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Restoration to Competency under G.S. 35A-1130: Common Issues and Questions

Meredith Smith

Guardianship is the legal relationship under which a person or entity is appointed by a court to make decisions and act on behalf of another person (the ward) with respect to the ward's personal affairs, financial affairs, or both.[1] This proceeding is governed by Chapter 35A of the North Carolina General Statutes (hereinafter G.S.) and presided over by the clerk of superior court, who has original and exclusive jurisdiction in the areas of incompetency and adult guardianship. Once the clerk[2] enters an order adjudicating a ward to be incompetent and appoints a guardian, that guardianship can be terminated in only two ways: upon death of the ward[3] or upon entry of an order by the clerk restoring the ward's competency pursuant to G.S. 35A-1130.[4] This bulletin analyzes ten common questions that arise in the context of a restoration proceeding under G.S. 35A-1130; these are as follows:

1. How is a restoration proceeding initiated? What type of document must be filed?
2. What happens if a motion for restoration is filed and it does not contain the required elements to initiate an action?
3. Is a medical report or doctor's note required to file for restoration? If the guardian, the guardian ad litem, or the clerk wants to obtain medical records or other medical evidence regarding the ward's condition, how do they go about obtaining them?
4. Does the petitioner have to have an attorney to file a motion for restoration?
5. To file a motion for restoration, does the ward have to be able to write or read the motion?

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

1. John L. Saxon, North Carolina Guardianship Manual § 1.4-A at 7 (2008).

2. The majority of restoration cases are presided over and decided by the clerk. However, the ward has a right to trial by jury in a restoration proceeding under G.S. 35A-1130(d). A trial by jury may be requested by the ward, his or her attorney, or the guardian ad litem. *See* G.S. 35A-1130(c). Failure to request a trial by jury constitutes a waiver of that right. *Id.* The clerk, on his or her own motion, may require a trial by jury in accordance with G.S. 1A-1, Rule 39(b). *Id.* The right of the clerk to enter an order for a trial by jury is notwithstanding any request or failure to request a trial by jury by the ward, his or her counsel, or his or her guardian ad litem. *Id.* This bulletin focuses on non-jury restoration proceedings, but similar principals described herein apply to cases involving a jury.

3. *See* G.S. 35A-1295(a)(3).

4. *See* G.S. 35A-1130.

6. Once a motion or other document is filed initiating the proceeding, when is the hearing held, what is the process for service, and who receives notice of the filing?
7. May the clerk appoint a guardian ad litem in the restoration proceeding? If so, who is responsible for payment of the guardian ad litem fees?
8. What is the burden of proof that the petitioner must meet at the hearing for restoration, and what may the clerk consider in making his or her ruling?
9. What rights are restored when the motion for restoration is granted by the clerk?
10. What is the applicable appeal period when the clerk denies the petitioner's request for restoration? What is the standard of review on appeal?

1. How is a restoration proceeding initiated? What type of document may be filed?

Any interested person, including a ward, a member of the ward's family, or a guardian, may file papers with the clerk of superior court to initiate a restoration proceeding.[5] There is no single document or form that must be filed. As set forth below, a document presented for filing with the clerk of superior court is sufficient to initiate the action as long as it is evident from the document itself that the filing party is seeking restoration for an identifiable ward and the document is properly verified and contains facts tending to show competence.

Article 3 of Chapter 35A governs the process of restoring competency after an adult[6] has been adjudicated incompetent under Article 1 of Chapter 35A. Article 3 provides, in part, that the guardian,[7] the ward[8] or any other interested person[9] "may petition for restoration of the ward to competency by filing a motion in the cause."[10] The use throughout the statute of the words "petition" and "petitioner" along with "motion in the cause" and "motion" often elicits confusion about what a person or entity must file to initiate the restoration process before the clerk of

5. *See* G.S. 35A-1130(a).

6. This bulletin focuses specifically on restoration of competency of an adult. Minors, defined as persons under the age of eighteen, are legally incompetent to transact business or give consent for most things until they reach the age of eighteen unless they are legally emancipated. *See* G.S. 35A-1201(a)(6); G.S. 48A-2. At the age of eighteen, a minor attains competency and must be adjudicated incompetent under Chapter 35A in order for the statute and any subsequent restoration proceeding to apply. A verified petition for adjudication of incompetence of a minor may be filed when the minor is 17.5 years old. *See* G.S. 35A-1105.

7. *See* G.S. 35A-1130(a). The guardian has an ethical duty to petition for restoration of the ward's competency if the guardian believes that the ward may no longer be legally incompetent. *See* John L. Saxon, Guardianship of Incapacitated Adults: A Summary of North Carolina Law 18 (Nov. 2004), www.sog.unc.edu/sites/www.sog.unc.edu/files/200411MasonGuardianship.pdf. A recent amendment to the North Carolina General Statutes provides that status reports filed by guardians must include a report of the guardian's efforts to restore competency. *See* G.S. 35A-1242(a1)(4).

8. One of the rights retained by the ward, despite an adjudication of incompetency, is the right to petition for restoration. *See* G.S. 35A-1130(a).

9. *Id.* If not the ward or the ward's guardian, the filing party must be an interested person. "Interested person" likely includes, but is not limited to, the ward's next of kin, a government entity or agency, such as a department of social services, a medical provider or other treatment provider of the ward, and any of the original parties to the incompetency/guardianship action.

10. *See* G.S. 35A-1130(a).

superior court.[11] This confusion is exacerbated by the fact that although what is filed is treated as a motion in the cause, it has characteristics of both a motion and a petition.[12] It is like a traditional motion in that it is filed in the existing incompetency proceeding and a new special proceeding file is not opened for the restoration action.[13] It is like a petition in that a written filing is required,[14] it must be served by the petitioner in accordance with Rule 4 of the North Carolina Rules of Civil Procedure,[15] the document initiates the restoration proceeding, and the proceeding has a separate burden of proof that, if met, resolves the case upon the merits.[16]

While this language understandably creates some confusion, it is helpful to understand that it does not matter whether the document presented for filing is called a motion or a petition. A person may file *any* written document, whether handwritten or typed, to petition for restoration as long as the document contains:

(a) a statement that indicates that the filing party is seeking restoration of competency for an identifiable ward previously adjudicated incompetent under Chapter 35A,[17]
(b) facts tending to show that the ward is competent,[18] and
(c) a verification.[19]

Once a document that includes all three elements is filed, the clerk will treat it as a motion in the cause.[20] Below is a more detailed discussion of these three required elements. Reflecting the language used in the statute, this bulletin will refer to the document to be filed as a motion and the person filing the motion as the petitioner.

