



**NORTH CAROLINA GENERAL ASSEMBLY**

**JOINT LEGISLATIVE OVERSIGHT  
COMMITTEE ON  
HEALTH AND HUMAN SERVICES**

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**SUBCOMMITTEE ON  
PUBLIC GUARDIANSHIP**

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**Co-chairs:  
Senator Tamara Barringer  
Representative Bert Jones**

**FINAL REPORT  
TO THE  
FULL COMMITTEE**

**MARCH 11, 2014**

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# TRANSMITTAL LETTER

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March 11, 2014

To Members of the Joint Legislative Oversight Committee on Health and Human Services:

The Joint Legislative Oversight Committee on Health and Human Services, Subcommittee on Public Guardianship, respectfully submits the following final report.

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Representative Bert Jones  
Co-Chair

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Senator Tamara Barringer  
Co-Chair

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## SUBCOMMITTEE MEMBERSHIP

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Senate Members	House Members
Senator Tamara Barringer, Chair	Representative Bert Jones, Chair
Senator Shirley Randleman	Representative Nelson Dollar
Senator Gladys Robinson	Representative Beverly Earle

Committee Staff:	
Gloria Whitehead, Senate Clerk	Brenda Olls, House Clerk
Jan Paul, Research Division	Jennifer Hillman, Research Division
Joyce Jones, Legislative Drafting Division	Theresa Matula, Research Division
Denise Thomas, Fiscal Research Division	Deborah Landry, Fiscal Research Division

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# SUBCOMMITTEE PROCEEDINGS

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The Joint Legislative Oversight Committee on Health and Human Services, Public Guardianship Subcommittee, was created by S.L. 2013-258 (HB 543), Section 3. The enacted legislation required the Joint Legislative Oversight Committee on Health and Human Services to appoint a subcommittee to examine the impact of the 1915(b)/(c) Medicaid Waiver and other mental health system reforms on public guardianship services, including guardianship roles, responsibilities, and procedures and the effect on existing relationships between guardians and wards.

Consistent with the Subcommittee's charge, the focus of the study was limited to public guardianship. Under the North Carolina General Statutes, a guardian is an individual appointed by the court to make decisions on behalf of an individual (ward). Under G.S. 35A-1213(d) a clerk may appoint a "disinterested public agent" to serve as guardian. The disinterested public agent will serve in that capacity by virtue of his or her office or employment, which shall be identified in the clerk's order and in the letters of appointment. Session Law 2012-151 amended G.S. 35A-1202 to define a disinterested public agent as the director or assistant directors of a county department of social services. Therefore, the scope of the Subcommittee's examination and recommendations extend only to issues involving those public guardians and their wards and does not address issues involving private guardians.

The Subcommittee experienced some weather-related delays in getting started, but met three times between February 26, 2014, and March 11, 2014. This section of the report provides a brief overview of the subcommittee proceedings. Detailed minutes and copies of handouts from each meeting are on file in the legislative library and are available online at the following site:

<http://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=144&sFolderName=\HHS Subcommittees by Interim\2013-14 HHS Subcommittees\Public Guardianship Subcommittee Folder> .

## Overview of Topics and Presenters

### February 26, 2014

The Subcommittee met at 9:00 a.m. on February 26, 2014. Representative Jones presided over the meeting. The Subcommittee heard the presentations outlined below.

- Committee Charge  
Denise Thomas, Fiscal Research Division, NCGA
- Background and Overview – 1915(b)/(c) Medicaid Waiver and Guardianship  
Jan Paul, Research Division, NCGA
- Issues and Perspectives were provided by the following:
  - Clerks of Court  
Lorin Freeman, Wake County Clerk of Court
  - Department of Health and Human Services

Dave Richard, Director, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, DHHS

Kevin Kelley, Section Chief, Child Welfare Services, Division of Social Services, DHHS

Dennis Streets, Director, Division of Aging and Adult Services, DHHS

- Departments of Social Services  
Kent Flowers, Jr., Director, Craven County Department of Social Services
  - LME/MCOs  
Pam Shipman, CEO, Cardinal Innovations
  - Other Stakeholders and Advocacy Groups  
Corye Dunn, Director of Public Policy, and Annaliese Dolph, Legal Counsel, Disability Rights NC
- Julia Adams, Assistant Director of Government Relations, The Arc of NC  
Karen McLeod, President/CEO, Benchmarks

### **March 5, 2014**

The Subcommittee met at 9:00 a.m. on March 5, 2014. Senator Barringer presided over the meeting. The Subcommittee heard the presentations outlined below.

