the clerk extends the time for good cause, for preparation of a multidisciplinary evaluation, or for completion of a mediation. [G.S. § 35A-1108(a)]

F. Issuing notice and service.

1. Within 5 days after filing of the petition, the clerk must issue a written notice of the date, time, and place for a hearing on the petition. [G.S. § 35A-1108(a)] NOTICE OF HEARING ON INCOMPETENCE/ MOTION IN THE CAUSE AND ORDER APPOINTING A GUARDIAN AD LITEM (AOC-SP-201) may be used.

2. If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a second notice to the parties informing them that the hearing has been continued, the reason for the continuance, and the date, time and place of the new hearing. The new hearing must be conducted not less than 10 days nor more than 30 days after service of the second notice on the respondent. [G.S. § 35A-1108(b)]

3. The petitioner must have the sheriff **personally** serve the respondent with copies of the petition and initial notice of hearing. [G.S. § 35A-1109] **The sheriff cannot leave service documents with any other person**.

a) Respondent's counsel or guardian ad litem may not waive personal service on the respondent.

b) A sheriff who serves the notice and petition must do so without demanding fees in advance. [G.S. § 35A-1109]

4. Respondent's counsel or guardian ad litem must be served pursuant to G.S. § 1A-1, Rule 4. [G.S. § 35A-1109] In practice, the guardian ad litem accepts service by signing the back of AOC-SP-201. Notices subsequent to the notice of hearing must be served on the parties as provided in G.S. § 1A-1, Rule 5. [G.S. § 35A-1108]

5. Within 5 days after filing the petition, the petitioner must mail by first-class mail a copy of the petition and notice of hearing to respondent's next of kin alleged in the petition and any other persons designated by the clerk, unless such person has accepted notice. Proof of mailings or acceptance is by affidavit or certificate of acceptance of notice filed with the clerk. [G.S. § 35A-1109] CERTIFICATE OF SERVICE (INCOMPETENT PROCEEDING) (AOC-SP-207) may be used. For more discussion of "next of kin", see section II.B.3 at page 85.4.

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

G. Multidisciplinary evaluation ("MDE").

1. Definition.

a) Multidisciplinary evaluation is defined as an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation, education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. [G.S. § 35A-1101(14)]

b) A MDE must set forth the nature and extent of the disability and recommend a guardianship plan and program. [G.S. § 35A-1101(14)]

2. Purpose. The purpose of a MDE is to assist in determining the nature and extent of a respondent's disability and/or to assist in developing an appropriate guardianship plan or program. [G.S. § 35A-1111(a)]

3. Request for MDE.

a) The clerk, on his or her own motion, or on the motion of any party, may require a MDE. [G.S. § 35A-1111(a)]

b) A request **by a party** for a MDE must be in writing and filed with the clerk within 10 days after service of the petition on the respondent. [G.S. § 35A-1111(a)] REQUEST AND

ORDER FOR MULTIDISCIPLINARY EVALUATION (AOC-SP-901M) may be used.

c) The clerk's own motion is not subject to the 10-day limitation.

d) The clerk may order that the respondent attend a MDE for the purpose of being evaluated. [G.S. § 35A-1111(d)]

4. Necessity for a MDE. A MDE is not necessary in every case but may be appropriate:

a) When the clerk feels that the evidence at the hearing is insufficient to make a determination on incompetency;

b) In cases of mental illness when information about the respondent's medications may be important; or

c) When the respondent has no family members or medical history.

5. Preparation and filing of evaluation.

a) If the clerk orders an evaluation, the clerk must name a "designated agency" to prepare it. [G.S. § 35A-1111(b)] A "designated agency" includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers. [G.S. § 35A-1101(4)] [Note: "Area mental health" agencies are now referred to as "local management entities" (LMEs)].

b) The agency must file the MDE with the clerk not later than 30 days after the agency receives the clerk's order. The agency must send copies to the petitioner and respondent's counsel or guardian ad litem within the same time limit, unless the clerk orders otherwise. [G.S. § 35A-1111(b)]

c) The agency must file the MDE and transmit copies within the 30 day time limit set out in subsection (b) above even if the MDE does not contain the medical, psychological, or social work evaluations ordered by the clerk. The agency must explain in a cover letter why the MDE does not contain the necessary evaluations. [G.S. § 35A-1111(b)]

6. Age of evaluation. A MDE must be current, which means that it must have been made not more than 1 year from the date it is presented to or considered by the clerk. [G.S. § 35A-1101(14)]

7. Use of evaluation. The clerk may consider the MDE at the incompetency hearing, a hearing on the appointment of a guardian, or both. [G.S. § 35A-1111(e)]

8. Compliance with order for evaluation. If the respondent refuses to attend the MDE, there is no provision in the statute to compel

compliance. There is no clear statutory authority for the clerk to exercise his or her contempt power to enforce these orders.

9. Access to evaluation limited.

a) A MDE is not a public record and must not be released except by order of the clerk. [G.S. § 35A-1111(b)]

b) The clerk should seal the MDE in an envelope marked "CONFIDENTIAL – DO NOT OPEN" or otherwise ensure that access is restricted.

c) See section IV.E at page 85.15 regarding disposition of evidence after the hearing.

H. Appointment of an interim guardian.

1. An interim guardian is appointed, if at all, **before** an adjudication of incomptency.

2. Motion for appointment of an interim guardian.

a) Petitioner may file a verified motion seeking appointment of an interim guardian at the time of or after the filing of the petition for incompetency. [G.S. § 35A-1114(a)] PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN OR LIMITED GUARDIAN/AND INTERIM GUARDIAN (AOC-SP-200) contains a motion for the appointment of an interim guardian.

b) The motion must set forth facts tending to show:

(1) That there is reasonable cause to believe that the respondent is incompetent, and

(2) One or both of the following:

(a) That the respondent is in a condition that constitutes or reasonably appears to constitute an **imminent or foreseeable risk of harm** to his or her well-being and that requires immediate intervention;

(b) That there is or reasonably appears to be an **imminent or foreseeable risk of harm** to the respondent's estate that requires immediate intervention to protect the respondent's interest; and

(3) That the respondent needs an interim guardian to be appointed immediately to intervene on his or her behalf before the adjudication hearing. [G.S. § 35A-1114(b)]

c) Service of motion and notice of hearing.

(1) Upon filing of the motion for appointment of an interim guardian, the clerk must immediately set a date and time for a hearing on the motion.

(2) The petitioner must have the motion and notice of hearing served promptly on the respondent and on his or her counsel or guardian ad litem and other persons the clerk may designate. [G.S. § 35A-1114(c)] The respondent's next of kin are not entitled to notice unless the clerk so designates.

(3) NOTICE OF HEARING ON INCOMPETENCE/ MOTION IN THE CAUSE AND ORDER APPOINTING GUARDIAN AD LITEM (AOC-SP-201) may be used as it gives notice of the motion for the appointment of an interim guardian.

3. Hearing on motion for appointment of an interim guardian.

a) A hearing must be held as soon as possible but no later than 15 days after the motion has been served on the respondent. [G.S. § 35A-1114(c)]

b) Respondent has a right to counsel or a guardian ad litem at the hearing.

4. Order for appointment of an interim guardian.

a) The clerk must immediately enter an order appointing an interim guardian if at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to the respondent's physical well-being and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent; and/or

(2) That there is, or reasonably appears to be, an imminent or foreseeable risk of harm to the respondent's estate and that immediate intervention is required to protect the respondent's interest. [G.S. § 35A-1114(d)]

b) The order appointing an interim guardian must include specific findings of fact to support the clerk's conclusions and set forth the interim guardian's specific powers and duties. The powers and duties of the interim guardian shall be limited and extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. [G.S. § 35A-1114(e)]

(1) ORDER ON MOTION FOR APPOINTMENT OF INTERIM GUARDIAN (AOC-SP-900M) may be used.

(2) The clerk must complete sections of the form calling for specific findings that support the clerk's conclusion that grounds for immediate intervention exist and for a description of the interim guardian's powers and duties.

5. An interim guardian is different than a guardian appointed temporarily in some cases.

a) An interim guardian is appointed, if at all, **before** an adjudication of incompetency.

b) Some clerks may appoint a guardian on a temporary basis **after** an adjudication of incompetency until the clerk can decide who is to serve as the permanent guardian. See Guardianship, Estates, Guardianships and Trusts, Chapter 86.

6. Interim guardian's bond. [G.S. § 35A-1114(e)]

a) If the interim guardian has authority related to the respondent's estate, the clerk must require a bond in an amount determined by the clerk, with any conditions the clerk may impose.

b) If the interim guardian has authority related only to the respondent's person, the interim guardian is not required to post a bond.

7. Termination of interim guardianship. An interim guardianship must terminate on the earliest of the following:

a) The date specified in the clerk's order;

b) 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days;

c) When any guardian is appointed following an adjudication of incompetence; or

d) When the court dismisses the proceeding at the adjudication hearing. [G.S. § 35A-1114(e)]

I. Voluntary dismissal.

1. The petitioner may take a voluntary dismissal as provided in G.S. § 1A-1, Rule 41, at any time **except** when the petitioner has moved for appointment of an interim guardian. [G.S. § 35A-1112(g)]

2. When the petitioner has filed a motion for an interim guardian, the petitioner may voluntarily dismiss the petition for adjudication of incompetence **only** if done before the hearing on the motion for

appointment of an interim guardian. [G.S. § 35A-1114(f)] If no interim guardian is appointed, a petitioner can voluntarily dismiss the petition without the necessity of an adjudication hearing.

III. Conducting the Hearing

A. The clerk or an assistant clerk holds all incompetency proceedings, whether jury or non-jury. A deputy clerk is not authorized to preside over incompetency hearings. [G. S. § 7A-102] See Appendix II at page 85.28 for a procedures checklist and Appendix III at page 85.29 for a summary of non-jury trial procedures.

B. Before proceeding with an incompetency hearing, the clerk should confirm that the respondent is either present or has been personally served with a copy of the petition and notice of hearing required by G.S. § 35A-1109. **Respondent's counsel or guardian ad litem may not waive personal service.**

C. Before proceeding, the clerk should confirm that the respondent was given 10 days' notice of the hearing. This can be determined by reviewing the sheriff's return of service.

1. There is no case law addressing whether a guardian ad litem can waive the 10 days' notice requirement.

2. Some clerks allow the guardian ad litem to waive the 10 days' notice depending on the circumstances.

3. Others clerks do not allow the guardian ad litem to waive the 10 days' notice on the ground that a waiver could interfere with the respondent's right to retain a private attorney.

D. The clerk should not proceed with an incompetency hearing unless the respondent is represented by a guardian ad litem appointed by the clerk pursuant to G.S. § 35A-1107 and/or by counsel of his or her choice.

E. The clerk should confirm that notice of the hearing and petition was given to the next of kin alleged in the petition and to any other persons designated by the clerk as required by G.S. § 35A-1109.

1. If a person is present **at the adjudication hearing** and claims that he or she was entitled to notice but did not receive it, the clerk should confirm that the person was entitled to notice.

a) If the person was not entitled to notice, the clerk should refer to section III.E.3 at page 85.13 before advising the person that he or she has no recourse.

b) If the person was entitled to notice, depending on the circumstances, the clerk may proceed with the hearing or may continue the matter if the person represents that he or she wants to consult with an attorney or have his or her evidence presented by an attorney.

2. If a person claims **after the hearing** that he or she was entitled to notice but did not receive it, the clerk should confirm that the person was entitled to notice.

   a) If the person was not entitled to notice, the clerk should refer to section 3 below before advising the person that he or she has no recourse.

   b) If the clerk determines that the person was entitled to notice, was not given notice and did not appear, the person may file a motion to set aside the order and reopen the proceeding. [*In re Ward*, 337 N.C. 443, 446 S.E.2d 40 (1994) (opposing party in a personal injury lawsuit was allowed to reopen an incompetency proceeding based on the ground in Rule 60(b)(6) "any other reason justifying relief from the judgment").]

   c) At the hearing on the motion to set aside the adjudication of incompetency:

      (1) The clerk may allow the person to present any evidence that he or she would have presented at the earlier hearing.

      (2) The clerk should decide if the evidence presented justifies relief based on the grounds in G.S. § 1A-1, Rule 60(b). In other words, would the evidence have affected the outcome of the previous hearing, on either the incompetency determination or the appointment of a guardian?

         (a) If the clerk decides that the evidence would have affected the outcome of the previous hearing, the clerk may enter a new order based on the evidence presented.

         (b) If the clerk decides that the evidence would not have affected the outcome of the previous hearing, the clerk may deny the Rule 60(b) motion. The prior adjudication order would remain in effect.

