

## Chapter 5

# Voluntary Admission of Incompetent Adults

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### 5.1 Overview

The North Carolina General Statutes provide for the voluntary admission of an adjudicated incompetent adult to facilities for the mentally ill and substance abusers. Procedures for the voluntary admission of competent adults generally apply. *See supra* Chapter 4 and *infra* Chapter 10. The exception is that the acts required of the competent adult in applying for admission and consenting to treatment are performed by the legally responsible person, in this instance the guardian of the person or general guardian. As the admission is not a voluntary act by the person admitted, the statutes provide for appointment of counsel and judicial review of these admissions.

## 5.2 Terminology Used in this Chapter

“General guardian” means “a guardian of both the estate and the person.” N.C. GEN. STAT. § 35A-1202(7) (hereinafter G.S.). A general guardian has authority to make health care decisions, including decisions concerning mental health and substance abuse treatment, unless limited by the order of the clerk of superior court appointing the guardian.

“Guardian,” for the purposes of Chapter 122C of the North Carolina General Statutes, is the “person appointed as a guardian of the person or general guardian by the court under Chapters 7A or 35A or former Chapters 33 or 35 of the General Statutes.” G.S. 122C-3(15). Because a guardian of the estate (see below) cannot make mental health or substance abuse treatment decisions for the ward, that type of guardian is not referenced in Chapter 122C.

“Guardian of the estate” is “a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.” G.S. 35A-1202(9). A guardian of the estate does not have the authority to make health care decisions, which include decisions concerning mental health and substance abuse treatment, for the ward.

“Guardian of the person” is “a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.” G.S. 35A-1202(10). A guardian of the person has authority to make health care decisions, including decisions concerning mental health and substance abuse treatment, unless limited by the order of the clerk of superior court appointing the guardian.

“Incompetent adult” as defined in Chapter 35A, “Incompetency and Guardianship,” is “an adult or emancipated minor who lacks sufficient capacity to manage the adult’s own affairs or to make or communicate important decisions concerning the adult’s person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.” G.S. 35A-1101(7). The term “incompetent adult” as used in Chapter 122C means “an adult individual adjudicated incompetent.” G.S. 122C-3(17).

“Incompetent child” is “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, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.” G.S. 35A-1101(8).

“Incompetent person” is “a person who has been adjudicated to be an ‘incompetent adult’ or ‘incompetent child’ as defined in G.S. 35A-1101(7) or (8).” G.S. 35A-1202(11).

“Interim guardian” is “a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person’s physical well-being or to the person’s estate.” G.S. 35A-1101(11). An interim guardian has authority to make decisions regarding mental health or substance abuse treatment only if specifically granted by the order of the clerk of superior court appointing the interim guardian.

“Legally responsible person” is “(i) when applied to an adult, who has been adjudicated incompetent, a guardian.” G.S. 122C-3(20). The term is used in the statutes governing voluntary admission of incompetent adults, and therefore is used in this chapter, although a legally responsible person for an incompetent adult is the guardian.

“Limited guardianship” is a guardianship limited to the specific areas of decision-making determined by the clerk of superior court to be beyond the ward’s capacity. The ward retains the right to make all decisions in matters not encompassed by the limited guardianship. G.S. 35A-1212(a), 35A-1215(b). For example, a guardianship may be limited to medical decision-making. The ward would retain the right to make all decisions except those related to health care.

“Ward” is “a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction.” G.S. 35A-1202(15).

## 5.3 Admission by Consent of Guardian

### A. By Application of Guardian of the Person or General Guardian

A person previously adjudicated incompetent pursuant to Chapter 35A or former Chapters 33 or 35 of the General Statutes may be voluntarily admitted to a 24-hour facility by application of the guardian of the person or the general guardian. *See* G.S. 122C-231, 35A-1241. A petition for involuntary commitment is not required. G.S. 122C-232(b).

A guardian of the estate alone does not have authority to make medical decisions for a ward. For powers of the guardian of the estate, see G.S. 35A-1251. When appointing a guardian of the person or a general guardian, the clerk of superior court may also make findings of fact regarding the “nature and extent” of the ward’s incompetence and order that the ward retain specific legal rights by ordering a limited guardianship. G.S. 35A-1215(b). As the ward could retain the right to make mental health or substance abuse treatment decisions, the guardianship order must be examined to determine if either has been retained.

