

CHAPTER 5:

Hearings, Practice, and Procedure

- 5.1 Scope of this Chapter 55**
- 5.2 Nature of Adult Guardianship Proceedings 55**
 - A. Civil, Not Criminal, Proceedings
 - B. “Quasi” Special Proceedings, Estate Proceedings, and Special Proceedings
- 5.3 Rules of Procedure 56**
 - A. Scope of N.C. Rules of Civil Procedure
 - B. Application of Rules of Civil Procedure to Adult Guardianship Proceedings
- 5.4 Right to Jury Trial 56**
 - A. Constitutional Right to Jury Trial
 - B. Statutory Right to Jury Trial
 - C. Demand for Jury Trial
 - D. Selection of Jurors
 - E. Jury Instructions
 - F. Hearing Without a Jury
- 5.5 Voluntary Dismissal, Default Judgment, and Summary Judgment 58**
 - A. Voluntary Dismissal by Petitioner
 - B. Default and Default Judgment
 - C. Summary Judgment
- 5.6 Discovery 58**
 - A. G.S. Ch. 35A, N.C. Rules of Civil Procedure, and Local Rules of Practice
 - B. Subpoenas
 - C. Discovery of Medical Records
- 5.7 Pre-Trial Conference 59**
- 5.8 Appointment of Interim Guardian 59**
 - A. Motion for Appointment
 - B. Notice of Hearing
 - C. Hearing
 - D. Order Appointing Interim Guardian
 - E. Qualifications and Authority of Interim Guardian
- 5.9 Order for Multidisciplinary Evaluation 61**
 - A. Nature and Purpose of Multidisciplinary Evaluations
 - B. Motion for Multidisciplinary Evaluations

- C. Order for Multidisciplinary Evaluation
- D. Filing of Multidisciplinary Evaluation

5.10 Calendaring and Continuance of Hearings 62

5.11 Hearing Procedure 63

- A. The Clerk's Role and Responsibilities
- B. Open and Closed Hearings
- C. Sequestering Witnesses
- D. Presence of the Respondent
- E. Right to Present Evidence
- F. Issues of Fact and Law
- G. Bifurcated Hearings
- H. Recording Hearings

5.12 Evidentiary Issues and Burden of Proof 65

- A. Application of N.C. Rules of Evidence in Adult Guardianship Proceedings
- B. Consideration of Improperly Admitted Evidence
- C. Burden of Presenting Evidence
- D. Mode and Order of Presenting Evidence
- E. Hearsay
- F. Physician-Patient Privilege
- G. Medical Records
- H. Multidisciplinary Evaluation (MDE)
- I. Opinion Testimony by Lay Witnesses
- J. Testimony by Experts
- K. Testimony by the Respondent
- L. Testimony by Respondent's Attorney or Guardian ad litem
- M. Presumption of Mental Capacity
- N. Burden of Proof (Persuasion)

5.13 Findings and Order 69

- A. Order of Dismissal
- B. Order and Findings Regarding Incapacity
- C. Order Appointing Guardian
- D. "Limited Guardianship" Orders

5.14 Costs and Fees 70

- A. Statutory Authority
- B. Order Appointing Guardian for a Ward Who Is Not Indigent
- C. Order Appointing Guardian for a Ward Who Is Indigent
- D. Order Dismissing Petition
- E. Costs and Fees for Mediated Cases

Appendix 5-1 Additional Resources 71

5.1

Scope of this Chapter

This chapter addresses much, but not all, of the practice and procedure in proceedings for the appointment of a guardian for an incapacitated adult.

Procedures governing the retention of counsel and the appointment of counsel or *guardians ad litem* for allegedly incapacitated respondents are discussed in Chapter 2.

Jurisdiction and venue in guardianship proceedings are discussed in Chapter 3. Parties, pleadings, and notice in guardianship proceedings are discussed in Chapter 4.

Procedures governing the determination of a respondent's incapacity and the appointment of a guardian for an incapacitated adult are discussed in Chapters 6 and 7.

Procedures governing the mediation of guardianship cases are discussed in Chapter 8.

Procedures governing the appeal of orders determining the incapacity of adults and appointing guardians for incapacitated adults are discussed in Chapter 9.

Procedures governing the restoration of a ward's capacity and the modification of guardianship orders are discussed in Chapter 10.

5.2

Nature of Adult Guardianship Proceedings

A. Civil, Not Criminal, Proceedings

Proceedings to appoint a guardian for an incapacitated adult are civil, rather than criminal, in nature. *See In re Dunn*, 239 N.C. 378 (1954). They are, however, *sui generis*.

B. "Quasi" Special Proceedings, Estate Proceedings, and Special Proceedings

Proceedings to appoint a guardian for an incapacitated adult are not considered to be civil actions. *See In re Dunn*, 239 N.C. 378 (1954). And despite the language of G.S. 1-3 (defining any civil proceeding that is not a civil action as a special proceeding), they are not considered to be special proceedings. *See In re Dunn*, 239 N.C. 378 (1954).

