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Basics of Guardianship Proceedings

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I. Introduction

A. What is a guardianship?

Guardianship is a legal proceeding whereby a court appoints a person or agency to make medical, personal, and/or financial decisions on behalf of another person, the Ward. A guardianship is required when a person is incapable of making their own decisions because of incapacity, injury, disability or age. The Court gives the Guardian the authority to act on behalf of the Ward, and the Guardian is accountable to and limited by the Court's decision.

B. When is a guardianship necessary?

When a person lacks the capacity to manage their own affairs or make decisions about their medical care, it may be necessary to have someone appointed, a Guardian, to make decisions on their behalf. Often, where estate planning documents, such as powers of attorneys and/or trusts are in place, a Guardianship is not needed. There are generally two main types of Guardianships: Incompetency and Minors. The statute defines the need for a Guardian as:

1. **Incompetent Adult**: "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, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7).
2. **Incompetent Child**: "A minor who is at least 17 1/2 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, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(8).
3. **Minors**: "Because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural

guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.” N.C.G.S. § 35A-1201(6). See also, N.C.G.S. § 35A-1202(12). Natural guardians have extremely limited authority.

4. The North Carolina Supreme Court defines incompetence as follows: “If the Respondent is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property, and estate, he is incompetent to manage his affairs. However, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property.” *Hagins v. Redevelopment Comm’n*, 275 N.C. 90, 165 S.E.2d 490 (1969). North Carolina Estate Administration Manual, Eighth Edition, XVI-13 (2016).

II. Incompetency Proceeding

Before a Guardian can be appointed, the Court must first determine if the person in question, the Respondent, has sufficient capacity to make their own decisions. This is done through an incompetency proceeding before the Court.

Adults are presumed competent and able to handle their own affairs, while minors are not. Note: the statute allows for the appointment of a Guardian in cases of an Incompetent Minor once they have reached age 17 ½ years old. This ensures continuity in the minor incompetent’s life.

A. Jurisdiction Over Guardianship Matters and Venue

The Clerk of Superior Court of the County in which the Respondent resides or is domiciled has exclusive and original jurisdiction in proceedings related to Guardianship and Incompetency. N.C.G.S. § 35A-1103.

B. Petition before the Clerk

Any interested person, including any State or local human services agency or healthcare provider, may submit a verified petition for the adjudication of incompetence of an adult. N.C.G.S. § 35A-1105. The contents of the petition shall comply with N.C.G.S. § 35A-1106 and are found in the Administrative Office of Courts’ (AOC) form number SP-200.

The Petitioner should also complete the Guardianship Capacity Questionnaire, AOC form SP-208. In an uncontested proceeding, an affidavit containing a medical diagnosis may be filed with the petition and can be helpful to both the Court and the GAL in making capacity determination. (However, the affidavit will not be allowed if the incompetency allegation is contested by the Respondent.)

C. Parties to the Proceeding

1. The Respondent is the person who is allegedly incompetent. N.C.G.S. § 35A-1101(15).
2. The Petitioner is the person requesting the person be declared incompetent.
3. A Guardian Ad Litem (the “GAL”) is appointed by the Court to independently observe and assess the Respondent and determine what is in their best interest, even if that disagrees with what the Respondent desires. N.C.G.S. § 35A-1107(b). If the Respondent retains their own counsel the Clerk may discharge the GAL. Id. The GAL’s responsibilities are laid out in detail in North Carolina General Statutes § 35A-1107(b).
4. Respondent’s counsel, if retained by the Respondent. The attorney represents the Respondent’s personal interests, which is sometimes in conflict with the Respondent’s best interest.
5. Any attorney-in-fact should also be served.
6. Any party to a pending civil action.

D. Service and Notice

The Respondent must be personally served by the Sheriff with a copy of the filed Petition and Notice of Hearing (AOC-SP-201). All other interested parties, including the Respondent’s counsel or GAL shall be served under Rule 4 of the NC Rules of Civil Procedure. AOC form SP-207 may be used to certify the remainder of Notices sent via USPS to the Respondent’s next of kin, attorney-in-fact(s) and any other persons interested in the proceedings or as the Clerk requires. N.C.G.S. § 35A-1109.

E. Motion for Appointment of Interim Guardian

Used specifically in cases where imminent danger or immediate intervention is required. (See AOC form SP-198.) The Interim Guardian is appointed prior to the incompetency hearing and limits the Respondent’s rights prior to adjudication of incompetence. An interim guardianship hearing must be held within 15 days of a verified petition being served upon the Respondent and GAL. N.C.G.S. § 35A-1114. Cases where this should be considered: immediate medical treatment needed or to prevent financial or physical abuse.

F. The Hearing on Incompetence

Chapter 35A creates a clear distinction between the adjudication of incompetence, and the subsequent appointment of a guardian. The Respondent has the right to request a

trial by jury (presided over by the Clerk), which is waived if not requested. N.C.G.S. § 35A-1110. During the incompetency hearing before the Clerk, only the Petitioner, Respondent and their counsel may call and question witnesses, present evidence and issue subpoenas. N.C.G.S. § 35A-1112(b).

