



The Guardian of Last Resort

Author : Meredith Smith

Categories : [Guardianship](#)

Tagged as : [Clerk of Superior Court](#), [department of social services](#), [Incompetency public agent guardian](#)

Date : February 3, 2016

After receiving a report and finding a need for protective services, the county department of social services (DSS) requests the DSS attorney file a petition with the court to adjudicate Jane Doe an [incompetent adult](#) under G.S Chapter 35A. The matter is heard by the clerk of superior court. DSS, as the petitioner, has the burden of proof. Through the presentation of testimony and other evidence at the hearing, including a [multidisciplinary evaluation](#) ordered by the clerk and prepared by DSS, the clerk determines that there is clear, cogent and convincing evidence that Jane is incompetent and that her best interests will be served by appointing DSS as her guardian of the person.

What analysis must the clerk apply before appointing DSS as guardian of the person?

In North Carolina, DSS is often referred to as the “guardian of last resort.” This is because our statutes direct the clerk to consider appointing a guardian in a certain order of priority. [G.S. 35A-1214](#).

1. First, the clerk must consider **an individual recommended by a will or other writing**. Any parent may recommend the appointment of a guardian by will for an unmarried child adjudicated incompetent. [G.S. 35A-1212.1](#). The clerk is not bound by the writing, but the recommendation is a strong guide for the clerk in appointing a guardian. *Id.*
2. Next, the clerk must consider an **individual**, such as a family member of the ward or other person qualified to serve. [G.S. 35A-1214](#).
3. If there is no qualified individual, the clerk must then consider appointing a **corporation**.
4. Finally, **once diligent efforts have failed** to produce an appropriate individual or corporation to serve, the clerk may appoint the **disinterested public agent** as guardian, which is the director or assistant director of a county DSS. [G.S. 35A-1202\(4\)](#).

Notwithstanding the priority set forth in the statute, the clerk is **always** charged with basing the appointment of the guardian on the best interests of the ward. *Id.*

In practice, DSS is typically appointed as a **guardian of the person (GOP)** (i) when there is no family member or other qualified individual available to serve as GOP, or (ii) when there is significant family conflict such that the appointment of any family member as GOP could have detrimental effects on the ward. A GOP is a guardian appointed solely for the purpose of performing duties related to the care, custody, and control of the ward. [G.S. 35A-1202\(10\)](#). This is opposed to a guardian of the estate who is appointed to manage property and business affairs of the ward and a general guardian who is appointed to do both. [G.S. 35A-1202\(7\) and \(9\)](#). Infrequently, DSS may be appointed as a general guardian or guardian of the estate. This post focuses on an appointment of DSS as GOP as that is the most common appointment for DSS.

Is DSS the only available public option?

Presently in NC, the director or assistant director of DSS is the only official authorized to serve as the “disinterested public agent” guardian. [G.S. 35A-1202\(4\)](#). Prior to 2012, the statutory definition of disinterested public agent included not only DSS but also other state and local human services agencies such as public health departments and area

mental health authorities (now known as local management entities/managed care organizations ([LME/MCOs](#))). The General Assembly enacted legislation eliminating these other agencies from the list of potential guardians, leaving DSS as the only option. A previous [blog post](#) by my colleague, Aimee Wall, discusses the reasons behind these changes.

At the time that legislation was enacted, over 1,000 people had to be transitioned from one guardian to another. To accommodate this influx, the Division of Aging and Adult Services (DAAS) of NC Department of Health and Human Services (DHHS), which oversees the county DSS guardianship programs, entered into contracts with corporations to provide public guardianship services for some of these wards. Today, nine corporations serve over 1,300 wards using public dollars under the DHHS contract in addition to the wards served by DSS.

Note that a disinterested public agent guardian is different than a public guardian. Article 11 of G.S. Chapter 35A authorizes the clerk to appoint a public guardian to serve in the county for a term of eight years. [G.S. 35A-1270](#). A public guardian is typically appointed as guardian of the estate when a ward needs assistance managing or disposing of assets and no one else is available or qualified to serve. Not every clerk appoints a public guardian because there is generally no separate source of funds to pay bond premiums. In addition, commissions from the ward's estate are typically negligible. In practice, some clerks appoint private attorneys on a case by case basis as a guardian of the estate to handle low asset cases. [See 2 Joan G. Brannon & Ann M. Anderson, North Carolina Clerk of Superior Court Procedures Manual 86.59 \(2012\)](#).

As mentioned above, DSS is most frequently appointed to serve as GOP and is the only available option as the disinterested public agent guardian. The GOP is not entitled to receive a fee for services and time carrying out his or her duties, but he or she is entitled to reimbursement for reasonable expenses incurred. [G.S. 35A-1241\(b\)](#). Therefore, when a family member or other individual is unwilling or unqualified to serve, DSS (or a corporation through a DHHS or county contract) is often the only viable option for appointment as GOP.

Does DSS have to accept the appointment by the clerk?

If a person is adjudicated incompetent in NC and the clerk appoints DSS as the guardian, DSS is required to serve and may not decline the appointment. [G.S. 35A-1213\(d\)](#). If DSS believes that there is a conflict of interest or service as guardian may not be in the ward's best interest, DSS may bring the matter to the attention of the clerk by filing a motion in the cause and seek the appointment of a different guardian. *Id.* However, with limited exception set forth in [G.S. 35A-1213\(f\)](#), the fact that a disinterested public agent provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian. [G.S. 35A-1202\(4\)](#).