Proceedings to appoint a guardian for an incapacitated adult, however, are treated as special proceedings for some purposes. *See In re Dunn*, 239 N.C. 378 (1954); *In re Daniels*, 67 N.C. App. 533 (1984); G.S. 35A-1116(a).

Certain aspects of guardianship proceedings, though, are treated as "estate" matters, rather than special proceedings. *See In re Simmons*, 266 N.C. 702 (1966); *In re Bidstrup*, 55 N.C. App. 394 (1982).

And some proceedings regarding the estates or property of incapacitated wards are expressly designated as special proceedings. *See* G.S. 35A-1301; G.S. 35A-1306; G.S. 35A-1307; G.S. 35A-1310.

5.3 Rules of Procedure

A. Scope of N.C. Rules of Civil Procedure

Rule 1 of the N.C. Rules of Civil Procedure provides that North Carolina's Rules of Civil Procedure "govern the procedure in the superior and district courts . . . in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." Similarly, G.S. 1-393 provides that the Rules of Civil Procedure and the provisions of G.S. Ch. 1, Art. 33 apply to special proceedings except as otherwise provided by law.

B. Application of Rules of Civil Procedure to Adult Guardianship Proceedings

Although proceedings to appoint a guardian for an incapacitated adult are not considered to be special proceedings, they are treated as special proceedings for some purposes and they are clearly "proceedings of a civil nature." See *In re Dunn*, 239 N.C. 378 (1954). Moreover, it is clear that these guardianship proceedings, when heard by the Clerk of Superior Court, are proceedings "in superior court." See G.S. 7A-40.

It therefore follows that the Rules of Civil Procedure apply to proceedings before the Clerk involving the appointment of guardians for incapacitated adults except to the extent that G.S. Ch. 35A or other statutes prescribe different procedures.

5.4 Right to Jury Trial

A. Constitutional Right to Jury Trial

The provisions of Art. I, Sec. 25 of the North Carolina Constitution, preserving the right to a jury trial in certain civil cases, do not apply to proceedings to appoint a guardian for an incapacitated adult. See *Groves v. Ware*, 182 N.C. 553 (1921); *In re Cook*, 218 N.C. 384 (1940).

B. Statutory Right to Jury Trial

G.S. 35A-1110 gives the respondent the right to a jury trial in a proceeding to appoint a guardian for the respondent.

The respondent's right to a jury trial extends only to the issue of whether the respondent is incompetent or incapacitated and does not extend to issues regarding who should be appointed as the respondent's guardian, the rights that the respondent will be allowed to retain, or the powers that will be granted to the respondent's guardian.

C. Demand for Jury Trial

The respondent's right to a jury trial may be invoked by the respondent or by the respondent's attorney or *guardian ad litem*. G.S. 35A-1110. The petitioner does not have the right to a jury trial on the issue of the respondent's incapacity.

Failure to make a timely request for a jury trial constitutes a waiver of the respondent's right thereto. G.S. 35A-1110. In order to demand a jury trial, the respondent, the respondent's retained counsel, or the respondent's appointed *guardian ad litem* must file the demand with the Clerk and serve it on all parties to the proceeding within 10 days after service of the petition or the last pleading directed to the issue of respondent's incapacity. N.C. R. Civ. P. Rule 38(b), (d).

If the respondent or respondent's counsel or *guardian ad litem* makes a timely demand for a jury trial on the issue of incapacity, the demand may not be withdrawn without the consent of all of the parties to the proceeding. N.C. R. Civ. P. Rule 38(d).

If the respondent fails to make a timely demand for a jury trial, the Clerk, on the Clerk's own motion, may, nonetheless, order a jury trial on the issue of incapacity. G.S. 35A-1110; N.C. R. Civ. P. Rule 39(b).

D. Selection of Jurors

If a jury trial is demanded by the respondent or ordered by the Clerk, the jury is composed of twelve persons chosen from the county's jury list in accordance with the provisions of G.S. Chapter 9 and empaneled pursuant to local rules of practice and procedure. The parties, however, may stipulate that the jury consist of fewer than twelve persons or that a finding on the issue of capacity by a majority of the jurors be taken as the jury's verdict. *See* N.C. R. Civ. P. Rule 48.

E. Jury Instructions

Suggested jury instructions, jury forms, and procedures for jury trials in guardianship proceedings involving allegedly incapacitated adults are included in the *North Carolina Clerk of Superior Court Procedures Manual* (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2003).

F. Hearing Without a Jury

If a jury trial is not demanded by the respondent and is not ordered by the Clerk, the Clerk acts as the finder of fact with respect to the issue of incapacity.

