

CHAPTER 10:

Modification and Termination of Guardianship Orders

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10.1 Termination of Guardianship

The guardianship of an incapacitated adult is terminated

- upon death of the incapacitated adult (G.S. 35A-1295(a)(3)); or
- upon the entry of an order restoring the ward's competency pursuant to G.S. 35A-1130 (G.S. 35A-1295(a)(2)).

Except as otherwise provided by G.S. 35A-1295(b), G.S. 35A-1266, or other law, the powers and duties of a guardian with respect to the person and property of an incapacitated adult terminate upon termination of the guardianship. G.S. 35A-1295(a).

Within 60 days after a guardianship is terminated pursuant to G.S. 35A-1295, the guardian must file a final account with the Clerk. G.S. 35A-1266. After the Clerk approves the guardian's final account, the Clerk must enter an order discharging the guardian from further liability. G.S. 35A-1266.

10.2

Restoration of Competency

A. Motion for Restoration of Competency

The guardian of an incapacitated adult, the incapacitated adult for whom a guardian has been appointed, or any “interested person” may petition the Clerk to restore an incapacitated adult’s competency by filing a verified motion in the cause with the Clerk who is exercising jurisdiction with respect to the incapacitated adult’s guardianship. G.S. 35A-1130(a).

A motion seeking restoration of an incapacitated adult’s competency must set forth facts tending to show that the adult has sufficient capacity to manage his or her own affairs and to make and communicate important decisions regarding his or her person, family, and property. G.S. 35A-1130(a); G.S. 35A-1101(7).

The movant must serve a copy of the motion on the ward, the ward’s guardian, and any other parties to the guardianship proceeding pursuant to Rule 4 of the N.C. Rules of Civil Procedure. G.S. 35A-1130(b).

B. Right to Counsel and Appointment of Attorney as *Guardian ad Litem*

The ward is entitled to retain counsel, if he or she is capable of doing so, and to be represented by retained counsel in a proceeding seeking restoration of the ward’s competency. G.S. 35A-1130(c).

If the ward is indigent and is not represented by counsel, an attorney must be appointed in accordance with rules adopted by the N.C. Indigent Defense Services Commission to represent the ward as the ward’s *guardian ad litem*. G.S. 35A-1130(c). The attorney who was appointed as an incapacitated adult’s *guardian ad litem* pursuant to G.S. 35A-1107 in the proceeding to appoint a guardian for the incapacitated adult does not, by virtue of that fact alone, serve as the ward’s attorney or *guardian ad litem* in a proceeding seeking restoration of the ward’s competency under G.S. 35A-1130; however, the Clerk will often reappoint the attorney who was previously appointed as the incapacitated adult’s *guardian ad litem* to serve in that capacity in a proceeding seeking restoration of competency.

If the ward is not indigent and is not represented by counsel and the Clerk determines that the ward’s interests are not adequately represented by the ward’s guardian, the Clerk may appoint a *guardian ad litem* pursuant to Rule 17 of the N.C. Rules of Civil Procedure to represent the ward’s interests in a proceeding seeking restoration of the ward’s competency. However, an attorney or other person who is appointed as a ward’s *guardian ad litem* for a nonindigent ward in a proceeding under G.S. 35A-1130 is appointed pursuant to Rule 17 of the N.C. Rules of Civil Procedure, *not* G.S. 35A-1130(c) and the rules adopted by the N.C. Indigent Defense Services Commission, and therefore is *not* entitled to compensation from the N.C. Office of Indigent Defense Services.

C. Hearing, Multidisciplinary Evaluation, and Right to Jury Trial

Upon the filing of a motion seeking restoration of an incapacitated adult's competency, the Clerk must set a date, time, and place for a hearing regarding the ward's capacity. G.S. 35A-1130(b).

Absent good cause, the hearing must be held not less than 10 days and not more than 30 days from the date of service of the motion and notice of hearing on the ward or the ward's guardian. G.S. 35A-1130(b).

Upon motion of any party or on the Clerk's own motion, the Clerk may order a multidisciplinary evaluation regarding the ward's capacity. G.S. 35A-1130(c). Multidisciplinary evaluations are discussed in more detail in Chapters 5 and 6 of this manual.

The ward, upon request of the ward, the ward's *guardian ad litem*, or the ward's counsel, is entitled to a jury trial on the issue of the ward's capacity. G.S. 35A-1130(c). The Clerk may order, on the Clerk's own motion, a jury trial on the issue of the ward's capacity in accordance with Rule 39(b) of the N.C. Rules of Civil Procedure. G.S. 35A-1130(c). The jury in a proceeding seeking restoration of a ward's capacity consists of 6, not 12, persons selected in accordance with G.S. Chapter 9. G.S. 35A-1130(c).

