

## CHAPTER 9:

# Appeal of Guardianship Orders

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## 9.1

### Appeal of Final and Interlocutory Orders

**Appeal of final orders.** A final order entered by the Clerk regarding the incapacity of a respondent in an adult guardianship proceeding or the appointment of a guardian for an incapacitated respondent may be appealed to the Superior Court. G.S. 35A-1115; G.S. 1-301.2(e); G.S. 1-301.2(g)(1); G.S. 1-301.3(c).

**Review of interlocutory orders on appeal.** Upon an appeal from a final order entered by the Clerk in an adult guardianship proceeding, the Superior Court may review any intermediate or interlocutory order entered by the Clerk in the proceeding if the order involves the merits of the proceeding and necessarily affects the Clerk’s judgment therein and the appellant’s objection thereto has been properly preserved. G.S. 1-278.

***Immediate appeal of interlocutory orders.*** Interlocutory orders entered by the Clerk in adult guardianship proceedings are immediately appealable and subject to review by the Superior Court only if they affect a substantial right of a party that cannot be adequately protected by timely appeal from the Clerk's ultimate disposition of the proceeding. *See In re Watson*, 70 N.C. App. 120, 123 (1984).

## 9.2 Standing to Appeal

### A. "Aggrieved" Party

A party who is "aggrieved" by a final order entered by the Clerk in an adult guardianship proceeding has standing to appeal that order to the Superior Court. G.S. 35A-1115; G.S. 1-301.2(e); G.S. 1-301.2(g)(1); G.S. 1-301.3(c).

A party is aggrieved by a final order in an adult guardianship proceeding if the order directly, substantially, and injuriously affects the party's legal rights. *See Culton v. Culton*, 327 N.C. 624, 625–626 (1990).

### B. Appeal by Respondent

Because an order determining that a respondent is incapacitated and appointing a guardian for the respondent directly and substantially affects the respondent's legal rights, it is clear that the respondent, or the respondent's attorney or *guardian ad litem* acting on behalf of the respondent, has standing to appeal the final order of the Clerk in an adult guardianship proceeding. It is also clear that the respondent, or the respondent's attorney or *guardian ad litem* acting on behalf of the respondent, has standing to appeal an order by the Clerk denying the respondent's motion for restoration of competency. *See* G.S. 35A-1130(f).

### C. Appeal by Petitioner

It is less clear whether a petitioner or applicant is "aggrieved" by and may appeal a final order determining that a respondent is not incapacitated or appointing someone other than the petitioner, the applicant, or a person recommended by the petitioner or applicant.

### D. Appeal by "Interested Persons" and Next of Kin

A person who is an "interested person" or the respondent's next of kin does not have standing to appeal a final order regarding the respondent's incapacity or guardianship unless that person has been made a party to the proceeding. *See In re Ward*, 337 N.C. 443 (1994); *Siler v. Blake*, 20 N.C. 90 (1838).

### 9.3 Notice of Appeal

Written notice of appeal from the Clerk's final order in an adult guardianship proceeding must be given within 10 days from the date on which the order was reduced to writing, signed by the Clerk, and filed with the Clerk. G.S. 1-301.2(e); G.S. 1-301.3(c). *See also* N.C. R. Civ. P. Rule 58(a) (governing entry of judgments).

The appellant must file the notice of appeal with the Clerk and serve it on the other parties to the proceeding. G.S. 1-301.2(e); G.S. 1-301.3(c).

The notice of appeal must specify the basis for the appeal. G.S. 1-301.3(c).

### 9.4 Stay Pending Appeal

The appeal of an order by the Clerk finding a respondent incapacitated does *not* stay the appointment of a guardian for the respondent unless the Superior Court or the North Carolina Court of Appeals so orders. G.S. 35A-1115.

The Clerk or a superior court judge may stay an order by the Clerk appointing a guardian for an incapacitated adult upon the appellant's posting an appropriate bond set by the Clerk or judge. G.S. 1-301.3(c).

Unless otherwise ordered by a superior court judge, the Clerk retains authority to enter orders affecting an adult guardianship during the pendency of an appeal of the Clerk's guardianship order to the superior court. G.S. 1-301.3(c).

### 9.5 Appellate Jurisdiction of the Superior Court

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**Practice Note:** The law, procedures, and standard of review for the Superior Court's appellate review of adult guardianship cases depend on whether the appeal involves only issues regarding the respondent's incapacity, only other issues regarding the appointment of a guardian for the respondent, or both. *See* G.S. 35A-1115; G.S. 1-301.2; G.S. 1-301.3.