5.5

Voluntary Dismissal, Default Judgment, and Summary Judgment

A. Voluntary Dismissal by Petitioner

A petitioner may voluntarily dismiss, without an order by the Clerk, a proceeding seeking the appointment of a guardian for the respondent pursuant to N.C. R. Civ. P. Rule 41(a)(1). G.S. 35A-1112(g). If, however, the petitioner has filed a motion seeking the appointment of an interim guardian pursuant to G.S. 35A-1114, the petitioner's notice of voluntary dismissal must be filed before the hearing on the motion for appointment of an interim guardian. G.S. 35A-1114(f).

B. Default and Default Judgment

Because G.S. Ch. 35A does not require a respondent to file an answer or other responsive pleading in a proceeding to appoint a guardian for an incapacitated adult, a respondent's 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. *See In re Thrift*, 137 N.C. App. 559, 563 (2000) (juvenile proceeding).

C. Summary Judgment

Similarly, summary judgment against a respondent in a proceeding under G.S. Ch. 35A, Art. 1 or Art. 5 is inappropriate. *See In re J.N.S.*, 165 N.C. App. 536 (2004) (juvenile proceeding).

5.6

Discovery

A. G.S. Ch. 35A, N.C. Rules of Civil Procedure, and Local Rules of Practice

G.S. Ch. 35A does not expressly address the issue of discovery in guardianship proceedings and the time frame under G.S. Ch. 35A for hearing and deciding cases involving the appointment of guardians for incapacitated adults renders the application of the discovery procedures under the Rules of Civil Procedure problematic.

Discovery in guardianship proceedings may be addressed through local rules of practice and procedure or in connection with a pre-trial order entered in a pending guardianship proceeding pursuant to N.C. R. Civ. P. Rule 16.

B. Subpoenas

A party or a party's attorney may obtain documents that are relevant to a pending guardianship proceeding through the issuance of a subpoena pursuant to N.C. R. Civ. P. Rule 45.

As the presiding judicial officer in guardianship proceedings, the Clerk may issue subpoenas, compel the production of documents, and issue commissions to take the testimony of witnesses in connection with a pending guardianship proceeding. *See* G.S. 7A-103(1), (3).

C. Discovery of Medical Records

Obtaining medical records and health information regarding an allegedly incapacitated respondent is problematic because this information may be privileged or confidential under federal and state laws (such as G.S. 8-53 and the federal medical privacy rules adopted pursuant to the Health Insurance Portability and Protection Act) that restrict the disclosure of this information. And unlike a *guardian ad litem* appointed to represent a juvenile in a juvenile proceeding involving abuse, neglect, or dependency (*see* G.S. 7B-601(c)), a *guardian ad litem* appointed to represent an allegedly incapacitated respondent under G.S. 35A-1107 does *not* have a statutory right to obtain medical records, health information, or other information that is privileged or confidential unless the subject of the information consents, the disclosure is authorized by law, or a court orders disclosure of the information.

5.7

Pre-Trial Conference

Although G.S. Ch. 35A does not include provisions for pre-trial conferences in guardianship proceedings, the Clerk may hold a pre-trial conference and enter a pre-trial order in a guardianship proceeding pursuant to N.C. R. Civ. P. Rule 16.

5.8

Appointment of Interim Guardian

An interim guardian is a temporary guardian who is appointed pursuant to G.S. 35A-1114 to protect an allegedly incapacitated respondent's well-being or estate from imminent harm before a judicial determination of the respondent's incapacity.

Practice Note: G.S. 35A-1114 does not authorize the appointment of an “interim” or “emergency” guardian after the Clerk has determined that a respondent is incapacitated and has appointed a guardian for the respondent—even in cases in which there is an emergency due to the guardian's death, resignation, removal, or failure or refusal to protect the ward. The Clerk, however, may enter an emergency order under G.S. 35A-1291 to protect the ward or the ward's property in these situations.

A. Motion for Appointment

A petitioner may seek the appointment of an interim guardian at the same time that he or she files a petition for adjudication of the respondent's incompetence or at any time subsequent to the filing of such a petition. G.S. 35A-1114(a). A request for appointment of an interim guardian is made by filing a verified motion setting forth facts that tend to show that

- there is reasonable cause to believe that the respondent is incapacitated, *and*
- intervention is required to protect the respondent's physical well-being or the respondent's estate from an imminent or foreseeable risk of harm, *and*
- immediate appointment of an interim guardian for the respondent or the respondent's estate is required. G.S. 35A-1114(a), (b).

B. Notice of Hearing

Upon the filing of a motion for the appointment of an interim guardian, the Clerk must immediately set a date, time, and place for a hearing on the motion. G.S. 35A-1114(c). The motion and notice of hearing must be served on the respondent, the respondent's attorney or *guardian ad litem*, and any other persons designated by the Clerk. G.S. 35A-1114(c).

C. Hearing

A hearing on the motion for appointment of an interim guardian must be held as soon as possible, but no later than 15 days after the motion has been served on the respondent. G.S. 35A-1114(c).