D. Standard and Burden of Proof

A ward's competency must be restored if the Clerk or jury finds, by a preponderance of the evidence, that the ward has sufficient capacity to manage his or her own affairs and to make and communicate important decisions regarding his or her person, family, and property. G.S. 35A-1130(d); G.S. 35A-1101(7).

E. Order and Appeal

If the Clerk or jury finds that the ward has sufficient capacity to manage his or her own affairs and to make and communicate important decisions regarding his or her person, family, and property, the Clerk must enter an order adjudicating that the ward is restored to competency. G.S. 35A-1130(d). Upon entry of an order restoring a ward's competency, the ward has the right to manage his or her affairs, make contracts, control and sell his or her property, and exercise his or her other legal rights as if he or she had never been adjudicated incompetent. G.S. 35A-1130(d). Following entry of an order restoring a ward's competency, the ward's guardian must file a final account with the Clerk pursuant to G.S. 35A-1266. G.S. 35A-1130(e). After the Clerk approves the guardian's final account, the Clerk must enter an order discharging the guardian from further liability. G.S. 35A-1130(e); G.S. 35A-1266.

If the Clerk or jury finds that there is insufficient evidence that the ward has sufficient capacity to manage his or her own affairs and to make and communicate important decisions regarding his or her person, family, and property, the Clerk must enter an order denying the motion. G.S. 35A-1130(f). The ward may appeal the Clerk's order denying a motion seeking restoration of the ward's competency to superior court for trial *de novo*. G.S. 35A-1130(f); G.S. 1-301.2.

G.S. 35A-1116 appears to govern the taxing of costs and fees in proceedings seeking the restoration of a ward's competency. The payment of costs and fees under G.S. 35A-1116 is discussed in Chapter 5 of this manual.

10.3 Modification of Guardianship Orders

Any "interested person" may file a motion in the cause with the Clerk in the county in which an adult guardianship is docketed requesting modification of the guardianship order or consideration of any other matter pertaining to the guardianship that is within the Clerk's jurisdiction. G.S. 35A-1207(a); G.S. 35A-1203. *See also* G.S. 35A-1290 (authorizing the Clerk, upon "information or complaint," to enter orders for the better management of the estates, the better care and maintenance of wards and their dependents, and the protection of the interests of wards).

Unless otherwise ordered by the Clerk, a motion under G.S. 35A-1207(a) and notice of hearing on the motion must be served by the movant pursuant to Rule 5 of the N.C. Rules of Civil Procedure on all parties to the guardianship proceeding and on such other persons as the Clerk may direct. G.S. 35A-1207(c). If the Clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate, the Clerk may enter an appropriate *ex parte* order to address the emergency pending the disposition of the matter at the hearing. G.S. 35A-1207(d).

Appointment of Guardian ad Litem. G.S. Chapter 35A does not specifically address the appointment of an attorney to represent an incapacitated adult in a proceeding to modify a guardianship under G.S. 35A-1207. The attorney who was appointed as an incapacitated adult's *guardian ad litem* pursuant to G.S. 35A-1107 in the proceeding to appoint a guardian for the incapacitated adult does not, by virtue of that fact alone, serve as the ward's attorney or *guardian ad litem* in a guardianship proceeding under G.S. 35A-1207.

If the Clerk determines that the ward's interests are not adequately represented by the ward's guardian, the Clerk may appoint a *guardian ad litem* pursuant to Rule 17 of the N.C. Rules of Civil Procedure to represent the ward's interests in a guardianship proceeding under G.S. 35A-1207.

Practice Note: The N.C. Office of Indigent Defense Services has taken the position that it will compensate an attorney who is appointed as the ward's *guardian ad litem* in a proceeding under G.S. 35A-1207 if the ward is indigent because the issues are sufficiently related to the purposes of the original guardianship proceeding and appointment of a guardian.

