

CHAPTER 4:

Parties, Pleadings, and Notice

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4.1 Parties

The parties in a proceeding to appoint a guardian for an allegedly incapacitated adult are the petitioner (or petitioners), the respondent, any person other than the petitioner who files an application requesting the appointment of a guardian for the respondent, and any other person who is properly joined as a party to the proceeding.

A. Petitioner

Any individual, corporation, or other person, including a nonresident petitioner, a disinterested public agent, or any state or local human services agency acting through its authorized representative, may file a petition seeking a determination of a respondent's incapacity and the appointment of a guardian for the respondent. G.S. 35A-1104; G.S. 35A-1210.

Although guardianship proceedings often are initiated by the spouse, an adult child, a relative, or friend of the respondent, there is no requirement that the petitioner have any particular relationship to the respondent.

Although guardianship proceedings may be initiated by a county social services department or other human services agency, state law does not expressly require county social services departments or other human services agencies to initiate proceedings to appoint guardians for allegedly incapacitated adults or to provide legal, financial, or social services to allegedly incapacitated adults or their families in connection with guardianship proceedings.

Practice Note: Although G.S. Chapter 35A does not require a county social services department to initiate an adult guardianship proceeding, Article 6 of G.S. Chapter 108A does require county social services departments to respond to reports regarding the abuse, neglect, or exploitation of disabled adults and to provide protective services, including, in certain circumstances, guardianship services, to disabled adults who need protective services.

B. Applicant

Any individual, corporation, disinterested public agent, or state or local human services agency may file an application for the appointment of a guardian for an allegedly incapacitated adult. G.S. 35A-1210. An application for the appointment of a guardian for an allegedly incapacitated adult may be joined with or filed subsequently to the filing of a petition seeking a determination of the respondent's incapacity. G.S. 35A-1210. When an application for the appointment of a guardian for an allegedly incapacitated adult is filed by a person other than the petitioner who filed a petition seeking a determination of the respondent's incapacity, the applicant, as well as the petitioner, is a party to the proceeding.

C. Respondent

The allegedly incapacitated adult who is the subject of a pending guardianship proceeding is a party to the proceeding.

D. *Guardian ad litem* and Counsel for Respondent

Although G.S. 35A-1109 requires that a respondent's counsel or *guardian ad litem* be served with the petition and notice of hearing in a guardianship proceeding, and other provisions of G.S. 35A authorize the respondent's counsel or *guardian ad litem* to exercise some or all of the respondent's rights as a party on the respondent's behalf, the respondent's retained or appointed counsel or *guardian ad litem* is *not* a party to the proceeding.

E. Respondent's Next of Kin and Other Interested Persons

Although G.S. 35A-1109 requires that the respondent's next of kin and other interested persons as designated by the Clerk be given notice of a pending guardianship proceeding, those persons are not parties to the proceeding unless they or the Clerk take some additional action that results in their becoming or being joined as parties to the proceeding.

The respondent's next of kin or other interested persons may become parties to a pending guardianship proceeding by filing an application for the appointment of a guardian for the respondent pursuant to G.S. 35A-1210 or by filing a motion in the cause pursuant to G.S. 35A-1207. The Clerk also may join a person as a party in a pending guardianship proceeding in response to a motion to intervene pursuant to N.C. R. Civ. P. Rule 24.

4.2

Pleadings and Motions

A. Petition and Application

The primary pleadings in a proceeding to appoint a guardian for an allegedly incapacitated adult are the petition and an application for appointment of guardian (which may be joined with or filed subsequent to the filing of the petition). G.S. 35A-1106; G.S. 35A-1210. In most cases, the application for appointment of guardian is included in the petition seeking a determination of the respondent's incapacity.

The North Carolina Administrative Office of the Courts has developed a form (AOC-SP-200) that can be used as the petition and application in guardianship proceedings involving allegedly incapacitated adults.

Verification. G.S. 35A-1105 requires that a petition for the appointment of a guardian for an allegedly incapacitated adult be verified by the petitioner.

Signing. The petition must be signed by the petitioner or, if the petitioner is represented by an attorney, by the petitioner's attorney. N.C. R. Civ. P. Rule 11(a).

Title. As a matter of custom and practice, pleadings in guardianship proceedings generally are titled as "In re [Name of Respondent]," rather than "[Name of Petitioner] v. [Name of Respondent]."