3. Because a determination of the incompetency of a party to a lawsuit may toll an otherwise expired statute of limitations, the interest of the opposing party in a personal injury suit may require notice to that person pursuant to G.S. § 35A-1109. [*See In re Ward*, 337 N.C. 443, 446 S.E.2d 40 (1994).] The holding in *In re Ward* (that a person not related to the respondent was entitled to notice of the incompetency proceeding) should not normally increase the persons entitled to notice. *In re Ward* may only be applicable when the tolling of a statute of limitations is at issue.

F. See section II.D at page 85.5 for respondent's right to jury trial. If trial is by jury, see Appendix IV at page 85.35 for a summary of jury trial procedures.

If the trial is before the clerk, see Appendix III at page 85.29 for a summary of non-jury trial procedures.

G. Recording. An incompetency hearing does not have to be recorded since appeal to superior court is *de novo.* [G.S. § 35A-1115]

1. Combined proceedings. It is typical, however, for the incompetency hearing to be combined with a hearing on the appointment of a guardian, from which appeal is on the record. [*In re Bidstrup*, 55 N.C. App. 394, 285 S.E.2d 304 (1982).] **When the proceedings are combined in this way, the entire proceeding should be recorded.** The clerk may want to hear the incompetency determination in a district courtroom so that the clerk can record the guardianship proceeding.

2. Jury trials. If the incompetency matter is tried before a jury, the jury does not hear evidence as to the appointment of a guardian and does not decide that issue. The clerk should be careful to separate (bifurcate) the incompetency and guardianship proceedings accordingly.

H. The hearing is open to the public unless the respondent, respondent's counsel or the guardian ad litem requests otherwise. Upon such a request, the clerk **must** exclude all persons other than those directly involved in or testifying at the hearing. [G.S. § 35A-1112]

I. It is good practice for the clerk to have a pretrial conference with attorneys so that the parties may preview the case. Matters to be considered include whether the petitioner has given respondent a copy of any doctor's statement the petitioner intends to introduce and whether any unusual defense will be presented.

J. **A proceeding for an adjudication of incompetency is not transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised. [G.S. § 1-301.2(g)(1)]**

K. A certificate by the Director of the United States Veterans' Bureau that the Bureau has rated a person incompetent is *prima facie* evidence of the necessity to appoint a guardian in the guardianship proceeding. [G.S. § 34-7]

1. No North Carolina court has construed whether this provision applies to G.S. Chapter 35A proceedings as well as Chapter 34 (Veterans' Guardianships) proceedings.

2. The only case construing a similar provision determined that the VA rating itself served as *prima facie* evidence of incompetency in the state court proceeding to appoint a guardian. [*In re Estate of Sykes*, 9 Kan. App. 2d 315, 675 P.2d 939 (1984).] The court noted, however, that the VA finding was not binding on the court and that the court could exercise its discretion in deciding whether to appoint a guardian.

3. See Veterans' Guardianship Act, Estates, Guardianships and Trusts, Chapter 87.

IV. Evidence

A. The clerk should be sensitive to the fact that some evidence may be embarrassing or degrading to the respondent. The clerk may wish to discuss this possibility with the parties before the hearing. In uncontested hearings, the clerk may wish to excuse the respondent from certain portions, if the respondent is present.

B. Burden of proof. The petitioner has the burden to show by **clear, cogent, and convincing evidence** that respondent is an incompetent adult or incompetent child. Appendix V at page 85.41 sets out a sample jury instruction on this standard of proof.

C. The petitioner and respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses. [G.S. § 35A-1112(b)]

D. Combined incompetency and guardianship proceedings. If the clerk determines the respondent is incompetent, the clerk may proceed to make inquiry and receive evidence as the clerk deems necessary to determine the nature and extent of the needed guardianship and the proper person or entity to act as guardian. If the clerk determines that the nature and extent of the respondent's capacity justifies ordering a limited guardianship, the clerk may do so. [G.S. § 35A-1212(a)] (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

E. Disposition of evidence after the hearing.

1. Because some evidence may contain information that is sensitive or that is confidential by law, the clerk may wish to dispose of this evidence when the hearing is concluded. The following options are available:

   a) At the close of the hearing, return the document to the person who tendered it; or

   b) Dispose of the evidence as provided in Sup. and Dist. Ct. R. 14. (See Clerk's Handling of Evidence, Courtroom Procedures, Chapter 52.)

2. If the evidence is to be maintained in the file and is not a public record, the clerk should seal the evidence in an envelope marked "CONFIDENTIAL – DO NOT OPEN" or otherwise ensure that access is restricted.

   a) The MDE is an example of a document that by statute is not a public record and to which access is limited.

   b) See section II.G at page 85.7 for more on the MDE.

F. Rules of Evidence. The North Carolina Rules of Evidence, G.S. § 8C-1, apply to incompetency hearings. [G.S. § 8C-1, Rule 1101]

G. Procedure with witnesses.

1. Swearing of witnesses.

a) The clerk or assistant clerk presiding over the hearing must swear each witness called to testify in the proceeding. [G.S. § 8C-1, Rule 603] If an assistant or deputy is acting as a courtroom clerk during the jury trial, he or she may swear the witness. For the procedure to be used when swearing a witness, see Courtroom Oaths, Courtroom Procedures, Chapter 51.

b) Affirmation in lieu of an oath. If a person to be sworn has conscientious scruples against being sworn by an oath, then he or she may be affirmed. [G.S. §§ 1A-1, Rule 43(d); 11-4]

c) Sample oath and affirmation:

Do you swear that the evidence you shall give to the court (and jury) in this matter shall be the truth, the whole truth, and nothing but the truth, so help you, God?

Do you affirm that the evidence you shall give to the court (and jury) in this matter shall be the truth, the whole truth, and nothing but the truth, and that this is your solemn affirmation?

2. Mode and order of presentation.

a) The petitioner is given the first opportunity to call and examine his or her witnesses, whom the respondent may then cross-examine. It is up to the court whether to allow re-direct and re-cross. [G.S. § 8C-1, Rule 611(a)]

b) Leading questions should not be used on direct examination of a witness except as needed to develop the testimony. A leading question is one that instructs the witness how to answer or suggests to the witness the answer desired. [BLACK'S LAW DICTIONARY 897 (7th ed. 1999)]

(1) Leading questions are ordinarily permitted on cross-examination. [G.S. § 8C-1, Rule 611(c)]

(2) The rule against leading questions on direct examination may have to be relaxed in incompetency proceedings.

c) After the petitioner finishes presenting evidence and rests his or her case, the respondent must be given an opportunity to call and examine witnesses, whom the petitioner may then cross-examine.

3. Exhibits.

a) Before any item of tangible evidence is offered as evidence, the exhibit should be marked for identification as either petitioner's exhibit # ____ or respondent's exhibit # ____. [See Sup. and Dist. Ct. R. 14]

(1) To expedite the process, the clerk may wish to premark exhibits.

(2) Not all clerks require exhibits to be marked.

b) The party offering the exhibit should have the witness identify the exhibit and explain its relevance in order to lay a proper foundation for its admissibility. [G.S. § 8C-1, Rules 401 and 901]

c) Many clerks accept affidavits as evidence without requiring the presence of a witness if the respondent's attorney and the guardian ad litem do not object.

4. Expert witnesses. The petitioner or respondent may offer a psychiatrist or other medical professional as an expert. The testimony of expert witnesses is governed by G.S. § 8C-1, Rules 702 through 705.

a) A witness offered as an expert may offer opinion testimony on matters within his or her area of expertise. [G.S. § 8C-1, Rules 702 and 704]

b) The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer. [*State ex rel Comm'r of Ins. v. Rate Bureau,* 75 N.C. App. 201, 331 S.E.2d 124 (1985).]

c) In practice, the doctor who testifies at an incompetency proceeding is an expert and will give an opinion on the respondent's competency.

(1) The attorney calling the doctor should "offer" or "tender" the witness as an expert.

(2) If so, the clerk should state that "The court accepts Dr. _____ as an expert" or something similar.

(3) The attorney calling the witness may neglect to formally offer or tender the witness as an expert. Given the informality of the proceeding, the clerk does not have to correct the oversight or do anything further.

d) **The clerk or jury must have evidence about the respondent's current mental and physical condition on which to base an opinion. A mere conclusory statement by a doctor or an expert witness that the respondent is incompetent does not decide the issue of the respondent's competency.**

e) Non-expert witnesses may testify about their interactions with the respondent, tasks the respondent is able or unable to accomplish, or the degree of assistance needed to accomplish routine transactions, but should not give an opinion as to the respondent's competency.

5. Attorneys as witnesses. Normally attorneys are not called as witnesses.

6. Guardians ad litem as witnesses. In incompetency determinations, the guardian ad litem may be called to testify. The guardian ad litem must present the respondent's express wishes and may make recommendations to the clerk concerning the best interests of the respondent. [G.S. § 35A-1107(b)]

7. Hearing from others present. The clerk may wish to inquire whether anyone else wishes to speak. If the clerk is going to allow individuals to speak from their seats, the clerk should first swear them. Alternatively, the clerk may require those individuals to testify from the witness chair.

a) The clerk may wish to ask these witnesses some preliminary questions to determine the foundation for their testimony and whether that testimony will be from their personal knowledge.

b) The parties should be permitted to cross-examine witnesses after those witnesses have given their direct testimony.

8. Other provisions.

a) For rules regarding competency of witnesses generally, see G.S. § 8C-1, Rule 601 and G.S. § 8-49.

b) For rule regarding objections and exceptions, see G.S. § 1A-1, Rule 46.

c) For rules regarding privileged communications, see G.S. §§ 8-53 *et seq*.

V. Adjudication and Order

A. Procedure when respondent found incompetent. [G.S. § 35A-1112(d)]

1. If the clerk or jury finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk must enter an order adjudicating the respondent incompetent.

a) The form is ORDER ON PETITION FOR ADJUDICATION OF INCOMPETENCE (AOC-SP-202).

b) If the clerk intends to allow the respondent to retain certain legal rights or privileges (and limit the powers of the guardian to be appointed), the order must so indicate. [G.S. § 35A-1215(b)] (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

2. After adjudicating incompetency, the clerk must either appoint a guardian pursuant to G.S. § 35A-1210 *et seq.* or, for good cause shown, transfer the proceeding for the appointment of a guardian to any county having proper venue under G.S. § 35A-1103.

   a) The clerk in the transferring county must transfer all original papers and documents, including the MDE, if any, to the transferee county and close the file with a copy of the adjudication order and transfer order. [G.S. § 35A-1112(f)]

   b) **Example.** The respondent is domiciled in County A but is in a facility in County B. County B is the county of adjudication. No guardian has been appointed. A transfer to County A would be warranted.

   c) For the procedures regarding appointment of a guardian, see Guardianship, Estates, Guardianships and Trusts, Chapter 86.

3. The clerk must send a certified copy of the ORDER ON PETITION FOR ADJUDICATION OF INCOMPETENCE (AOC-SP-202) to:

   a) The Division of Motor Vehicles (for address information, see www.ncdot.gov/dmv) [G.S. § 20-17.1(b)]; and

   b) The clerk of the county of the respondent's legal residence to be filed and indexed as in a special proceeding in that county. [G.S. § 35A-1112(f)] This is done even if the matter is not being transferred for the appointment of a guardian.

4. In practice, some clerks do not send a copy of the adjudication order to DMV if the respondent has been incompetent since birth and has not ever had a driver's license.

5. The clerk may send a certified copy of the adjudication order to any county in which the respondent owns real property.

B. Procedure when respondent is found competent. [G.S. § 35A-1112(c)] If the clerk or jury finds that the respondent is competent, the clerk must dismiss the proceeding.

C. ORDER ON PETITION FOR ADJUDICATION OF INCOMPETENCE (AOC-SP-202) may be used for either determination.

D. Appeal. An appeal from an adjudication of incompetency is to the superior court *de novo* and does not stay the appointment of a guardian unless so ordered by the superior court (or, if the case has been further appealed, by the Court of Appeals). [G.S. §§ 35A-1115; 1-301.2(g)(1)] Next of kin who are entitled to notice of the proceeding are entitled to appeal an adjudication of incompetence. [*In re Winstead*, 189 N.C. App. 145, 657 S.E.2d 411 (2008).]