1. Incompetency proceeding: The Petitioner must prepare the case for hearing and subpoena and secure the attendance of witnesses or secure their affidavits. Statements as to the Respondent's competence from a health care professional or medical doctor can usually be received into evidence if the matter is not contested and if there is no objection by the GAL. Where the Respondent wishes to contest the allegation of incompetence, the GAL or counsel of the Respondent will generally object to the use of any affidavits or other out-of-court statements offered for their truth.
2. Interested person: Generally, a person with extensive knowledge of the Respondent and their situation, such as next of kin (including a grandparent or sibling), fiancé or house mate. A person who is neither the Petitioner nor the Respondent, may present a motion to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure or may file an Application for the Appointment of Guardian (AOC form E-206), serve it upon all other parties and become a party to the proceedings. N.C.G.S. § 35A-1210-1211. Every interested person has the right to testify as to who should (or should not) be appointed guardian.
3. Multidisciplinary Evaluation: The Clerk may require a Multidisciplinary Evaluation, or any party to the Hearing may request one. (See AOC form SP-901M.) The evaluation can be helpful when determining the scope of a Limited Guardianship. The Evaluation is not made part of the public record and cannot be released except by Order of the Clerk. The evaluation is considered current if made within one year of presentation to the Clerk. N.C.G.S. § 35A-1111. See also N.C.G.S. § 35A-1202(13).
4. Adjudication of Incompetence: If the Clerk (or jury) "finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk shall enter an order adjudicating the respondent incompetent." N.C.G.S. § 35A-1112(d). See also AOC form SP-202. The Clerk (or jury if requested) will dismiss the proceeding if the Respondent is found not to be incompetent. N.C.G.S. § 35A-1112(c).

III. Appointment of a Guardian

The rules governing the appointment of guardians for both incompetent adults and for minors are set forth in Subchapter II of Chapter 35A, beginning with N.C.G.S. § 35A-1201. Upon adjudication of incompetence, the Clerk shall appoint a Guardian. N.C.G.S. § 35A-1112(e). Guardianship proceedings are open to allow anyone with knowledge to testify as to who should be appointed guardian. (See above, II-F-2, "Interested Person.") Once a person is adjudicated incompetent they are referred to as a Ward. N.C.G.S. § 35A-1101(17).

A. Guardian

There are three forms of Guardians: Guardian of the Person, Guardian of the Estate and General Guardian, all of which can be subjected to limitations by the Court. These are discussed in brief here, and in more detail in Section IV: Powers and Duties of the Guardian.

1. Guardian of the Person: “a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.” N.C.G.S. § 35A-1202(10).
2. Guardian of the Estate: “a guardian appointed solely for the purpose of managing the property, estate and business affairs of a ward.” N.C.G.S. § 35A-1202(9). An Estate is defined as “any interest in real property, choses in action, intangible personal property, and tangible personal property, and includes any interest in joint accounts or jointly held property.” N.C.G.S. § 35A-1202(5).
3. General Guardian: “a guardian of both the estate and the person.” N.C.G.S. § 35A-1202(7).
4. Limited Guardianship: The statutes guide that a “Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment” and that he “should be permitted to participate as fully as possible in all decisions that will affect him.” N.C.G.S. § 35A-1201(5). So where possible, the Clerk should seek to limit the guardianship if the ward’s capacity justifies it. N.C.G.S. § 35A-1212. See also AOC form E-406.

B. Jurisdiction

The Clerk of Superior Court has “original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons” as well as “guardians of the estate for minors, for the appointment of guardians of the person or general guardians for minors who have no natural guardian, and of related proceedings.” N.C.G.S. § 35A-1203(a-b).

C. Venue

Venue is the county in which the Ward was adjudicated incompetent, or in the county in which the minor is domiciled. N.C.G.S. § 35A-1204.

D. Appointment of Guardian for an Incompetent Ward

Appointment of a Guardian for an incompetent adult or an incompetent child is governed by Article 5 of Chapter 35A. N.C.G.S. § 35A-1210-1217.

1. Filing Petition: Although considered separate matters under the statutes, the Petitioner can make a request for both the Petition for Adjudication of Incompetence and Application at once using AOC form SP-200.
2. Service: The Application shall be served on respondent, respondent's counsel or guardian ad litem and other parties of record, pursuant to G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the Application is made with the Petition for Adjudication of Incompetence, in which case it shall comply with Rule 4 of the NC Rules of Civil Procedure. (See above, II-D, "Service and Notice.")
3. Hearing: Usually the appointment of the Guardian takes place during the Incompetence hearing.
4. Qualification: Once the guardian is appointed, the guardian will need to qualify and receive letters of guardianship from the Estates Division of the Clerk's office.
 - a. Application: Application for Letters of Guardianship for an Incompetent after the Clerk has declared the Ward incompetent. The requirements of the application are outlined in N.C.G.S. § 35A-1210. See AOC Form E-206.
 - b. Oath: The guardian will be required to take the Oath required of a fiduciary. See AOC Form E-400.
 - c. Bond: A Guardian of the Estate or General Guardian must have a surety bond in place approved by the Clerk before receiving the ward's property. N.C.G.S. § 35A-1230. See AOC Form E-401. For estates under \$100,000 in value the surety bond shall be at 125%, while estates over \$100,000 may be lowered to 110% of the value. N.C.G.S. § 35A-1231.
 - d. Fitness: Make sure the person applying is responsible, understands the requirement of filing annual reports, and has good credit. Insurance companies will conduct a credit check on the applicant to make sure that person is creditworthy before approving a surety bond to cover the ward's assets against loss. The Clerk will also run a criminal background check and may disqualify a person from serving as Guardian of the Estate.
 - e. Letters of Appointment: The Clerk of Court issues an Order appointing the Guardian. The letters are signed and sealed by the Clerk and

specify whether the guardian is guardian of the estate or of the person, or a general guardian. N.C.G.S. § 35A-1206. See AOC Forms E-407, E-408 and E-413.

E. Appointment of Guardian for a Minor Ward

The appointment of a guardian for a minor solely needed because of the minor's age is governed by the provisions of Article 6 of Chapter 35A. N.C.G.S. § 35A-1220-1228.