Contents. G.S. 35A-1106 and G.S. 35A-1210 require that a petition for the appointment of a guardian for an allegedly incapacitated adult contain the following information to the extent that it is known to the petitioner:

- the petitioner's name, address, and county of residence;
- the petitioner's interest in the proceeding;
- the respondent's name, age, address, and county of residence;
- the name, address, and county of residence of any person who is the respondent's next of kin or who is known to have an interest in the proceeding;

- the facts that tend to show that the respondent is incapacitated and a statement of the reasons why a determination of the respondent's incapacity and the appointment of a guardian for the respondent are being sought;
- information regarding any adjudication of the respondent's incapacity by a court of another state if the petitioner is seeking a determination of incapacity on the basis of another court's order adjudicating the respondent's incapacity;
- whether the petitioner is seeking the appointment of a general guardian, guardian of the person, or guardian of the estate for the respondent;
- the name of the person, corporation, or disinterested public agent that is recommended as the respondent's guardian; and
- a general statement of the amount or value of the respondent's income, receivables, property, assets, and liabilities.

B. Responsive Pleadings and Motions

G.S. Ch. 35A does not require the respondent, the respondent's attorney, or the respondent's *guardian ad litem* to file an answer or other pleading in response to a petition for the appointment of a guardian. A respondent or the respondent's counsel or *guardian ad litem*, however, may file an answer or motion to dismiss in response to a petition in a guardianship proceeding.

Because G.S. Ch. 35A is silent with respect to answers and motions to dismiss, it is unclear whether a respondent's answer or motion to dismiss must be filed within 10 days after service of the petition pursuant to G.S. 1-394 or whether it may be filed at any time on or before the date of the hearing to determine the respondent's incapacity. If a respondent files an answer or motion to dismiss, it must be served on all of the parties to the proceeding pursuant to N.C. R. Civ. P. Rule 5.

Failure to file an answer or motion to dismiss does not provide a basis for entering default or default judgment against the respondent pursuant to N.C. R. Civ. P. Rule 55.

C. Other Motions and Pleadings

G.S. 35A-1207 allows any "interested person" to file a motion in a pending guardianship proceeding regarding any matter that pertains to the guardianship. *See In re Ward*, 337 N.C. 443 (1994).

4.3

Summons Not Required

In most civil actions and special proceedings, the Clerk of Superior Court issues a summons that must be served on the defendant or respondent pursuant to N.C. R. Civ. P. Rule 4, and notifies the defendant or respondent that if he fails to file a timely answer or response to the complaint or petition, the plaintiff or petitioner will apply to the court for the relief sought in the complaint or petition.

The Clerk's office, however, does *not* issue a summons in a proceeding seeking the appointment of a guardian for an allegedly incapacitated adult. Instead, the notice of hearing issued and served pursuant to G.S. 35A-1108 and G.S. 35A-1109 serves the same function as, and dispenses with any necessity for, a summons. *See In re Barker*, 210 N.C. 617 (1936).

4.4

Notice of Hearing

A. Issuance

G.S. 35A-1108 requires the Clerk to issue a notice of hearing within five days after the petition is filed.

B. Contents

The notice of hearing must state the date, time, and place of the hearing. G.S. 35A-1108.

The North Carolina Administrative Office of the Courts (AOC) has adopted a form (AOC-SP-201) that is used by Clerks to provide notice of hearing in guardianship proceedings. The AOC form also notifies the respondent that a petition has been filed alleging that

- the respondent is incompetent and requesting that a guardian be appointed for the respondent;
- a *guardian ad litem* has been appointed for her;
- she may retain, at her own expense, counsel to represent her in connection with the proceeding; and
- she may file a written response to the petition with the Clerk at or before the time set for the hearing.

C. New Notice of Hearing

If a multidisciplinary evaluation or mediation is ordered after the initial notice of hearing is issued and, as a result, the date for the hearing is continued, the Clerk must issue a new notice advising the parties that the hearing has been continued and stating the reason for the continuance and the date, time, and place of the new hearing. G.S. 35A-1108(b).

4.5

Service of Petition and Notice of Hearing

A. Service on the Respondent

Copies of the petition and the initial notice of hearing must be served on the respondent. G.S. 35A-1109. *See also In re Robinson*, 26 N.C. App. 341 (1975).