- State Funding for Guardianship Services  
Deborah Landry, Fiscal Research Division, NCGA
- Department of Health and Human Services Public Guardianship Ad-Hoc Workgroup Report  
Dennis Streets, Director, Division of Aging and Adult Services, DHHS
- Oversight of Public Guardians and Impact of 1915(b)/(c) Medicaid Waiver on Care Coordination and Case Management Oversight  
Dennis Streets, Director, Division of Aging and Adult Services, DHHS  
Dave Richard, Director, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, DHHS  
Lorrin Freeman, Wake County Clerk of Court
- Potential Conflicts of Interest  
"Potential Conflicts of Interest and Options for Addressing Them"  
Aimee Wall, UNC School of Government  
"Relative as Provider: NC Innovations Waiver"  
Sara Wilson, Provider Network Specialist, Alliance Behavioral Healthcare, and  
Suzanne Goerger, IDD Care Coordinator Manager  
"Office of Public Guardianship"

Pete Powell, Legal Counsel, NC Administrative Office of the Courts

- Consumer and Family Perspective  
Cindy and Walter Amerson
- Appeals of LME/MCO Actions  
Jennifer Hillman, Research Division, NCGA

**March 10, 2014**

The Subcommittee met at 2:00 p.m. on March 10, 2014. Representative Jones presided over the meeting which included presentation of a draft report. The Subcommittee approved the report for presentation to the Joint Legislative Oversight Committee on Health and Human Services.

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# SUBCOMMITTEE FINDINGS AND RECOMMENDATIONS

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The findings and recommendations below are based on information provided to the Subcommittee.

## **SUMMARY FINDING**

Guardianship is a legal relationship under which a person or agency (the guardian) is appointed by a court to make decisions and act on behalf of an individual (the ward) with respect to the ward's personal affairs, financial affairs, or both, when the ward lacks sufficient mental capacity to make those decisions. It is critical that the State have a guardianship system ensuring that all vulnerable adults adjudicated incompetent have access to an appropriate guardian. In the State's current guardianship model, the State assumes vital roles to assure a uniform and reliable statewide guardianship system. This model is properly designed to protect and to advance the best interests of vulnerable adults, and should be maintained.

The Subcommittee appreciates the Public Guardianship Ad-Hoc Workgroup Report prepared for the Secretary of Health and Human Services as presented to this Subcommittee, and is in agreement with the Workgroup's findings as follows:

- North Carolina's current model of public guardianship positions the disinterested public agent as the guardian of last resort, does not cap the number of guardians available to the public, is good public policy, and serves people most in need of a legal surrogate decision maker.
- Private corporations fulfill a vital role in NC's system of public guardianship.
- People being served by a public guardian have complex needs, few resources of their own, and will likely need a guardian for many years.
- Guardians generally, and public guardians specifically, experience difficulty accessing the array of mental health services provided by LME/MCOs on behalf of the people they serve.
- The vast majority of NC's public guardianship service is supported by federal and county funds (96%); the State contributes only 4%.
- The number of people needing a public guardian will continue to increase.
- Current and future demands for a public guardian cannot be met without additional resources, primarily in the form of additional funding.
- A public guardian is being appointed on average 30% of the time when a guardian is needed.
- Pursuant to General Statute Chapter 35A, a guardian of the person is not entitled to receive a fee for their services and time spent carrying out their duties. They are only entitled to receive reimbursement of reasonable expenses incurred.
- Directors of departments of social services (DSS) experience a number of conflicts of interest fulfilling their role as the sole public agency serving as guardian. These

conflicts include, but are not limited to, the conflict of interest when serving as guardian for an adult with a child(ren) in custody of the DSS.