10.4 Removal of Guardian

G.S. 35A-1290 authorizes the Clerk, upon “information or complaint,” to remove the guardian of an incapacitated adult if the guardian

- mismanages the ward’s estate;
- wastes or converts the ward’s money or estate;
- neglects to care for or maintain the ward or the ward’s dependents in a suitable manner;
- violates his or her fiduciary duties through default or misconduct;
- has a private interest that might tend to hinder or be adverse to carrying out the guardian’s duties (*see also In re Armfield*, 113 N.C. App. 467 (1994));
- was originally unqualified for appointment as guardian and continues to be unqualified;
- is adjudicated incompetent;
- is convicted of a felony and the guardian’s citizenship is not restored;
- is the spouse of the ward and has lost his or her spousal rights as provided in G.S. Chapter 31A;
- is likely to become insolvent or has sureties who are likely to become insolvent;
- no longer qualifies to serve as the ward’s guardian;
- fails to post, renew, or increase a bond as required by law or court order;
- refuses or fails without justification to obey any process served on the guardian in connection with the guardianship;
- fails to file required accountings with the Clerk; or
- is unsuitable for any reason to continue serving as the ward’s guardian (*see also In re Thomas*, ___ N.C. App. ___, 644 S.E.2d 608 (N.C. Ct. App. 2007) (authorizing the Clerk to remove a guardian and appoint a successor guardian for the “better care of the ward” without any finding of misconduct or unsuitability on the part of the incumbent guardian)).

G.S. 35A-1291 authorizes the Clerk to remove a guardian if the Clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward’s estate. The language of this section implicitly suggests that the Clerk may not remove a guardian without a hearing in cases that do not involve an emergency that threatens the ward’s physical well-being or constitutes a risk of substantial injury to the ward’s estate. G.S. Chapter 35A, however, does not expressly state the procedures that the Clerk must follow in connection with a proceeding to remove a guardian under G.S. 35A-1290.

Emergency or interlocutory orders. If the Clerk revokes a guardian's letters of appointment pursuant to G.S. 35A-1290 or G.S. 35A-1291, the Clerk may enter such interlocutory orders and decrees as the Clerk finds necessary for the protection of the ward or the ward's estate pending the resolution of the matter and appointment of a successor guardian. G.S. 35A-1291.

Appointment of Guardian ad Litem. G.S. Chapter 35A does not specifically address the appointment of an attorney to represent an incapacitated adult in a proceeding to remove a guardian under G.S. 35A-1290. The attorney who was appointed as an incapacitated adult's *guardian ad litem* pursuant to G.S. 35A-1107 in the proceeding to appoint a guardian for the incapacitated adult does not, by virtue of that fact alone, serve as the ward's attorney or *guardian ad litem* in a proceeding to remove a guardian under G.S. 35A-1290.

If the Clerk determines that the ward's interests are not adequately represented by the ward's guardian, the Clerk may appoint a *guardian ad litem* pursuant to Rule 17 of the N.C. Rules of Civil Procedure to represent the ward's interests in a proceeding to remove a guardian under G.S. 35A-1290.

Practice Note: The N.C. Office of Indigent Defense Services has taken the position that it will compensate an attorney who is appointed as the ward's *guardian ad litem* in a proceeding under G.S. 35A-1290 if the ward is indigent because the issues are sufficiently related to the purposes of the original guardianship proceeding and appointment of a guardian.

Appointment of successor guardian. If the Clerk revokes a guardian's letters of appointment under G.S. 35A-1290 or G.S. 35A-1291, the Clerk must appoint a successor guardian. G.S. 35A-1293. The appointment of a successor guardian is discussed in § 10.6 of this chapter.

10.5 Resignation of Guardian

G.S. 35A-1292 allows the Clerk to accept the resignation of a guardian of an incapacitated adult. G.S. Chapter 35A, however, does not expressly state the procedures that the Clerk must follow in connection with the resignation of a guardian under G.S. 35A-1292.

Appointment of Guardian ad Litem. G.S. Chapter 35A does not specifically address the appointment of an attorney to represent an incapacitated adult in connection with the resignation of a guardian under G.S. 35A-1292. The attorney who was appointed as an incapacitated adult's *guardian ad litem* pursuant to G.S. 35A-1107 in the proceeding to appoint a guardian for the incapacitated adult does not, by virtue of that fact alone, serve as the ward's attorney or *guardian ad litem* in connection with the resignation of the ward's guardian under G.S. 35A-1292.

If the Clerk determines that the ward's interests are not adequately represented by the ward's guardian, the Clerk may appoint a *guardian ad litem* pursuant to Rule 17 of the N.C. Rules of Civil Procedure to represent the ward's interests in connection with the resignation of a ward's guardian under G.S. 35A-1292.

Practice Note: The N.C. Office of Indigent Defense Services has taken the position that it will compensate an attorney who is appointed as the ward's *guardian ad litem* in connection with the guardian's resignation under G.S. 35A-1292 if the ward is indigent because the issues are sufficiently related to the purposes of the original guardianship proceeding and appointment of a guardian.

Appointment of successor guardian. If the Clerk accepts a guardian's resignation under G.S. 35A-1292, the Clerk must appoint a successor guardian. G.S. 35A-1293. The appointment of a successor guardian is discussed in § 10.6 of this chapter.

