

CHAPTER 8:

Mediation of Adult Guardianship Cases

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8.1

Statutory Authority and Rules

Except as otherwise provided in G.S. 7A-38.3B(b), G.S. 7A-38.3B allows the Clerk to order mandatory mediation of any matter that is within the Clerk’s exclusive and original jurisdiction, including matters regarding the appointment of a guardian for an incapacitated adult pursuant to G.S. Chapter 35A.

G.S. 7A-38.3B specifies the procedures that govern the mediation of guardianship proceedings involving incapacitated adults. These statutory procedures are supplemented by rules adopted by the North Carolina Supreme Court governing the mediation of

guardianship and other matters pending before the Clerk of Superior Court. These rules are available online: www.nccourts.org/Courts/CRS/Councils/DRC/Clerks/Rules.asp.

The following discussion is based on the requirements of G.S. 7A-38.3B and the Supreme Court rules governing mediation of matters before the Clerk.

8.2 Ordering Mediation in Adult Guardianship Cases

A. Clerk's Authority to Order Mediation

The Clerk *may*, on the Clerk's own initiative or in response to a motion requesting mediation filed by a party or other interested person, enter an order requiring mediation of some or all issues related to a proceeding seeking the appointment of a guardian for an incapacitated adult pursuant to G.S. Ch. 35A.

Practice Note: The Clerk is not required to hold a hearing to determine whether mandatory mediation should be ordered in a pending guardianship proceeding.

The decision whether to order mandatory mediation in a pending guardianship proceeding is vested in the Clerk's discretion.

Mandatory mediation of some or all of the issues regarding the guardianship of an allegedly incapacitated adult *may* be appropriate if the respondent or another party or interested person is contesting

- the petitioner's allegations regarding the respondent's incapacity;
- the nature and extent of the respondent's incapacity;
- whether the respondent needs a guardian;
- whether a plenary or limited guardianship is appropriate; or
- who should be appointed as the respondent's guardian.

Mandatory mediation of guardianship matters generally is *not* appropriate with respect to

- uncontested proceedings;
- matters involving only questions of law;
- matters requiring immediate judicial action (such as appointment of an interim guardian);
- cases involving alleged criminal activity or domestic abuse, elder abuse, or substance abuse by a party;
- cases in which a party exhibits volatile or hostile behavior; or
- cases in which the possibility of coercion or intimidation of a vulnerable party exists.

B. Order for Mandatory Mediation in Guardianship Proceedings

If the Clerk determines that mandatory mediation is appropriate with respect to a pending adult guardianship proceeding, the Clerk must enter an order, using form AOC-G-301T,

- requiring that a mediation be held with respect to some or all of the issues in the case;
- establishing a deadline for the selection of a mediator;
- establishing a deadline for completion of the mediation;
- stating the names of the persons and entities who must attend the mediation;
- stating the parties' right to select their own mediator;
- stating the rate of compensation that will be allowed if the parties fail to select a mediator and the mediator is appointed by the court; and
- informing the parties' of their responsibilities regarding payment of the mediator's fee.

Practice Note: An order requiring mediation of an adult guardianship proceeding does not delay other proceedings in the matter unless the Clerk orders otherwise.

C. Motion to Dispense with Mediation

If the Clerk has entered an order requiring mediation of an adult guardianship proceeding, any party, interested person, or fiduciary may file a motion asking the Clerk to dispense with mediation. The motion must state the reasons that relief is sought and be served on the mediator and on all persons who have been ordered to attend the mediation. The Clerk may grant the motion for good cause shown.

D. Voluntary Dismissal After Entry of Order for Mediation

In adult guardianship proceedings seeking an adjudication of a respondent's incapacity, the petitioner may not voluntarily dismiss the proceeding after the Clerk has entered an order requiring mediation.

8.3

Selecting the Mediator

Selection by agreement. The parties involved in an adult guardianship proceeding may select, by agreement, a mediator who has been certified by the Dispute Resolution Commission to mediate estate and guardianship matters.

If the parties select a mediator, the petitioner must file a notice (AOC-G-302T) with the Clerk within the time specified in the Clerk's order for mediation. The notice must state the name, address, and phone number of the mediator and the rate at which the mediator will be compensated.