Additionally, the Subcommittee makes the specific findings and recommendations provided below.

### **FINDING 1: FURTHER STUDY OF PUBLIC GUARDIANSHIP - APPOINTMENT OF A SUBCOMMITTEE**

Guardianship limits the personal autonomy and legal rights of an incompetent ward. However, guardianship also may protect a ward or the ward's property. Limiting the rights of an individual through the appointment of a guardian should not be undertaken unless it is clear that guardianship will give the ward a fuller capacity for exercising his or her rights. The law must balance the competing interests of autonomy and protection by establishing the procedures for the appointment of an appropriate guardian, and providing guidelines or rules relating to potential conflicts of interest, the provision of necessary services, the safeguarding of the ward's personal resources as well as of public resources, the protection of the ward from abuse, neglect, exploitation, and to ensure adequate and appropriate oversight.

The Subcommittee heard presentations indicating that the number of guardianships is increasing as Baby Boomers advance in age. Where there are no individuals able to serve, increased burdens are placed on public guardians, and study should be made with regard to developing a more robust system of disinterested public guardians, as well as making transition plans for wards whose family member or other individual guardian may become unable to continuing providing guardianship services.

Previously, the clerk could appoint LMEs and other entities as guardians. Under the recent change in the law allowing for the appointment only of a department of social services as disinterested public agent, cases that formerly went to other entities as disinterested public agent now go to DSS. As such, DSS agencies may need additional resources to handle the guardianship demands placed on the agency. There are corporations that serve as guardian, contracting with DSS to provide guardianship services in order to relieve DSS of its increasing caseload, but those corporations must be paid for their services under the contracts, and sources of funding must be identified.

The Subcommittee on Public Guardianship has had insufficient time and opportunity to explore and examine all of the important issues and information affecting the provision of guardianship services. Specifically the Subcommittee would like to have explored other options, including the possibility of the creation of an Office of Public Guardianship. Therefore, the Subcommittee believes the interests of the citizens of the State would be well-served by allowing a committee to continue this important work.



## **RECOMMENDATION 1: FURTHER STUDY OF PUBLIC GUARDIANSHIP - APPOINTMENT OF A SUBCOMMITTEE**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee appoint a subcommittee for continued study of public guardianship issues during the 2014-15 interim.

## **FINDING 2: OVERSIGHT/STATUS REPORTS**

G.S. 35A-1202 defines status reports and G.S. 35A-1242 defines the status report for incompetent wards. Presentations by the Department of Health and Human Services, Division of Aging and Adult Services (DAAS), on behalf of the Public Guardianship Ad Hoc Workgroup recommended that G.S. 35A-1202(14) and G.S. 35A-1242 be modified to require additional information be included in status reports.

The Subcommittee agrees that greater oversight is needed of public guardians of the person and public general guardians. It is important that more detailed information regarding the ward be available for review by the clerk.

## **RECOMMENDATION 2: OVERSIGHT/STATUS REPORTS**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee support the enactment of legislation [[2013-SHz-9](#)] by the General Assembly to amend the requirements contained in the provisions of the General Statutes relating to the contents of the status reports that must be filed by guardians with the clerk of superior court.

## **FINDING 3: OVERSIGHT/COMPLAINT INVESTIGATION**

During the March 5th meeting, the Subcommittee heard a presentation by the Division of Aging and Adult Services, Department of Health and Human Services. A portion of the presentation focused on the complaint investigation and resolution process with a county Department of Social Services (DSS). The following three points were made:

- Any citizen-initiated concerns, including those passed through legislative (State and Congressional) and executive branches are investigated by the Division of Aging and Adult Services field-based staff.
- Interviews are conducted with DSS staff, family members, and others involved in the ward's care.
- On-site visits are made as needed to ensure the ward's needs are appropriately addressed.