Service by sheriff or other authorized person. If the respondent is served in North Carolina, the petition and notice of hearing must be served by the sheriff of the county in which the respondent is served or by some other person duly authorized by law to serve the petition and notice. G.S. 35A-1109; N.C. R. Civ. P. Rule 4(a). If the respondent is served outside North Carolina, the petition and notice may be served by any person who is at least twenty-one years of age, is not a party to the proceeding, and is duly authorized to serve the petition and notice under the law of the state in which service is made. N.C. R. Civ. P. Rule 4(a).

In North Carolina, a sheriff must serve the petition and notice without advance payment of the fee for service. G.S. 35A-1109.

Personal service. Copies of the petition and initial notice of hearing must be served on the respondent by giving them personally to the respondent. G.S. 35A-1109. The petition and initial notice of hearing may *not* be served on the respondent by other means, such as leaving copies of the petition and notice with a person of suitable age and discretion residing at the respondent's dwelling house or usual place of abode, delivering them to the respondent's agent, sending them to the respondent by registered or certified mail or through a designated delivery service or the Postal Service's signature confirmation service, or serving the respondent's counsel or *guardian ad litem*.

Practice Note: The respondent's counsel or *guardian ad litem* may *not* waive personal service of the petition and notice of hearing on the respondent or accept service of the petition and notice of hearing on behalf of the respondent.

Timing of service. The petition and notice must be served on the respondent at least ten days before the date of the hearing regarding the respondent's alleged incapacity. G.S. 35A-1108(a).

Return of service. When the sheriff serves the petition and notice of hearing on the respondent in North Carolina, the sheriff files a return of service (side two of AOC-SP-201) noting the date, time, and address at which the respondent was served.

B. Service on the Respondent's Counsel or *Guardian ad Litem*

G.S. 35A-1109 also requires that the respondent's counsel or *guardian ad litem* be served with the petition and initial notice of hearing pursuant to N.C. R. Civ. P. Rule 4(j).

C. Service on the Respondent's Next of Kin and Other Interested Persons

The petitioner must send copies of the petition and initial notice of hearing to the respondent's next of kin and to any other persons designated by the Clerk by first-class mail within five days after filing the petition and file an affidavit of mailing or certificate of acceptance of notice (AOC-SP-207) with the Clerk. G.S. 35A-1109.

"Next of kin" probably means the person or persons who are most closely related by blood, adoption, or marriage to the respondent (for example, the respondent's spouse or, if the respondent is not married, the respondent's children, or, if the respondent is unmarried and does not have any children, the respondent's parents). See *In re Bryant*, 116 N.C. App. 329 (1994).

Failure to provide notice of a pending guardianship proceeding to a respondent's next of kin is not a basis for invalidating an order determining the respondent's incapacity or appointing a guardian for the respondent. *See In re Barker*, 210 N.C. 617 (1936). *Cf. In re Ward*, 337 N.C. 443 (1994) (holding that failure to give notice of an adult guardianship proceeding to an "interested person" was a sufficient ground for setting aside the guardianship order on the "interested person's" motion).

4.6 Service of Other Pleadings and Motions

Subsequent notices of hearing, pleadings, and motions must be served on parties to the proceeding, on respondent's counsel or *guardian ad litem*, and on other persons designated by the Clerk. G.S. 35A-1207(c); G.S. 35A-1211.

The Clerk is responsible for sending subsequent hearing notices to the respondent's next of kin and other appropriate persons by first-class mail. G.S. 35A-1109. Except as otherwise provided by law, other notices, pleadings, and motions must be served pursuant to N.C. R. Civ. P. Rule 5, unless the Clerk orders otherwise. G.S. 35A-1108(c); G.S. 35A-1207(c); G.S. 35A-1211(b).

Appendix 4-1 Additional Resources

The North Carolina Administrative Office of the Courts has developed a form (AOC-SP-200) that can be used as the petition and application in guardianship proceedings involving allegedly incapacitated adults. This form is available on line: www.nccourts.org/Forms/Documents/707.pdf.

The North Carolina Administrative Office of the Courts has adopted a form (AOC-SP-201) that is used by Clerks to provide notice of hearing in guardianship proceedings. This form is available on-line: www.nccourts.org/Forms/Documents/669.pdf.