1.a. A Statement Seeking Restoration for an Identifiable Ward

The first requirement of a restoration motion is relatively easy to satisfy. If the clerk understands from reading the document that the filing party would like the clerk to consider restoring a ward's competency, it is likely that the first requirement has been met. Generally, under North Carolina law, pleadings and motions are interpreted liberally for purposes of initiating an action or raising an issue before the court, particularly when an unrepresented litigant is the filing party.[21] Therefore, when determining whether a filing is sufficient to initiate an action, a

11. *See generally* G.S. 35A-1130.
12. A historical underpinning for this confusion may be the fact that, prior to 1987, initiating a restoration action required the filing of a petition for restoration. *See* G.S. 35-4 (1986) ("When any insane person or inebriate becomes of sound mind and memory or becomes competent to manage his property . . . a petition on behalf of such person may be filed before the clerk . . . "); G.S. 35-1.39(a) (1986) ("The guardian, ward or any other interested person may file a petition with the clerk who appointed the guardian for the restoration of the ward to competency.").
13. *See* G.S. 35A-1130(a).
14. *Id.* Unlike motions, which sometimes may be made orally to a court, a written filing is required by statute to petition for restoration. *Id.* A request for restoration may not be made to the court informally by oral motion during a hearing. *Id.*
15. *See* G.S. 35A-1130(b).
16. *See* G.S. 35A-1130(d).
17. *See generally* G.S. 35A-1130.
18. *See* G.S. 35A-1130(a).
19. *Id* (stating that "the motion shall be verified").
20. *Id.*
21. *See generally* 1 G. Gray Wilson, North Carolina Civil Procedure § 7-4 (motions), § 8-1 (pleadings) (3d ed. 2007).

considerable amount of leeway should be afforded to the filing party.[22] This is to allow the party the opportunity to prove his or her case at the hearing rather than restrict his or her access to restoration based on the technicalities of the documents filed.[23]

1.b. Facts Tending to Show Competency

The motion initiating the restoration proceeding must contain facts tending to show competency.[24] These facts may include, but are not limited to, a description through anecdotes or statements of the ward's ability to manage his or her affairs or to make and communicate decisions regarding the ward's finances, nutrition, personal hygiene, health care, personal safety, employment, and residence.[25] Examples of various statements tending to show competency can be found on the Administrative Office of the Courts (AOC) form SP-208, Guardianship Capacity Questionnaire.[26]

The motion does not have to contain all of the facts and evidence necessary to meet the burden of proof required for a restoration order.[27] There is a significant gap between what a party must include in a motion for the purpose of initiating a restoration action and what a petitioner must prove at a hearing on restoration to obtain a restoration order. The petitioner is afforded the opportunity to fill that gap and meet the burden of proof at the hearing through the presentation of evidence, including oral testimony and written exhibits. Thus, the motion for restoration does not have to contain enough facts and evidence in and of itself to prove the ward's competency. It simply must include some facts *tending* to show competency.[28]

1.c. Verification

Any document filed for the purpose of initiating a restoration proceeding must be verified.[29] Verification serves two key purposes. First, it binds the person filing the document under oath to his or her statement of facts, subject to the penalty of perjury for any falsity.[30] As one court noted, a verification is a reasonable method of assuring that the court exercises power only when an identifiable person "'vouches' for the validity of the allegations."[31] Second, and equally important, a proper verification is necessary to invoke the subject matter jurisdiction of the court over the matter.[32]

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22. *See id*.
23. *See id*.
24. *See* G.S. 35A-1130(a).
25. *See generally* Administrative Office of the Courts (AOC) Form SP-208 (Guardianship Capacity Questionnaire).
26. *See id.*
27. To obtain restoration of competency for the ward, the petitioner must prove by a preponderance of the evidence that the ward is competent. *See* G.S. 35A-1130(d). This burden of proof is discussed in greater detail in question 8, below.
28. *See* G.S. 35A-1130(a).
29. *See id*.
30. *See* G.S. 1A-1, Rule 11(b). *See also* 1 G. Gray Wilson, North Carolina Civil Procedure § 11-5 (3d ed. 2007).
31. *See In re* T.R.P., 360 N.C. 588, 592 (2006).
32. *See id.* at 591.

To properly verify the motion, the petitioner must follow three steps. First, the motion must contain a statement that is substantially similar to the following:

> The contents of the [document] verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he or she believes them to be true.[33]

Second, the person filing the motion for restoration must swear to this or a similar statement under oath before a notary public or other officer of the court authorized to administer oaths, such as a magistrate, judge, or clerk of superior court.[34] To properly administer the oath, the notary or other authorized officer must be able to certify that at a single time and place the petitioner:

1. appeared in person before the notary,
2. was personally known to the notary or identified by the notary through satisfactory evidence, such as a driver's license, and
3. made a vow of truthfulness on penalty of perjury while invoking a deity or using any form of the word "swear."[35]

For the third and final step, the notary then notarizes the motion. The notary certification must contain at least the following information:[36]

1. the name of the petitioner who appeared in person before the notary unless the name of the petitioner is otherwise clear from the record itself,
2. an indication that the petitioner signed the document and certified to the notary under oath or affirmation the truth of the matters stated in the document,
3. the date of the oath or affirmation,
4. the signature and seal or stamp of the notary who took the oath or affirmation,
5. the notary's commission expiration date.

An example of a valid verification can be found on page 3 of AOC form SP-200, the Petition for Adjudication of Incompetence and Application for Appointment of Guardian or Limited Guardian.[37] A copy of this verification is set forth in Figure 1, above.

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33. *See* G.S. 1A-1, Rule 11(b). *See also In re* the Triscari Children, 109 N.C. App. 285, 287 (1993) (holding that, in the context of a termination of parental rights proceeding, where a chapter requires a verified petition, and verification is not defined in the chapter, "the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified"); State v. Johnson, 198 N.C. App. 138, 140–41 (2009) (adopting the holding of *In re* the Triscari Children and stating that in the absence of specific requirements for a verified petition in a child custody case under Chapter 52C, the requirements for verification established by Rule of Civil Procedure 11(b) apply).

34. *See* G.S. 1A-1, Rule 11(b); G.S. 1-148. *See also* 1 G. Gray Wilson, North Carolina Civil Procedure § 11-7 (3d ed. 2007).

35. G.S. 10B-3(14).

36. *See* G.S. 10B-40(d). Pursuant to G.S. 10B-40(d), the notary certification is acceptable also if it is in the form set forth in G.S. 10B-43, which contains all of the information required under G.S. 10B-40(d) as well as some additional information, such as the county and state where the notary notarized the document.

37. *See* Administrative Office of the Courts, Form AOC-SP-200, www.nccourts.org (click on "Forms" at the top of the page).