Individuals served by a publicly funded guardian generally are vulnerable individuals with complex needs. In many cases, guardians can be supportive and serve to maximize a ward's potential and quality of life. It was reported to the Subcommittee that there may have been cases in which public guardians have been non-responsive, impeded employment and

housing opportunities, and obstructed appropriate restoration of competency or modification of guardianship. In cases where the clerk or the DSS receives a report of abuse, neglect or exploitation of a ward, it is important that appropriate protection and advocacy services be provided. The ward should be offered an opportunity to provide information to an investigator and to participate as fully as possible in all decisions that affect him or her. The DSS should have specific protocols and policies to govern guardians, including responsiveness, personal contact with the ward, and a person-centered plan, and should develop plans for each guardian in order to ensure that the ward's needs are met and that the guardianship plan is regularly monitored.

### **RECOMMENDATION 3: OVERSIGHT/COMPLAINT INVESTIGATION**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee direct the Division of Aging and Adult Services (DAAS), Department of Health and Human Services, to collaborate with the Administrative Office of the Courts to develop a plan regarding the evaluation of complaints by DAAS so that, in addition to current requirements, the complaint process also incorporates a face-to-face observation of the ward and/or an interview with the ward. The plan shall provide that the interview or observation be performed by an individual who is experienced in understanding the unique needs and abilities of the ward.

### **FINDING 4: CONFLICT OF INTEREST - GENERALLY**

Changes to State guardianship laws made as a result of the 1915(b)/(c) Medicaid Waiver limit the clerk of superior court when appointing a disinterested public agent as guardian to the appointment only of the director or assistant director of a county department of social services. Clerks of superior court no longer have the authority to appoint an area mental health agency or other human services agency as a disinterested public agent. National Guardianship Association standards provide that the guardian shall avoid all conflicts of interest and self-dealing, or the appearance of such, when addressing the needs of the person under guardianship. Such conflicts may be based on moral, ethical, and/or financial reasons and can arise, for example, when the guardian directly provides housing, medical, legal, or other direct services to the ward and is not a family guardian approved by the court to provide specified direct services that are in the best interest of the ward. Guardians should be educated as to what constitutes a conflict of interest and self-dealing and why they should be avoided. Under current State law, if a disinterested public agent believes that his role or the role of his agency in relation to the ward is such that his service as guardian would constitute a conflict of interest, or if he knows of any other reason that his service as guardian may not be in the ward's best interest, the disinterested public agent is required to bring such matter to the attention of the clerk and seek the appointment of a different guardian.

Virtually all presenters who addressed the issue of parents and relatives as both guardians and paid service providers agreed that the clerk of superior court should continue to have the discretion, based on full information and a determination as to the ward's best interest, to appoint the person who will take the best care of the ward.

#### **RECOMMENDATION 4: STUDY CONFLICTS OF INTEREST, GENERALLY**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee direct a subcommittee study the issue relating to potential conflicts of interest between public guardians, wards, and services providers, and that the subcommittee report its findings and recommendations.

#### **FINDING 5: CONFLICT OF INTEREST – CHILD WELFARE CASES**

The Subcommittee heard from presenters that the potential for a conflict of interest arises when a county Department of Social Services has been appointed as guardian for both a child who is the subject of a report of abuse, neglect or dependency that must be investigated by Child Protective Services as well as for the parent or legal guardian of that child.

#### **RECOMMENDATION 5: DHHS AND COUNTY DSS STUDY CONFLICT OF INTEREST IN CHILD WELFARE CASES**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee direct the Department of Health and Human Services, specifically the Division of Social Services, to study the issue of conflicts of interest in child welfare cases, and to make recommendations in a report to the Joint Legislative Oversight Committee. Among the various options to be considered in order to address potential conflicts of interest are creating internal firewalls to prevent information sharing and influence among staff members involved with the conflicting cases; creating a formal or informal "buddy system" allowing a county with a conflict to refer a case to a neighboring county; referring the guardianship to a corporate guardian until the child welfare case is resolved; having the Department of Health and Human Services assume responsibility for either the guardianship or the child welfare case; and legislation to permit the clerk the option of appointing a public agency or official other than the director of social services to serve as a disinterested public agent in exceptional circumstances.