Certification of mediators for estate and guardianship matters. Approximately 160 persons have been certified to mediate estate and guardianship matters. A listing of persons who have been

certified to mediate estate and guardianship matters is available online: <http://www1.aoc.state.nc.us/mediatorpublic/clerkmenu.do>.

Designation of mediator by Clerk. If the parties in an adult guardianship proceeding fail to agree regarding the selection of a mediator, the Clerk must appoint a mediator who has been certified by the Dispute Resolution Commission to mediate estate and guardianship matters. In making this appointment, the Clerk must, absent good cause, appoint qualified mediators by rotation from a list of certified mediators within the jurisdiction without regard to the mediator's occupation, race, gender, religion, natural origin, or disability, and without regard to whether the mediator is an attorney.

Disqualification of mediator. Any person who has been ordered to attend a mediation may move that a mediator who has been selected by the parties or appointed by the Clerk be disqualified for cause from mediating the case. The Clerk may grant such a motion for good cause shown.

8.4

Responsibilities of Respondent's Counsel or *Guardian ad Litem*

If the petitioner in an adult guardianship proceeding is represented by counsel, the attorney who is retained by a respondent or appointed as the *guardian ad litem* for a respondent in an adult guardianship proceeding and the petitioner's attorney must discuss with each other as soon as practicable the means available to the parties to resolve their disputes through mediation and other settlement procedures without resort to a contested hearing before the Clerk. The respondent's attorney or *guardian ad litem* and petitioner's attorney also must discuss with each other which neutral third party would best suit their clients and the matter in controversy.

If the Clerk orders mandatory mediation of an adult guardianship proceeding, the respondent's attorney or *guardian ad litem* must attend the mediation hearing and represent the respondent's interests in the mediation.

8.5

The Mediation Process

A. Location of Mediation Hearings

The mediation may be held at any location agreed upon by the mediator and all of the persons who have been ordered to attend the mediation. In the absence of such an agreement, the mediator must notify the parties that the mediation will be held in the courthouse or another public or community building in the county where the matter is pending.

B. Date and Time of Mediation Hearings

Scheduling. The mediator must try to schedule the mediation at a time that is convenient to all of the participants. In the absence of an agreement by the participants regarding the date and time of the mediation, the mediator shall select a date and time for the mediation.

Notice. The mediator must notify the parties of the date and time for the mediation and conduct the mediation before the date specified in the Clerk's order requiring mediation.

Extension and continuances. The mediator or any person ordered to participate in mediation may request the Clerk to extend the deadline for completion of mediation. The request to extend the deadline for completing the mediation must state the reasons therefor and be delivered to the mediator and all persons who have been ordered to participate in the mediation. The Clerk may grant the request without hearing by setting a new deadline for completion of the mediation. Notice of the Clerk's decision must be filed with the court and delivered by the person who made the request to the mediator and all persons who have been ordered to participate in the mediation.

The parties involved in the mediation of an adult guardianship proceeding and their attorneys must promptly notify the mediator of any significant problems they may have with the dates set for mediation sessions and must keep the mediator informed as to such problems as may arise before a scheduled mediation session.

After mediation has been scheduled for a specific date, a person ordered to participate in mediation may not unilaterally postpone the mediation. A mediator, however, may postpone a mediation session upon the request of a participant, notice to other participants, and a finding of good cause beyond the control of the moving party. A mediator also may postpone a scheduled mediation session with the consent of all of the participants.

Recesses. The mediator may recess the mediation at any time and may set the time for reconvening the mediation. Notice of the date and time for reconvening the mediation is not required if the time for reconvening the mediation is set before the mediation is recessed.

C. Attendance and Participation at Mediation Hearings

Persons required to attend and participate in mediation. The Clerk's order requiring mediation of an adult guardianship proceeding must specify the persons who are required to participate in mediation. The following persons, and their attorneys, may be ordered to attend and participate in the mediation of an adult guardianship proceeding:

- the named parties to the proceeding;
- other persons or entities who have a right, interest, or claim in the matter;
- the respondent's next of kin;
- other persons or entities that the Clerk deems necessary for resolution of the matter;
- other persons or entities identified by the Clerk as possessing useful information about the matter and whose attendance would be beneficial to the mediation;
- fiduciaries of named parties, interested persons, or nonparty participants.