D. Order Appointing Interim Guardian

The Clerk is required to appoint an interim guardian for the respondent or the respondent's estate if, after the hearing, the Clerk determines that

- there is reasonable cause to believe that the respondent is incapacitated, *and*
- there is an imminent or foreseeable risk of harm to the respondent's physical well-being and an immediate need for a guardian to provide consent or take other steps to protect the respondent, *or* there is an imminent or foreseeable risk of harm to the respondent's estate and immediate intervention is required to protect the respondent's interests. G.S. 35A-1114(d).

The Clerk's order appointing an interim guardian must contain specific findings of fact to support the Clerk's conclusions regarding the respondent's probable incapacity and the need for an interim guardian. G.S. 35A-1114(e).

E. Qualifications and Authority of Interim Guardian

G.S. 35A-1114 does not directly address the qualifications of an interim guardian. An interim guardian whose authority relates only to the person of a respondent is not required to post a bond. If the interim guardian is granted authority with respect to the respondent's estate, the interim guardian must post a bond in an amount and subject to any conditions determined by the Clerk. G.S. 35A-1114(e).

The powers and duties of the interim guardian must be set forth in the Clerk's order and must be limited to those necessary to meet the conditions necessitating appointment of the interim guardian. G.S. 35A-1114(e). An interim guardian's authority terminates upon the earliest of the following conditions:

- the date specified in the Clerk's order;
- 45 days from the date of the Clerk's order (unless extended, for good cause, by the Clerk for an additional period of 45 days);
- the appointment of a guardian for the respondent or the respondent's estate pursuant to G.S. Ch. 35A, Art. 5;
- the dismissal of the incompetency petition by the Clerk. G.S. 35A-1114(e).

5.9

Order for Multidisciplinary Evaluation

A. Nature and Purpose of Multidisciplinary Evaluations

A multidisciplinary evaluation (MDE) is an evaluation that is prepared by a designated human services agency at the direction of the Clerk of Superior Court pursuant to G.S. 35A-1111 regarding the nature and extent of a respondent's or ward's incapacity. The purpose of an MDE is to assist the Clerk in determining whether or to what extent the respondent is incapacitated, whether a limited guardianship is appropriate, or other issues regarding guardianship.

An MDE must include current (within the past year) medical, psychological, and social work evaluations as directed by the Clerk and may include evaluations by other professionals regarding the respondent's or ward's needs with respect to education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech therapy, etc. G.S. 35A-1101(14). Suggested guidelines for the preparation of MDEs in incompetency proceedings have been developed by the North Carolina Department of Health and Human Services' Division of Aging and Adult Services.

B. Motion for Multidisciplinary Evaluations

G.S. Ch. 35A does not require that an MDE be prepared in every guardianship proceeding involving an allegedly incapacitated respondent.

Instead, G.S. 35A-1111 and G.S. 35A-1212(b) allow the Clerk, on his or her own motion or on the motion of any party, to order an MDE of a respondent or ward in an adult guardianship proceeding.

A party's request for an MDE must be filed with the Clerk within 10 days after service of the petition on the respondent. G.S. 35A-1111(a). North Carolina's Administrative Office of the Courts has developed a model form for the Request and Order for Multidisciplinary Evaluation (AOC-SP-901M).

C. Order for Multidisciplinary Evaluation

Although ordering an MDE is within the Clerk's discretion, the Clerk should order an MDE, even in the absence of a request by a party, when there is insufficient or conflicting evidence regarding the respondent's alleged incapacity, when it appears that limited

guardianship may be appropriate, or when additional information is needed in order to develop an appropriate guardianship plan.

The Clerk's order for an MDE may require the respondent to attend the MDE for the purpose of being evaluated. G.S. 35A-1111(d). If the respondent *willfully* fails to attend the MDE as ordered by the Clerk, the respondent may be held in civil or criminal contempt in accordance with the procedures specified in G.S. Ch. 5A. The Clerk, however, does not have any express or inherent authority to order law enforcement officers to enforce the Clerk's order by seizing the respondent and transporting him or her to the evaluation. *See In re Transportation of Juveniles*, 102 N.C. App. 806 (1991).

D. Filing of Multidisciplinary Evaluation

If an MDE is ordered, the designated agency is required to file the evaluation with the Clerk and, unless otherwise ordered by the Clerk, to send copies of the evaluation to the petitioner, the respondent's *guardian ad litem*, and the respondent's retained counsel within 30 days from the date the agency receives the Clerk's order to perform the evaluation. G.S. 35A-1111(b).

If the evaluation does not include the medical, psychological, or social work evaluations ordered by the Clerk, the agency nonetheless must file and serve the evaluation along with an explanation as to why the evaluation does not contain the required medical, psychological, or social work evaluations. G.S. 35A-1111(c).

An MDE is not a public record and its contents may not be revealed, released, or disclosed except by order of the Clerk. G.S. 35A-1111(b). The Administrative Office of the Courts suggests that the copy of the MDE that is filed with the Clerk be placed in the court file in a sealed envelope marked "Multidisciplinary Evaluation: Do Not Open."