Figure 1. Form of proper verification (from page 2 of AOC-SP-200)

VERIFICATION	
I, the undersigned petitioner, have read this Petition and state that its contents are true to my own knowledge except those matters stated on information and belief, which I believe are true.	
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	*Date*
Date / *Signature Of Person Authorized To Administer Oaths*	*Signature Of Petitioner*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*	
☐ *Notary* / *Date My Commission Expires*	
SEAL / *County Where Notarized*	

AOC-SP-200, Page Two, Rev. 6/14

In contrast, AOC-E-415, the Motion in the Cause to Modify Guardianship form, does not contain a valid verification because the signature block requires only the signature of the petitioner and a notary.[38] This form is regularly relied upon in guardianship cases to modify an existing guardianship. Although the form is not drafted to specifically address an action for restoration, the petitioner can adapt the form to satisfy the requirements of a restoration motion. First, the petitioner could check the "Other/Comment" box on page 1 and write "enter an order for restoration to competency" to identify the relief requested. Second, the petitioner could notify the court that he or she is seeking to prove that the ward is competent by checking off the relevant competencies listed on page 2. Third, the petitioner could include any additional facts showing competency on page 3. Finally, the petitioner should attach a separate verification to the form to properly verify the document before filing it similar to AOC-SP-200, discussed above.

2. What happens if a motion for restoration is filed and it does not contain the required elements to initiate an action?

The hearing clerk[39] should analyze a motion for restoration after it is filed and before the hearing to ensure it complies with the requirements set forth in question 1, above. If the hearing clerk determines it is not clear that the petitioner is seeking restoration for an identifiable ward, or if the motion does not contain facts tending to show competency, the hearing clerk may give the

38. *See* Martin v. Martin, 130 N.C. 27, 28 (1902) (holding that the phrase "sworn and subscribed to" is defective as a verification); *In re* the Triscari Children, 109 N.C. App. 285, 287 (holding that petitions with only a signature and notary notarizing the signature were not in compliance with the statute requiring them to be verified).

39. The clerk at the counter who accepts filings does not review the motion to determine whether it meets the legal standard to initiate a restoration action. The clerk at the counter accepts the motion and clocks it in even if there appear to be deficiencies in the motion. The motion is then reviewed by the elected clerk or assistant clerk with the judicial authority to preside over the hearing on restoration. This is because the determination of whether the motion or other document filed meets the legal standard for initiating the restoration action is a judicial decision. It is not a decision to be made by a clerk accepting filings at the counter and acting in an administrative capacity.

petitioner an opportunity to file an amendment to the motion to fix the deficiency in the filing prior to the hearing. However, if the motion filed is missing or lacks a proper verification, it is less clear whether the hearing clerk may give the petitioner an opportunity to amend the motion to correct or add the verification without potentially voiding any subsequent order entered in the proceeding. Where a motion lacks a proper verification, the best practice, as evidenced by the discussion below, is for the clerk to dismiss the motion without prejudice and allow the petitioner to re-file the action.

As noted above, a proper verification is necessary to invoke the subject matter jurisdiction of the clerk to hear the restoration matter.[40] If a motion for restoration is missing a verification or contains an invalid verification and the clerk subsequently enters an order in that proceeding, the order may be void and could later be vacated on appeal.[41] It is incumbent upon the clerk to review the verification to ensure that the motion was properly verified,[42] even if the parties do not raise the issue to the court.[43] Furthermore, the North Carolina Supreme Court has held that an invalid or missing verification may not be cured by consent of the parties.[44]

Although there are no North Carolina cases that address the requirement that a restoration motion under Chapter 35A be verified, there are a number of cases in the juvenile arena where the court vacated orders for abuse, neglect, and dependency and the termination of parental rights when the petitions in those cases were not properly verified.[45] These juvenile cases are similar to an action for restoration in that the relative underlying statutes each require verification of the petition or motion initiating the proceeding.[46] In *In re T.R.P.*, the North Carolina Supreme Court held that a challenge to subject matter jurisdiction could not be waived and

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40. *See* Boyd v. Boyd, 61 N.C. App. 334, 336 (1983) (holding that a proper verification at the time of filing is mandatory for jurisdiction when required by statute); Fansler v. Honeycutt, ___ N.C. App. ___, 726 S.E.2d 6, 8 (2012) (stating that "if an action is statutory in nature, the requirement that pleadings be signed and verified is not a matter of form, but substance, and a defect therein is jurisdictional" (internal quotation omitted)). Subject matter jurisdiction is the court's or the clerk's authority to hear and enter orders in a case. *See* Haker-Volkening v. Haker, 143 N.C. App. 688, 693 (2001). The clerk has original jurisdiction over restoration proceedings pursuant to G.S. 35A-1103(a).

41. *See In re* the Triscari Children, 109 N.C. App. 285 (vacating a termination of parental rights order for lack of subject matter jurisdiction because the petition was not verified); *In re* Green, 67 N.C. App. 501 (vacating and dismissing a juvenile abuse and neglect case for want of subject matter jurisdiction because the department of social services representative failed to verify the petition). *See also* State *ex rel*. Hanson v. Yandle, 235 N.C. 532, 535 (1952) ("A lack of jurisdiction or power in the court entering a judgment always avoids the judgment, and a void judgment may be attacked whenever and wherever it is asserted . . . " (internal citation omitted)).

42. The court has an inherent power to inquire into and determine whether it has subject matter jurisdiction. *See In re* McKinney, 158 N.C. App. 441, 448 (2003).

43. *See* Feldman v. Feldman, 236 N.C. 731, 734 (1953) (stating that "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties.").

44. *See In re* Sauls, 270 N.C. 180, 186 (1967) (holding that subject matter jurisdiction "cannot be conferred upon a court by consent, waiver or estoppel, and therefore failure to . . . object to the jurisdiction is immaterial" (quotation omitted)). *See also* Anderson v. Atkinson, 235 N.C. 300, 301 (1952).

45. *See generally In re* T.R.P., 360 N.C. 588 (2006).