10.6 Appointment of Successor Guardian

Upon the removal, death, or resignation of a guardian, the Clerk must appoint a successor guardian following the same criteria that would apply to the initial appointment of a guardian under Article 5 of G.S. Chapter 35A. G.S. 35A-1293.

Appointment of Guardian ad Litem. Although G.S. 35A-1293 requires the Clerk to "follow the same criteria that would apply to the initial appointment of a guardian" under Article 5 of G.S. Chapter 35A, G.S. 35A-1293 does not expressly require the Clerk, in appointing a successor guardian, to follow the *same procedures* that apply to the initial appointment of a guardian under Article 5 of G.S. Chapter 35A. It is not entirely clear, therefore, whether an attorney must be appointed pursuant to G.S. 35A-1107 to represent an incapacitated ward in connection with a proceeding involving the appointment of a successor guardian under G.S. 35A-1293. The attorney who was appointed as an incapacitated adult's *guardian ad litem* pursuant to G.S. 35A-1107 in the proceeding to appoint a guardian for the incapacitated adult probably does not, by virtue of that fact alone, serve as the ward's attorney or *guardian ad litem* in connection with the appointment of a successor guardian under G.S. 35A-1293.

The Clerk may appoint a *guardian ad litem* pursuant to Rule 17 of the N.C. Rules of Civil Procedure to represent the ward's interests in connection with the appointment of a successor guardian under G.S. 35A-1292.

Practice Note: The N.C. Office of Indigent Defense Services has taken the position that it will compensate an attorney who is appointed as the ward's *guardian ad litem* in connection with the appointment of a successor guardian if the ward is indigent because the issues are sufficiently related to the original guardianship proceeding and appointment of a guardian.

10.7 Other Guardianship Proceedings

The guardianship of an incapacitated adult may involve legal proceedings other than those discussed above and in the preceding chapters of this manual. These other guardianship proceedings may include:

- proceedings related to the guardian's bond (G.S. Ch. 35A, Art. 7);
- proceedings seeking the Clerk's approval of the guardian's consent to medical or other care or treatment of a ward (G.S. 35A-1241(a)(3));
- proceedings to compel status reports (G.S. 35A-1244);
- proceedings involving the sterilization of a mentally ill or developmentally disabled ward in cases of medical necessity (G.S. 35A-1245);
- proceedings seeking the Clerk's approval of specific matters involving administration of the ward's estate (G.S. 35A-1251);
- proceedings related to returns and accountings regarding a ward's estate (G.S. Ch. 35A, Art. 10);
- proceedings for the appointment of an ancillary guardian for a nonresident ward (G.S. 35A-1280);
- proceedings involving the sale, mortgage, exchange, or lease of the ward's estate (G.S. Ch. 35A, Art. 14);
- proceedings involving the mortgage or sale of property in which the ward has an interest as a joint tenant by the entireties (G.S. Ch. 35A, Art. 15);
- proceedings involving the advancement of surplus income to a ward's relatives (G.S. Ch. 35A, Art. 16);
- proceedings seeking the approval of a superior court judge for gifts from a ward's estate (G.S. Ch. 35A, Arts. 17 and 18);
- proceedings making a gift of a ward's life interest in a trust (G.S. Ch. 35A, Art. 19); and
- proceedings to revoke a ward's health care power of attorney (G.S. 32A-22(a)).

Appointment of Guardian ad Litem. G.S. Chapter 35A does not specifically address the appointment of an attorney to represent an incapacitated adult in connection with the proceedings listed above, except for sterilization proceedings under G.S. 35A-1245 (providing for appointment of an attorney in accordance with IDS rules). The attorney who was appointed as an incapacitated adult's *guardian ad litem* pursuant to G.S. 35A-1107 in the proceeding to appoint a guardian for the incapacitated adult does not, by virtue of that fact alone, serve as the ward's attorney or *guardian ad litem* in connection with the proceedings listed above.

If the Clerk determines that the ward's interests are not adequately represented by the ward's guardian, the Clerk may appoint a *guardian ad litem* pursuant to Rule 17 of the N.C. Rules of Civil Procedure to represent the ward's interests in connection with the proceedings listed above.

Practice Note: The N.C. Office of Indigent Defense Services has taken the position that an attorney who is appointed as a ward's *guardian ad litem* in connection with the proceedings listed (other than sterilization proceedings) is appointed pursuant to Rule 17 of the N.C. Rules of Civil Procedure, *not* G.S. 35A-1107, and therefore is *not* entitled to compensation from the N.C. Office of Indigent Defense Services for his or her service as the ward's *guardian ad litem*.