VI. Costs and Fees

A. Except as otherwise provided, costs are assessed as in special proceedings. [G.S. § 35A-1116(a)]

B. Costs in incompetency proceedings are not always collected in advance.

1. When the county is the petitioner in an incompetency proceeding (e.g., Department of Social Services), court costs generally are not collected in advance. [G.S. § 7A-317]

2. In any incompetency proceeding, a sheriff must serve the notice and petition without demanding fees in advance. [G.S. § 35A-1109]

C. Indigency determination necessary. If the clerk has not previously determined whether the respondent is indigent, upon an adjudication of incompetence, the clerk will need to review respondent's assets and liabilities and make a determination before allocating costs. Information about respondent's assets and liabilities should be included on AOC-SP-200 or AOC-E-206.

D. Allowable costs. Costs, including any reasonable fees and expenses of counsel for the petitioner that the clerk may allow, may be taxed against either party in the discretion of the court unless:

1. The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs are taxed to the petitioner; or

2. The respondent is indigent, in which case the costs must be waived by the clerk if not taxed against the petitioner as provided in section 1 above or otherwise paid as provided in section V.E immediately below. [G.S. § 35A-1116(a)]

E. Who pays.

1. Costs of multidisciplinary evaluation.

a) If the respondent is adjudicated incompetent, the respondent pays for the MDE unless the respondent is indigent, in which case the Department of Health and Human Services pays the costs. [G.S. § 35A-1116(b)(1) and (2)]

b) If the respondent is not adjudicated incompetent, the clerk may tax the cost against either party or the Department of Health and Human Services, or apportion the cost among the parties. [G.S. § 35A-1116(b)(3)]

2. Witness fees.

a) If the respondent is adjudicated incompetent, the respondent pays the witness fees, unless respondent is indigent, in which case the AOC pays the fees. [G.S. § 35A-1116(c)(1) and (3)]

b) If the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding, the petitioner pays the fees. [G.S. § 35A-1116(c)(2)]

c) If the respondent was not adjudicated incompetent and the clerk finds that there were reasonable grounds to bring the

proceeding, each party pays for his or her witnesses, except if the respondent is indigent, the AOC pays for the respondent's witnesses. [G.S. § 35A-1116(c)(2a) and (3)]

3. Fees of court-appointed guardian ad litem.

   a) If the respondent is adjudicated incompetent, the respondent pays the fees of the guardian ad litem, unless respondent is indigent, in which case the Office of Indigent Defense pays the fees. [G.S. § 35A-1116(c2)(1) and (4)]

   b) If the respondent is not adjudicated incompetent and the clerk finds that there were reasonable grounds to bring the proceeding, the respondent pays the fees of the guardian ad litem, unless the respondent is indigent, in which case the Office of Indigent Defense pays the fees. [G.S. § 35A-1116(c2)(2) and (4).]

   c) If the respondent is not adjudicated incompetent **and** the clerk finds that there were not reasonable grounds to bring the proceeding, the petitioner pays the fees. [G.S. § 35A-1116(c)(2)]

   d) The clerk sets the amount of the fee for the guardian ad litem.

4. Mediator fees are paid as provided in G.S. § 7A-38.3B.

5. All other costs.

   a) The clerk has discretion to decide whether the petitioner or the respondent pays other costs of the proceeding, unless:

      (1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case the clerk must tax costs to the petitioner, or

      (2) The respondent is indigent, in which case the clerk must waive the costs (except as indicated above.) [G.S. § 35A-1116(a)]

   b) If not collected in advance, the clerk also collects the costs of the proceeding under G.S. § 7A-306, fees for service of any subpoenas, any other service fees, witness fees, and any certified mail charges.

6. The provisions of G.S. § 35A-1116 apply to all parties to any proceedings under Chapter 35A, including a guardian who has been removed from office and the sureties on the guardian's bond. [G.S. § 35A-1116(d)]

VII. Incompetence Determined in Another State

A. When the petition alleges that the respondent is incompetent based on an adjudication from another state, the clerk may either:

1. Decline to adjudicate incompetence on the basis of the other state's adjudication and proceed with an adjudicatory hearing as in any other case; or

2. Adjudicate incompetence based on the prior adjudication, if the clerk finds by clear, cogent, and convincing evidence that:

   a) The respondent is represented by an attorney or guardian ad litem; and

   b) A certified copy of the prior adjudication has been filed in the proceeding; and

   c) The prior adjudication was made by a court of competent jurisdiction on grounds comparable to a ground for adjudication of incompetence under North Carolina law; and

   d) The respondent, after the adjudication of incompetency, assumed residence in North Carolina and needs a guardian in this State. [G.S. § 35A-1113]

B. In practice, many clerks use the expedited procedure based on another state's adjudication only in uncontested cases. If there is any doubt or question as to the respondent's competence, the better practice is to have a full adjudicatory hearing.

VIII. Restoration of Competency

A. Petition.

1. The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion **in the original special proceeding**. [G.S. § 35A-1130(a)]

   a) This is a motion in the cause in the special proceeding case in which the respondent was adjudged incompetent and should **not** be assigned a new SP number.

   b) There is no AOC form for a restoration proceeding.

2. If the original proceeding has been transferred to another county, the motion for restoration of competency must be filed in the county to which the matter was transferred, that is, to the county where the guardianship is being administered.

B. Right to counsel or guardian ad litem. The ward is entitled to counsel or a guardian ad litem at the hearing. If the ward is indigent and not represented by counsel, the clerk must appoint a guardian ad litem. [G.S. § 35A-1130(c)] The clerk may choose to appoint the same guardian ad litem that served in the incompetency determination.

C. Scheduling hearing. After filing of a motion to restore competency, the clerk must schedule a hearing for a date not less than 10 days or more than 30 days from service of the motion and notice of hearing, unless the clerk for good cause directs otherwise. [G.S. § 35A-1130(b)]

1. There is no case law addressing whether a guardian ad litem can waive the 10 days' notice requirement.

2. Some clerks allow the guardian ad litem to waive the 10 days' notice depending on the circumstances.

3. Other clerks do not allow the guardian ad litem to waive the 10 days' notice on the ground that a waiver could interfere with the ward's right to retain a private attorney.

D. Service of the motion and notice. The petitioner serves notice and a copy of the motion according to G.S. § 1A-1, Rule 4, on the guardian and ward (but not on himself or herself if the petitioner is the guardian or the ward) and any other parties to the incompetency proceeding. [G.S. § 35A-1130(b)]

E. Right to a jury trial.

1. The ward has a right to a jury trial upon the ward's request, or upon the request of counsel or the guardian ad litem. If there is no request, jury trial is waived. [G.S. § 35A-1130(c)]

2. The clerk may nevertheless order a jury trial upon his or her own motion pursuant to G.S. § 1A-1, Rule 39(b). [G.S. § 35A-1130(c)]

3. If the restoration proceeding is by jury trial, only 6 jurors are required (not 12). Jurors are selected in accordance with Chapter 9 of the General Statutes and in the same manner as for an incompetence adjudication by jury. [G.S. § 35A-1130(c)]

F. Multidisciplinary evaluation. The clerk may order a multidisciplinary evaluation upon the clerk's own motion or upon the motion of any party. [G.S. § 35A-1130(c)]

G. Burden of proof.

1. The petitioner has the burden of proof to show by a **preponderance of the evidence** that the ward is competent. [G.S. § 35A-1130(d)] Sample jury instructions for a restoration proceeding are attached as Appendix VIII at page 85.61.

2. This is a lesser standard than is required to find an individual incompetent in the initial adjudication proceeding, which is by "clear, cogent, and convincing evidence." (See section IV.B at page 85.15.) The clerk or jury deciding the matter, however, must decide the issue by considering the same definition of incompetency in both the initial proceeding and the restoration proceeding, defined in G.S. § 35A-1101(7) and (8) and set out in section I.G at page 85.2.

H. A proceeding for restoration of competency is not transferred to superior court even if an issue of fact, an equitable defense, or a request for equitable relief is raised. [G.S. § 1-301.2(g)(1)]

I. Adjudication and restoration order.

1. If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk must enter an order restoring the ward's competency. [G.S. § 35A-1130(d)] There is no AOC form.

    a) Upon such an adjudication, the ward is authorized to manage his affairs, make contracts, control and sell his real and personal property, and exercise all rights as if he had never been adjudicated incompetent. [G.S. § 35A-1130(d)]

    b) The general guardian or guardian of the estate must file a final account with the clerk according to G.S. § 35A-1266. Upon approval of the final account, the guardian is discharged. (See Guardianship, Estates, Guardianships and Trusts, Chapter 86.)

2. The clerk must send a certified copy of the restoration order to:

    a) The Division of Motor Vehicles [G.S. § 20-17.1(b)] (but only if the original incompetency order was sent to DMV); and

    b) The clerk of the county of the respondent's legal residence (when that is not the county of adjudication) to be filed and indexed as in a special proceeding in that county. [G.S. § 35A-1112(f)]

3. The clerk should send a certified copy of the restoration order to any county where the original incompetency order was sent.

4. If the clerk or jury finds that the ward remains incompetent, the clerk must enter an order denying the petition to restore the ward to competency. [G.S. § 35A-1130(f)]

J. Appeal. The ward may appeal from the clerk's order denying the petition to restore the ward to competency to the superior court for a trial *de novo*. [G.S. § 35A-1130(f)]

K. Costs. The restoration statute, G.S. § 35A-1130, does not address costs. G.S. § 35A-1116(a), discussed in section VI at page 85.19, is applicable to restoration proceedings. For purposes of assessing costs, a petition for restoration of competency should be treated as a motion in the existing incompetency file.

APPENDIX I

INFORMATIONAL SHEET

INCOMPETENCY AND GUARDIANSHIP
(G.S. CHAPTER 35A)

When an adult person is able to comprehend and understand but simply needs assistance in various areas of his or her personal and business affairs, a POWER OF ATTORNEY may be more appropriate. The person signing the POWER OF ATTORNEY will choose someone to act on his or her behalf in certain matters as outlined in the POWER OF ATTORNEY. This is a legal document usually prepared by an attorney.

One of the strongest presumptions under North Carolina law, other than the presumption of innocence, is the presumption of competency. A petitioner has the burden of proof in a court of law before a jury and judge, or a judge alone in some instances, to show that the respondent is incompetent, and in need of a guardian. A guardian cannot be appointed for an adult person until that person has been adjudicated incompetent.

An incompetent adult means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. [G.S. § 35A-1101(7)]

An incompetent child is a minor who is at least 17 ½ years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. [G.S. § 35A-1101(8)]

HOW TO BEGIN A COURT PROCEEDING FOR AN INCOMPETENCY ADJUDICATION

BASIS FOR PETITION
If you believe that the person you are inquiring about meets the definition set out above for an incompetent adult or an incompetent minor, there is a basis for the petition.

WHO CAN FILE A PETITION?
Any person who has personal knowledge that the facts set forth on the petition are true. This person is the "petitioner." The person the petitioner seeks to have this court declare incompetent is the "respondent."

FILING OF PETITION
The petitioner should fully complete an original and 3 copies of PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-SP-200), typewritten or hand written legibly in ink, signed and sworn to

before a notary or Clerk of Court. Form AOC-SP-200 is available from the Clerk of Superior Court or at the North Carolina Court System Web site at www.nccourts.org.

This petition (original and 3 copies) must be filed with the Clerk of Superior Court, with the appropriate filing fee, in the county in which the respondent resides, is domiciled, or is an inpatient in a treatment facility. In cases of indigency, fees may be waived.

The clerk must appoint a Guardian Ad Litem to represent the respondent in the proceedings and will set a date for the hearing, issue a NOTICE OF HEARING, and cause a copy of the Petition and Notice to be served on the respondent and Guardian Ad Litem and any other interested parties. **Respondent must be served personally. (The Sheriff cannot leave papers with any other person.)** The petitioner will be responsible for serving additional persons, such as next of kin and other interested persons.

Upon the filing of a petition the Court may order a MULTIDISCIPLINARY EVALUATION. This means that a team of professional caregivers will make a report to the court. The petitioner or respondent may request the clerk to seek a MDE or the clerk may order one on his or her own motion.

PREPARATION OF CASE FOR HEARING

Petitioner (by and through an attorney, if necessary) must prepare the case for hearing and subpoena proper witnesses or secure their attendance otherwise. Proper witnesses may include health care providers, sitters or family members who see the respondent on a daily basis and can testify under oath to his or her condition. The evidence must accurately reflect the respondent's current condition. The sworn statement of the primary doctor will be received into evidence if the matter is not contested and if there is no objection by the Guardian Ad Litem or attorney for respondent. Any psychological evaluations should be certified before being submitted as evidence.

The petitioner should be prepared to present the case in a court of law and to provide all necessary documents. If the petitioner is unable to do so according to the North Carolina Rules of Evidence, an attorney may be needed. The clerk has no authority to appoint counsel or to provide counsel to the petitioner.