All persons and entities who are ordered to attend and participate in mediation of an adult guardianship proceeding and the lawyers who represent those persons and entities must attend and participate in the mediation unless excused by the Clerk or by agreement of the mediator and all parties involved in the mediation.

Practice Note: The mediator may allow persons other than those specified in the Clerk's order to attend and participate in the mediation of an adult guardianship proceeding.

Sanctions for failure to attend or participate in mediation. The Clerk, after notice and hearing, may enter an order imposing sanctions on any person, entity, or lawyer who fails, without good cause, to attend and participate in the mediation of an adult guardianship proceeding as required by the Clerk's order. These sanctions may include an appropriate monetary sanction, including but not limited to, payment of fines, payment of attorney's fees, payment of mediator fees, and payment of expenses and loss of earnings incurred by persons attending the mediation. A person seeking sanctions against another person must do so in a written motion stating the grounds therefor and the relief sought. The Clerk also may initiate a sanction proceeding on the Clerk's own motion by entry of a show cause order.

D. Authority and Duties of Mediator

The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct must be in accordance with the standards of conduct for mediators promulgated by the North Carolina Supreme Court. The mediator must act impartially and advise all participants of any circumstances bearing on the mediator's possible bias, prejudice, or partiality.

Private communications. The mediator may communicate privately with any participant or counsel prior to, during, or after the mediation. The mediator, however, must disclose to all participants at the beginning of the mediation any prior private communications between the mediator and a participant or counsel. The mediator also must disclose to participants at the beginning of the mediation the circumstances under which the mediator may meet and communicate privately with participants or other persons and whether, or under what circumstances, communications with the mediator will be held in confidence.

E. Mediated Agreements

No one participating in the mediation of an adult guardianship proceeding is required to make a settlement offer or demand that is contrary to the participant's best interests.

If an agreement is reached upon some or all of the issues involved in the mediation of an adult guardianship proceeding, the participants must reduce its terms to writing and sign the agreement along with their counsel. These agreements must include the following language in a prominent place in the document: "This agreement is not binding on the Clerk but will be presented to the Clerk as an aid to reaching a just resolution of the matter."

F. Impasse in Mediation

The mediator has a continuing duty to determine whether an impasse exists. To that end, the mediator must inquire of and consider the desires of the participants to cease or continue the mediation. If the mediator determines that an impasse exists, the mediator must terminate the mediation.

G. Reporting the Results of Mediation

The mediator must file a report (AOC-G-303T) with the Clerk within five days of completion of the mediation stating whether the mediation resulted in a proposed settlement or an impasse. If the participants reached an agreement, the mediator's report must include a copy of the agreement.

The mediator's report must include a report of the time spent by the mediator in connection with the mediation and the fees charged for mediation.

8.6

Consideration of Mediated Agreements by the Clerk

An agreement or settlement reached by the parties in the mediation of an adult guardianship proceeding is not binding on the Clerk or on the parties. The agreement, however, may be offered into evidence at the hearing of an adult guardianship matter and may be considered by the Clerk for the purpose of reaching a just and fair resolution of the matter.

Evidence of statements made and conduct occurring in the mediation of an adult guardianship proceeding in which an agreement is reached is admissible in a hearing before the Clerk in the pending proceeding. G.S. 7A-38.3B(g)(3).

Practice Note: Evidence of statements made and conduct occurring in the mediation of an adult guardianship proceeding is *not* admissible in a hearing before the Clerk in the pending proceeding if the mediation results in an impasse.

8.7

Cost of Mediation

When a mediator is selected by the parties, the mediator's compensation is determined by an agreement between the mediator and the parties.

When a mediator is appointed by the Clerk, the mediator's compensation is determined by the Supreme Court's rules governing mediation of matters before the Clerk.

In mediations involving adult guardianship proceedings, the mediator's fee must be paid by the participants in shares as determined by the Clerk. The Clerk, however, may not require a person to pay a share of the mediator's fee if the Clerk determines that the person

is indigent. Nor may the Clerk assess a share of the mediator's fee against the estate of an incapacitated adult, a fiduciary, or an interested person unless the Clerk enters an order making specific written findings of fact justifying the taxing of costs.