#### **FINDING 6: CONFLICT OF INTEREST – REPRESENTATIVE PAYEE**

Although it is unusual for individuals requiring public guardianship services to have significant financial resources, there are wards whose guardians are individuals, corporations, or disinterested public agents who have assets to be safeguarded and whose financial affairs must be properly managed. Many wards may be receiving Social Security, SSI or other disability benefits. The Subcommittee was informed that there is a potential conflict of interest as well as opportunity for abuse and exploitation when a guardian seeks to be designated as representative payee of the ward's Social Security or SSI benefits or is the

payee of other public monies. The issues relating to these financial conflicts of interest warrant further examination and study.

#### **RECOMMENDATION 6: STUDY CONFLICT OF INTEREST IN REPRESENTATIVE PAYEE SITUATIONS**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee direct a study of the issues relating to potential conflicts of interest when funds are involved and a guardian is designated as representative payee. The Joint Legislative Oversight Committee may direct a subcommittee to study the issues or direct a particular agency or agencies to study it and report findings and recommendations.

#### **FINDING 7: CONFLICT OF INTEREST – GUARDIAN AS PAID SERVICE PROVIDER**

Clerks, through their judicial role, make a determination as to who is best able to act in the best interest of ward. Clerks use a variety of means by which to gather information to assist them with their decision, including conducting criminal background checks, conducting interviews, reviewing medical records, and examining family dynamics. Clerks need to continue to be allowed discretion to make those decisions appropriately and based on full information, in order to choose whomever they believe is going to take the best care of the ward. Clerks of court are currently working with their local Departments of Social Services to ensure that all private guardianship possibilities are exhausted before appointing a public guardian.

A guardian has tremendous power and authority, whether compensated or not. There is a need to focus on the interplay between the personal decision-making responsibilities of a ward who receives a great number of public service dollars. As a practical matter, any amount of compensation a guardian receives for providing guardianship services is significantly less than the amount of dollars that may be needed for the ward on the service side. In some jurisdictions, there may be a trend to disallow a guardian who is making decisions as to what services are needed and appropriate for the ward to also be a paid provider of those services. Recent case law in the State stands for the proposition that it is not in the best interests of the ward and that there exists an actual or potential conflict of interest when an entity is both providing services and acting as guardian.

On the other hand, there was consensus among the presenters that no one can better serve as guardian than a family member who cares about the ward and has perhaps spent a great deal of his or her life providing for the ward's care. The presenters agreed that not only is any movement towards appointing disinterested third parties and away from private individuals as guardians concerning, but also in some situations where a parent or relative cannot work outside the home because of the needs of their ward, it may be in the ward's best interest for that parent or relative to serve both as the guardian and a paid provider of services. In fact, in situations where, because of the nature of the ward's disability, they need full-time, around-the-clock care, it might be in the ward's best interest for the parent to be a

guardian who receives a monthly stipend as well as a paid service provider, and it might be less expensive for the State.

Conflicts of interest are more likely to arise where money is changing hands and there is no familial or moral obligation towards the ward on the part of the guardian. Clerks, through their judicial role, are charged with the legal responsibility of making a determination as to what is in the best interests of the ward, and thereby need discretion to choose whomever they believe is going to be the best person to serve as guardian and to act in the best interest of ward. Parents and other relatives, as permitted under current law, should continue to be both guardians and paid providers when appropriate, if adequate oversight is present. However, a plan should be in place for an alternate guardianship arrangement in the event an individual guardian of the person becomes unwilling or unable to serve, and such plan should explore all possible alternatives to prevent the appointment of a public guardian in order to ensure the best interests of the ward as well as to safeguard the resources of the State. In addition, a plan should be in place for provision of services by an alternative provider.