The Clerk may appoint a guardian of the estate for any minor but may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian. N.C.G.S. §§ 35A-1221, -1224(a). See Form AOC-E-407 and Form AOC-E-408. N.C.G.S. § 35A-1206.

1. Filing Petition: Appointing a Guardian for a Minor is not considered a Special Proceeding, though a GAL will still likely be appointed and a hearing may be required. Rather than filing a Petition for Adjudication of Incompetence, for minor guardianships an Application should be filed directly with the Clerk. N.C.G.S. § 35A-1221. See AOC form E-208.
2. Service: The Application shall be served on each parent, guardian and legal custodian of the minor who is not an applicant, or guardian ad litem and other parties of record. N.C.G.S. § 35A-1222. Service shall comply with Rule 4 of the NC Rules of Civil Procedure. Id.
3. Hearing: The Clerk considers at the hearing if and what type of a guardian is needed and, upon finding that a Guardian is needed for the minor, the Clerk receives additional evidence to determine the minor's assets, liabilities and needs, and who the guardian shall be. N.C.G.S. § 35A-1223.
4. Selection of Guardian: The Clerk must give "substantial weight" to a testamentary recommendation made by the minor's parent(s), though it cannot affect the rights of the last surviving parent and ultimately the Clerk must make a decision that is in the minor's best interest. N.C.G.S. § 35A-1224(d).
5. Appointment of a Guardian: The Clerk of Court issues an Order appointing the Guardian. N.C.G.S. § 35A-1226. See AOC form E-406.
6. Qualification: Once the guardian is appointed, the guardian will need to qualify and receive letters of guardianship from the Estates Division of the Clerk's office.
 - a. Application: Application for Letters of Guardianship for an Incompetent after the Clerk has declared the Ward incompetent. The requirements of the application are outlined in N.C.G.S. § 35A-1211. See AOC Form 208.

- b. Oath: The guardian will be required to take the Oath required of a fiduciary. See AOC Form E-400.
- c. Bond: A Guardian of the Estate or General Guardian must have a surety bond in place approved by the Clerk before receiving the ward's property. For estates under \$100,000 in value the surety bond shall be at 125%, while estates over \$100,000 may be lowered to 110% of the value. N.C.G.S. § 35A-1230-1231. See AOC Form E-401.
- d. Fitness: Make sure the person applying is responsible, understands the requirement of filing annual reports, and has good credit. Insurance companies will conduct a credit check on the applicant to make sure that person is creditworthy before approving a surety bond to cover the ward's assets against loss.
- e. In circumstances where a family member of the minor cannot qualify for a bond, the Clerk may allow the use of the Receipt and Agreement. The Clerk may exclude from the bond calculation funds deposited with a financial institution that signs an agreement that it will not allow the money to be withdrawn except with court authorization. N.C.G.S. § 35A-1232(b). See AOC Form E-901M.
- f. Letters of Appointment: The Clerk of Court issues an Order appointing the Guardian. See AOC form E-406. The Clerk order also may include findings as to the minor's circumstances, assets, and liabilities as they relate to his needs for a guardian. N.C.G.S. § 35A-1226.

IV. Powers and Duties of the Guardian

A. Guardian of the Person

The guardian of the person may consent to legal, medical, psychological or other professional care. Article 8 of Chapter 35A (N.C.G.S. § 35A-1240-1247) discusses the powers and duties of the Guardian of the Person are as follow:

1. Custody: The Guardian of the Person has custody of the Ward and makes provision for the Ward's "care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for the ward's training, education, employment, rehabilitation, or habilitation" and handles the Ward's personal effects and tangible items. N.C.G.S. § 35A-1241(a)(1).
2. Abode: Establish the Ward's residence, with priority being to locations inside the state of North Carolina and not treatment facilities. Where the only appropriate place is a

treatment facility, the Guardian “shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based.” N.C.G.S. § 35A-1241(a)(2).

3. Consent: Provide consent or approval to enable the Ward to receive a variety of services, including medical, legal, psychological or other professional care. N.C.G.S. § 35A-1241(a)(3).
 - a. If the Ward has a previously executed valid health care power of attorney, the health care agent has the right to exercise the authority granted in the health care power of attorney “unless the Clerk has suspended the authority of that health care agent.” N.C.G.S. § 35A-1241(a)(3).
4. Reimbursement: The Guardian is able to seek reimbursement from the Ward’s Estate for “reasonable and proper expenditures” incurred on behalf of the Ward. N.C.G.S. § 35A-1241(b).

B. Guardian of the Estate

A guardian of the estate is responsible for the management of the Ward’s assets. Article 9 of Chapter 35A (N.C.G.S. § 35A-1250-1253) discusses the powers and duties of the Guardian of the Estate are to exercise a “reasonable and prudent” standard for “the collection, preservation, management, and use of the ward's estate...in the ward’s best interest.” N.C.G.S. § 35A-1251.

1. The statutes specify many express powers that a Guardian has inherently and need only show appointment letters to exercise. N.C.G.S. § 35A-1251(1-24).
2. There are several powers that require approval of the Court by statute, including: mortgaging property, leasing property for longer than three years, sale lease or exchange of any personal property over \$5,000, use of principal and use of powers related to revocable trusts. N.C.G.S. § 35A-1251(19, 17b, 12, 24). The Clerk may impose other restrictions as well.
3. Additional duties are outlined in N.C.G.S. § 35A-1253.

C. Guardian of the Minor’s Estate

Virtually the same as the Guardian’s powers of an incompetent Ward’s estate with several key differences:

1. Added is the power to maintain an action to obtain or enforce support the Minor is entitled to. N.C.G.S. § 35A-1252(3).