Although the respondent may appear at the hearing, there is no statutory requirement that he or she be present.

WHO WILL SERVE AS GUARDIAN?

The court will appoint a guardian upon an adjudication of incompetency according to the following order of priority: an individual; a corporation; or a disinterested public agent. [G.S. § 35A-1214]

HOW DO I PROCEED FROM HERE?

In any matter of concern for the welfare of any person, it is advisable to contact an attorney before filing a petition.

The laws governing guardianships are complex, and this brief outline is not intended to cover all legal matters that may arise.

The clerk is not allowed to act as legal counselor to any party to this matter. You should consult an attorney for this function.

CLERK OF SUPERIOR COURT, _____ COUNTY

APPENDIX II

PROCEDURES CHECKLIST

If pretrial conference held, review any pending matters from that conference. _____

Obtain respondent's social security number, driver's license number, and date of birth. _____

Confirm personal service on respondent. _____

Confirm 10-day notice on respondent. _____

Ensure respondent's right to counsel or guardian ad litem. _____

Determine whether trial is by jury. _____

Determine whether hearing must be recorded. _____

Determine whether public is to have access to the hearing. _____

Premark exhibits. _____

Send copy of order of incompetency to DMV (optional if respondent has never held a driver's license). _____

If respondent out of county, send copy of order of incompetency to county of residence. _____

Ask if respondent owns real property in another county. Send copy of order of incompetency to those counties (optional). _____

If not collected in advance, collect costs under G.S. § 7A-307, fees for service of any subpoenas, any other service fees, witness fees and any certified mail charges. _____

APPENDIX III

SUMMARY OF NON-JURY TRIAL PROCEDURES

I. Introduction

A. *Ex parte* communications.

1. The clerk should be aware that he or she will be making the incompetency determination. Due process requires an impartial decision-maker. To maintain impartiality, the clerk should limit communications with family members, parties or their attorneys.

a) These are called *ex parte* communications because these communications are made on behalf of only one party without notice to or consent of the other party.

a) *Ex parte* communications between an attorney and a judge or hearing officer are governed by the Rules of Professional Conduct. In an adversary proceeding, a lawyer shall not communicate *ex parte* with a judge or other official except:

(1) In the course of official proceedings;

(2) In writing, if a copy is furnished simultaneously to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(3) Orally, upon adequate notice to opposing counsel or to the adverse party if he or she is not represented by a lawyer; or

(4) As otherwise permitted by law. [Rule of Professional Conduct 3.5(a)(3) and Comment 8]

B. If the respondent is not present at the hearing.

1. Before beginning the proceeding, the clerk should confirm that the respondent was given notice of the proceeding and should confirm the presence and readiness of the guardian ad litem.

2. The clerk should confirm that the guardian ad litem has had personal contact with the respondent.

a) Since G.S. § 35A-1107(b) requires the guardian ad litem to personally visit the respondent, the clerk should continue the hearing if the guardian ad litem has not had contact with the respondent.

b) The clerk may wish to determine whether there has been contact before the hearing.

C. Preliminary statement. The clerk may wish to make a brief statement to those assembled.

We are here today to determine the competency of _____. I am _____, the clerk of superior court for _____ County. One of my responsibilities as clerk is to conduct incompetency determinations.

An incompetency determination is a proceeding to determine whether an individual is incompetent and needs to have a guardian appointed for him or her. This incompetency determination was brought by _____, the petitioner, who is seated _____, to determine whether _____, the respondent, is incompetent. [If the petition was brought by DSS, the clerk may wish to indicate who is representing DSS in the proceeding.] Petitioner's lawyer, _____, is seated next to him/her. I have appointed _____, an attorney, to serve as guardian ad litem for the respondent. _____is seated next to the respondent. [If respondent is represented by a private attorney, introduce him or her.] While those of us present may have different opinions on the issue to be decided today, each of us involved in the proceeding will consider and act in the best interest of the respondent, _____.

The proceeding today will be conducted less formally than a trial but we will follow all applicable court rules and the rules of evidence. The hearing will be conducted in two parts. The incompetency determination will be conducted first. The petitioner, _____, has the burden to show by clear, cogent and convincing evidence that respondent, _____, is incompetent as that term is defined by statute in North Carolina. [May want to read G.S. § 35A-1101(7)] To satisfy that burden, the petitioner will call witnesses and may also offer written evidence. The guardian ad litem may ask the witnesses questions. I may ask questions after the guardian ad litem.

After the petitioner has presented all of his/her evidence regarding _____'s incompetency, the guardian ad litem may or may not present evidence on this same point. If the guardian ad litem does present evidence on _____'s competency, the petitioner's attorney may question the witnesses called by the guardian ad litem. I may ask question of those witnesses as well.

After the petitioner and the guardian ad litem have presented all of their evidence, I will hear anyone who wants to be heard. You will be given the opportunity to be heard but will not be allowed to ask questions. [Delete if this is not your practice.]

After everyone has been heard, I will either find the respondent, _____, competent and dismiss the proceeding or find the respondent, _____, incompetent and will proceed to the second part of the hearing, the appointment of a guardian. In some instances, I may continue the hearing so that the respondent can be medically evaluated.

At this time, petitioner may call the first witness.

II. Witnesses

A. Swearing. The witnesses may be sworn individually as each is called to testify or those expected to be called may be asked to approach so that they may be sworn at one time.

B. Respondent as a witness. Generally the respondent is not questioned unless he or she is called as a witness by the guardian ad litem.

1. If the clerk believes that hearing from the respondent will be helpful, the clerk may swear and question the respondent.

2. As a courtesy, to the extent possible, the clerk may wish to advise the guardian ad litem of this possibility before the hearing.

C. Expert witnesses. The petitioner or respondent may offer a psychiatrist or other medical professional as an expert.

1. A witness offered as an expert may offer opinion testimony on matters within their area of expertise. [G.S. § 8C-1, Rules 702 and 704]

2. The decision to qualify a witness as an expert is ordinarily within the exclusive province of the trial judge or hearing officer. [*State ex rel Comm. of Ins. v. Rate Bureau,* 75 N.C. App. 201, 331 S.E.2d 124, *review denied,* 314 N.C. 547, 335 S.E.2d 319 (1985).]

3. In practice, the doctor who testifies at an incompetency proceeding is an expert and will give an opinion on the respondent's competency.

a) The attorney calling the doctor should "offer" or "tender" the witness as an expert.

b) If so, the clerk should state that "The court accepts Dr. _____ as an expert" or something similar.

c) The attorney calling the witness may neglect to formally offer or tender the witness as an expert. Given the informality of the proceeding, the clerk does not have to correct the oversight or do anything further.

4. The clerk must have evidence about the respondent's current mental and physical condition on which to base an opinion. A mere conclusory statement by a doctor or an expert witness that the respondent is incompetent does not decide the issue of the respondent's competency.

5. Non-expert witnesses may testify about their interactions with the respondent, tasks the respondent is able or unable to accomplish, or the degree of assistance needed to accomplish routine transactions, but should not give an opinion as to the respondent's competency.

D. Attorneys as witnesses. Normally attorneys are not called as witnesses. In incompetency determinations, the guardian ad litem may be called to testify.

E. Hearing from others present. The clerk may wish to inquire whether anyone else wishes to speak. If the clerk is going to allow individuals to speak from their seats, the clerk should first swear them. Alternatively, the clerk may require those individuals to testify from the witness chair.

III. Clerk's Ruling

A. Factors to consider. There is no definitive test that determines whether an individual is competent. The clerk must decide the issue on the evidence presented in each case, including the recommendation of the guardian ad litem. Some factors that the clerk may wish to consider in making this determination are listed below.

1. Care for self.

a) Nutrition. Is the respondent able to:

(1) Maintain a proper diet?

(2) Acquire, store and prepare food?

(3) Prepare meals that meet his or her nutritional needs?

(4) Eat without assistance?

(5) Understand the need for nutrition?

b) Personal hygiene. Is the respondent able to:

(1) Use the bathroom?

(2) Wash himself or herself?

(3) Keep clothes clean?

(4) Keep the living environment clean?

(5) Dress and undress without assistance?

(6) Select clothes adequate for the weather?

(7) Understand the need for adequate clothing and personal hygiene?

c) Health care. Is the respondent able to:

(1) Take care of minor health problems?

(2) Follow prescribed routines and take prescribed medications?

(3) Take precautions against illness?

(4) Alert others of serious health problems or reach a doctor, if necessary?

(5) Relay necessary health information to health care providers?

(6) Demonstrate a factual understanding of the risks and benefits of any recommended medical treatments (i.e., able to give informed consent)?

(a) Is respondent aware of or denies his or her illness?

(b) Is respondent able to express a treatment preference?

(c) Does respondent understand the consequences of no treatment?

d) Residential. Is the respondent able to:

(1) Maintain shelter that is safe and adequately heated and ventilated?

(2) Contact people for routine repairs?

(3) Maintain an environment that meets his or her other needs?

e) Safety. Is the respondent able to:

(1) Recognize and avoid hazards in the home (high water temperatures, fire hazards)?

(2) Handle emergencies (fires, break-ins, floods)?

(3) Contact friends or law enforcement if necessary?

(4) Recognize when others present a danger and avoid that danger?

2. Care for property.

a) Acquisition. Is the respondent able to collect money or benefits to which he or she is entitled?

b) Daily management of property. Is the respondent able to:

(1) Handle small and large amounts of money?

(2) Write checks?

(3) Safeguard money?

(4) Make routine purchases such as groceries and clothing?

(5) Pay bills for necessary goods and services?

(6) Budget for everyday expenses? Major expenses?

(7) Avoid being taken advantage of (by being overcharged or the recipient of unnecessary services)?

(8) Resist overtures for money from strangers?

(9) Balance accounts?

(10) Make investments?

c) Disposition.

(1) Is the respondent able to make plans for disposing of his or her assets?

(2) Are these plans erratic or in conflict with previously expressed wishes?

d) Decision making. Is the respondent able to understand, in a general way, how various financial matters might affect him or her?

These factors are taken from Andrerer, *A Model for Determining Competency in Guardianship Proceedings*, 14 Mental & Physical Disability L. Rep. 107, 110-112 (1990).

B. **The clerk must have evidence about the respondent's current mental and physical condition on which to base an opinion. A mere conclusory statement by a doctor or an expert witness that the respondent is incompetent does not decide the issue of the respondent's competency.**

C. The clerk hears from each attorney before the clerk rules. The statements by the attorneys are brief.

D. If the clerk feels that he or she needs more information before deciding the issue, the clerk may continue the hearing and order a multidisciplinary evaluation. [G.S. § 35A-1111(d)]

E. If the clerk wants to review any evidence that was submitted during the hearing, the clerk may do so before ruling. Depending on the amount of evidence to be reviewed, the clerk may review it in the hearing room or in the clerk's office.

F. If the clerk is prepared to make a decision, the clerk should state his or her decision for the record. No findings are necessary unless the clerk allows the respondent to retain certain legal rights. [G.S. § 35A-1215(b)]

IV. Miscellaneous

A. Bench conferences. Sometimes during the proceeding an attorney will ask to approach the bench.

1. Attorneys for both sides, including the guardian ad litem, should be allowed to approach.

2. The attorney requesting the bench conference may relay to the clerk an issue that has just arisen that he or she would like decided out of the hearing of those present.

3. The clerk should provide guidance on the issue and has discretion whether or not to make the matter public.

APPENDIX IV

SUMMARY OF JURY TRIAL PROCEDURES

I. Introduction

A. The procedures for a jury trial of an incompetency determination are the same as for civil jury trials. G.S. Chapter 1A, Rules of Civil Procedure, applies unless otherwise specified.

B. The clerk may use a bailiff or courtroom clerk, or both, to assist in the proceeding.

II. Drawing of the Jury Panel

A. If practical, the clerk should schedule an incompetency jury trial during a jury session of superior or district court so that jurors for the incompetency proceeding may be drawn from the jury pool at the same time, and in the same manner, as for sessions of superior and district court. [See G.S. §§ 9-2 and 9-5] (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.)

B. If a jury session of superior or district court is not being held when jurors are needed for an incompetency proceeding, the clerk should order that a special venire be selected from the jury list in the same manner as is provided for selection of regular jurors. [G.S. § 9-11(b)] (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.)

C. A juror summoned under these provisions will be paid as a regular juror in accordance with G.S. § 7A-312.

III. Jury Orientation and Selection

A. The clerk should introduce himself or herself and any other court personnel present.

B. The clerk should summarize jurors' duties, hear excuses and administer the oath (if not already sworn.) (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.)