46. *See* G.S. 7B-403(a) (requiring that to initiate a case for the abuse, neglect, or dependency of a juvenile, "the petition shall be drawn by the director, *verified* before an official authorized to administer oaths, and filed by the clerk, recording the date of filing" (emphasis added)); G.S. 7B-1104 (requiring that to initiate a termination of parental rights proceeding the "petition or motion . . . shall be *verified* by the petitioner or movant" (emphasis added)).

quoted other court decisions that held that defects in jurisdiction such as an invalid or missing verification may not be "cured by waiver, consent, amendment, or otherwise."[47]

However, in the case of *Estate of Livesay*, the North Carolina Court of Appeals upheld an amendment to a complaint in a civil action where the sole purpose of the amendment was to add a signature and verification by the petitioner, which was lacking in the originally filed complaint.[48] The court in *Livesay* stated that the amended complaint, which was identical to the complaint except that it added a signature and proper verification, was an effective remedy to give the court subject matter jurisdiction.[49] In its holding, the court stated that Rule 11 allows prompt remedial measures to fix the lack of a signature and/or verification in the original pleading, thereby rectifying the omission and restoring the subject matter jurisdiction of the court.[50] Although the underlying facts of the case related to a signature by an attorney or a party under Rule 11(a), which specifically allows for remedial measures, the court's holding seemed to discuss Rule 11 more generally, including actions such as restoration, where a statute requires verification of a pleading by a party under Rule 11(b).[51]

There is at least one other case, *Alford v. Shaw*, where the court held that a party could amend the initial pleading to add the missing the verification.[52] In that case, unlike in *Livesay*, the underlying statute did require that the petition be verified.[53] A later decision by the North Carolina Supreme Court limited the court's holding in *Alford* and stated that "a shareholder derivative suit appears to be the only situation where a specific requirement that the pleadings be verified is not considered jurisdictional in nature."[54]

In contrast to the court's decision in *Livesay* and *Alford*, the North Carolina Court of Appeals, in the context of the divorce proceeding *Boyd v. Boyd*, upheld the decision of a trial court to dismiss the proceeding without prejudice where the plaintiff filed an unverified complaint and seven days later filed a verified complaint.[55] The court looked to the governing divorce statute for guidance, and it required verification of a divorce complaint.[56] Given the statutory language, the court held that where a statute requires verification for a complaint to be valid, the complaint must be verified at the time it is filed in accordance with Rule 11.[57] If it is not, then the complaint is not valid and the court never obtained jurisdiction over the case.[58] The court further stated that "[t]he want of a proper verification is a fatal defect and is a cause for dismissal of

47. 360 N.C. 588, 595 (2006) (quoting Anderson v. Atkinson, 235 N.C. 300, 301 (1952)).
48. 219 N.C. App. 183, 190 (2012).
49. *Id.* at 187.
50. *Id.* at 186.
51. The court in *Livesay* referenced the North Carolina Supreme Court's decision in *In re T.R.P* and interpreted language in *T.R.P.* to suggest that later filings may be sufficient to invoke the subject matter jurisdiction of the court and remedy the failure of the petitioner to initially verify the petition. *See id.* at 190.
52. 327 N.C. 526, 533 (1990).
53. *Id.*
54. *See In re* T.R.P., 360 N.C. 588, 591 (2006) (internal quotation omitted).
55. 61 N.C. App. 334, 336 (1983).
56. *Id.* at 335.
57. *Id.* at 335–36.
58. *Id.* at 336.

the action."[59] The court advised that the plaintiff would have been better off taking a voluntary dismissal without prejudice and refiling the action at the point in time when the issue with the verification arose.[60] The court did not indicate that the plaintiff could have amended the original complaint to fix the mistake.[61] This holding appears at odds with the courts' decisions in *Livesay* and *Alford*. The *Boyd* decision indicates that if the original pleading is invalid, the court is not able to later obtain jurisdiction over the case, by amendment or otherwise, if the verification is required by statute.

One distinction between *In re T.R.P.* and *Boyd* on one side and *Livesay* and *Alford* on the other is that *Livesay* and *Alford* both dealt with civil actions where there was no specific requirement, outside of Rule 11, that the motion or petition be verified. In *T.R.P.* and *Boyd*, the statutes that served as the basis for the actions required the respective filings initiating the actions to be verified.[62] An action for restoration is more akin to these types of proceedings because the underlying statute in a restoration proceeding, G.S. 35A-1130(a), requires that the motion initiating the action be verified. Therefore, *Livesay* serves as some authority that may provide the clerk a basis for allowing a party that filed a motion for restoration with a missing or invalid verification to remedy the error by amending the motion to include a valid verification. However, because orders entered by a court that lacks subject matter jurisdiction are void, the safest practice where a motion lacks a proper verification in light of *T.R.P.* and *Boyd* may be for the clerk or the petitioner to dismiss the motion without prejudice and allow the petitioner to re-file the action.[63] If the matter is dismissed, the petitioner will have to pay another filing fee once the petitioner re-files the motion for restoration.

3. Is a medical report or doctor's note required to file for restoration? If the guardian, the guardian ad litem, or the clerk wants to obtain medical records or other medical evidence regarding the ward's condition, how do they go about obtaining them?

A medical report, doctor's note indicating the ward is competent, or other statement or documentation from a medical or mental health professional is *not* required to file a motion for restoration.[64] As long as the motion meets the requirements set forth in question 1 above, it is sufficient to initiate a restoration proceeding. Furthermore, statements by medical professionals or medical facts alleged in the motion initiating the action are not evidence. Generally, pleadings and motions contain allegations and statements for purposes of initiating an action or bringing an issue before the court and do not themselves constitute evidence to be considered by the court. Only evidence presented at the hearing should be considered by the clerk in rendering a decision on restoration to competency.

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59. *Id.* (quotation omitted).

60. *Id*.

61. *See generally id.*

62. *Id*. at 335. *See also supra* note 46.

63. *See* Boyd v. Boyd, 61 N.C. App. 334, 336 (1983) (affirming the trial court's dismissal of the plaintiff's divorce action because the complaint was not properly verified but noting that nothing prevented plaintiff from refiling the action).

64. *See generally* G.S. 35A-1130.

When the ward will not or does not produce his or her own medical records as evidence, there are three primary ways to obtain medical records and other medical evidence in a restoration proceeding; these include (a) from the guardian, (b) from the guardian ad litem, and (c) pursuant to a multidisciplinary evaluation (MDE) ordered by the clerk.

3.a. Guardian Obtains Medical Records

The guardian of the person and the general guardian[65] generally have the authority to obtain medical records of the ward without a subpoena or any other court process, unless the order appointing the guardian provides otherwise.[66] It is advisable and helpful to the clerk for the guardian to appear with these records at the restoration hearing if they are relevant to the ward's competency.[67]

3.b. Guardian Ad Litem Obtains Medical Records

In contrast, the guardian ad litem (GAL) appointed by the clerk for purposes of the restoration proceeding does not have a right to obtain the ward's medical records without the guardian's written authorization, provided the guardian is authorized to make health care decisions for the ward. However, the GAL can seek an order from the court to obtain them.[68] Although these types of medical records typically contain privileged information, such as information protected by a physician–patient privilege or psychologist–patient privilege,[69] the court can enter an order compelling the disclosure of privileged information *provided* the court finds that the records are necessary for the proper administration of justice.[70] The statute dealing with the disclosure

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65. A health care agent appointed pursuant to a valid power of attorney that has not been suspended likely has the authority to obtain medical records on behalf of the ward, provided the health care power of attorney provides such authority to the agent. A guardian of the person or general guardian must file a separate proceeding to suspend a health care power of attorney after the appointment of the guardian of the person or general guardian. *See* G.S. 32A-22.