2. Missing is the right to complete a contract (since a minor cannot enter into a contract).
3. The guardian may not use estate funds to affect the parent's legal duty to support the minor.

D. General Guardian:

All the powers granted in Article 8 and 9 of Chapter 35A of the North Carolina General Statutes. (Items IV-4-A-B above.)

V. Accounting Requirements

Required for all General Guardians and Guardians of the Estate.

- A. Inventory: Within three months of appointment, the Guardian shall file with the Clerk an Inventory of all assets owned by the Ward. N.C.G.S. § 35A-1261. See AOC Form E-510.
- B. Supplemental Inventory: When new property is discovered or if the value on the original Inventory is found to be erroneous, a supplemental or amended Inventory must be filed. N.C.G.S. § 35A-1263.1.
- C. Annual Accounts: Within thirty days of the annual anniversary of appointment, the Guardian shall file with the Clerk an accounting of the Ward's assets and accounts. The accounting should contain manner and nature of all investments under the Guardian's control, including receipts and expenses from the year with supporting documentation. N.C.G.S. § 35A-1264.
 1. Attached to the Annual Account should be statements from each investment and bank account, showing the current balance. N.C.G.S. § 35A-1268.
- D. Final Account: Within 60 days after a guardianship is terminated. N.C.G.S. § 35A-1266.
- E. Commissions: Commissions are allowed to the Guardian in the same manner, and with the same rules and restrictions, of commissions allowed personal representatives of Estates, pursuant to N.C.G.S. § 28A-23-3. N.C.G.S. § 35A-1269.

VI. Rights and privileges retained by the Ward

The incompetent Ward may retain any of the following rights, unless the Clerk recommends otherwise.

- A. Right to vote. 43:1 N.C. Atty. Gen. Reports 85 (1973).
- B. Ability to drive. N.C.G.S. § 20-17.1.
- C. Right to marry. *Geitner v. Townsend*, 67 N.C. App. 159, 312 S.E.2d 236 (1984).
- D. Right to make a Will (if the Ward has testamentary capacity). *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983).

- E. Right to contract (though contracts are voidable, they are not considered void). *Medical College of Virginia v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952). *In re Dunn*, 239 N.C. 378, 79 S.E.2d 921 (1954).
- F. Right to be a witness. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970).

VII. Rights and privileges retained by Order of the Clerk (Limited Guardianship)

The Clerk should allow the retention of as many rights as are within the Ward's understanding and judgement, if the nature and extent of the Ward's capacity warrants it. N.C.G.S. § 35A-1201(5), -1212(a). The Order on Application for Appointment of Guardian contains a section for the Clerk to outline specific limits to the Order. N.C.G.S. § 35A-1215(b). See AOC form E-406.

Some examples of cases which may be appropriate for a Limited Guardian:

- A. When the Ward has a medical condition that can be treated by medication and a Guardian can oversee the prescription routine.
- B. When the Ward has limited capacity due to intellectual disability.
- C. When the Ward is involuntarily committed or an in-patient at a public psychiatric facility.

The Letters issued by the Clerk must specify the type of guardianship. N.C.G.S. § 35A-1206. See AOC Forms E-407, 413, 408, 417, 418, 419.

VIII. Termination of a Guardian's Powers

A guardian's final account is due within 60 days after the guardianship is terminated. N.C.G.S. § 35A-1266.

A. Removal by Clerk

The Clerk is required to remove a Guardian (or take other action to protect the Ward's assets) in a variety of circumstances outlined in N.C.G.S. § 35A-1290, most of which center on misconduct or mismanagement by the Guardian. N.C.G.S. § 35A-1290(a) provides the standard for a Clerk to remove a guardian and appoint a substitute guardian by the "better care and maintenance standard" for the ward. See *In Re Guardianship of Thomas*, 183 N.C. App. 480, 644 S.E.2d 608 (2007).

B. Resignation

Any guardian may resign to the Clerk by written explanation. A general guardian or guardian of the estate wishing to resign as guardian of the estate must also submit his final accounting with the request for removal. After the final accounting is approved and a new Guardian appointed, the Clerk will discharge the Guardian of the estate. N.C.G.S. § 35A-1292.

C. Appointment of Successor Guardian

The Clerk appoints a successor guardian upon the removal, death, or resignation of a guardian, and follows the same procedure that would apply to the initial appointment of the guardian. N.C.G.S. § 35A-1293. The Clerk also has the right to act as receiver or appoint another person as receiver until a successor guardian is appointed. N.C.G.S. § 35A-1294.

D. Termination of Guardianship

A guardianship ends when a minor ward reaches majority, or an incompetent ward is adjudicated to be restored to competency, or the ward dies. The guardian of the estate or general guardian remains responsible for making all required accountings until the Clerk discharges him. N.C.G.S. § 35A-1295.

1. **Restoration to Competency**: Like the Petition for Adjudication of Incompetency, the Guardian or any interested person may petition for the restoration to competency. Additionally, the Ward may also submit the petition. N.C.G.S. § 35A-1130(a). See AOC Form SP-215.
 - a. The Hearing on the motion shall be set for at least 10 (but no more than 30) days from service of the motion and the Notice of Hearing on the Ward and/or Guardian (depending on whom is making the motion). Service should follow Rule 4 of the Rules of Civil Procedure. N.C.G.S. § 35A-1130(b). See AOC Form SP-216.
 - b. The Ward is entitled to be represented by a GAL or counsel. N.C.G.S. § 35A-1130(c).
 - c. If upon the preponderance of evidence the Clerk (or jury) finds the Ward to be competent, the Clerk will enter an Order adjudicating the Ward competent and all rights are restored. N.C.G.S. § 35A-1130(d). See AOC Form SP-218.

X. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)

The North Carolina Legislature adopted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) in 2016. Generally, the UAGPPJA applies if a Ward:

- A. has assets in another state
- B. is moving to another state
- C. is moving to North Carolina.

UAGPPJA was enacted December 1, 2016 and is codified under N.C.G.S. §§ 35B-1-46. The purpose of UAGPPJA “is to provide clear direction to the courts, attorneys, guardians, and individuals about the proper jurisdiction for guardianship proceedings.” N.C.G.S. § 35A-1. The goal of the Act is to minimize legal and emotional costs by recognizing another state’s determination of incompetence and appointment of Guardians.

IX. Alternatives to Guardianship

A. Estate Planning Documents

Need for a Guardianship can often be avoided with estate planning documents prior to an incapacitating event. These include:

1. Durable Power of Attorney: When wording contains the principal's intent that the authority is exercisable notwithstanding the principal's subsequent incapacity or mental incompetence. N.C.G.S. § 32A-8.
2. Health Care Power of Attorney: N.C.G.S. §§ 32A-15 to -27 with an advance instruction for mental health treatment N.C.G.S. §§ 122C-71 to -77.
3. Trusts: Includes revocable trusts where the incompetent is the Grantor of a trust created prior to incapacitation. Pursuant to N.C.G.S. 36A-115, the beneficiary's interest in a discretionary or support trust may not be alienated or transferred.
4. Standby Guardianship: Often completed as part of the Estate Planning documents when a minor or incompetent's parent or guardian is suffering from a debilitating or terminal illness. N.C.G.S. §§ 32A-1370-1382. See requirements at N.C.G.S. § 32A-1374.
 - a. Should "identify the designator, the minor child or incompetent adult, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian." N.C.G.S. § 32A-1374(b). See attached sample form "Designation of Standby Guardian."

B. Adult Protective Services: Useful for issues surrounding a temporary or non-recurring medical condition, or in instances when determining the need for a guardianship.

C. Representative Payee: Helpful for cases with federal or state benefits. Only the disbursing agency can designate or change a representative payee. *Brevard v. Brevard*, 74 N.C. App. 484, 328 S.E.2d 789 (1985).

D. Transfers under the Uniform Custodial Trust Act (UCTA): N.C.G.S. §§ 33B-1 to -22.

NORTH CAROLINA
WAKE COUNTY

**DESIGNATION OF STANDBY
GUARDIAN**

Pursuant to N.C.G.S. § 35A-1374, the undersigned Designators hereby designate standby guardianship of their minor children / incompetent adult child as follows:

Name of Designators:

NAME-OF-PARENT-ONE
NAME-OF-PARENT-TWO

Name and birthdate of Minor Children:

NAME-OF-MINOR-ONE, born on MONTH, DD, YYYY
NAME-OF-MINOR-TWO, born on MONTH, DD, YYYY

Name, birthdate and date of adjudication of Incompetence of incompetent adult child:

NAME-OF-INCOMPETENT, born on MONTH, DD, YYYY
Adjudicated incompetent on MM/DD/YYYY
See Wake County Clerk of Superior Court File numbers:
2018-SP-1234 and 2018-E-0567

Name of Primary Standby Guardian:

STANDBY-GUARDIAN-NAME-ONE
1234 Avenue Street
Raleigh, NC, 27607
919-781-4000

Name of Secondary Standby Guardian (if primary is not available):

STANDBY-GUARDIAN-NAME-TWO
1234 Avenue Street
Raleigh, NC, 27607
919-781-4000

Triggering Event:

- _____ When we become incapacitated [N.C.G.S. § 35A-1370(8)].
- _____ When we become debilitated [N.C.G.S. § 35A-1370(3)] and consent to commencement of standby guardianship authority.
- _____ Upon our death prior to the commencement of a judicial proceeding to appoint a guardian of the person or general guardian of any named minor child.

_____ I consent to the commencement of standby guardianship authority immediately.

This Designation is signed this day, _____, 2019.

Signature of Designator: _____

Signature of Designator: _____

Signature of non-guardian Witnesses (at least age 18 and in presence of Designator and each other)

_____, 2019
WITNESS-ONE (print name)

_____, 2019
WITNESS-TWO (print name)

NORTH CAROLINA

WAKE COUNTY

I, the undersigned, a Notary Public, hereby certify that NAME-OF-PARENT-ONE and NAME-OF-PARENT-TWO and WITNESS-ONE and WITNESS-TWO, personally appeared before me this day, and affirmed to me and to the witnesses in my presence that this instrument is a Designation of Standby Guardian, and that each willingly and voluntarily made and executed it as a free act and deed for the purposes expressed in it.

This the ____ day of _____, 2019.

_____, Notary Public

My Commission Expires:

Guardianship: The case of the Taylor family --- misfortune

Jennifer Woy, NCCP
Wyrick Robbins Yates & Ponton, LLP
Raleigh, North Carolina
jwoy@wyrick.com

The case of the Taylor family misfortune



[ELEMENTAL TO SUCCESS]

Meet the Taylors

Annie Taylor



Andy Taylor

Opie Taylor

Andy Taylor, widower



Andy & Elinor engaged; happy family ⁵



TRAGEDY STRIKES



Mayberry Gazette

NEWS OF THE TOWN

"THE PEOPLE'S VOICE"

Vol. XXII, No. 32

THURSDAY, MAY 12, 1955

LOCAL MECHANIC PUTS CAR IN COURT HOUSE

RESTRICTED LOAD AN MODIFIED 4 MAIN ROADS

Regulations Are Set in Effect on State Highways

A high and steep grade is a common feature in the mountainous country of the state. It is for this reason that the state highway department has issued regulations governing the load and the modification of the main roads.