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#### A. Appeals Involving Incapacity

An appeal from the Clerk's order regarding a respondent's incapacity is heard and determined by the Superior Court *de novo*. G.S. 35A-1115.

#### B. Appeals Involving Guardianship

An appeal from the Clerk's order appointing a guardian for an incapacitated adult or from other orders arising in connection with an adult guardianship is not heard and determined

by the superior court *de novo*. Appeals in these matters generally are reviewed by the superior court “on the record.” G.S. 1-301.3(d).

The superior court’s appellate jurisdiction with respect to these appeals is limited to determining

- whether the findings of fact included in the Clerk’s order are supported by the evidence in the record;
- whether the Clerk’s conclusions of law are supported by the Clerk’s findings of fact; and
- whether the Clerk’s order is consistent with the Clerk’s conclusions of law and with applicable law. G.S. 1-301.3(d).

## 9.6

### Appellate Procedure in Superior Court

#### A. Appeals Involving Incapacity

***De novo hearing.*** In a *de novo* appeal regarding a respondent’s incapacity, the superior court should follow procedures similar to those described in Chapter 5 of this manual. Following the *de novo* hearing, the superior court judge must enter an order determining whether or to what extent the respondent is incapacitated.

***Dismissal.*** If the judge (or jury) determines that the respondent is not incapacitated, the judge must dismiss the case.

***Remand or review of guardianship.*** If the judge (or jury) determines that the respondent is incapacitated, the judge must remand the case to the Clerk for further proceedings or, if the Clerk’s order appointing a guardian for the respondent has been appealed, review the Clerk’s guardianship order pursuant to G.S. 1-301.3(d).

#### B. Appeals Involving Guardianship

***Transcript or summary of evidence.*** With respect to appeals that are not heard *de novo*, a transcript of the proceedings before the Clerk may be ordered by any party, by the Clerk, or by the presiding judge. G.S. 1-301.3(f). If an adult guardianship proceeding was not recorded, the Clerk must submit to the superior court a summary of the evidence presented to the Clerk. G.S. 1-301.3(f).

***Receiving additional evidence.*** If the superior court judge determines that the record is insufficient with respect to an evidentiary issue, the judge may receive additional evidence on that issue and, if the judge chooses to do so, may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence. G.S. 1-301.3(f).

***Evidentiary errors.*** If the judge finds prejudicial error in the admission or exclusion of evidence, the judge may either remand the matter to the Clerk for hearing or determine the appeal on the basis of the record. G.S. 1-301.3(d).

**Standard of review, remand, or affirmance.** If the judge determines that the Clerk's findings of fact are not supported by the evidence, that the Clerk's conclusions of law are not supported by the findings, that the Clerk's order is not consistent with the Clerk's conclusions of law, or that the Clerk's order is not consistent with applicable law, the judge must remand the case to the Clerk for such further action as is necessary with respect to the guardianship matter. G.S. 1-301.3(e).

If, in an appeal that is not heard *de novo*, the judge determines that the Clerk's findings of fact are supported by the evidence, that the Clerk's conclusions of law are supported by the findings, that the Clerk's order is consistent with the Clerk's conclusions of law, and that the Clerk's order is consistent with applicable law, the judge must enter an order affirming the Clerk's order.

**Superior court judge may not appoint guardian.** A superior court judge who has heard an appeal regarding an adult guardianship matter may not appoint a person or entity as the respondent's guardian or enter any order, other than an order affirming the Clerk's order or remanding the matter for further proceedings before the Clerk, that affects guardianship matters that are within the Clerk's original and exclusive jurisdiction. *See In re Simmons*, 266 N.C. 702 (1966).

## 9.7

### Appellate Review by the Court of Appeals and Supreme Court

A party who is aggrieved by a final order or judgment entered by a superior court judge in an adult guardianship proceeding may appeal the order or judgment to the North Carolina Court of Appeals. *See* G.S. 1-277; G.S. 7A-27(e). The North Carolina Rules of Appellate Procedure govern the appeal of adult guardianship cases to the North Carolina Court of Appeals and the North Carolina Supreme Court.

## 9.8

### Abatement of Appeal

The death of the respondent in an adult guardianship proceeding during the pendency of an appeal to the superior court, the North Carolina Court of Appeals, or the North Carolina Supreme Court abates the appeal. *See In re Higgins*, 160 N.C. App. 704 (2003).