#### **RECOMMENDATION 7A: GUARDIAN AS PAID SERVICE PROVIDER**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee direct the Department of Health and Human Services continue utilizing safeguards already in place regarding guardians as paid service providers, and that the Joint Legislative Oversight Committee direct the Division of Aging and Adult Services and/or the Division of Social Services to consult with the clerks of superior court, the LME/MCOs, the North Carolina Bar Association Section on Elder Law, and any other interested groups, to develop a transition plan for when a parent/caregiver is no longer able to provide care or be a guardian, with the specific goal of formulating a plan that will avoid the necessity of making an individual a ward of the State, and to report its findings and recommendations to the Joint Legislative Oversight Committee.

#### **RECOMMENDATION 7B: OVERSIGHT/UTILIZATION OF CARE COORDINATION SERVICES**

The Subcommittee on Public Guardianship, Joint Legislative Oversight Committee on Health and Human Services, recommends the Joint Legislative Oversight Committee direct the Department of Health and Human Services to continue to study whether utilization of care coordination services would provide needed oversight to safeguard against conflicts of interest when guardians serve as paid providers.

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# PROPOSED LEGISLATION

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1 (15) "Ward" means a person who has been adjudicated incompetent or an adult or  
2 minor for whom a guardian has been appointed by a court of competent  
3 jurisdiction."

4 **SECTION 2.** G.S. 35A-1242 reads as rewritten:

5 "**§ 35A-1242. Status reports for incompetent wards.**

6 (a) Any corporation or disinterested public agent that is guardian of the person for an  
7 incompetent person, within six months after being appointed, shall file an initial status report  
8 with ~~the designated agency, if there is one, or with the clerk.~~ The initial status report shall also  
9 be submitted to the designated agency, if there is one. Such guardian shall file a second status  
10 report with the ~~designated agency or the clerk~~ one year after being appointed, and subsequent  
11 reports annually thereafter. The clerk may order any other guardian of the person to file status  
12 reports. If a guardian required by this section to file a status report is employed by the  
13 designated agency, the guardian shall file any required status report with both the designated  
14 agency and the clerk.

15 (a1) Each status report shall include the items outlined below.

16 (1) A report of recent medical and dental examinations of the ward by one or  
17 more physicians and dentists.

18 (2) A report on the guardian's performance of the duties set forth in this Chapter  
19 and in the clerk's order appointing the guardian.

20 (3) A report on the ward's residence, education, employment, and rehabilitation  
21 or habilitation.

22 (4) A report of the guardian's efforts to restore competency.

23 (5) A report of the guardian's efforts to seek alternatives to guardianship.

24 (6) If the guardians in a disinterested public agent or corporation, a report of the  
25 efforts to identify alternative guardians.

26 (7) The guardian's recommendations for implementing a more limited  
27 guardianship, preserving for the ward the opportunity to exercise rights that  
28 are within ward's comprehension and judgment.

29 (8) Any additional reports or information required by the clerk.

30 (a2) The guardian may include in the status report additional information pertaining to  
31 the ward's best interests.

32 (b) Each status report shall be filed under the guardian's oath or affirmation that the  
33 report is complete and accurate so far as he is informed and can determine.

34 (b1) The clerk shall make status reports submitted by disinterested public agents or  
35 corporations available to Director, or the Director's designee, of the Division of Aging and  
36 Adult Services, Department of Health and Human Services. The Director, or the Director's  
37 designee, shall review the status reports in connection with its regular program of oversight for  
38 these categories of guardians.

39 (c) A clerk ~~or designated agency~~ that receives a status report shall not make the status  
40 report available to anyone other than the guardian, the ward, the court, or State or local human  
41 ~~resource services~~ agencies providing services to the ward.

42 (d) The clerk, on his or her own motion, or any interested party may file a motion in the  
43 cause pursuant to G.S. 35A-1207 with the clerk in the county where the guardianship is  
44 docketed to request modification of the order appointing the guardian or guardians or for  
45 consideration of any matters contained in the status report."

46 **SECTION 3.** This act becomes effective October 1, 2014.