An MDE may be considered by the court at a hearing to determine the respondent's incapacity or to appoint a guardian for an incapacitated respondent. G.S. 35A-1111(e).

5.10 Calendaring and Continuance of Hearings

The hearing on a petition to appoint a guardian for an allegedly incapacitated adult must be held not less than 10, nor more than 30, days after service of the petition and notice of hearing on the respondent, unless the clerk extends the time for the hearing in order to complete mediation of the issues, for preparation of a multidisciplinary evaluation, or for other good cause. G.S. 35A-1108(a).

If the Clerk orders a multidisciplinary evaluation after the initial notice of hearing has been issued, the Clerk may extend the time for the hearing, which must be held not less than 10, nor more than 30, days after service of the second hearing notice on the respondent. G.S. 35A-1108(b).

5.11 Hearing Procedure

Practice Note: Suggested hearing procedures for guardianship proceedings involving allegedly incapacitated adults are included in the *North Carolina Clerk of Superior Court Procedures Manual* (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2003).

This section discusses adult guardianship hearings before the Clerk of Superior Court. In guardianship proceedings that are heard before a Superior Court Judge pursuant to G.S. 35A-1103(d) or G.S. 35A-1115, the Superior Court Judge, rather than the Clerk of Superior Court, exercises the judicial authority and functions described below, unless otherwise specified.

A. The Clerk's Role and Responsibilities

The Clerk of Superior Court or an Assistant Clerk of Superior Court presides as the judge in a hearing regarding the appointment of a guardian for an allegedly incapacitated respondent under G.S. Ch. 35A, Arts. 1 and 5. As the presiding judicial officer in guardianship proceedings, the Clerk has the authority to administer oaths and to preserve order in his or her court. *See* G.S. 7A-103(2), (7).

Unless a jury is empaneled to determine the issue of the respondent's incapacity, the Clerk is the trier of fact and may not transfer a contested guardianship proceeding for hearing by a Superior Court Judge. G.S. 1-301.2(g)(1).

B. Open and Closed Hearings

The hearing regarding appointment of a guardian for an allegedly incapacitated adult is open to the public unless the respondent, the respondent's retained counsel, or the respondent's *guardian ad litem* requests that the hearing be closed. G.S. 35A-1112(a). The hearing may not be closed on the motion of the petitioner or on the Clerk's own motion. If the respondent requests that the hearing be closed, the Clerk must exclude all persons other than those directly involved in or testifying at the hearing.

C. Sequestering Witnesses

The Clerk may, at the request of a party or on the Clerk's own motion, exclude witnesses so that they cannot hear the testimony of other witnesses, but may not exclude a natural person who is a party to the proceeding, an officer or employee of a party that is not a natural person if the officer or employee has been designated by the party's attorney as the party's representative, a person whose presence is necessary to a party, or a person whose presence is in the interest of justice. N.C. R. Evid. Rule 615.

D. Presence of the Respondent

Although the respondent has the right to attend the hearing, the respondent's presence is not required.

Practice Note: The attorney who is appointed as the respondent's *guardian ad litem* should make reasonable efforts to ensure that the respondent is present at an adult guardianship hearing unless the respondent's attendance at the hearing would jeopardize the respondent's physical, mental, or medical condition or otherwise be contrary to the respondent's best interest. In some cases, it may be appropriate to ask the Clerk to conduct all or part of an adult guardianship hearing at the location where the respondent resides.

E. Right to Present Evidence

The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses. G.S. 35A-1112(b). Although the respondent's next of kin and other interested persons do not have the right to present evidence, examine and cross-examine witnesses, make arguments to the court, or otherwise participate in a guardianship hearing, the Clerk may allow them to do so.

F. Issues of Fact and Law

Proceedings under G.S. Ch. 35A, Arts. 1 and 5 involve two primary issues:

- whether the respondent is an incapacitated adult;
- if so, who should be appointed as the respondent's guardian.

Guardianship proceedings under G.S. Ch. 35A, Arts. 1 and 5, however, also involve related and overlapping issues regarding

- the nature and extent of the respondent's incapacity;
- whether a general guardian, guardian of the person, or guardian of the estate should be appointed;
- whether a limited guardianship is appropriate;
- what rights should be retained by the respondent; and
- to what extent the guardian's powers should be limited.

G. Bifurcated Hearings

In a proceeding involving the appointment of a guardian for an allegedly incapacitated adult, the court does not reach or decide issues regarding whether a guardian should be appointed, whether the guardianship should be limited, and who should be appointed as the respondent's guardian unless the court first determines that the respondent is an incapacitated adult.

