

**INFORMATIONAL SHEET
INCOMPETENCY GUARDIANSHIP
(G.S. CHAPTER 35A and 35B)**

HOW TO BEGIN A COURT PROCEEDING FOR AN INCOMPETENCY ADJUDICATION

BASIS FOR PETITION

If you believe someone is unable to manage their own affairs or make their own decisions, perhaps due to injury or mental health issues, a petition may be filed before the Clerk of Superior Court to have the person adjudicated incompetent and to have a legal guardian appointed.

WHO CAN FILE A PETITION?

Any person who has personal knowledge that the facts set forth on the petition are true.

FILING OF PETITION

The Petitioner should fully complete the attached GUARDIAN QUESTIONNAIRE and PETITION FOR ADJUDICATION OF INCOMPETENCE AND APPLICATION FOR APPOINTMENT OF GUARDIAN (AOC-SP-200). The forms may be typewritten or hand written legibly in ink. Form AOC-SP-200 must be signed and sworn to before a notary or Clerk of Court.

Pursuant to N.C. Gen. Stat. §35B which became effective on 12/1/2016, a petitioner must allege that North Carolina has jurisdiction to adjudicate incompetence and to appoint a guardian. Jurisdictional priority is first given to the respondent's "home state" (physical presence of respondent for the six months immediately preceding the filing of the petition), then to a "significant-connection state" (physical presence in North Carolina for at least six consecutive months within the twelve months immediately preceding the filing of the petition), and then to an "other state" (home state and significant other states decline jurisdiction because NC is a more appropriate forum and jurisdiction in NC is consistent with the United States and North Carolina Constitution). If none of these scenarios apply, then petitioner must allege that jurisdiction arises due to an emergency related to the respondent's person or property located in North Carolina.

This petition must be filed with the Clerk of Superior Court in the county in which the Respondent is domiciled or physically present with the appropriate filing fee. In some cases, fees may be waived. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence; it is the place where he or she intends to remain permanently, or for an indefinite length of time.

NOTE: If a Respondent has been adjudicated incompetent in another state, you will need to consider whether transfer of the guardianship to North Carolina or registration of the guardianship in North Carolina is appropriate.

Upon the filing of the petition, the court will appoint a Guardian Ad Litem attorney (GAL). A GAL is a guardian appointed by a court to protect the interests of the Respondent (person alleged to be incompetent) at an incompetency hearing. A Respondent has a right to retain his or her own attorney for the proceeding.

An adjudication of incompetence results in the loss of many of the basic rights that we take for granted, such as the right to make decisions regarding one's health care and medical treatment or where one lives. No matter how "obvious" a person's incompetence may be to family members, every alleged incompetent person has a right to be heard by the court and insist that the Petitioner demonstrate "clear, cogent and convincing" evidence that a guardian is necessary. The court-appointed Guardian Ad Litem will ensure that the Respondent's interests are known to the court:

In addition, upon filing the petition, you will need to mail a copy of the Notice of Hearing and the petition to all next of kin. Typically, a person's next of kin will include the spouse, parents, children and siblings. The next of kin must be listed in the petition and you must file a notarized/sworn Affidavit of Service that a copy of the Notice of Hearing and petition were mailed to each next of kin or interested person by first class mail to the address(es) listed within five (5) days of filing the petition.

The Respondent must be served personally by Sheriff. (The Sheriff cannot leave papers with any other person).

An incompetency hearing is generally scheduled four (4) weeks from the filing of the petition. This allows the Sheriff's Department sufficient time to serve the Respondent with the petition and notice of hearing, allow time for the family members/interested persons to plan to attend the hearing if they wish, and provides an opportunity for the court-appointed Guardian Ad Litem to make a personal visit with the Respondent and decide how best to represent him/her.

Please be advised of the following: If you believe there is an emergency situation that threatens the physical or financial well-being of the Respondent and feel a guardian is needed immediately to address the issue, please complete the Motion for Appointment for Interim Guardian. Our office will review the motion and determine whether an interim hearing would be appropriate (FORM AOC-SP-198).

Examples of evidence in incompetency hearings include medical records, affidavit(s) from a doctor, psychologist, or psychiatrist stating that, in the doctor's opinion, the Respondent lacks the capacity to make and communicate decisions or to manage his or her own affairs, as well as any witnesses present in court and prepared to testify.

For information about health care powers of attorney and living wills (health care directives), please visit the North Carolina Secretary of State's Advanced Care Directive Registry. (<http://www.secretary.state.nc.us/ahcdr/>)

Fees (unless waived):

Petition court filing fee is \$120.00

Sheriff's service fee is \$30.00

Motion to Modify/Notice of Hearing fee is \$20.00

Motion for Interim Guardian fee is \$20.00

Responsibilities of Guardians in North Carolina (AOC-SP-850) THIS BOOKLET IS AVAILABLE FOR PICKUP UPON REQUEST. IT IS GOOD PRACTICE TO READ THIS BOOKLET BEFORE FILING A PETITION.

State law prohibits the Clerk's office staff from providing any legal advice, providing instructions for completing forms, referring an attorney, or recommending specific ways to pursue legal action.

Principles of Guardianship

1. Guardianship should be used only as a last resort and only when less intrusive alternatives are not appropriate.
2. Guardianship should be sought only when it is clear that it will give an individual a fuller capacity for exercising his or her rights.
3. Guardianship should seek to preserve opportunities for the individual to exercise rights that are consistent with his or her abilities.
4. Guardianship should be tailored to meet the needs of each individual.
5. Guardianship should periodically be reviewed. Alternatives, including limited guardianship and restoration to competency, should be considered.

