

Chapter 35A Guardianship Trumps Chapter 50 Custody

[G.S. Chapter 35A](#) authorizes the clerk of court to appoint a general guardian or guardian of the person for a child who has no natural guardian. A biological or adoptive parent is a natural guardian of a child, so these guardianships are an option only for children whose parents are both deceased or parental rights have been terminated (either both parents' rights have been terminated, or one parent is deceased and the other parent's rights have been terminated). [See G.S. 35A-1224\(a\)](#). However, orphaned children also are often the subject of [Chapter 50](#) custody actions. What happens if a child is the subject of both proceedings? Can both move forward or does one preclude or take priority over the other? In [Corbett v. Lynch, \(Dec. 20, 2016\)](#), the North Carolina Court of Appeals held that the appointment of a general guardian or guardian of the person renders pending issues of Chapter 50 custody moot. In supporting its holding, the court indicates that a [Chapter 35A](#) guardianship creates a relationship between the child and the guardian that is more comprehensive than a relationship between a child and a custodian designated pursuant to Chapter 50.

[Corbett v. Lynch](#)

The biological mother of the two minor children involved in this case died in 2006. Their father later married Ms. Corbett, referred to by the court of appeals as the “stepmother.” Tragically, father was killed in 2015. Father’s will designated the children’s aunt, Ms. Lynch, and her husband as testamentary guardians of the two children, but stepmother filed a petition for guardianship of the children pursuant to Chapter 35A. In addition, the day after filing the guardianship petition, stepmother filed a Chapter 50 custody action and obtained an ex parte custody order granting her temporary custody of the children. Aunt thereafter filed an application for guardianship as well as an Answer and counterclaim for custody in the Chapter 50 proceeding.

The clerk of superior court granted general guardianship to Ms. Lynch and her husband. Following the entry of the guardianship order, the district court dismissed stepmother’s custody case. Stepmother appealed the dismissal of the custody case, arguing that the district court erred in determining it did not have jurisdiction to proceed after the clerk entered the guardianship order.

Chapter 35A Guardianship

[GS 35A-1221](#) allows “any person” to file an application with the clerk of superior court requesting the appointment of a guardian of the person or a general guardian for any minor who does not have a natural guardian. The clerk conducts a hearing to decide whether appointment of a guardian is required and if so, considers the child’s best interest to determine who the guardian or guardians should be. Once guardianship is ordered, the clerk retains jurisdiction to enforce compliance with all guardianship provisions, to resolve disputes between guardians, and to remove and replace guardians if necessary. [G.S. 35A-1203](#). In addition, as the court of appeals in *Corbett* noted in a footnote, the clerk has authority to enter a temporary, *ex parte* order when “an emergency exists which threatens the physical well-being of the ward or constitutes a risk of

substantial injury to the ward's estate." [GS 35A-1207](#).

In [Corbett](#), the court of appeals affirmed the trial court's dismissal of stepmother's custody case, holding that "the appointment of a general guardian by the clerk of superior court in the [Chapter 35A](#) guardianship proceeding rendered Stepmother's Chapter 50 custody action moot" because an award of general guardianship "necessarily includes physical custody of the minor child." See [GS 35A-1241\(a\)\(1\)](#)(a general guardian or guardian of the person is entitled to custody of the child).

Further, the court implies without specifically stating that a [Chapter 35A](#) general guardian or guardian of the person of a minor child takes on the legal role of a child's parent who has a "constitutionally-protected right to exclusive custody, care and control of [his or her] children." These parental rights include but are not limited to the right to physical custody of the child.

The court of appeals quoted the Supreme Court of Rhode Island to explain the relationship between guardianship and custody:

"Permanent custody, so called, with its attendant responsibilities, is an incident of guardianship and parents are the natural guardians of their children... Where, as here, a child has been orphaned, the appointment of a guardian supersedes that of a custodian since the latter is contained within the former."

Petition of Loudin, 219 A.2d 915, 917-18 (1966).

What is the effect of a guardianship on an existing Chapter 50 custody order?

The court in [Corbett](#) held that there was no reason to go forward with the pending custody case because the issue of who should have physical custody of the child had been resolved by the guardianship order making the pending custody case "moot." However, the court also held that a general guardianship or guardianship of the person supersedes any existing permanent custody order. The court stated:

"our [guardianship] statutes provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person: Chapter 35A allows for an eligible party to obtain guardianship of a minor child with no living parents even if the child's custody has *already been resolved* by the district court in a Chapter 50 proceeding." (emphasis in original)

As support for this conclusion, the court cited [G.S. 35A-1221\(4\)](#) which requires that an applicant for guardianship "include a copy of any ... custody order" for the clerk's consideration in making a decision about guardianship. The court reasoned that this provision makes it clear that the legislature intended for guardianship orders to replace any existing custody order.

Does the entry of a guardianship preclude any future custody proceeding pursuant to

Chapter 50?

The answer appears to be yes. As previously stated, [Chapter 35A](#) provides that once a guardianship is entered, the clerk retains jurisdiction to enforce or modify a guardianship and to resolve all disputes between guardians. In [McKoy v. McKoy, 202 N.C. App. 509 \(2010\)](#), the court of appeals held that the parents of a disabled adult child who had been appointed general guardians of the child could not proceed with a GS 50 custody proceeding to resolve their dispute over the allocation of physical custody of the child between the two of them. According to the court in [McKoy](#), the clerk retained exclusive jurisdiction to “determine disputes between guardians.” In an even more broad statement, the court in [Mckoy](#) held that, at least in the case of a disabled adult child, the district court has no jurisdiction to determine custody of the child once the clerk has entered a guardianship order.