Because issues regarding the appointment of a guardian are contingent upon a determination that the respondent is incapacitated and because the issues of incapacity and appointment of guardians for incapacitated adults are addressed separately in two different articles of G.S. Ch. 35A, some Clerks bifurcate hearings involving the appointment of guardians for incapacitated adults, hearing and determining the issue of the respondent's incapacity first, and then hearing and determining issues regarding who should be appointed as the respondent's guardian and whether a limited guardianship is appropriate. G.S. Ch. 35A, however, does not require that guardianship proceedings be bifurcated in this manner.

H. Recording Hearings

Because the Superior Court conducts a *de novo* hearing on the issue of a respondent's incapacity if the Clerk's order determining incapacity under G.S. Ch. 35A, Art. 1 is appealed, the Clerk is not required to record that portion of a bifurcated guardianship proceeding involving the respondent's incapacity. The Clerk, however, is required, upon request of a party, to make an electronic recording of the portion of a bifurcated guardianship proceeding involving the appointment of a guardian for a respondent who has been adjudicated incompetent. G.S. 1-301.3(f). When a guardianship proceeding is not bifurcated, the entire proceeding should be recorded.

5.12 Evidentiary Issues and Burden of Proof

A. Application of N.C. Rules of Evidence in Adult Guardianship Proceedings

The North Carolina Rules of Evidence apply to proceedings involving the appointment of guardians for incapacitated persons. N.C. R. Evid. Rule 1101.

B. Consideration of Improperly Admitted Evidence

When a judge hears a case without a jury, the law presumes that the judge will disregard improperly admitted evidence and that the improper admission of evidence is not prejudicial. *See State v. Cheek*, 307 N.C. 552 (1983); *Pritchard v. Pritchard*, 45 N.C. App. 189 (1980). This presumption, however, does not apply if there is a timely and proper objection to the evidence, the judge erroneously overrules the objection, and a party properly assigns error to the judge's ruling on appeal. *See Douglas v. W.C. Mallison & Son*, 265 N.C. 362 (1965); *Carson v. Reid*, 76 N.C. App. 321, *aff'd*, 316 N.C. 189 (1985).

C. Burden of Presenting Evidence

The petitioner has the burden of presenting evidence sufficient to prove that the respondent is an incapacitated adult and, if the petitioner is requesting that the petitioner or another person be appointed as the respondent's guardian, presenting evidence regarding the proposed guardian's qualification and suitability.

D. Mode and Order of Presenting Evidence

The Clerk has the authority to control the mode and order of interrogation and presentation of evidence as provided in N.C. R. Evid. Rule 611.

All testimony in proceedings involving the appointment of a guardian for an incapacitated adult must be offered under oath or affirmation. N.C. R. Evid. Rule 603.

The Clerk may, on the Clerk's own motion or at the suggestion of a party, call witnesses. N.C. R. Evid. Rule 614(a). The Clerk also may question witnesses called by a party or called by the court. N.C. R. Evid. Rule 614(b).

E. Hearsay

"Hearsay" is a statement, other than one made by the declarant while testifying at the hearing, that is offered in evidence to prove the truth of the matter asserted. N.C. R. Evid. Rule 801(c). Upon proper objection by a party, the Clerk must refuse to admit or consider hearsay evidence in a proceeding involving the appointment of a guardian for an incapacitated adult except as provided by statute or the Rules of Evidence. N.C. R. Evid. Rule 802.

F. Physician-Patient Privilege

Communications between the respondent and the respondent's doctor, information obtained by the respondent's doctor in connection with the doctor's treatment of the respondent, and information in medical records regarding the medical treatment of or health care provided to the respondent are privileged and protected from disclosure in connection with legal proceedings. G.S. 8-53.

This privilege, however, may be waived expressly by the respondent, the respondent's counsel, or the respondent's *guardian ad litem* and is implicitly waived if

- the respondent or the respondent's counsel or *guardian ad litem* fails to object to the admissibility of otherwise privileged testimony or evidence;
- the respondent or the respondent's counsel or *guardian ad litem* calls the respondent's doctor as a witness and examines the doctor with respect to the respondent's medical condition;
- the respondent testifies regarding communications between the respondent and the respondent's doctor; or
- the respondent or the respondent's counsel or *guardian ad litem* directly places the respondent's medical condition at issue. *See Mims v. Wright*, 157 N.C. App. 339 (2003).

If the respondent or the respondent's counsel or *guardian ad litem* has not waived the patient-physician privilege, the Clerk may order that otherwise admissible privileged or confidential information regarding the respondent's medical condition or treatment be admitted in evidence upon a finding that disclosure of the information is necessary for the proper administration of justice. G.S. 8-53.

G. Medical Records

Medical records regarding the respondent's medical condition or treatment may be admitted as evidence in a proceeding to appoint a guardian for an incapacitated adult if

- the respondent or the respondent's counsel or *guardian ad litem* stipulates or fails to object to their admission in evidence; or
- the records are relevant (N.C. R. Evid. Rule 401); are properly authenticated (N.C. R. Evid. Rule 901); are admissible under the "business record" exception to the hearsay rule (N.C. R. Evid. Rule 803(6)) or another exception to the hearsay rule; and the respondent or the respondent's counsel or *guardian ad litem* has waived the physician-patient privilege with respect to the records or the Clerk has ordered that the records be disclosed under G.S. 8-53.