Principles of for the Person Involved

1. The Ward should be involved in all decision making consistent with his or her capabilities.
2. The Ward has the right to petition the court for periodic review of the Guardianship and for restoration to competency.
3. The Ward should be allowed to exercise those rights consistent with his or her capabilities.
4. The Ward is entitled to be represented by an attorney or a guardian ad litem (clerk appointed attorney) who represents the expressed wishes of the Ward in Guardianship proceedings.

The Guardian's Responsibilities

A Guardian serves as a surrogate decision maker and advocate for an individual (the Ward) who has been determined incompetent. However, the Guardian must allow the Ward to participate as much as possible in the decisions affecting him or her. The Guardian is also required to preserve the opportunity for the Ward to exercise the rights that are within his or her comprehension and judgment, allowing for the same possibility of error as a person who is not incompetent.

The Guardian must advocate for the Ward and protect the Ward's right to make his or her own choices. Wards should be given the opportunity to take as much control over their lives as possible. This means that Guardians must support Wards in developing the necessary skills for assuming responsibility in their decision making. The Guardian is responsible for making decisions that ensure the health and well-being of the Ward.

If the Ward is incapable of making certain decisions for him or herself, the Guardian should make decisions based on the expressed wishes of the Ward or what the Ward would decide if he or she was capable of making the decisions. In order to make the best decision, the Guardian should seek prior information about the Ward's value system, wishes, and needs. The Guardian may get this information from the Ward or the Ward's family, friends, or a legal document, such as a Living Will or Health Care Power of Attorney. In instances where the Ward has never been able to participate in the decision making process or express wishes and values, the Guardian makes decisions based on the Ward's best interest. The Guardian must be sensitive to the Ward's needs, values, and wishes. Through this sensitivity, the Guardian can ensure that the decisions he or she makes with the Ward are individualized, consistent with the Ward's value system, and are in the Ward's best interest. No Guardian may consent to the sterilization of a Ward without a court order.

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Modifying an Existing Guardianship

If a guardianship has already been established and you would like to see it modified, you may bring your request to the attention of the Clerk by filing a Motion in the Cause to Modify Guardianship (AOC-E-415 Rev 7/06).

Restoration of Competency

The Ward can have the guardianship reversed and be restored to competency. The Ward, the Guardian, or any other interested person can ask the Clerk of Superior Court to reopen the case by filing a written motion or petition if the guardianship is administered in Wake County.

When a Ward seeks restoration to competency, he or she is entitled to a court hearing before the clerk and, if desired, a jury. The Ward is also entitled to be represented by a privately retained attorney, but the clerk will appoint a guardian ad litem to represent him or her. The Ward must prove by a preponderance of the evidence that the Ward is able to manage his or her own affairs and make and communicate important decisions concerning his or her self, family, and property. When someone is restored to competency, the Guardian is dismissed and the former Ward is authorized to manage his or her own affairs and exercise rights as if he or she had never been adjudicated incompetent. Partial restoration to some rights is an alternative to full restoration.

Alternatives to Guardianship and Incompetency:

For information about health care powers of attorney and living wills (health care directives), please visit the North Carolina Secretary of State's Advanced Health Care Directive Registry. (<http://www.secretary.state.nc.us/ahcdr/>)

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STATE OF NORTH CAROLINA

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

WAKE County

IN THE MATTER OF

Name And Address Where Respondent Is Located (If different from Address on Petition)

[Redacted]

County

Name And Address Of Attorney Guardian Ad Litem

NOTICE OF HEARING ON
INCOMPETENCE AND ORDER APPOINTING
GUARDIAN AD LITEM

G.S. 35A-1107, -1108, -1109, -1112

State Bar No.

NOTE: Form AOC-E-211 is available to be used as a Notice of Hearing form for a hearing on a motion to modify guardianship.

NOTICE

You are notified to appear before the Clerk of Superior Court on the date and at the time and place specified below for a hearing on the attached Petition/Motion. You may file a written response in the office of the Clerk on or before the time set for the hearing.

A petition has been filed alleging that the respondent is incompetent and requesting that a guardian be appointed. If, at the hearing, the Court finds by clear, cogent and convincing evidence that the respondent is incompetent, an adjudication of incompetence will be entered and a guardian of the person or a guardian of the estate or a general guardian or a limited guardian may be appointed.

Date Of Hearing

Time

AM
 PM

Place To Appear

Wake County Courthouse
12th Floor, Special Proceedings
316 Fayetteville Street, Raleigh NC 27601

A motion for the appointment of an interim guardian has also been made (applies only for incompetence hearings). You are further notified to appear before the Clerk on the earlier date and at the time and place specified below for a hearing on the motion for the appointment of an interim guardian contained in the attached petition. (Disregard if box above is not checked.)

Date Of Hearing On Interim Guardian

Time

AM
 PM

Place To Appear

ORDER APPOINTING GUARDIAN AD LITEM

It is ORDERED that the attorney named above be and hereby is appointed as guardian ad litem to represent the respondent at all stages of this proceeding. The respondent has the right to retain his/her own attorney, at his/her own expense, and if he/she does so, the Court may discharge the guardian ad litem.

Date

Time

AM
 PM

Signature

Assistant CSC
 Clerk Of Superior Court

INSTRUCTIONS TO PETITIONER:

This Notice and a copy of the petition must be personally served on the respondent and must be served on the guardian ad litem by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, within five (5) days after filing the petition, you must mail this Notice and a copy of the petition, by first-class mail, to the respondent's next of kin named on the petition and any other person(s) the clerk may designate (except those person(s) who have accepted notice) and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

(Over)