1. It will often be the case that a jury panel brought before a clerk in an incompetency proceeding has already appeared as part of a larger jury pool summoned for a superior or district court session. In that case, jurors may have been familiarized with the court process and may have been sworn for jury duty. If not, the clerk should summarize the duties and qualifications of jurors. [G.S. §§ 9-3 and 9-6 (a)] Sample language follows:

You are being asked to perform one of the greatest obligations of citizenship, and that is to sit in judgment on the facts presented in this proceeding involving your fellow citizen.

Trial by jury is a right guaranteed to every citizen. It is the public policy of North Carolina that all qualified citizens, without exception, serve as jurors.

To be eligible to serve as a juror, you must be a citizen and resident of _____ County, at least 18 years of age, physically and mentally competent, able to hear and understand the English language, not have been convicted of a felony nor have pleaded no contest to a felony (unless citizenship has been restored), not have been adjudged incompetent (unless restored to competency), and not have served on either a grand jury or a trial jury in the state courts during the last two years.

(For interpretation of "service as a juror" see Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54. For information about the requirement that a juror be able to "hear and understand the English language" and a possible conflict with the Americans with Disabilities Act, see Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54.)

2. The clerk should advise the jurors that excuses from jury service will be allowed only in exceptional cases. [G.S. §§ 9-6 (a) and 9-6.1] Sample language follows:

Since jury service is a public duty, excuses from this duty are granted only when service as a juror would be more than merely inconvenient and would constitute a great hardship. Under these circumstances you may have your service deferred to a later time. If any of you would like to request that your jury service be deferred due to an exceptional hardship, please raise your hand [or approach.]

(For the clerk's duties upon excusing a juror, see Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54.)

3. After the clerk rules on requests to be excused, the clerk swears the jurors. [G.S. § 9-14] (See Courtroom Oaths, Courtroom Procedures, Chapter 51.) The clerk should ask the jurors to stand, to place their left hand on the Bible and to raise their right hand. (Placing a hand on the Bible is optional if an affirmation is being used.) Sample language for an oath and an affirmation follows:

Do you swear that you will truthfully and without prejudice or partiality try the matter coming before you and give a true verdict according to the evidence, so help you, God?

Do you affirm that you will truthfully and without prejudice or partiality try the matter coming before you and give a true verdict according to the evidence, and that this is your solemn affirmation?

C. Call matter for trial and seat twelve jurors.

1. After the jury panel has been sworn, the clerk should call the matter for trial, introduce the parties, summarize the jury selection procedure, and pick twelve jurors by random from the jury panel.

2. Jurors may be selected by one of two methods.

a) If the clerk uses a manual system, jurors are each given a number and the clerk draws numbered slips of paper from a box or the jurors' names are put on slips of paper that the clerk draws from the box.

b) If a randomized list is used, the clerk calls the first 12 names from the list. If the randomized list is maintained in alphabetical order, the clerk must use an alternate method of selection that results in each name having an equal opportunity to be selected.

c) See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on this procedure.

d) A sample instruction for calling the incompetency adjudication for trial and seating twelve jurors is contained in Appendix V.

D. Select jury.

1. Questioning prospective jurors.

a) The court and the parties to an action are entitled to inquire into the fitness and competency of any prospective juror to serve as a juror. [G.S. § 9-15(a)]

b) The actual questioning of prospective jurors to elicit relevant information may be conducted either by the court or by counsel for the parties. [G.S. § 9-15(a); *State v. Dawson*, 281 N.C. 645, 190 S.E.2d 196 (1972).]

c) The clerk, rather than the parties, usually questions prospective jurors. A list of proper subjects to ask prospective jurors is contained in Appendix V.

2. Challenging prospective jurors.

a) A challenge is the method used by the clerk on occasion and the parties to object to prospective jurors who may be biased against the case and to secure a fair and impartial jury.

b) The petitioner and the respondent are each allowed to peremptorily challenge 8 prospective jurors. [G.S. § 9-19] A peremptory challenge is a challenge to a juror without assigning a reason for the challenge. [BLACK'S LAW DICTIONARY 223 (7th ed. 1999)]

c) After a party has exercised a peremptory challenge, the clerk must excuse the juror from the jury box and replace that

juror with another prospective juror by random selection as described in section III.C.2 above. (See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for discussion on the return of excused jurors to the jury pool.)

d) There is no statutory limit on the number of challenges for cause available to the parties. A challenge for cause is a request that a prospective juror not be allowed to serve because of a specified reason or cause, such as bias or knowledge of the case. [BLACK'S LAW DICTIONARY 223 (7th ed. 1999)]

3. Alternate jurors.

a) The clerk has discretion to allow one or more alternate jurors to be selected. Alternate jurors are selected in the same manner as the regular trial panel of jurors in the case. [G.S. § 9-18(a)]

b) Each party is entitled to 2 peremptory challenges as to each such alternate, in addition to any unexpended challenges the party may have after the selection of the regular trial panel. [G.S. § 9-18(a)]

E. Impanel jury.

1. After all jurors, including alternate jurors, if any, have been selected, the clerk impanels the jury. Sample language is included in Appendix V.

2. Additional instructions explaining the trial procedure and nature of an incompetency adjudication may be given after the jury has been impaneled. Sample language is set out as a preliminary statement in Appendix V.

IV. Trial Procedures

A. Opening statements.

1. At any time before the presentation of evidence, counsel for each party may make an opening statement setting forth the grounds for the claim or defense of his or her respective party. The parties may elect to waive opening statements. [Sup. and Dist. Ct. R. 9]

2. In practice, opening statements in an incompetency proceeding are very brief or are waived. Ten minutes is the customary limit.

B. Hear evidence.

1. Evidence is presented in the same manner as for non-jury incompetency proceedings.

2. See discussion in section IV of the main outline at page 85.15.

C. Final arguments.

1. If the respondent does not introduce evidence during the proceeding, he or she has the right to open the final argument to the jury and may then make a closing argument after the petitioner argues. In other words, if respondent introduces no evidence, respondent's final argument may be first **and** last with the petitioner's final argument in the middle. [Sup. and Dist. Ct. R. 10]

2. In all other cases, the petitioner argues first, followed by the respondent. [Sup. and Dist. Ct. R. 10]

3. The court has discretion as to the conduct of closing arguments. [G.S. § 7A-97]

D. Jury instruction conference.

1. The clerk must hold a jury instruction conference at the close of the evidence or at such earlier time as the clerk may reasonably direct. [Sup. and Dist. Ct. R. 21]

2. The purpose of the conference is to discuss the proposed instructions to be given to the jury. [Sup. and Dist. Ct. R. 21]

3. The conference is held out of the presence of the jury. [Sup. and Dist. Ct. R. 21] The clerk may call a recess for this purpose or may send the jurors to the jury room to select a foreperson.

4. The lawyers must be given an opportunity to request any additional instructions or to object to any of the instructions proposed by the clerk. [Sup. and Dist. Ct. R. 21]

5. If special instructions are desired, they should be submitted in writing to the clerk at or before the conference. [Sup. and Dist. Ct. R. 21]

6. The conference does not have to be recorded but the rule requires that requests, objections and rulings thereon be placed in the record. [Sup. and Dist. Ct. R. 21] Sample language for this conference is included in Appendix V.

7. For miscellaneous jury instructions not included in the sample jury instructions in Appendix V, see Appendix VII.

E. Instruct jurors.

1. General admonition before recess. The clerk should issue a general admonition to jurors before a recess. (See North Carolina Pattern Instruction ("N.C.P.I.") Civil 100.20 included in Appendix VII.)

2. A sample jury charge for an incompetency adjudication is included in Appendix V.

a) The clerk is to explain the law but must not express any opinion as to facts. [G.S. § 1A-1, Rule 51(a)]

b) N.C.P.I. Civil 150.20 on this point is included as part of jury instructions in Appendix V.

3. Special instructions. The clerk has discretion whether to give any special instructions to the jury. [G.S. §§ 1A-1, Rule 51(b); 1-181] See D.5 above.

4. Objections to instructions. After the jury has been instructed but before the jury begins deliberations, the clerk must give the lawyers an opportunity out of the hearing of the jury to object to any instruction given or to the omission of an instruction. Any objections must be made before the jury begins to deliberate and the lawyers must specifically state what part of the charge is objected to and the grounds for the objection. [Sup. and Dist. Ct. R. 21; N.C.R.App.P. 10(b)(2)] See sample language in Appendix V.

5. Additional instructions. If an objection to instructions is made and the clerk considers a request for any corrections or additions to be appropriate, the clerk may give the jury additional instructions to correct or withdraw an erroneous instruction, or to inform the jury on a point of law that should have been covered in the original instructions. See sample language in Appendix V.

6. Procedure for instructing deadlocked jury.

   a) If it appears to the clerk that the jury has been unable to unanimously agree on a verdict, the clerk may require the jury to continue its deliberations and may give or repeat the standard instruction for failure to reach a verdict. This instruction, N.C.P.I. Civil 150.50, is included in Appendix VII.

   b) The clerk may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals. If it appears that there is no reasonable possibility of agreement, the clerk may declare a mistrial and discharge the jury.

F. Receive verdict.

1. See sample language in Appendix V. See also Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for a summary of the procedure for receiving the verdict.

2. See Appendix VI for a sample verdict sheet. The AOC Form is VERDICT SHEET FOR INCOMPETENCY ADJUDICATION (AOC-CPM-1). Note that although only the jury foreperson is required to sign the verdict sheet, some clerks have all twelve jurors sign. Appendix VI contains sample verdict sheets signed by the foreperson only and by the foreperson and all other jurors. These forms are available in a fillable PDF format at www.nccourts.org

G. Discharge jury. After the verdict has been returned and accepted, or after a mistrial has been declared, the clerk should discharge the jury. N.C.P.I. Civil 150.60 is included in Appendix VII.

APPENDIX V

SAMPLE JURY INSTRUCTIONS FOR INCOMPETENCY ADJUDICATION

[NOTE: These instructions are provided as a sample only and need to be adapted according to the specific facts of each case. READ CAREFULLY BEFORE USING. In particular, you will need to alter the charge if respondent is a minor alleged to be an incompetent child and if the proceeding involves a limited guardianship.]

PART I- Call matter for trial and select jury.

Members of the jury, the court now calls for trial the matter of _____. This is a proceeding brought by _____, the petitioner, who is seated _____, to determine whether or not _____, the respondent, who is seated _____, is incompetent and needs to have a guardian appointed. Petitioner's lawyer, _____, is sitting next to petitioner, and respondent's lawyer, _____, is sitting next to respondent.

[NOTE: If respondent is not present, amend by omitting language referring to where respondent is seated and adding language that respondent has waived the right to be present and is represented by his or her lawyer _____, who is seated _____.]

We are now ready to select a jury of twelve persons who will sit on this case, First, the names of twelve of you will be selected randomly and those twelve will be asked to sit in the jury box. Those twelve will then be asked some questions to determine whether they are able to set aside any personal feelings they may have and to fairly consider the evidence that will be presented and the law that I will instruct them on and to impartially determine the issues in this case. These questions are not designed to pry into your personal affairs but are necessary to assure each party an impartial jury.

In the process of selecting a jury, I may excuse a juror if there is a valid reason why that person cannot sit as an impartial juror in this case. Lawyers for both parties are also allowed to excuse a limited number without giving a reason for doing so. If you are excused from serving on the jury, please do not be concerned about that or be upset with the lawyer who excused you. The fact that a lawyer may excuse you in one case does not mean that same lawyer would object to your serving as a juror in another case.

We ask no more of you as jurors than that you use the same good judgment and common sense that you use every day in handling your own affairs.

Now, when your name is called, please come forward and take the seat designated.

[NOTE: At this point, the clerk may wish to initiate questioning of jurors concerning their service in the case. The questioning may be conducted either by the clerk or by the

petitioner's attorney and the guardian ad litem. A list of proper subjects to ask prospective jurors follows (all but the first topic may be asked of the jurors as a group, rather than individually):

A. The occupation of each juror and the juror's immediate family members.

B. Acquaintance or friendship with or bad feelings about the petitioner, respondent, or their attorneys.

C. Acquaintance or friendship with or bad feelings about expected witnesses (for example, the doctor who examined the respondent and whose report will be introduced.)

D. Personal experiences that might give the juror a preconception about the case (for example, family member or friend found incompetent.)

E. Prior jury service and whether verdict was reached. (Clerk cannot ask how juror voted or what verdict was.)

F. Any reason why any juror would be unable to be fair and impartial in hearing the case.

PART II- Impanel jury.

Members of the jury, you have been sworn and are now impaneled to try the issue in the case of _____. You will sit together, hear the evidence, and render your verdict accordingly.

PART III-Preliminary statement.