Traffic Safety Plan Outlined by City Roads Authorities

The city roads authorities have outlined a plan for the improvement of the city roads. The plan includes the installation of traffic lights, the widening of the roads, and the improvement of the drainage system.



Will Sheriff Andy Taylor survive?

Driving Safety Month Set to Begin

Ace mechanic Goober Pyle is quoted as saying "You'd smell like gas too if you sat around a filling station all day".

An immediate investigation is underway and authorities are that some new light will be shed upon the situation in the near future. Available facts seem to indicate that the situation is not as serious as it first appeared. Future plans will, of course, be made.

MORE RIGID RULES SOUGHT IN FIGHT TO CLEAN CITY PARKS

PREPAID TAXES REACH HIGHER MARK IN HISTORY

The city treasurer has announced that the prepaid taxes for the year 1955 have reached a new high. This is due to the fact that the city has been able to collect more taxes than in any previous year.

The city has been able to collect more taxes than in any previous year. This is due to the fact that the city has been able to collect more taxes than in any previous year.

The city has been able to collect more taxes than in any previous year. This is due to the fact that the city has been able to collect more taxes than in any previous year.

U. S. Delegates Attend Meet

Coma: Andy is stable but non-responsive



Family steps in... and waits...



[ELEMENTAL TO SUCCESS]



Is a Guardianship necessary for Andy?

- Who has legal authority to make medical and financial decisions on his behalf?
- Who is best situated to handle these decisions?
- “An adult ...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, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.” N.C.G.S. § 35A-1101(7).

Andy Taylor's Guardianship

- Fiancé Elinore submits a Petition for the Adjudication of Incompetence for Andy Taylor to the Clerk of Court – Special Proceedings, and nominates herself as General Guardian. (AOC form SP-200)
- Whom does she notice?
 - Aunt Bee
 - aunt, shares household & finances, known: 42 years
 - Suggested (but not required):
 - Barney Fife
 - cousin, best friend, known: 40 years

STATE OF NORTH CAROLINA

File No.

County

NOTE TO PETITIONER: If you are petitioning the court to accept guardianship on transfer from another state, this is not an appropriate form to use.

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

IN THE MATTER OF

Full Name Of Respondent

Telephone No. Of Respondent

Address Of Respondent

County Of Residence Of Respondent

Date Of Birth

Race*

Sex*

*Race and sex are collected so that this information may be transmitted to NCGS in the event of a qualifying education under G.S. 14-403.4(b)(2).

G.S. 35A-1105, -1112, -1114, -1210; 35B-17, -18

Name And Address Of Attorney For Petitioner

☐ Respondent Indigent

Respondent's Drivers License No.

State

Name And Address Of Petitioner

Telephone No. Of Petitioner's Attorney

State Bar No.

Name And Address Of Treatment Facility If Respondent Is An Inpatient

County Of Residence Of Petitioner

Telephone No. Of Petitioner

Petitioner's Relationship To Respondent Or Interest In Proceeding

**PETITION FOR ADJUDICATION OF
INCOMPETENCE AND APPLICATION FOR
APPOINTMENT OF GUARDIAN
OR LIMITED GUARDIAN
☐ AND MOTION FOR APPOINTMENT
OF INTERIM GUARDIAN (AOC-SP-198)**

The undersigned, being duly sworn, requests that the Court, after notice and hearing, adjudicate the respondent above to be incompetent, and also applies for the appointment of the person(s) named below to serve, in the capacity indicated, as guardian(s) of the respondent. In support of this Petition, the undersigned states:

1. During the past twelve (12) months, the above-named respondent was physically present as follows:

Period of Physical Presence (include up to the 12 months prior to the filing date of the petition; do not list periods of temporary absence)		Address
From	To	
	Present	

2. (check a. or check and complete b.) (NOTE: In both a. and b., "state" includes a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.)

- ☐ a. There is no other pending proceeding involving the respondent in any court or agency of a state or foreign country.
☐ b. There is a pending proceeding(s) involving the respondent in the court or agency of a state or foreign country, as set forth below:

Location (County, State, and Country)	Type of Proceeding	File Number

3. A North Carolina court has jurisdiction to rule on this petition and application.

4. The respondent is

- ☐ a resident of this county.
☐ domiciled in this county.
☐ an inpatient in the facility named above.
☐ present in this county, it being impossible to determine his/her county of residence or domicile.

(Over)

AOC-SP-200, Rev. 4/18
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9. RECOMMENDED GUARDIAN(S)

Name And Address Of Recommended Guardian

Name And Address Of Recommended Guardian

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

10. MOTION FOR APPOINTMENT OF INTERIM GUARDIAN

NOTE: In certain circumstances, an interim guardian may be needed to intervene on a respondent's behalf prior to an adjudication hearing. To request that the Court appoint an interim guardian for the respondent, complete and attach form AOC-SP-198, Motion For Appointment Of Interim Guardian.

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, Side Two, Rev. 4/18
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Pre-Hearing Activity

- Hearing date set for 30 days
- Notices sent to all interested parties with petition
- Court appoints Guardian Ad Litem
- GAL interviews interested parties
- GAL reviews all medical reports
- GAL prepares report for Clerk
- Parties prepare for Hearing and subpoena witnesses

Serving Notice of Hearing & Preparation for Hearing

- Sherriff must personally serve Andy Taylor.
- Notice must be sent to all interested parties following Rule 4 of the Rules of Civil Procedure
 - Note: Gomer Pile should also be noticed as an interested party due to the pending civil liability case from the automobile accident.
- Since Elinore is the Petitioner (and Andy does not have his own counsel), she is the only party that can call and question witnesses, present evidence and issue subpoenas. N.C.G.S. § 35A-1112(b).