66. *See* G.S. 35A-1241. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) gives individuals the right of access to their medical records in most circumstances. 45 C.F.R. § 164.524. The right of access may be exercised by an individual's personal representative if the individual is incompetent. 45 C.F.R. § 164.502(g). A guardian of the person or general guardian who has been authorized to make health care decisions for a ward is a personal representative for HIPAA purposes.

67. The guardian has a duty to seek restoration and to provide for the ward's best interests. *See supra* note 7.

68. It is advisable for the GAL to locate and identify any relevant medical records or other health information prior to the hearing. Once the information is located, the GAL may file a motion requesting that the clerk enter an order compelling the disclosure of the records. Most federal and state confidentiality laws permit the disclosure of information pursuant to a court order. In order to avoid the additional restrictions and regulations imposed by HIPAA, it is advisable not to seek a subpoena of the records but instead to seek directly an order from the court compelling the disclosure of the records. 45 C.F.R. § 164.512(e). HIPAA expressly permits disclosure of protected health information for court proceedings pursuant to a court order. *Id.* There is one exception to this general rule. If the court order is for information maintained by a substance abuse program and the program is required to comply with the federal substance abuse confidentiality regulations in 42 C.F.R. Part 2, the court order must be accompanied by a subpoena. *See* 42 C.F.R. Part 2.

69. *See* G.S. 8-53, -53.3.

70. *Id*. Typically, the court is granted wide discretion in determining what is necessary for the proper administration of justice for the purpose of compelling the disclosure of medical records subject to privilege. *See* State v. Westbrook, 175 N.C. App. 128, 131 (2005).

of records subject to privilege states that if the case is in district court, the judge compelling the disclosure shall be a district court judge and that if the case is in superior court, the judge compelling the disclosure shall be a superior court judge.[71] The statute does not address who can compel disclosure if the case is before the clerk. Because clerks have original and exclusive jurisdiction in all matters related to incompetency of an adult under Chapter 35A, it is likely that the clerk does have the authority to compel the disclosure of these records, but, as noted, the statute on disclosure does not make that clear.

3.c. The Clerk Orders an MDE

If the clerk determines that evidence related to the ward's medical condition is necessary to his or her decision, the clerk may order an MDE on the clerk's own motion or on the motion of any party to the proceeding.[72] An MDE is an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and may include evaluations of other professionals in other disciplines, such as occupational therapy, psychiatry, and vocational therapy.[73] The MDE is current if it was conducted "not more than one year from the date on which it is presented to or considered by the court."[74] The MDE must set forth the nature and extent of the ward's disability and recommend a guardianship plan or program.[75] This may include a treatment plan, steps for attaining restoration, and assessments by professionals of whether or not restoration is appropriate given the ward's condition.[76] An MDE may be helpful in those restoration cases where there is insufficient or conflicting evidence regarding the ward's capacity, when it appears that limited guardianship may be appropriate instead of restoration, or when additional information is needed to modify or develop an appropriate guardianship plan.

G.S. 35A-1130 regarding restoration does not specifically set out details related to the ordering, completion, and maintenance of the MDE in the court records.[77] The clerk or any party requesting an MDE may do so by using AOC-SP-901M, the Request and Order for Multidisciplinary Evaluation form developed to request an MDE in the original incompetency

71. *Id.*

72. *See* G.S. 35A-1130(c).

73. *See* G.S. 35A-1101(14).

74. *See id.* A new or updated MDE should be ordered by the clerk if (one) the motion for restoration is filed within one year of an adjudication of incompetency, (two) an MDE was obtained during the course of the proceeding to adjudicate a ward incompetent, and (three) an MDE is requested in connection with the restoration proceeding.

75. *See* G.S. 35A-1101(14).

76. *Id.*

77. A party's request for an MDE in the original incompetency proceeding must be filed with the clerk within ten days after service of the incompetency petition. *See* G.S. 35A-1111(a). This may provide some guidance to the clerk when considering the timeliness of a request for an MDE by a party to the restoration proceeding. Although there is no hard-and-fast rule in the restoration statute, the clerk may decide that a request is not timely if it was made at the hearing on restoration, immediately preceding the hearing on restoration, or substantially outside of ten days from the filing of the motion for restoration. There is no time limit on the clerk's authority to order an MDE. *See* G.S. 35A-1130. It is always within the clerk's discretion whether or not to order an MDE. *See* G.S. 35A-1130(c) ("the clerk may order a multidisciplinary evaluation").

proceeding.[78] Because the statute on restoration is silent as to the details of the MDE, the clerk should include in the MDE order the following information, even in the absence of a request by a party:

1. the state or local human services agency ordered to prepare the report,
2. the deadline for filing the MDE with the court if different from the thirty days set forth in the form,
3. the parties entitled to receive copies of the MDE,
4. a statement that the contents should be revealed only as directed by the clerk and that the MDE will not be a public record,
5. a request that the agency identify whether and to what extent restoration is appropriate and whether a limited guardianship may be appropriate instead, and
6. the party or entity charged with paying the costs of the MDE (see below).[79]

While the law does not specify where the clerk should file the MDE, it would be logical to file it in the incompetency file upon receipt from the agency that prepared it.[80] The Administrative Office of the Courts suggests that the copy of the MDE that is filed with the clerk be placed in a sealed envelope marked "Multidisciplinary Evaluation: Do Not Open."[81]

As noted above, the statute on restoration also does not specify who pays the costs of an MDE.[82] In the clerk's order on restoration, the clerk should include how the costs of the MDE are to be paid. If the clerk follows a pattern similar to how the costs are taxed in the original incompetency proceeding, the costs of the MDE would be taxed as follows in the restoration proceeding:

- If the clerk enters an order in favor of the petitioner and the ward is not indigent, the ward pays the costs of the fees.
- If the clerk enters an order in favor of the petitioner and the ward is indigent, the Department of Health and Human Services (DHHS) pays the fees.
- If the clerk denies the motion but finds there were reasonable grounds to bring it, the costs may be taxed against the petitioner, the ward if not the petitioner, or DHHS, in the clerk's discretion.
- If the clerk denies the motion and finds that there were no reasonable grounds to bring the motion, the costs are taxed against the petitioner.[83]

78. *See* Administrative Office of the Courts, Form AOC-SP-901M, www.nccourts.org (click on "Forms" at the top of the page).