The case you are about to hear is an incompetency determination in which the petitioner seeks to have respondent declared incompetent, as I will define that term for you, so that a guardian may be appointed to look after the respondent's property or personal affairs or both. Respondent will have an attorney to represent respondent's interests.

It will be your responsibility to determine whether or not respondent is incompetent. If respondent is found to be incompetent, it will be my duty to appoint a guardian. It is not your responsibility to determine whether a guardian will be appointed, who the guardian will be, or what the duties of the guardian should be – these matters are for me to decide [at a separate hearing]. If you do not find respondent to be incompetent, then this matter will be dismissed.

You may be interested to know the following things about guardians. A guardian appointed to manage an incompetent person's property must be bonded, must file annual reports concerning all financial transactions involving that property, and cannot sell any of the incompetent's real estate without prior approval from both me and a superior court judge.

If a person who has been declared incompetent regains competency at any time, there is a procedure available for discharging the guardian and enabling the person to regain control over the management of (*his/her*) property and personal affairs.

Do not confuse this incompetency proceeding with a proceeding for commitment to a mental institution of a mentally ill person or a person with a substance abuse problem. This incompetency proceeding is entirely different from, and does not result in, commitment to a mental institution or placement in a mental retardation center.

At this time, I want to summarize for you the procedure we will follow in hearing this case.

First, the lawyers will have an opportunity to make brief opening statements outlining what each of them believes the competent and admissible evidence will be.

Following opening statements, evidence will be offered by means of testimony of witnesses and documents or other exhibits.

It is the right of the lawyers to object when testimony or other evidence is offered that the lawyer believes is not admissible. When the court sustains an objection to a question, you will be instructed to disregard the question, and the answer, if one has been given, and draw no inference from the question or answer, and not speculate as to what the witness would have said if permitted to answer. When the court overrules an objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

When the evidence is completed, the lawyers will make their final statements or arguments. The final arguments are not evidence but are given to assist you in evaluating the evidence.

Finally, I will give you instructions on the law that applies to this particular case and then you will be taken to the jury room to deliberate and reach a unanimous verdict or decision about the issue I will give to you at that time.

At this point, you are not expected to know the law – as I said, I will instruct you later as to the law that you are to apply to the evidence in this case. It is your duty to decide from the evidence what the facts are, and then to apply to those facts the law that I will later instruct you on.

While you sit as juror in this case, you are not to form any opinion about the case until I tell you to begin your deliberations. Also, you must not talk about the case among yourselves or to anyone else, and must not communicate in any way with any of the parties, lawyers or witnesses in this case. You must follow these rules, both while the trial is in progress or while it is in recess, or while you are in the jury room, in order to ensure that you remain a fair and impartial trier of the facts in this case.

We are now ready for the opening statements of counsel.

PART IV- Jury charge.

Members of the jury, this is a proceeding in which the petitioner, _____, seeks to have the respondent, _____, declared an incompetent adult so that a guardian may be appointed. The petitioner alleges that respondent is an incompetent adult in need of a guardian in that respondent lacks

sufficient capacity to manage respondent's own affairs or to make or communicate important decisions concerning (*his/her*) person, family or property.

There is only one issue or question for you to answer based on the evidence you have heard in this proceeding. [*There may be additional issues if the proceeding involves a limited guardianship.*] That issue is: "Is the respondent, _____, an incompetent adult?" You will answer this issue "Yes" or "No", depending on whether or not you find that the evidence presented in this hearing proves in a clear, cogent, and convincing manner that respondent is an incompetent adult, as I will define that term for you.

CLEAR, COGENT AND CONVINCING EVIDENCE
The burden of proof on this issue is on petitioner, _____, to prove to you by clear, cogent, and convincing evidence that respondent, _____, is an incompetent adult.

Clear, cogent, and convincing evidence is evidence which, in its character and weight, establishes what _____, the petitioner, seeks to prove in a clear, cogent, and convincing fashion. You shall interpret and apply the words "clear", "cogent", and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech. [North Carolina Pattern Instruction ("N.C.P.I.") Civil 101.11 Clear, Strong and Convincing Evidence]

If you find by clear, cogent and convincing evidence that respondent, _____, is an incompetent adult, then you should answer the issue "yes". If you fail to so find, then you should answer the issue "no."

The law in North Carolina defines the term "incompetent adult" to mean an adult who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning (*his/her*) person, family or property, whether such lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

A person lacks sufficient capacity to manage (*his/her*) own affairs if the person is unable to transact the ordinary business involved in taking care of property, and is unable to exercise rational judgment and weigh the consequences of acts upon himself, his family, his property, and estate. It is not enough to show that another might manage that person's property more wisely or efficiently than the person does, or that lack of judgment is shown in an isolated incident and does not apply to (*his/her*) management of (*his/her*) entire property and business. If the person understands what is required for the management of ordinary business affairs and is able to perform those acts with reasonable continuity, if the person comprehends the effect of what (*he/she*) does and can exercise (*his/her*) own will, the person is not lacking capacity to manage (*his/her*) affairs.

A person lacks sufficient capacity to make or communicate important decisions about (*his/her*) person, family, or property if the person is unable to make or communicate decisions about how to furnish the necessities of life, such as food, shelter, clothing, and medical care for himself and his family, if any.

The law does **not** require proof that such lack of capacity is **caused** by any particular cause or condition. Although the definition of incompetent adult refers to certain medical conditions, lack of capacity may be shown without evidence that respondent suffers from any of those conditions, and, likewise, evidence that respondent suffers from any of those conditions does not, by itself, prove lack of sufficient capacity.

[NOTE TO CLERKS: Although the law does not require proof that respondent's incompetency is <u>caused</u> by a particular medical disease or condition, evidence that respondent suffers from such cause or condition may be presented and should be treated as any other evidence. Definitions of such conditions have been deliberately deleted from the jury charge to avoid the implication that causation must be shown. In the event there is evidence that respondent suffers from one of the medical conditions listed in the definition of incompetent adult and respondent's attorney makes a specific request for additional instructions to define such condition, give the following instruction:

In this case, evidence has been presented that respondent suffers from (*name of disease, injury, or medical condition).* The law defines **(***name of disease, injury, or medical condition)* as (*provide appropriate definition from G.S. § 35A-1101).* This evidence is to be considered in the same manner as any other evidence presented in this hearing and should not be given any greater weight or credibility than the rest of the evidence. Even if you find that respondent suffers from (*name of disease, injury, or medical condition),* that alone does not mean that respondent lacks sufficient capacity and is incompetent, as I have defined those terms for you. The only issue for you to decide is whether respondent lacks sufficient capacity to make or communicate important decisions about respondent's person, family, or property or to manage (*his/her)* own affairs.]

WEIGHT OF THE EVIDENCE
You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case. [N.C.P.I. Civil 101.20]

CREDIBILITY OF WITNESS.
You are the sole judges of the credibility of each witness.

You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony.

In determining whether to believe any witness, you should use the same tests of truthfulness you apply in your everyday affairs. These tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is sensible and reasonable; and whether the testimony of the witness is consistent with other believable evidence in this hearing. [N.C.P.I. Civil 101.15]

[NOTE: The following language is optional and ordinarily would not be given unless there are special circumstances bringing into question the opinion or credibility of an expert witness.

TESTIMONY OF EXPERT WITNESS
You have also heard evidence from [a witness] [witnesses] who [has] [have] testified as (an) expert witness(es). An expert witness is permitted to testify in the form of an opinion in a field where (*he*/*she*) purports to have specialized skill or knowledge.

As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight about which I have already instructed you, the evidence with respect to the witness's training, qualifications, and experience or the lack thereof; the reasons, if any, given for the opinion; whether or not the opinion is supported by facts that you find from the evidence; whether or not the opinion is reasonable; and whether or not it is consistent with the other believable evidence in the case.

You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony. [N.C.P.I. Civil 101.25]

DUTY TO RECALL THE EVIDENCE
It is your duty to recall and consider all of the evidence introduced during the trial. If your recollection of the evidence differs from that which the attorneys argued to you, you should be guided by your own recollection in your deliberations. [N.C.P.I. Civil 101.50].

THE COURT HAS NO OPINION
The law requires the presiding judge to be impartial and express no opinions as to the facts. You are not to draw any inference from any ruling that I have made. You must not let any inflection in my voice, expression on my face (or any question I have asked a witness) or anything else that I have done during this trial influence your findings. It is your duty to find the facts of this case from the evidence as presented. [N.C.P.I. Civil 150.20]

JURY SHOULD CONSIDER ALL THE EVIDENCE
Now, members of the jury, you have heard the evidence and the arguments of the attorneys. It is your duty to consider all of the evidence, all contentions arising from that evidence, and the arguments and positions of the attorneys. You must weigh all of these in light of your common sense and determine the truth of this matter. You are to perform this duty fairly and objectively, and without bias, sympathy, or partiality toward any party. [N.C.P.I. Civil 150.10]

JURY SHOULD RENDER VERDICT BASED ON FACTS, NOT CONSEQUENCES
You should not be swayed by pity, sympathy, partiality, or public opinion. You must not consider the effect of a verdict on the petitioner or respondent, or concern yourself as to whether it pleases the Court. Both the petitioner and the respondent (as

well as the public) expect that you will carefully and fairly consider all the evidence in the case, follow the law as given to you by the Court and reach a just verdict, regardless of the consequences. [N.C.P.I. Civil 150.12]

It is exclusively your duty to find the facts, and to determine from clear, cogent, and convincing evidence whether or not you will find the respondent is an incompetent adult, and to answer the issue presented to you either "Yes" or "No".

I instruct you that a verdict is not a verdict until all twelve jurors agree unanimously as to what your decision shall be. You may **not** answer the issue by majority vote. [N.C.P.I. Civil 150.30]

Your first act when you retire to the jury room should be to select one of your members to serve as your foreperson to lead you in your deliberations. [N.C.P.I. Civil 150.40]

PART V – Concluding instructions.
[NOTE: Excuse the alternate juror, if any.]

WHEN TO BEGIN DELIBERATIONS, CHARGE CONFERENCE
Members of the jury, in just a moment I will send you to the jury room. You are to proceed only with the matter of the selection of your foreperson. Do not begin your deliberations in this case until such time as the bailiff delivers the verdict sheet to you. When the verdict sheet is delivered, you may then begin your deliberations. When you have reached a unanimous verdict and are ready to pronounce it, please have your foreperson properly mark the verdict sheet, date and sign the verdict sheet and notify the bailiff by knocking on the door to the jury room. You will then be returned to the courtroom to pronounce your verdict.

You may now go to the jury room to select your foreperson.

[NOTE: At this point the clerk should call the attorneys to the bench and ask if there are any objections to the charge or any omissions from the charge.]

Counsel, before sending the verdict sheet to the jury and allowing them to begin their deliberations, are there any specific objections to any portion of the charge, or to any omission therefrom?

The clerk should consider all specific requests and, if appropriate, bring the jury back and correct or add to the charge.

After all such requests have been submitted and considered and the appropriate record notation(s) made, give the verdict sheet to the bailiff and ask him/her to hand it to the jury without comment, unless further instructions are necessary.

If it is necessary to return the jury to the courtroom for corrections or additions to the charge, the clerk should address the jury, in the courtroom, as follows:

Members of the jury, some additional instructions are necessary to [*correct*] [*further explain*] the previous instructions I gave you.

I instruct you that (*state additional instructions*).

You may now return to the jury room and begin your deliberations as soon as you receive the verdict sheet.

Out of the hearing of the jury, repeat the question to the lawyers regarding corrections or additions to the charge. If there are further specific requests repeat the same procedure as before; if not, hand the verdict sheet to the bailiff to give to the jury. [N.C.P.I. Civil 150.45]

PART VI – Receive verdict.

Would the foreperson please stand.

Has the jury reached a verdict?

Please hand the verdict sheet to [*the assistant clerk/bailiff*].

Members of the jury, you have returned as your unanimous verdict that the respondent (*is/is not*) incompetent. Is this your verdict, so say you all? If it is, please raise your hand.

(See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on the procedure used in receiving a verdict.)

PART VII – Discharge jury.

Members of the jury, this concludes your work and you are now discharged as jurors in this proceeding. Thank you for your service as jurors.

APPENDIX VI

STATE OF NORTH CAROLINA
_____County

File No

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

IN THE MATTER OF:
Name Of Respondent

VERDICT SHEET FOR INCOMPETENCY ADJUDICATION*

ISSUE:

Is the respondent an incompetent adult? ☐ Yes ☐ No

Date	*Name Of Foreperson Of the Jury (Type Or Print)*	*Signature Of Foreperson Of The Jury*

*May have to revise if limited guardianship being considered.

