

CHAPTER 3:

Jurisdiction and Venue

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3.1

Subject Matter Jurisdiction

A. The Clerk of Superior Court’s Jurisdiction

Original jurisdiction. The Clerk of Superior Court has original jurisdiction, and in most cases original and exclusive jurisdiction, over legal proceedings to appoint a guardian for an incapacitated adult pursuant to G.S. Ch. 35A. G.S. 35A-1103(a); G.S. 35A-1203(a). *See also In re Simmons*, 266 N.C. 702 (1966).

The Clerk also has original jurisdiction over proceedings to restore the capacity of an incapacitated ward, to appoint an ancillary guardian, to remove guardians, to appoint successor guardians, to adjust the amount of a guardian’s bond, to determine disputes

between guardians, and to ensure compliance with the court's orders and statutory requirements related to guardianship of incapacitated persons. G.S. 35A-1130; G.S. 35A-1203; G.S. 35A-1207; G.S. 35A-1280. *See also Cline v. Teich*, 92 N.C. App. 257 (1988); *In re Ward*, 337 N.C. 443 (1994).

Judicial authority of Assistant Clerks of Superior Court. The Clerk's judicial authority in guardianship proceedings may be exercised by the Clerk of Superior Court or by an Assistant Clerk of Superior Court. G.S. 1-13; G.S. 7A-103(14); G.S. 7A-103(16); G.S. 7A-102(b).

Family court programs in the District Court Division. In 1998, the General Assembly enacted legislation authorizing the establishment of "Family Court" programs in the District Court Division of the General Court of Justice and provided that district court judges assigned to Family Court had jurisdiction to hear and decide all matters involving "intrafamily rights, relationships, and obligations . . . including . . . guardianship. . . ." S.L. 1998-202, §25. In practice, however, Family Courts in North Carolina have not exercised jurisdiction over proceedings under G.S. Ch. 35A to appoint guardians for allegedly incapacitated adults.

B. The Jurisdiction of Superior Court Judges

If the Clerk "has an interest, direct or indirect, in" a proceeding involving the appointment of a guardian for an allegedly incapacitated respondent, subject matter jurisdiction over the proceeding is vested in the Superior Court and may be exercised by any superior court judge residing or presiding in the district. G.S. 35A-1103(d).

G.S. 7A-104(a) lists several circumstances under which a Clerk is disqualified from exercising judicial authority with respect to an estate matter or other legal proceeding. Neither G.S. 35A-1103(d) nor G.S. 7A-104, however, specify the procedures for transferring subject matter jurisdiction from the Clerk to a Superior Court Judge.

Appellate Jurisdiction. The appellate jurisdiction of Superior Court Judges is discussed in Chapter 9 of this manual.

3.2

Personal Jurisdiction

A. Grounds for Exercising Personal Jurisdiction

G.S. Ch. 35A does not address directly the State's authority to exercise personal jurisdiction over an allegedly incapacitated person in a proceeding seeking the appointment of a guardian for that person.

G.S. 1-75.4(1), however, provides that a North Carolina court may exercise personal jurisdiction over a person who has been served pursuant to N.C. R. Civ. P. Rule 4(j) or Rule 4(j1) if the person against whom the claim is asserted is, at the time of service of process, a natural person who is

- present in the State; *or*
- domiciled in the State.

B. Domicile and Personal Jurisdiction

An adult is “domiciled” in North Carolina if she actually resides in North Carolina and has the present intention of continuing to reside in the State permanently or indefinitely or if she was domiciled in North Carolina, is absent from the State, and has not established a new domicile elsewhere. *See Sherwood v. Sherwood*, 29 N.C. App. 112 (1976).

An adult who has been adjudicated mentally incompetent, however, generally lacks the capacity to change her domicile and therefore is deemed to remain domiciled in the state in which she was domiciled prior to becoming incompetent, regardless of whether she has subsequently moved to another state. *See Lawson v. Langley*, 211 N.C. 526 (1937). The same is probably true with respect to an adult who has not been adjudicated incompetent but is, in fact, incompetent when he moves or is moved from the state of his domicile to another state.

C. Service of Process and Personal Jurisdiction

To exercise personal jurisdiction over a respondent in a guardianship proceeding, the Clerk must find that the respondent has been served with process or notice in accordance with G.S. 35A-1109.