79. *See* G.S. 35A-1111(a) and (b) (related to an MDE ordered in the original incompetency and guardianship proceeding before the clerk).

80. *See* G.S. 35A-1130 (a motion for restoration proceedings is filed in the original incompetency special proceeding file).

81. *See* Saxon, *supra* note 1, § 5.9-D at 62.

82. *See* G.S. 35A-1130.

83. *See* G.S. 35A-1111.

4. Does the petitioner have to have an attorney to file a motion for restoration?

The guardian, the ward, or any other interested person who petitions for restoration does *not* need to have any attorney to file the motion or appear at the hearing on restoration. There is one exception to this rule. If the petitioner is a corporation, including nonprofit corporations, or a limited liability company, the petitioner must be represented by a duly-admitted and licensed attorney.[84] An officer, shareholder or other agent of the corporation or limited liability company that is not a lawyer may not file or appear in court proceedings on the entity's behalf.[85] Therefore, if a corporate guardian desires to file for restoration, it may do so only through an attorney. In the event a corporation or other entity files for restoration without an attorney, the party may be able to cure the defect. The North Carolina Court of Appeals seemed to indicate in at least one case that the defect of filing by a non-attorney party on an entity's behalf could later be cured if an attorney appeared at the hearing on behalf of the petitioning entity.[86]

5. To file a motion for restoration, does the ward have to be able to write or read the motion?

No. There is no literacy prerequisite to petitioning for restoration, and the ward may receive assistance in preparing and filing the motion and presenting his or her case at the hearing before the clerk. Whether a ward can read and/or write is not determinative of legal competency under Chapter 35A.

6. Once a motion or other document is filed initiating the proceeding, when is the hearing held, what is the process for service, and who receives notice of the filing?

Once the motion for restoration is filed, the clerk schedules the matter for hearing. The hearing date should not be less than ten days nor more than thirty days from the date that the motion and notice of hearing are served on the ward and the guardian. The clerk may alter this timeline

84. *See* Lexus-Nexus v. Travishan Corp., 155 N.C. App. 205, 209 (2002) (holding that a corporation must be represented by an attorney and cannot be represented by an agent of the corporation, such as an officer or shareholder); Bodie Island Beach Club Ass'n, Inc. v. Wrap, 215 N.C. App. 283, 290 (2011) (extending the application of *Lexus-Nexus* to limited liability corporations); Willow Bend Homeowners Ass'n, Inc. v. Robinson, 192 N.C. App. 405, 414 (2008) (acknowledging that nonprofit corporations also must be represented by an attorney).

85. *See* G.S. 84-5 ("It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . "); *Lexus-Nexus*, 155 N.C. App. at 209. There are some exceptions to this general rule. For example, a corporation may prepare legal documents. *See* State v. Pledger, 257 N.C. 634, 637–38 (1962). In addition, a corporation may process litigation without an attorney in a small claims action. *See* Duke Power Co. v. Daniels, 86 N.C. App. 469, 472 (1987). Finally, a corporation may make an appearance in court through its vice president to avoid default. *See* Roland v. W & L Motor Lines, Inc., 32 N.C. App. 288, 290 (1977).

86. *See* Reid v. Cole, 187 N.C. App. 261, 265 (2007) (affirming the ruling of a trial court which allowed the plaintiff estate administrator to file a pleading on behalf of the estate without an attorney given that the plaintiff later retained counsel and appeared by counsel in subsequent proceedings).

for good cause.[87] For example, if the clerk orders an MDE and the professionals completing the MDE need additional time, the clerk may find good cause to extend the hearing date to a time outside of thirty days from the service of the motion.

It is the petitioner's obligation under the statute to serve the motion for restoration. The petitioner must serve notice of the hearing and a copy of the motion for restoration on:

1. the guardian, if the guardian is not the petitioner;
2. the ward, if the ward is not the petitioner; and
3. any other party to the original incompetency proceeding.[88]

The petitioner is required to serve the notice of hearing and motion for restoration on these parties pursuant to Rule 4 of the North Carolina Rules of Civil Procedure.[89] When a party entitled to service is incompetent, such as the ward when the ward is not the petitioner, Rule 4(j) of the North Carolina Rules of Civil Procedure requires that the ward and his or her guardian are both served. The ward must be served with the notice of hearing and motion in the same manner as any competent person is served. This includes service by any one of following:

- personal delivery to the ward by someone authorized to serve process;
- leaving copies at the ward's home or usual place of abode with some person of suitable age and discretion residing there;
- delivering copies to an agent authorized to accept service of process on behalf of the ward;
- mailing copies via registered or certified mail, return receipt requested;
- mailing copies by signature confirmation, delivering to the ward; or
- depositing with a designated delivery service, followed by a delivery receipt.[90]

In addition, because at the time of the filing the ward is considered disabled, the rule requires that the ward's guardian is served by one of the methods listed above in order to effectuate proper service on the ward.[91] The guardian is also required to be served pursuant to G.S. 35A-1130(b). If the guardian is served with the notice of hearing and the motion by one of

87. *See* G.S. 35A-1130(b).

88. *See id.* Parties to the original incompetency proceeding include the original petitioner, the respondent/ward, and the guardian ad litem. The ward's next of kin and any other interested party who received notice of the original incompetency proceeding also may be entitled to notice. *See In re* Ward, 337 N.C. 443, 447 (1994) (holding that where a determination of the incompetency of a party to a lawsuit effects the tolling of an otherwise expired statute of limitations, the interest of the opposing party to the lawsuit entitles that party to notice of the incompetency proceeding); *In re* Winstead, 189 N.C. App. 145, 149–50 (2008) (holding that a next of kin who received notice of the original incompetency proceeding was entitled to appeal the incompetency determination as an aggrieved party). The question raised by these decisions is whether next of kin and interested persons are entitled to notice of the restoration proceeding and whether they must be served with the restoration motion pursuant to Rule 4, which is required for parties to the original incompetency proceeding under G.S. 35A-1130(b), or pursuant to Rule 5, which is the same manner they are served in the original incompetency proceeding under G.S. 35A-1109. It is likely that a clerk may conclude that next of kin and interested parties are not parties to the original incompetency proceeding, even though they may be entitled to notice of the original action and have standing to appeal an incompetency proceeding because they are not entitled to present evidence under G.S. 35A-1112(b) and require Rule 5 service only in the restoration proceeding.

89. *See* G.S. 35A-1130(b).

90. *See* G.S. 1A-1, Rule 4(j)(1).