AOC-CPM-1, New 6/2000.
2000 Administrative Office of the Courts

Use form on REVERSE SIDE for signature of jury foreperson and jurors

Form available in fillable PDF format at www.nccourts.org.

STATE OF NORTH CAROLINA
_____County

File No

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

IN THE MATTER OF:
Name Of Respondent

VERDICT SHEET FOR INCOMPETENCY ADJUDICATION*

ISSUE:

Is the respondent an incompetent adult? ☐ Yes ☐ No

Date *Signature Of Foreperson Of the Jury*

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

Signature Of Juror

*May have to revise if limited guardianship being considered.

AOC-CPM-1, Side Two, New 6/2000

Form available in fillable PDF format at www.nccourts.org.

APPENDIX VII

MISCELLANEOUS PATTERN JURY INSTRUCTIONS

1. Recesses (North Carolina Pattern Instruction Civil 100.20) (referred to as "N.C.P.I.")
2. Taking of Notes by Jurors (N.C.P.I. Civil 100.70)
3. Testimony of Interested Witness (N.C.P.I. Civil 101.30)
4. Burden of Proof and Greater Weight of the Evidence (N.C.P.I. Civil 101.10)
5. Failure of Jury To Reach Verdict (N.C.P.I. Civil 150.50)
6. Discharging the Jury (N.C.P.I. Civil 150.60)

N.C.P.I.--Civil 100.20
Replacement June 2010

RECESSES.[1]

Members of the jury, we will now take a (*state length*) recess. During this recess [and any other recess that we have while this trial is in progress], I instruct you that it is your duty to carefully observe the cautions I am now going to give you.

During the course of the trial you should not talk with each other about the case. You may only talk with each other about the case at the end of the trial when you go to the jury room to consider your verdict. It may be difficult for you to understand why you may not discuss this case among yourselves until it is finally submitted to you. It would be unfair to discuss the case among yourselves before you receive everything necessary to reach an informed decision. Until you are instructed to begin deliberations on your verdict, you should not form or express any opinion about the case.

You should not talk or have contact of any kind with any of the parties, attorneys or witnesses. You should not talk to anyone else or allow anyone else to talk with you or in your presence about the case. If anyone attempts to communicate with you about the case you must notify the bailiff immediately. If that person persists, simply walk away and notify the bailiff.

In this age of instant electronic communication and research, I want to emphasize that in addition to not speaking face-to-face with anyone about the case, you should not engage in any form of electronic communication about the trial, including but not limited to: Twitter, blogging, Facebook, text messaging, instant messaging, computer gaming, and any

[1]N.C. GEN. STAT. § 15A-1236 spells out the admonitions that must be given to the jury in a criminal case. There is no comparable statute for civil cases.

These instructions should be given at the first recess after the jury is selected. Although the instructions need not be given in full at each recess throughout the trial, the shorter version found at N.C.P.I. Civil—100.21 ("Recesses") should be repeated.

other such means of electronic communication. Any such discussion could lead to a mistrial and would severely compromise the parties' right to a fair trial.

You should explain this rule prohibiting discussion of the case to your family and friends. (When the trial is over) (When your jury duty is completed), you will be released from this instruction. At that time, you may, but are not required to, discuss the case and your experiences as a juror.

You should avoid watching, reading or listening to any accounts of the trial that might come from any news media. That is, you should not read, listen, or watch anything about it that might be in the newspaper, or on the Internet, radio, or television. Media reports may be incomplete or inaccurate. You may only consider and decide this case upon the evidence received at the trial. If you acquire any information from an outside source, you must not report it to other jurors and you must disregard it in your deliberations. In addition, you should report the outside source of information to the bailiff or to the court at the first opportunity.

While the trial is going on, you must not go to (*state place where case arose*) or make any independent inquiry or investigation about this matter, including, but not limited to, any Internet or other kind of research. You are prohibited from performing your own experiments as well. This case involves the scene and events as it existed at the time, not as it exists today. Viewing the scene, pictures or other materials without the benefit of explanation in court is unfair to the parties who need you to decide this case solely upon the evidence that is admitted in this case.

If you base your verdict on anything other than what you learn in this courtroom, that could be grounds for a mistrial—which means that all of the work that you and your fellow jurors put into this trial will be wasted, and the lawyers, the parties, and a judge will have to do this all over again. If you communicate with others in violation of my orders, you could be held in contempt of court. That's why this is so important. After you have rendered your

verdict, or have been otherwise discharged by me, you will be free to do any research you choose, or to share your experiences either directly or through your favorite electronic means.

You must keep all cell phones turned off when you are in the courtroom or the jury room. While the trial is in progress, you may only talk on a cell phone during a recess outside of the jury room.

If, during the trial, issues arise that would affect your ability to pay attention and sit as a fair and impartial juror, you may explain the matter to the bailiff who will inform me. At any time if you cannot hear a witness, an attorney, or me, please make that fact known immediately by raising your hand.

N.C.P.I.—Civil 100.70
Replacement May 2004

TAKING OF NOTES BY JURORS.[1]

NOTE WELL: While the Rules of Civil Procedure have no statutory analogue to G.S. §15A-1228, which permits jurors in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion), note-taking in civil cases has been left, as a matter of practice, to the sound discretion of the trial judge.

[*If Denied*: In my discretion, members of the jury, you will not be allowed to take notes in this case.]

[*If Allowed*: In my discretion, you will be allowed to take notes in this case.

When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance in your deliberations. All of the evidence is important. Do not let note-taking distract you. Listen at all times intently to the testimony.

Any notes taken by you are not to be considered evidence in this case. Your notes are only to assist your memory and are not entitled to any greater weight than the individual recollections of other jurors.]

[1]Absent a statute permitting or prohibiting note-taking by jurors, the majority of federal circuits have held that the decision lies in the discretion of the trial judge. That the decision should lie within the trial judge's discretion is supported by the fact that neither arguments for or against this issue are so dispositive and outweighing that note-taking should or should not be allowed as a matter of law. Those arguments favoring note-taking are that it is, "when done properly, . . . a valuable method of refreshing memory. In addition, note-taking may help focus jurors' concentration on the proceedings and help prevent their attention from wandering." *United States v. Maclean*, 578 F.2d 64, 66 (3rd Cir. 1978). Arguments against note-taking contend that too much significance will be placed on all matters "arbitrarily" excluded from the notes by the note-taker. Similarly, the few note-takers might dominate jury deliberations and even falsify testimony deliberately. Additionally, by busying themselves with note-taking, some believe that these jurors will miss important testimony. Finally, some simply believe that the "average" juror cannot take notes well and will therefore take notes of inconsequential and irrelevant matters while excluding the substantial issues of the case. *Id*.

N.C.P.I.—Civil 101.30
Replacement March 1994

TESTIMONY OF INTERESTED WITNESS.

You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take the interest of the witness into account. If, after doing so, you believe the testimony of the witness, in whole or in part, you will treat what you believe the same as any other believable evidence.

N.C.P.I.—101.10
Replacement 1994

BURDEN OF PROOF AND GREATER WEIGHT OF THE EVIDENCE.

In this case you will be called upon to answer (*state number*) questions--also called issues. As I discuss each issue I will tell you which party has the burden of proof. The party having that burden is required to prove, by the greater weight of the evidence, the existence of those facts which entitle that party to a favorable answer to the issue.

The greater weight of the evidence does not refer to the quantity of the evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

If you are so persuaded, it would be your duty to answer the issue in favor of the party with the burden of proof. If you are not so persuaded, it would be your duty to answer the issue against the party with the burden of proof.

N.C.P.I. Civil 150.50
Replacement October 1980

FAILURE OF JURY TO REACH VERDICT.

Members of the jury, I am going to ask you to resume your deliberations in an attempt to return a verdict. I have already instructed you that your verdict must be unanimous--that is, each of you must agree on the verdict.[1] I shall give you these additional instructions:

First, it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment.[2]

Second, each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors.[3]

Third, in the course of your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.[4]

Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.[5]

Please be mindful that I am in no way trying to force or coerce you to reach a verdict. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to

[1] Different instructions must be given where the parties have stipulated a stated majority verdict under N.C.G.S. § 1A-1, Rule 48.
[2] Compare N.C.G.S. § 15A-1235(b)(1).
[3] Compare N.C.G.S. § 15A-1235(b)(2).
[4] Compare N.C.G.S. § 15A-1235(b)(3).
[5] Compare N.C.G.S. § 15A-1235(b)(4).

reconcile your differences, if such is possible without the surrender of conscientious convictions, and to reach a verdict.[6]

I will now let you resume your deliberations.[7]

[6] State v. Williams, 288 N.C. 680, 693-696 (1975).

[7] This instruction does not mention that a mistrial will probably necessitate the selection of another jury to hear the case and evidence again, or that more time of the court will be spent in the retrial of the case. Although such language was approved in such cases as State v. Williams, 288 N.C. 680, 693-696 (1975) and State v. Dial, 38 N.C. App. 529, 532-533 (1978), the later case of State v. Lamb, 44 N.C. App. 251 (1979) holds that deadlocked criminal juries are to be instructed in accordance with N.C.G.S. § 15A-1235 after July 1, 1978. Since N.C.G.S. § 15A-1235 does not mention wasted jury and judicial resources which might occur as the result of mistrials, it may be error to so charge in criminal cases, c.f., State v. Alston, 294 N.C. 577 (1978). Whether the same rule will obtain in civil cases is an open question. This instruction, however, takes the conservative approach and follows State v. Lamb and N.C.G.S. § 15A-1235.

N.C.P.I.--Civil 150.60
Replacement May 1988

Discharging The Jury. [1]

Members of the Jury, this concludes your work *(in this case)* and you are now discharged as jurors *(in this case)*. [2]

As a juror you are now permitted to discuss the evidence and all aspects of **[**this case**] [**the case***(s)*** in which you were involved**]** [3] including your verdict*(s)* and your deliberations with other persons, but you are not required to do so.

It is in the public interest that there be the utmost freedom of debate in the jury room and that each juror be permitted to express his or her views without fear of incurring public scorn or the anger of any of the parties. In any event, you should be careful what you say. You should make no statement or answer any question unless you are sure that your statement or answer is complete and correct. It is only fair that you should make no statement that you would not be willing to make, under oath, in the presence of the Court, your fellow jurors, the witnesses, the parties and their counsel.

(In any event, you are directed not to discuss any aspect of this case including your verdict and your deliberations with anyone until you have completed your work for the entire week and I have discharged you at the end of the week. At that time, each of you must determine for yourself whether or not you will discuss these matters.) [4]

[1] Based upon The Art of Instructing the Jury by McBride, Sections 3.69, 3.70 and 3.71, this instruction may be given after the verdict has been returned and accepted. It may also be given after a mistrial has been declared with modifications to reflect that a verdict was not reached.
[2] Use the two phrases in parentheses when the jurors being discharged may be required to serve on other juries in other cases during the session.
[3] Use the first phrase in brackets when the jurors being discharged may be required to serve on other juries in other cases during the session. Use the second phrase in brackets when jurors being discharged will not be required to serve on any further juries during the session.
[4] This paragraph should be used only when the jurors being dismissed may be required to serve on other juries in other cases during the same session.

APPENDIX VIII

SAMPLE JURY INSTRUCTIONS FOR RESTORATION OF COMPETENCY

[NOTE: These instructions are provided as a sample only and need to be adapted according to the specific facts of each case. READ CAREFULLY BEFORE USING.]

PART I–Call matter for trial and select jury.

Members of the jury, the court now calls for trial the matter of _____. This is a proceeding brought by *(name moving party*), the moving party, who is seated (*state where seated)*, to restore [his/her competency] [the competency of (*name incompetent)*]. The moving party's lawyer, *(name attorney)*, is sitting next to him/her. The other party to this proceeding is *(name party)*, and his/her lawyer, *(name attorney)*, is seated next to him/her.

We are now ready to select a jury of six persons who will sit on this case. First, the names of six of you will be selected randomly and those six will be asked to sit in the jury box. Those six will then be asked some questions to determine whether they are able to set aside any personal feelings they may have and to fairly consider the evidence that will be presented and the law that I will instruct them on and to impartially determine the issues in this case. These questions are not designed to pry into your personal affairs but are necessary to assure each party an impartial jury.

In the process of selecting a jury, I may excuse a juror if there is a valid reason why he or she cannot sit as an impartial juror in this case. Lawyers for both parties are also allowed to excuse a limited number without giving a reason for doing so. If you are excused from serving on the jury, please do not be concerned about that or be upset with the lawyer who excused you. The fact that a lawyer may excuse you in one case does not mean that same lawyer would object to your serving as a juror in another case.