Becoming a Party to the Proceeding

- Aunt Bee and Barney Fife, together, file an Application for the Appointment of Guardian to the Clerk, serve it upon all other parties and become a party to the proceedings.
- This gives them the right to testify as to who should (or should not) be appointed guardian.

Guardian Ad Litem duties

- GAL interviews Aunt Bee, Barney and Elinore
- GAL reviews all medical reports
- GAL determines what is in Andy's best interest, even if that disagrees with what the he (or any other party) desires.
- GAL makes following recommendation to Court:
 - Guardian of the Estate: Aunt Bee
 - Guardian of the Person: Barney Fife
 - Or in the alternative, for the two to serve concurrently as General Guardians

The Hearing on Andy's Incompetence



[ELEMEN

Vr
ckrobbins

Singulars abound in the 1960 classic television series *The Andy Griffith Show*.

Hearing

- Elinore, Barney, Aunt Bee and GAL are all present
- All parties stipulate to Dr. Martin's medical opinion that Andy is incompetent.
- Each presents evidence as to suitability to serve as Guardian
- Clerk adjudicates Andy as Incompetent and Issues Letters of:
 - Guardianship of the Person to Barney Fife
 - Guardianship of the Estate to Aunt Bee

Is a Guardianship necessary for Opie?

- Who has legal authority to make decisions and care for him?
- Who is best situated to handle these decisions?
- “Because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.” N.C.G.S. § 35A-1201(6).

Opie's Guardianship Considerations

- Opie's mother, Annie Taylor, died testate naming her parents, Granny and Jed, of Beverly Hills, CA as Guardians of Opie
- Andy, having been declared incompetent, can no longer act
- The Clerk must give "substantial weight" to a testamentary recommendation made by the minor's parent(s), though it cannot affect the rights of a surviving parent and ultimately the Clerk must make a decision that is in the minor's best interest. N.C.G.S. § 35A-1224(d).



Opie Taylor's Guardianship

- Aunt Bee submits an Application for Appointment of a General Guardian of a Minor to the Clerk of Court – Estates Division, and nominates herself as General Guardian.
- Whom does she notice?
 - Andy Taylor – natural parent
 - Barney Fife – Guardian of the Person for Andy Taylor and second cousin to Opie
 - Granny & Jed – Guardians nominated in Opie's mother's Last Will and Testament

(TYPE OR PRINT IN BLACK INK)

STATE OF NORTH CAROLINA

County

File No.

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

IN THE MATTER OF THE ESTATE OF:

Name And Address Of Minor

APPLICATION FOR APPOINTMENT OF

- ☐ GUARDIAN OF THE ESTATE
☐ GUARDIAN OF THE PERSON
☐ GENERAL GUARDIAN

FOR A MINOR

G.S. 35A-1221, 35A-1225

Social Security No. (Last Four Digits) Age Date Of Birth

County Of Residence Of Minor

Name And Street Address, PO Box, City, State And Zip Of Applicant 2

Name And Street Address, PO Box, City, State And Zip Of Applicant 1

County Of Residence Of Applicant 2

Telephone No.

County Of Residence Of Applicant 1

Telephone No.

Name And Address Of Attorney For Applicant(s)

Applicant(s)'s Relationship Or Interest In Proceeding

Telephone No.

The undersigned, being duly sworn, applies to be appointed guardian(s) for the minor named above, to serve in the capacity indicated, and in support of this Application state(s):

- The minor resides or is domiciled in this county.
- The parents of the minor are listed below. (Attach copy(ies) of death certificate(s) if parent(s) not living.)

Name Of Mother, And Address If Living

Name Of Father, And Address If Living

Date Of Death, If Not Living

County Of Estate Administration

Date Of Death, If Not Living

County Of Estate Administration

- Other persons known to have an interest in this proceeding are:

Name And Address

Name And Address

Relationship To Minor Or Interest In Proceeding

Relationship To Minor Or Interest In Proceeding

- If applicable in the proceeding identified below ☐ custody of the minor was awarded ☐ a guardian of the minor was appointed ☐ the Last Will and Testament of the minor's parent(s), recommending the applicant(s) as guardian(s) for the minor, was admitted to probate. (Attach copy of custody or guardianship order or probated will, if available.)

Date Of Order Or Probate

County Of Proceeding

Name And Address Of Custodian Or Guardian, If Any

File Or Other Identification No.

- The reason for seeking a guardian, and information concerning the need, type and person(s) to appoint are:

- A statement of the assets and liabilities of the minor, including any income and receivables to which the minor is entitled, is set forth on the reverse side of this Application.

- I hereby acknowledge receipt of the AOC-SP-850, "Responsibilities Of Guardians In North Carolina" or I acknowledge that said pamphlet is available online at www.nccourts.org/forms and I further acknowledge that I am required to comply with said responsibilities and to manage the guardianship estate in accordance with North Carolina law.

(Over)

PROPERTY OF MINOR'S ESTATE

PART II. OTHER PROPERTY

Description	Estimated Value	Description	Estimated Value
seeds	\$	1. Right Of Action For Injury, Etc. (NOTE: Increase bond before receipt.)	\$
nts			
ashed Checks On Hand		2. Interests In Real Property	
		3. Custodial Accounts, Trust Income Or Other Resources Available For Support Of Minor, NOT Administered Or Received By Guardian (Attach itemized list)	
nds			
Livestock And Equipment			
Personal Property		TOTAL PART II.	\$ 0.00
al Income	\$	Custodian, Trustee, Attorney-in-fact, Etc. (Name)	
vidends, Etc.		Major medical or similar insurance is in effect through: (Name Of Insurer)	
		(Policy No.)	
n Or Retirement Security, her		PART III. LIABILITIES	
Insurance		1. Mortgage Loans	\$
y Settlement Or Payments		2. Other Secured Loans Or Obligations	
		3. Unsecured Obligations	
Subtotal Of Line 8	\$ 0.00	4. Other	
		TOTAL PART III.	\$ 0.00
base bond on this amount)	\$ 0.00		

VERIFICATION

applicant, have read this Application and state that its contents are true to my own knowledge except those matters on and belief, which I believe to be true.