91. *See* G.S. 1A-1, Rule 4(j)(2)(b).

the means listed above, that is sufficient to satisfy the requirements of serving the ward under Rule 4 and the guardian under G.S. 35A-1130(b). The guardian does not have to be served twice.

7. May the clerk appoint a guardian ad litem in the restoration proceeding? If so, who is responsible for payment of the guardian ad litem fees?

The clerk may appoint a guardian ad litem to represent the ward at the restoration hearing.[92] The clerk will likely appoint the same guardian ad litem from the original incompetency proceeding, if that attorney is available. However, the clerk is not required to appoint the same guardian ad litem. During the original incompetency proceeding, the guardian ad litem is charged with presenting the respondent's express wishes to the court as well as making any recommendations to the court regarding the respondent's best interests.[93] The statute on restoration does not specify a role for the guardian ad litem during the restoration hearing that is different from the original incompetency proceeding. Therefore, the guardian ad litem appointed for a restoration proceeding should likely provide a similar detailed report to the court. It is advisable that the guardian ad litem deliver the report to the clerk in writing prior to the hearing and provide copies of the report to each of the parties to the proceeding. As a basis for the report, the guardian ad litem should (i) meet with the ward in person where the ward lives prior to the hearing, (ii) diligently work to obtain medical records and other evidence of the ward's capacity, and (iii) meet with and interview the ward's guardian and other family members and interested persons. The report of the guardian ad litem should also include recommendations to the court regarding limited guardianship when restoration may not be appropriate.

The ward is entitled to be represented by counsel at the hearing on restoration and may elect to retain his or her own attorney in addition to any guardian ad litem appointed by the clerk.[94] If the ward retains his or her own attorney, the role of the guardian ad litem becomes less clear. The guardian ad litem should still provide a report to the court that is based on the diligence described above and include recommendations regarding the ward's best interests and, if appropriate, limited guardianship. The counsel hired by the ward will be charged with zealously representing his or her client and presenting the ward's express interests to the court.[95]

If the clerk appoints a guardian ad litem, the fees of the guardian ad litem are paid as follows:

- by the ward, if the ward is not indigent;
- by the movant if relief is not granted and there were no reasonable grounds to bring the proceeding; and
- in all other cases, by the Office of Indigent Defense Services.[96]

92. *See* G.S. 35A-1130(c).

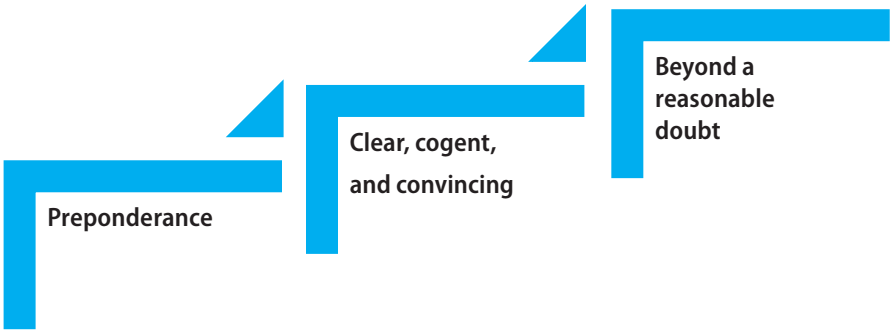
93. *See* G.S. 35A-1107(b).

94. *See id.*

95. For a more in-depth discussion of the role of the guardian ad litem, refer to the *North Carolina Guardianship Manual*, which provides a lengthy discussion of the dual role of the guardian ad litem and how that may conflict with retained counsel by the ward. Saxon, *supra* note 1, chapter 2, at 20–37.

96. *See* North Carolina Office of Indigent Defense Services and Administrative Office of the Courts, North Carolina Proceedings That Involve Guardians Ad Litem (GALs) (Oct. 2014), www.ncids.org/Rules%20&%20Procedures/GAL_Chart.pdf.

Figure 2. Burdens of proof to adjudicate someone incompetent under Chapter 35A



8. What is the burden of proof that the petitioner must meet at the hearing for restoration, and what may the clerk consider in making his or her ruling?

To enter an order restoring competency of the ward, the clerk must find that the ward is competent by a preponderance of the evidence.[97] This means that the clerk must find that the greater weight of the evidence shows that the ward is competent.[98] In other words, the clerk must find that it is more likely than not that the ward is competent. Preponderance of the evidence is a lower standard than what is required to adjudicate someone incompetent under Chapter 35A, which may occur only if there is clear, cogent, and convincing evidence that the ward is incompetent (see Figure 2).[99]

In considering whether or not the ward is competent, the clerk may consider admissible[100] oral testimony and written evidence presented at the hearing. There are two key issues the clerk should be aware of when making a decision on restoration. First, the motion for restoration filed by the petitioner and the facts contained therein constitute allegations, not evidence. Therefore, the clerk should not rely on the motion as evidence in entering an order on restoration but only on evidence presented at the hearing.

Second, if the evidence submitted by the parties at the hearing includes affidavits, including affidavits from doctors and other medical professionals, the clerk should be cautious in relying on them in rendering a final decision.[101] The North Carolina Court of Appeals has stated that an

97. *See* G.S. 35A-1130(d).

98. *See* 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 41 (7th ed. 2011).

99. *See* G.S. 35A-1112(d). *See also In re* D.R.B., 182 N.C. App. 733, 735 (2007) (discussing the various standards of proof and stating that clear, cogent, and convincing evidence is stricter than preponderance of the evidence but less stringent than beyond a reasonable doubt).

100. A discussion of admissibility of evidence is beyond the scope of this bulletin. In general, the clerk should not consider inadmissible evidence in making his or her decision regarding restoration. Rules of evidence, including rules on hearsay, apply. For a more in-depth discussion of hearsay and other rules of evidence, see "Evidence," N.C. Superior Court Judges' Benchbook, http://benchbook.sog.unc.edu/benchbook_section/5.