3.3

Interstate Jurisdictional Issues

Potential interstate jurisdictional conflicts arise in guardianship proceedings when an allegedly incapacitated respondent’s domicile is unclear, when the respondent is domiciled in one state but is residing or present in a different state, or when the respondent moves or is moved from one state to another and both a North Carolina Clerk of Superior Court and a court in another state assert, are asked to assert, or could assert jurisdiction over a proceeding to appoint a guardian for the respondent.

The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. In 2007, the National Conference of Commissioners on Uniform State Laws approved a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), which establishes rules and procedures for minimizing and resolving interstate jurisdictional conflicts in guardianship proceedings. North Carolina, however, has not enacted the UAGPPJA or other legislation regarding interstate jurisdictional conflicts in guardianship cases.

3.4

Venue

A. Definition of Venue

Venue refers to the county in which a guardianship proceeding should be filed and heard.

B. Distinction Between Venue and Jurisdiction

Venue is distinct and different from jurisdiction. The fact that a guardianship proceeding is filed and heard in a county that is not the proper venue for the proceeding does not affect the Clerk's jurisdiction over the matter or the validity of the Clerk's order appointing a guardian for the respondent. *See Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741 (1952). *Cf. Duke v. Johnston*, 211 N.C. 171 (1937) (interpreting the *venue* provisions in a prior version of North Carolina's guardianship law to render void for lack of jurisdiction the appointment of a guardian by the Clerk of a county other than the county in which the ward resided).

C. Proper Venue for Adult Guardianship Proceedings

G.S. 35A-1103(b) and G.S. 35A-1204(a) provide that the proper venue for a proceeding to appoint a guardian for an allegedly incapacitated adult under G.S. Ch. 35A is the county in which the respondent

- resides; or
- is domiciled; or
- is an inpatient in a treatment facility.

If the respondent's residence or domicile cannot be determined, the proper venue for the proceeding is the county in which the respondent is present or found. G.S. 35A-1103(b).

Venue for the appointment of an ancillary guardian pursuant to G.S. 35A-1280 is in any county in which the nonresident ward owns real property or, if the nonresident ward does not have an interest in real property in the State, in any county in which the nonresident ward owns or has an interest in personal property. G.S. 35A-1204(c).

Simultaneous proceedings in two counties. If venue is proper in two different counties and guardianship proceedings involving the same respondent are brought in both counties, venue lies in the county in which the proceedings were first commenced. G.S. 35A-1103(c).

3.5

Change of Venue

A. Waiver of Improper Venue

If a guardianship proceeding is filed in a county in which venue is not proper, the issue of improper venue is waived unless raised by a timely motion objecting to improper venue pursuant to N.C. R. Civ. P. Rule 12(b)(3).

B. Motion and Order for Change of Venue

G.S. 35A-1104 authorizes a Clerk, on motion of a party or on the Clerk's own motion, to order a change of venue in a guardianship proceeding if the Clerk finds that the change of venue will not result in any hardship or prejudice to the respondent.

C. Transfer of Venue Following Determination of Incapacity

G.S. 35A-1204 authorizes a Clerk, at any time before or after appointing a guardian for an incapacitated adult, to transfer venue of a guardianship proceeding to a different county on motion of a party or on the Clerk's own motion.

3.6

Abatement

The death of an allegedly incapacitated respondent during the pendency of a proceeding to appoint a guardian for the respondent abates the proceeding. *In re Higgins*, 160 N.C. App. 704 (2003).

Appendix 3-1

Additional Resources

Interstate jurisdictional issues in guardianship proceedings are discussed in more detail in: Vicki Gottlich, *Finders, Keepers, Losers, Weepers: Conflict of Laws in Adults Guardianship Cases*, 23 CLEARINGHOUSE REV. 1415 (1990); A. Frank Johns, *Subject-Matter Jurisdiction, Domicil(e) and the Jet-Age Independence of Vulnerable Adults*, 1 NAT'L GUARDIANSHIP J. 291 (Fall 1990); A. Frank Johns, Vicki Gottlich, and Marlis Carson, *Guardianship Jurisdiction Revisited: A Proposal for a Uniform Act*, 26 CLEARINGHOUSE REV. 647 (Oct. 1992); Sally Balch Hurme, *Mobile Guardianships: Partial Solutions to Interstate Jurisdictional Problems*, NAT'L ACAD. OF ELDER LAW ATTYS. Q. 6 (Summer 2004).

A copy of the final draft of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act is available on-line: www.law.upenn.edu/bll/archives/ulc/ugjjaea/2007am_final.pdf.