In some states, such as Florida, public agent guardians may only serve a fixed number of wards and waitlists are common for public guardianship services. [See Pamela B Teastor, et. al., Wards of the State: A National Study of Public Guardianship, pg. 115 \(March 31, 2005\)](#). NC has not imposed such a cap on the number of wards DSS may serve. This policy has the benefit of ensuring that wards are not left in limbo waiting for guardianship services. However, it can also result in overburdening the available public agent guardians where resources are not allocated to keep up with demand. A 2012 report published at the request of the NC DSS Director's Association Adult Service Committee recommended a ratio of one full-time DSS staff member for every 22 wards served. A later December 2013 DAAS report concluded that an additional 33 full-time employees are needed across the state to meet current needs at the recommended ratio.

Does DSS have to post a bond?

In the guardianship context, a bond is typically required when a guardian of the estate or general guardian is appointed. [G.S. 35A-1230](#). The purpose of the bond is to protect the ward against financial loss in the event the guardian fails to properly exercise his or her duties. However, a bond is not required when a clerk appoints someone as guardian of the person that is a resident of NC. *Id.*

An exception to this rule is when DSS is appointed as guardian of the person. DHHS must require or purchase bonds for all disinterested public agent guardians, regardless of whether they serve as general guardian, guardian of the estate, or guardian of the person. [G.S. 35A-1239](#). In practice, DHHS has purchased a blanket bond covering all disinterested public agent guardians. [See DAAS Guardianship Services Manual, Sec. 6640. 3\(c\)](#).

The clerk does not have a role in setting a bond amount or confirming bond coverage where DSS serves as guardian of the person. *Id.* The duty falls on DHHS and the DSS as the guardian to ensure each appointment is covered by the blanket bond. Per the DAAS Guardianship Manual, after DSS is appointed as guardian of the person by the clerk, DSS is required to send notice of appointment and request for bond coverage to DHHS using form [DHHS-7016](#).

Is DSS subject to liability for actions as guardian of the person on a ward's behalf?

In addition to prescribing the powers and duties of the guardian of the person, Chapter 35A also sets forth limits on the liability of any individual, corporation, or public agent serving as guardian of the person. [G.S. 35A-1241](#). If a guardian of the person acts within the limits imposed by (a) **Article 8 of Chapter 35A**, and (b) **the clerk's order** appointing the guardian, the statute provides that the guardian will not be held liable for damages to the ward or the ward's estate that result from the following:

1. The authorization, consent, or approval of legal, psychological, or other professional care, counsel, treatment, or service for the ward, if damages result from negligence or other acts of a third person; and
2. The authorization of medical treatment or surgery for the ward, if the guardian acts in good faith and is not negligent.

Note, included within Article 8 of Chapter 35A is the **duty of DSS to file status reports with the clerk that comply with [G.S. 35A-1242](#)** within six months after being appointed and annually thereafter.

Notwithstanding the protections afforded to the guardian of the person under G.S. 35A-1241, the GOP ***may petition the clerk for the clerk's concurrence*** in any consent or approval given by the guardian on the ward's behalf that may be required or in the ward's best interests. [G.S. 35A-1241\(a\)\(3\)](#). This includes any consent or approval for the purpose of enabling the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service. *Id.* However, the guardian may not consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk. *Id.*

If the clerk does not concur in the consent or approval, the clerk could remove guardian and appoint a new guardian. [G.S. 35A-1290](#) (giving the clerk authority to remove the guardian and to enter orders for the better care and maintenance of wards); [In re Guardianship of Thomas, 183 NC App 480 \(2007\)](#) (rejecting the argument that a clerk may only remove a guardian for cause and holding that the clerk has the permissive authority to remove a guardian and enter orders to ensure the better care and maintenance of the ward under G.S. 35A-1290(a)).

The Bigger Picture: The Role of DSS throughout the Proceeding and after Appointment

DSS serves an important role in the NC guardianship system as the disinterested public agent guardian. Service as guardian of the person is a role that many DSS directors and staff see as an important part of their mission. As was the case with fictional Jane at the start of this post, DSS may conduct an adult protective services investigation if they receive a report regarding an abused or exploited disabled or older adult. [See Aimee Wall, Financial Exploitation of Older Adults and Disabled Adults: An Overview of North Carolina Law \(Oct. 2014\)](#). After finding a need for protective services, DSS may then file a petition for the person to be adjudicated incompetent. [G.S. 35A-1105](#). DSS may be ordered by the clerk to prepare a multidisciplinary evaluation (MDE) as a designated agency, which is a key tool used to assess competency during the competency adjudication hearing. [G.S. 35A-1101\(4\) and \(14\)](#). As described herein, DSS may then be appointed as guardian for the ward.

It is clear that the clerk is directed to consider DSS as a guardian of last resort in all cases. However, because DSS is the only remaining option as the public agent guardian, it is important to recognize the complex and dynamic role DSS may play prior to, during, and after an incompetency and guardianship proceeding before the clerk. Feel free to contribute your thoughts and feedback below.