Signature Of Applicant 1

Date

Signature Of Applicant 2

ED AND SUBSCRIBED TO BEFORE ME

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Person Authorized To Administer Oaths

Date

Signature Of Person Authorized To Administer Oaths

Title

Commission Expires

County Where Notarized

County Where Notarized

Date Commission Expires

SEAL

WAIVER OF NOTICE/CONSENT TO GUARDIANSHIP

I hereby waive notice of a hearing on this Application and consents to the appointment of the applicant(s) as minor to serve in the capacity indicated.

Signature

Date

Signature

Or Print)

Name Of Applicant 2 (Type Or Print)

Custodian

☐ Guardian

Relationship To Minor

☐ Parent☐ Custodian☐ Guardian

ED AND SUBSCRIBED TO BEFORE ME

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Person Authorized To Administer Oaths

Date

Signature Of Person Authorized To Administer Oaths

Title

Commission Expires

County Where Notarized

County Where Notarized

Date Commission Expires

SEAL

This Application and written notice of the time, date and place set for a hearing, shall be served on any parent, guardian or legal representative of the minor who is not an applicant and who does not sign the waiver and consent above, and any other person the Clerk may direct, by first-class mail, return receipt requested, to the address of the minor. Service shall be as provided by Rule 4 of the Rules of Civil Procedure unless the Clerk directs otherwise. G.S. 35A-1222.

Pre-Hearing Activity

- Hearing date set for 30 days
- Notices sent to all interested parties with Application
- Court appoints Guardian Ad Litem
- GAL interviews interested parties
- GAL prepares report for Clerk
- Parties prepare for Hearing

Serving Notice of Hearing & Preparation for Hearing

- The Application shall be served on each parent, guardian and legal custodian of the minor who is not an applicant, or guardian ad litem and other parties of record. Service shall comply with Rule 4 of the NC Rules of Civil Procedure. N.C.G.S. § 35A-1222.

Guardian Ad Litem duties

- GAL interviews Aunt Bee, Barney and Opie in person
- GAL arranges for phone interview of Granny and Jed
- GAL determines what is in Opie's best interest
- GAL makes following recommendation to Court:
 - General Guardian: Aunt Bee

Hearing

- Aunt Bee, Barney, Granny, Jed and GAL are all present
- Each presents evidence as to suitability to serve as Guardian
- Clerk determines it is in Opie's best interest to remain in NC and Issues:
 - Letters of General Guardianship of a Minor, with the limitation that the Guardianship term is to remain only so long as Andy Taylor remains incompetent

Duties of Andy's Guardians

Guardian of the Estate:

Aunt Bee

- Obtains Bond for 110% of Andy's assets
- Files Inventory of Assets within 90 days
- Utilizes Ward's income to maintain assets
- Provides Annual Accountings to the Clerk
- Obtains increased bond as required

Guardian of the Person:

Barney Fife

- Provides for his "care, comfort, and maintenance,"
- Arranges for his "training, education, employment, rehabilitation, or habilitation"
- N.C.G.S. § 35A-1241(a)(1).

Duties of Opie's Guardian

- Obtains bond for 125% of Opie's assets with premium based on years until Opie reaches majority
- Files Inventory of Assets within 90 days
- Maintains Minor Ward's income and assets
- Provides Annual Accountings to the Clerk
- Provides for his "care, comfort, and maintenance,"
- Arranges for his "training, education, employment, rehabilitation, or habilitation"
- N.C.G.S. § 35A-1241(a)(1).

Two years pass...

- Andy regains consciousness and begins the long task to rehabilitation
- Barney arranges for Andy to move to a rehabilitation center
- Eventually, Andy returns home and resumes normal activity



Andy Petitions for Restoration

- Andy submits a Petition for Restoration to Competency. AOC Form SP-215.
- Hearing date set for 10-30 days from service of the motion and the Notice of Hearing on the Guardians
- Clerk enters an Order adjudicating Andy as competent and all rights are restored. N.C.G.S. § 35A-1130(d). AOC Form SP-218
- Clerk simultaneously removes Aunt Bee as Opie's Guardian.

Duties of Aunt Bee

- Within 60 days after the guardianship is terminated she must file a Final Account for Andy. N.C.G.S. § 35A-1266.
- Obtains a refund for bond premium paid for Opie's guardianship
- Within 60 days after the guardianship is terminated she must file a Final Account for Opie.



[ELEMENTAL TO SUCCESS

The Wild Boar & the Fox

by Aesop

A Wild Boar was sharpening his tusks busily against the stump of a tree, when a Fox happened by. Now the Fox was always looking for a chance to make fun of his neighbors. So he made a great show of looking anxiously about, as if in fear of some hidden enemy. But the Boar kept right on with his work.

"Why are you doing that?" asked the Fox at last with a grin. "There isn't any danger that I can see."

"True enough," replied the Boar, "but when danger does come there will not be time for such work as this. My weapons will have to be ready for use then, or I shall suffer for it."

Preparedness for war is the best guarantee of peace.

<http://www.read.gov/aesop/014.html>