We ask no more of you as jurors than that you use the same good judgment and common sense that you use every day in handling your own affairs.

Now, when your name is called, please come forward and take the seat designated.

[NOTE: At this point, the clerk may wish to initiate questioning of jurors concerning their service in the case. The questioning may be conducted either by the clerk or by the moving party's attorney and the other party's attorney. A list of proper subjects to ask prospective jurors follows (all but the first topic may be asked of the jurors as a group, rather than individually):

A. The occupation of each juror and his or her immediate family members.

B. Acquaintance or friendship with or bad feelings about the moving party, other party to the proceeding, their attorneys, or the person seeking to be declared competent if not the moving party.

C. Acquaintance or friendship with or bad feelings about expected witnesses (for example, the doctor who examined the person seeking to be declared competent and whose report will be introduced.)

D. Personal experiences that might give the juror a preconception about the case (for example, family member or friend found incompetent.)

E. Prior jury service and whether verdict was reached. (Clerk cannot ask how juror voted or what verdict was.)

F. Any reason why any juror would be unable to be fair and impartial in hearing the case.

PART II–Impanel jury.

Members of the jury, you have been sworn and are now impaneled to try the issue in the case of _____. You will sit together, hear the evidence, and render your verdict accordingly.

PART III–Preliminary Statement.

In an earlier case *(name incompetent)* was declared to be incompetent and a guardian was appointed to manage his/her property and personal affairs. The case you are about to hear is a restoration of competency, in which the moving party seeks to [be declared competent] [have *(name incompetent)* declared competent], as I will define that term for you.

It will be your responsibility to determine whether or not *(name incompetent)* is competent. If he/she is found to be competent, it will be my duty to discharge the guardian and *(name incompetent)* will be able to look after his/her property and personal affairs. If you do not find *(name incompetent)* competent, then this matter will be dismissed and *(name incompetent)* will continue to have a guardian to look after his/her property or personal affairs, or both.

At this time, I want to summarize for you the procedure we will follow in hearing this case.

First, the lawyers will have an opportunity to make brief opening statements outlining what each of them believes the competent and admissible evidence will be.

Following opening statements, evidence will be offered by means of testimony of witnesses and documents or other exhibits.

It is the right of the lawyers to object when testimony or other evidence is offered that the lawyer believes is not admissible. When the court sustains an objection to a question, you will be instructed to disregard the question, and the answer, if one has been given, and draw no inference from the question or answer, and not speculate as to what the witness would have said if permitted to answer. When the court overrules an

objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

When the evidence is completed, the lawyers will make their final statements or arguments. The final arguments are not evidence but are given to assist you in evaluating the evidence.

Finally, I will give you instructions on the law that applies to this particular case and then you will be taken to the jury room to deliberate and reach a unanimous verdict or decision about the issue I will give to you at that time.

At this point, you are not expected to know the law—as I said, I will instruct you later as to the law that you are to apply to the evidence in this case. It is your duty to decide from the evidence what the facts are, and then to apply to those facts the law that I will later instruct you on.

While you sit as juror in this case, you are not to form any opinion about the case until I tell you to begin your deliberations. Also, you must not talk about the case among yourselves or to anyone else, and must not communicate in any way with any of the parties, lawyers or witnesses in this case. You must follow these rules, both while the trial is in progress or while it is in recess, or while you are in the jury room, in order to ensure that you remain a fair and impartial trier of the facts in this case.

We are now ready for the opening statements of counsel.

PART IV–Jury charge.

Members of the jury, this is a proceeding in which the moving party, *(name moving party)*, seeks to have [his/her competency] [the competency of *(name incompetent)*] restored. The moving party alleges that [he/she] [*(name incompetent)*] is a competent adult in that *(name incompetent)* has sufficient capacity to manage (his/her) own affairs and to make and communicate important decisions concerning his/her person, family or property.

There is only one issue or question for you to answer based on the evidence you have heard in this proceeding. That issue is: "Is *(name incompetent)* a competent adult?" You will answer this issue "Yes" or "No", depending on whether or not you find that the evidence presented in this hearing proves by a preponderance of the evidence that *(name incompetent)* is a competent adult, as I will define that term for you.

The burden of proof on this issue is on the moving party, *(name moving party)*, to prove to you by the preponderance of the evidence that [he/she] [*(name incompetent)*] is a competent adult. This means the moving party must prove by a preponderance of the evidence those facts which entitle that party to a favorable answer to the issue.

The preponderance of the evidence does not refer to the quantity of evidence, but rather to the quality and convincing force of the evidence. It means that you must be persuaded, considering all of the evidence, that the necessary facts are more likely than not to exist.

If you are persuaded, it would be your duty to answer the issue "Yes" in favor of the moving party. If you are not so persuaded, it would be your duty to answer the issue "No."

The law in North Carolina defines the term "competent adult" to mean an adult who has sufficient capacity to manage his or her own affairs and to make and communicate important decisions concerning his/her person, family or property.

A person has sufficient capacity to manage his/her own affairs if he/she is able to transact the ordinary business involved in taking care of his/her property, and is able to exercise rational judgment and weigh the consequences of his/her acts upon himself/herself, his/her family, his/her property, and estate. A person does not lack competence because another might manage that person's property more wisely or efficiently than he/she himself/herself, or because lack of judgment is shown in an isolated incident and does not apply to his/her management of his/her entire property and business. If he/she understands what is required for the management of his/her ordinary business affairs and is able to perform those acts with reasonable continuity, if he/she comprehends the effect of what he/she does and can exercise his/her own will, he/she has the capacity to manage his/her affairs.

A person has sufficient capacity to make and communicate important decisions about his/her person, family, or property if he/she is able to make and communicate decisions about how to furnish the necessities of life, such as food, shelter, clothing, and medical care for himself/herself and his/her family, if any.

[Note to clerk: Use the following paragraph if there is evidence that the person adjudicated incompetent suffers from a disease or medical condition.]

The fact that *(name incompetent)* has certain medical conditions does not by itself prove lack of sufficient capacity. In this case, evidence has been presented that *(name incompetent)* suffers from (*name of disease, injury, or medical condition*). The law defines (*name of disease, injury, or medical condition*) as (*provide appropriate definition from G.S. § 35A-1101*). This evidence is to be considered in the same manner as any other evidence presented in this hearing and should not be given any greater weight or credibility than the rest of the evidence. Even if you find that *(name incompetent)* suffers from (*name of disease, injury, or medical condition*), that alone does not mean that he/she lacks sufficient capacity and is incompetent. The only issue for you to decide is whether *(name incompetent)* has sufficient capacity to make and communicate important decisions about his/her person, family, or property and to manage his/her own affairs.

WEIGHT OF THE EVIDENCE

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case. [N.C.P.I. 101.20]

CREDIBILITY OF WITNESS

You are the sole judges of the credibility of each witness.

You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of that testimony.

In determining whether to believe any witness, you should use the same tests of truthfulness you apply in your everyday affairs. These tests may include: the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias or partiality the witness may have; the apparent understanding and fairness of the witness; whether the testimony is sensible and reasonable; and whether the testimony of the witness is consistent with other believable evidence in this hearing. [N.C.P.I. Civil 101.15]

[NOTE: The following language is optional and ordinarily would not be given unless there are special circumstances bringing into question the opinion or credibility of an expert witness.

TESTIMONY OF EXPERT WITNESS
You have also heard evidence from [a witness] [witnesses] who [has] [have] testified as (an) expert witness(es). An expert witness is permitted to testify in the form of an opinion in a field where (he/she) purports to have specialized skill or knowledge.

As I have instructed you, you are the sole judges of the credibility of each witness and the weight to be given to the testimony of each witness. In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of credibility and weight about which I have already instructed you, the evidence with respect to the witness's training, qualifications, and experience or the lack thereof; the reasons, if any, given for the opinion; whether or not the opinion is supported by facts that you find from the evidence; whether or not the opinion is reasonable; and whether or not it is consistent with the other believable evidence in the case.

You should consider the opinion of an expert witness, but you are not bound by it. In other words, you are not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony. [N.C.P.I. Civil 101.25]

DUTY TO RECALL THE EVIDENCE
It is your duty to recall and consider all of the evidence introduced during the trial. If your recollection of the evidence differs from that which the attorneys argued to you, you should be guided by your own recollection in your deliberations. [N.C.P.I. Civil 101.50]

THE COURT HAS NO OPINION
The law requires the presiding judge to be impartial and express no opinions as to the facts. You are not to draw any inference from any ruling that I have made. You must not let any inflection in my voice, expression on my face (or any question I have asked a witness) or anything else that I have done during this trial influence your findings. It is your duty to find the facts of this case from the evidence as presented. [N.C.P.I. Civil 150.20]

JURY SHOULD CONSIDER ALL THE EVIDENCE
Now, members of the jury, you have heard the evidence and the arguments of the attorneys. It is your duty to consider all of the evidence, all contentions arising from that evidence, and the arguments and positions of the attorneys. You must weigh all of these in light of your common sense and determine the truth of this matter. You are to

perform this duty fairly and objectively, and without bias, sympathy, or partiality toward any party. [N.C.P.I. Civil 150.10]

JURY SHOULD RENDER VERDICT BASED ON FACTS, NOT CONSEQUENCES
You should not be swayed by pity, sympathy, partiality, or public opinion. You must not consider the effect of a verdict on the moving party, or other party [or on *(name incompetent if not petitioner)*], or concern yourself as to whether it pleases the Court. The parties, as well as the public, expect that you will carefully and fairly consider all the evidence in the case, follow the law as given to you by the Court and reach a jury verdict, regardless of the consequences. [N.C.P.I. Civil 150.12]

It is exclusively your duty to find the facts, and to determine by the preponderance of the evidence whether or not you will find that *(name incompetent)* is a competent adult, and to answer the issue presented to you either "Yes" or "No."

I instruct you that a verdict is not a verdict until all six jurors agree unanimously as to what your decision shall be. You may **not** answer the issue by majority vote. [N.C.P.I. Civil 150.30]

Your first act when you retire to the jury room should be to select one of your members to serve as your foreperson to lead you in your deliberations. [N.C.P.I. Civil 150.40]

PART V–Concluding instructions.
[NOTE: Excuse the alternate juror, if any.]

WHEN TO BEGIN DELIBERATIONS, CHARGE CONFERENCE
Members of the jury, in just a moment I will send you to the jury room. You are to proceed only with the matter of the selection of your foreperson. Do not begin your deliberations in this case until such time as the bailiff delivers the verdict sheet to you. When the verdict sheet is delivered, you may then begin your deliberations. When you have reached a unanimous verdict and are ready to pronounce it, please have your foreperson properly mark the verdict sheet, date and sign the verdict sheet and notify the bailiff by knocking on the door to the jury room. You will then be returned to the courtroom to pronounce your verdict.

You may now go to the jury room to select your foreperson.

[NOTE: At this point the clerk should call the attorneys to the bench and ask if there are any objections to the charge or any omissions from the charge.]

Counsel, before sending the verdict sheet to the jury and allowing them to begin their deliberations, are there any specific objections to any portion of the charge, or to any omission therefrom?

The clerk should consider all specific requests and, if appropriate, bring the jury back and correct or add to the charge.

After all such requests have been submitted and considered and the appropriate record notation(s) made, give the verdict sheet to the bailiff and ask him/her to hand it to the jury without comment, unless further instructions are necessary.

If it is necessary to return the jury to the courtroom for corrections or additions to the charge, the clerk should address the jury, in the courtroom, as follows:

Members of the jury, some additional instructions are necessary to [*correct*] [*further explain*] the previous instructions I gave you.

I instruct you that (*state additional instructions*).

You may now return to the jury room and begin your deliberations as soon as you receive the verdict sheet.

Out of the hearing of the jury, repeat the question to the lawyers regarding corrections or additions to the charge. If there are further specific requests repeat the same procedure as before; if not, hand the verdict sheet to the bailiff to give to the jury. [N.C.P.I. Civil 150.45]

PART VI–Receive verdict.

Would the foreperson please stand.

Has the jury reached a verdict?

Please hand the verdict sheet to [the assistant clerk/bailiff].

Members of the jury, you have returned as your unanimous verdict that the *(name incompetent)* (*is*/*is not*) competent. Is this your verdict, so say you all? If it is, please raise your hand.

(See Clerk's Responsibilities for Petit Juries, Courtroom Procedures, Chapter 54, for more on the procedure used in receiving a verdict.)

PART VII–Discharge jury.

Members of the jury, this concludes your work and you are now discharged as jurors in this proceeding. Thank you for your service as jurors.