These provisions do not apply to a person who is de facto incompetent but who

has not been so adjudicated. Involuntary commitment procedures must then be followed (*see supra* Chapters 2 and 3), unless the person has executed an applicable advance instruction or health care power of attorney. *See infra* Chapter 11.

### **B. Guardian Acts for Respondent**

The provisions of G.S. 122C-211 regarding the voluntary admission of competent adults (*see infra* Chapter 10) apply to the voluntary admission of an incompetent adult, with the guardian of the person or general guardian acting in place of the individual. G.S. 122C-231. The guardian so acting makes treatment decisions in the best interest of the ward unless the ward executed advance instructions for mental health treatment while competent. If advance instructions exist, the guardian shall follow those instructions in consenting to or refusing treatment, “consistent with G.S. 35A-1201(a)(5).” 122C-73(e). This statute instructs the guardian to allow the ward an opportunity to participate in decision-making “within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent.” G.S. 35A-1201(a)(5).

## **5.4 Evaluation for Admission**

Voluntary admission of an incompetent adult is generally pursuant to G.S. 122C-211, the statute governing the voluntary admission of a competent adult, with the legally responsible person acting on behalf of the individual. G.S. 122C-231. Under G.S. 122C-211(a), an individual applying for voluntary admission must be evaluated to “determine whether the individual is in need of care, treatment, habilitation or rehabilitation for mental illness or substance abuse or further evaluation by the facility.” The incompetent adult must therefore be evaluated under this standard prior to admission. *See infra* Appendix A, Form DMH 5-73-01.

## **5.5 Attorney Representation**

### **A. Appointment of Counsel**

The statute requiring judicial review of a voluntary admission of an incompetent adult provides that, “[u]nless otherwise provided in this Part, the hearing . . ., including the provisions for representation of indigent incompetent adults,” and all related proceedings are governed by the procedures for involuntary commitment. G.S. 122C-232(c); *see supra* § 2.5A.

For more on the role and responsibilities of counsel, see *infra* Appendix C, “Working with Clients.”

## B. Ethical Considerations

There are challenges in representing a person who has already been adjudicated incompetent. The statutory section on admissions states that the legally responsible person shall act for the person admitted, including “giving or receiving any legal notice.” G.S. 122C-231. The hearing procedures, however, are designed to protect the due process rights of the *respondent*. Counsel is ethically required to explain the hearing procedures and dispositional alternatives to the respondent. Although the incompetent respondent does not have the legal capacity to sign in to the facility voluntarily, the respondent may contest the admission at the district court hearing or may decide not to contest. The attorney should determine how the respondent wishes to proceed. If the respondent is contesting, counsel must prepare the case as any other, reviewing records, talking with witnesses, and issuing subpoenas as appropriate.

Effective communication, given the disability of the client, is a concern. A prior review of records, as well as talking with the treatment team after obtaining any required consent by opposing counsel, may offer guidance on how best to approach the client interview.

*See infra* Appendix C, “Working with Clients.”

## 5.6 Hearings

### A. Venue

All hearings are held in the district court in the county in which the 24-hour facility is located. G.S. 122C-232(a).

### B. Application of Involuntary Commitment Procedures

Except when otherwise specified in the sections dealing with voluntary admission of incompetent adults, the required initial hearing and any subsequent proceedings are governed by the provisions for involuntary commitments in Article 5, Part 7 of Chapter 122C. G.S. 122C-232(c). These procedures are discussed *supra* in Chapter 2.

### C. Duties of Clerk of Superior Court

***Calendaring of hearing.*** The procedures and notice required for involuntary adult commitment proceedings apply to hearings for the voluntary admission of an incompetent person. The process begins with the written application for admission rather than with a petition. G.S. 122C-231. The clerk of superior court in the county where the facility is located must calendar the hearing within 10 days of the admission. G.S. 122C-268(a).

**Notice to respondent.** Notice is given by the clerk to the respondent according to Rule 4(j) of the North Carolina Rules of Civil Procedure at least seventy-two hours before the hearing. G.S. 122C-264(b), (c). Rule 4(j) requires service on the respondent by, among other methods, personal service or certified mail (with proof of service on the respondent). Rule 4(j)(2)b. provides for separate service on the guardian.

It is doubtful that service on the respondent is actually being done given the time limitations of the hearing and the notice requirements. The respondent's counsel could make a motion to dismiss for lack of service, but rather than being released, the respondent could be readmitted by a new application of the guardian. The ward might remain in the facility while the process begins anew, delaying the time before the respondent is afforded a hearing.