H. Multidisciplinary Evaluation (MDE)

G.S. 35A-1111(e) provides that an MDE may be considered by the Clerk at a hearing regarding the respondent's incapacity, at a hearing regarding the appointment of a guardian for an incapacitated respondent, or both.

I. Opinion Testimony by Lay Witnesses

A witness who has not been qualified to testify as an expert witness may offer his or her opinion regarding a respondent's mental incapacity if the lay witness's opinion is rationally based on the witness's perception of the respondent and the Clerk determines that the witness's opinion regarding the respondent's incapacity will be helpful in understanding the witness's testimony or determining the respondent's incapacity. N.C. R. Evid. Rule 701. *See State v. Strickland*, 321 N.C. 31 (1987); *State v. Davis*, 321 N.C. 52 (1987); *State v. Bond*, 345 N.C. 1 (1996).

J. Testimony by Experts

If a witness is properly qualified as an expert witness, he or she may testify regarding his or her opinion regarding the respondent's capacity to manage the respondent's affairs or to make or communicate important decisions regarding the respondent's person, family, or property. N.C. R. Evid. Rule 704. *See State v. Shank*, 322 N.C. 243 (1988). *See also* N.C. R. Evid. Rules 702, 703, 705, 706.

K. Testimony by the Respondent

The respondent may be called by the petitioner, by the respondent's counsel or *guardian ad litem*, by any other party, or by the Clerk to testify as a witness and must testify if he or she is called as a witness and is competent to testify as a witness.

An allegedly incapacitated respondent is competent to testify unless the court determines that he or she lacks the capacity to understand his or her oath as a witness or lacks the capacity to relate the facts that are the subject of his or her testimony. *See In re Will of Leonard*, 82 N.C. App. 646 (1986).

L. Testimony by Respondent's Attorney or Guardian ad litem

Communications between a respondent and the respondent's attorney are generally protected by the attorney-client privilege and, if they are protected by the attorney-client privilege and the privilege has not been waived by the respondent, the respondent's attorney may not testify or be compelled by the court to testify with respect to those communications. *See State v. McIntosh*, 336 N.C. 517, 523 (1994); *In re Miller*, 357 N.C. 316 (2003).

Rule 1.6 of the North Carolina State Bar's Revised Rules of Professional Conduct also prohibits the respondent's lawyer from disclosing other information obtained during the attorney's representation of the respondent unless the respondent gives informed consent to the disclosure, the disclosure is impliedly authorized in connection with the lawyer's representation of the respondent, or the disclosure is required by court order, law, or the Revised Rules of Professional Conduct. These rules do not apply to a lawyer who is appointed as the respondent's *guardian ad litem* if the lawyer is acting solely as the respondent's *guardian ad litem* and not as the respondent's attorney. *See* 2004 Formal Ethics Opinion 11. *See also In re Shepard*, 162 N.C. App. 215 (2004).

M. Presumption of Mental Capacity

The law presumes that, in the absence of proof to the contrary, all adults have sufficient mental capacity to make their own decisions regarding their personal affairs. *See State v. Thompson*, 328 N.C. 477 (1991); *Ridings v. Ridings*, 55 N.C. App. 630 (1982); *In re Womack*, 53 N.C. App. 221 (1981); *State v. Jones*, 293 N.C. 413 (1977); *Hagins v. Greensboro Redevelopment Comm'n*, 275 N.C. 90 (1969) (presumption implicit in holding); *Jones v. Winstead*, 186 N.C. 536 (1923); *Hudson v. Hudson*, 144 N.C. 449 (1907). This presumption, however, may be rebutted by sufficient, competent evidence of mental incapacity in a legal proceeding, including a guardianship proceeding pursuant to G.S. Ch. 35A, in which an adult's mental capacity is at issue.

A finding that a respondent lacks the capacity to consent to protective services made by a district court judge in a special proceeding under G.S. Ch. 108A, Art. 6 is inadmissible and may not be considered in a guardianship proceeding under G.S. Ch. 35A, Art. 1 or 5. G.S. 108A-105(d).

A certified copy of an order entered by a court of another state that includes a finding that a respondent is incompetent may be admissible in a guardianship proceeding under G.S. Ch. 35A, Art. 1 or 5, but it is not necessarily conclusive on the issue of the respondent's incapacity. G.S. 35A-1113.

N. Burden of Proof (Persuasion)

The petitioner has the burden of persuading the Clerk or jury, by clear, cogent, and convincing evidence, that the respondent is incapacitated. *See* G.S. 35A-1112(d). If the petitioner fails to prove the respondent's incapacity by clear, cogent, and convincing evidence, the Clerk must dismiss the proceeding. G.S. 35A-1112(c).