101. Although affidavits are generally a permissible form of evidence with regard to the appointment of the original guardian, no such similar statute applies in the context of incompetency and restoration. *See* G.S. 35A-1223; *see also generally* G.S. 35A.

affidavit is "inherently weak as a method of proof."[102] The court noted that affidavits are made without notice to the other party and under circumstances that afford ample opportunity to lead the person making the affidavit.[103] Furthermore, the affidavit may include only matters that are deemed helpful to the party who submits the affidavit and may exclude anything negative, contain half-truths, and omit important matters.[104] Most importantly to the court, the statements in the affidavit are not able to be subjected to the "searching light" of cross-examination, which allows the court the best opportunity to assess the value of testimony.[105] However, the court has also recognized that affidavits may be properly admitted as evidence "in certain limited situations in which the weakness of this method of proof is deemed substantially outweighed by the necessity for expeditious procedure."[106] The clerk may find it necessary to consider affidavits in making his or her decision on restoration, particularly given that many wards may lack the resources to pay for medical experts to appear in person to testify. If the clerk elects to consider affidavits, the clerk should keep in mind that the affidavit may lack credibility, that a party has the right to dispute the truthfulness of the affidavit, and that an affidavit is not determinative or controlling of the clerk's decision. Despite the potential weaknesses or risks related to using affidavits, a clerk may find them to be useful evidence, particularly where there are no objections disputing their truth or authenticity and the credentials of the person making the affidavit are verifiable, relevant to the restoration proceeding, and not called into question.

Whether evidence is submitted through affidavits, oral testimony, or other documents, the clerk must ultimately determine whether the ward is competent. A ward is competent if he or she has the capacity to manage his or her own affairs and to make or communicate important decisions concerning his or her family and property. Evidence that may be helpful to the clerk in rendering a decision, particularly in those cases where the ward suffers from mental health issues or substance abuse, includes but is not limited to whether:

- the ward has a treatment plan in place;
- the ward has adhered to a treatment/therapy plan over an extended number of months;
- the ward acknowledges and understands the condition or cause that led to the order adjudicating the ward to be incompetent;
- the ward acknowledges the risk of relapse and has an emergency plan in place in the event of a relapse along with a support network of people to contact in the event of relapse;
- the ward is able to manage his or her daily affairs without assistance from his or her guardian, such as making decisions about where to live, paying rent, maintaining employment, providing for food, and living safely without being a threat to himself or herself or others;
- the guardian and/or the guardian ad litem support the motion for restoration;
- the clerk finds any other information persuasive in making the decision to restore competency.

102. *See In re* Custody of Griffin, 6 N.C. App. 375, 378 (1969).
103. *See id.*
104. *See id.*
105. *See id.*
106. *See id.*

If the burden of proof required for the clerk to enter an order granting restoration is not met, the clerk may hear evidence at the hearing that indicates that a limited guardianship may be appropriate if there is a change in the ward's capacity.[107] A limited guardianship is one where the guardian's authority is limited by the court and the ward obtains or retains certain legal rights and the ability to make decisions in certain aspects of his or her life.[108] The clerk may enter an order denying restoration but modifying the guardianship to allow the ward, for example, to manage small amounts of money or decide where he or she wants to live, go to church, work, or spend time. Limited guardianship can be used as a stepping stone to restoration when a full restoration may not be appropriate.

9. What rights are restored when the motion for restoration is granted?

Once a ward's competency has been restored, he or she may exercise all rights as if he or she had never been adjudicated incompetent, with one exception.[109] The rights restored upon entry of the clerk's order include, but are not limited to, the following:

- executing advance directives and powers of attorney;
- controlling and selling real and personal property;
- giving any consent or approval that may be necessary to enable the former ward to receive medical, legal, psychological, or other professional care, counseling, treatment, or service;
- determining where he or she will live; and
- otherwise managing his or her financial affairs and taking care of himself or herself.[110]

At the time the order of restoration is entered by the clerk, the guardian no longer has authority over the ward or his or her financial affairs.[111] However, the guardian does have continuing duties to the court. The general guardian and the guardian of the estate must file, and the clerk must enter, an order approving a final accounting before the guardian is discharged from his or her duties.[112]

In preparing for a restoration hearing, the guardian may want to consider assisting the ward in drafting advance directives, such as a durable power of attorney or health care power of attorney. The ward could then execute them after the restoration order is entered and possibly avoid a future guardianship proceeding in the event the ward relapsed or encountered some other issue that results in a lack of competency. A durable power of attorney and health care power of attorney may serve to replace the need for any future guardianship through the courts.

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107. *See* G.S. 35A-1207(a) and (b); 35A-1212(a).

108. *See* Saxon, *supra* note 7, at 12.

109. *See* G.S. 35A-1130(d). The right to carry a firearm is not automatically restored upon entry of the clerk's order. The individual (former ward) is prohibited from purchasing a firearm through the National Instant Criminal Background Check System (NICS) until the individual obtains a separate order from a district court judge to remove the individual's disability designation under NICS. *See* G.S. 122C-54.1; 18 U.S.C. 922(g).

110. *See* G.S. 35A-1130(d).

111. *See id*.

112. *See* G.S. 35A-1130(e) & G.S. 35A, Subchapter II.

10. What is the applicable appeal period when the clerk denies the petitioner's request for restoration? What is the standard of review on appeal?

In the event that the clerk determines that the petitioner failed to show by a preponderance of the evidence that the ward is competent, the clerk will then enter an order denying the restoration of the ward to competency.[113] The ward or the ward's attorney may appeal from the clerk's order to the superior court for a trial *de novo*.[114] At a trial *de novo*, the evidence regarding the ward's competency and suitability for restoration will be presented and heard again by the superior court judge.[115]

The time period for appeal is the same as for special proceedings generally, which is ten days from the entry of the order denying the restoration motion.[116] The order is entered, and thus the ten days starts tolling, when it is reduced to writing, signed by the clerk, and filed with the clerk's office.[117] The clerk is not required by statute to serve the order on the parties, and therefore the parties may not receive notice of the entry of the order and thus the commencement of the ten-day tolling period.[118] Notice of appeal must be in writing and is filed with the clerk.[119] The notice of appeal should be served by the appealing party on the guardian, the ward, and any other parties to the incompetency and restoration proceeding in accordance with the provisions of Rule 5 of the Rules of Civil Procedure.[120] The order of the clerk denying the restoration motion remains in effect until it is modified or replaced by an order of the superior court judge.[121] As a result, the guardianship remains in place pending the appeal.

113. *See* G.S. 35A-1130(f).

114. *Id.*

115. *See* Caswell Cnty. v. Hanks, 120 N.C. App. 489, 491 (1995) ("A court empowered to hear a case *de novo* is vested with full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court." (internal quotation omitted)).

116. *See* G.S. 1-301.2(e).

117. *See* G.S. 1A-1, Rule 58.

118. *See* G.S. 35A-1130(d); G.S. 1-301.2(f).

119. *See* G.S. 1-301.2(e).

120. *See* G.S. 35A-1130(b) (stating that service of the original motion for restoration shall be on the guardian, the ward, and any other parties to the incompetency proceeding). *See also* G.S. 1A-1, Rule 5. Because G.S. 35A-1130 does not specifically state that Rule 4 service is required for a notice of appeal, it is likely that only Rule 5 service is required.

121. *See* G.S. 1-301.2(e).