**Notice to others.** The clerk is also to provide notice to the respondent's counsel and to the legally responsible person, who is the guardian. G.S. 122C-232(d). This notice is to be sent at least seventy-two hours before the hearing by first-class mail, postage prepaid. G.S. 122C-264(c). Although the legally responsible person may file a written waiver with the clerk of the right to receive notice, there is no provision for waiver by the respondent's counsel. G.S. 122C-232(c), (d).

Due to the time constraints and volume of cases, it is unclear whether the notices are given as required by Rule 4(j) and the statutes. Again, the respondent's counsel could make a motion to dismiss for lack of service, but this might result in delay of the hearing to allow proper service rather than the respondent's release.

#### **D. Continuance**

A continuance of the hearing of up to five days may be granted on motion of the court, the respondent's counsel, or the responsible professional, who is the person named by the facility director to oversee the respondent's care. G.S. 122C-232(a), 122C-3(32). As many district courts hold hearings for commitments and admissions only once a week or on two consecutive days, a five-day continuance will not suffice. It is common practice for the court to allow a seven-day continuance upon consent of the parties.

#### **E. Criteria for Judicial Review of Admission**

The court must determine whether the respondent "is mentally ill or a substance abuser and is in need of further treatment at the facility." G.S. 122C-232(b). The court must find that these requirements have been met by clear, cogent, and convincing evidence and that treatment cannot be provided in a less restrictive manner. If these requirements are not met, the respondent is to be released. *Id.* An important distinction between these "voluntary" proceedings and involuntary

commitment hearings is that there is no requirement of a finding of danger to self or others.

#### **F. Dispositional Alternatives**

The dispositional alternatives for the voluntary admission of an incompetent adult are either concurrence with the inpatient admission or discharge. G.S. 122C-232(b). If the treatment provider is recommending outpatient treatment, an involuntary commitment proceeding for outpatient commitment must be initiated.

#### **G. Discharge Pending Hearing**

Prior to the initial court hearing, the respondent is to be discharged on request of the legally responsible person, who is the guardian, subject to the right of the facility to hold the respondent for up to seventy-two hours to initiate involuntary commitment proceedings. G.S. 122C-233(a), 122C-211(b).

#### **H. Discharge After Hearing**

After the court has concurred in the admission, only the court or the facility may release the respondent. The legally responsible person may apply to the court to review a request for discharge if the facility refuses to release the respondent when the legally responsible person believes release is in the best interest of the respondent. G.S. 122C-233(b). There is no provision for appointed counsel for the legally responsible person. Special Counsel or appointed counsel continues to represent the respondent until unconditional discharge or through proceedings at the trial level. G.S. 122C-270(a), (e).

### **5.7 Appeal**

Appeal is directly to the North Carolina Court of Appeals. G.S. 122C-272. The statute provides that any party on the record may appeal as in civil cases. *Id.* It is unclear how this would apply to the voluntary admission of an incompetent person.

It seems clear that the incompetent adult could appeal as the person whose rights are protected by the judicial review of the admission. It is less clear whether the legally responsible person can appeal as the person acting on behalf of the incompetent adult. There is no case law on this point, but it could be argued that the legally responsible person is a party.

Chapter 122C provides for attorney representation of an incompetent person through any appellate proceedings. G.S. 122C-232(c), 122C-270. Appeal by the respondent's counsel is therefore at the direction of the respondent. In determining who is responsible for providing notice of appeal, the only guidance

from 122C-232 (c) is that “all subsequent proceedings, . . . are governed by the involuntary commitment procedures of Part 7 of this Article [Article 5 of Chapter 122C].” Part 7 regulates involuntary commitment of the mentally ill. Appeals under Part 7 are taken by respondents. Pursuant to 122C-270, assigned counsel represents respondents through all proceedings in the district court. Presumably, this covers notice of appeal, which is required to be given at the district court level. These specific statutory provisions take precedence over the North Carolina Rules of Civil Procedure, which provide that an incompetent person can appear or appeal in civil cases only through a guardian ad litem or general guardian. N.C. R. Civ. P. 17.

Attorneys assigned by the North Carolina Office of the Appellate Defender are responsible for representing the respondent following the filing of appeal. G.S. 122C-232(c), 122C-270(a), (e).