5.13 Findings and Order

A. Order of Dismissal

If the Clerk (or a jury) determines that the respondent is not incapacitated, the Clerk must enter an order dismissing the proceeding.

B. Order and Findings Regarding Incapacity

If the Clerk (or a jury) determines that the respondent is incapacitated, the Clerk must enter an order adjudicating the respondent incompetent. G.S. 35A-1112(d). The Clerk's order should include findings regarding the nature and extent of the respondent's incapacity. *See* G.S. 35A-1112(d).

If the Clerk enters an order adjudicating the respondent incompetent, the Clerk must also enter an order appointing a general guardian, guardian of the person, or guardian of the estate for the respondent (unless the Clerk transfers the case to another county for the appointment of a guardian for the respondent). G.S. 35A-1112(e); G.S. 35A-1215. The Clerk's order appointing a guardian for the respondent may be combined with the Clerk's order adjudicating the respondent incompetent.

C. Order Appointing Guardian

The Clerk's order appointing a guardian for an incapacitated respondent must specify the nature of the guardianship or guardianships to be created, the name of the person or entity that is appointed as the respondent's guardian, the identity of any agency that will serve as the designated agency pursuant to G.S. 35A-1243, and the powers and duties of the guardian or guardians. G.S. 35A-1215(a).

The Clerk's order should contain findings sufficient to support the Clerk's determination that the guardian appointed for the respondent is qualified and suitable to serve as the respondent's guardian.

D. "Limited Guardianship" Orders

The Clerk's order should create a limited guardianship whenever a limited guardianship is appropriate. *See* G.S. 35A-1212(a). If the Clerk orders a limited guardianship, the Clerk's order must include findings regarding the nature and extent of the respondent's incapacity as they relate to the respondent's need for a guardian. G.S. 35A-1215(b). When the Clerk orders a limited guardianship, the Clerk's order may provide that the ward retains certain legal rights and privileges to which the respondent was entitled before he or she was adjudicated incompetent. G.S. 35A-1215(b).

5.14

Costs and Fees

A. Statutory Authority

G.S. 35A-1116 governs the taxing of costs and fees in guardianship proceedings.

B. Order Appointing Guardian for a Ward Who Is Not Indigent

If the court enters an order appointing a guardian for an incapacitated ward who is not indigent, the Clerk must assess the cost of the respondent's *guardian ad litem*, witness fees, and the cost of the MDE (if an MDE was prepared) against the respondent, and may tax the reasonable fees of the petitioner's attorney, the court filing fee, fees for service of process, and other costs allowed under G.S. 7A-307 or common law against the respondent or the petitioner.

C. Order Appointing Guardian for a Ward Who Is Indigent

If the court enters an order appointing a guardian for an incapacitated ward and the ward is indigent, the Clerk may not tax costs and fees against the respondent. In those cases, the reasonable fee of the respondent's *guardian ad litem* must be paid by the State, witness fees must be paid by the Administrative Office of the Courts, and the cost of an MDE (if an MDE was prepared) must be paid by the state Department of Health and Human Services. Other costs and fees may be taxed against the petitioner.

D. Order Dismissing Petition

If the Clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, the Clerk must tax the reasonable fees of the respondent's *guardian ad litem* (but not the reasonable fees of the respondent's retained counsel except as otherwise provided under N.C. R. Civ. P. Rule 11), witness fees, the cost of the MDE (if an MDE was prepared), and others costs as allowed by G.S. 7A-307 and the common law against the petitioner.

If the Clerk does not enter an order appointing a guardian for the respondent but finds that the petitioner had reasonable grounds to bring the proceeding, the cost of the respondent's *guardian ad litem* must be paid by the State, witness fees must be paid by the Administrative Office of the Courts, and the cost of the MDE (if an MDE was prepared) must be taxed against the petitioner or the respondent or paid by the state Department of Health and Human Services. The Clerk may tax the reasonable fees of the petitioner's attorney, the court filing fee, fees for service of process, and other costs allowed under G.S. 7A-307 or common law against the respondent or the petitioner.

E. Costs and Fees for Mediated Cases

Payment of costs and fees for mediation is discussed in Chapter 8.

Appendix 5-1 Additional Resources

Suggested guidelines for the preparation of MDEs multidisciplinary evaluations in incompetency proceedings have been developed by the North Carolina Department of Health and Human Services' Division of Aging and Adult Services and are available on-line: http://info.dhhs.state.nc.us/olm/manuals/daa/ga/man/AFSc8xg.htm#P9_13.

Suggested jury instructions, jury forms, and procedures for jury trials in guardianship proceedings involving allegedly incapacitated adults are included in the *North Carolina Clerk of Superior Court Procedures Manual* (Chapel Hill: School of Government, The University of North Carolina at Chapel Hill, 2003).

