

Temporary Changes to Service on the Respondent in Incompetency Proceedings

A heightened level of service is required on a respondent to an incompetency proceeding in North Carolina. [G.S. 35A-1109](#) requires copies of the petition ([SP-200](#)) and the notice of hearing ([SP-201](#)) to be personally served on the respondent (the alleged incompetent adult). As my colleague, Ann Anderson, discussed in an [earlier post](#), because the use of private process servers is very limited in North Carolina, personal service is completed on the respondent by the sheriff in most cases. Under the version of G.S. 35A-1109 in effect prior to May 4, 2020, service was not proper if the notice and petition were sent by FedEx, UPS, or regular mail or left with a family member at the respondent's home or with a caregiver at a facility where the respondent resides. This heightened requirement of service on the respondent ensures that the respondent knows of the proceeding and knows the location, date, and time of the hearing. It reflects the significant impact an adjudication of incompetency has on a person's rights to make decisions about his or her life and property.

As a result of the public health crisis related to COVID-19, many nursing homes, long term care homes, and other facilities are restricting visitors. [Current CDC guidance](#) is that facilities should restrict visitation except for certain compassionate (i.e. end of life) care situations. In some cases, this has prevented the sheriff from entering a facility to serve the respondent with copies of the petition and notice of hearing. Absent service on the respondent, the court does not have jurisdiction and is not able to proceed with the case, including the appointment of an interim guardian in an emergency. (For more on interim guardianship, refer to this [blog post](#).)

In response to these concerns about service, the NC General Assembly passed, and Governor Cooper signed, legislation effective Monday, May 4, 2020 that modifies the service requirements in these proceedings. The changes are found in Section 4.11(a) of Senate Bill S704, which became [Session Law 2020-3](#). This bill adds a new subsection (b) to G.S. 35A-1109 and states:

"(b) In the event that personal service is not possible because the respondent resides in a facility that restricts visitors due to a public health emergency, the respondent may be served by the sheriff leaving copies of the petition and initial notice of hearing at the facility with a person employed by the facility who is apparently in charge of the office or who has apparent authority to receive documents intended for residents. The facility employee shall, as soon as practicable, present the copies to the respondent. Proof of service on the respondent shall be by return of service filed with the clerk showing the respondent was personally served or copies were left with the facility as described in this subsection."

A few things to keep in mind about these revisions.

1. **Expiration date.** They are not permanent. These changes expire August 1, 2020.

2. **Definition of facility.** Facility is not defined by the new law. Presumably it would include nursing homes, adult care homes, long term care facilities, rehabilitation facilities, group homes, and any other communal setting where a respondent resides.
3. **Proof of service.** Prior to this change, to show completed service on the respondent, the sheriff typically completes side 2 of the Notice of Hearing (SP-201) by checking the box that the respondent was served by delivering a copy of the notice and the petition to the respondent at an address completed by the sheriff on the form. The SP-201 form does not contain space for the sheriff to identify that the respondent was served by leaving copies with a person of authority at the facility. If the sheriff completes service in accordance with this subsection, it would be appropriate for the sheriff to modify the form to make that clear and to indicate the name and title of the person who received the documents at the facility on the form or an addendum to the form.
4. **Person with apparent authority to receive documents.** It is important to note that the sheriff may not leave copies with any person at the facility. The person must be “apparently in charge of the office” or have “apparent authority to receive documents intended for residents.” It would not be appropriate, for example, for the sheriff to leave the copies with maintenance staff who happen to be entering the facility at the time the sheriff arrives at the facility to complete service or a nurse assistant who does not typically receive documents intended for residents.
5. **Role of the guardian ad litem (GAL) attorney.** When a petition for adjudication of incompetency is filed, the clerk appoints a GAL attorney to represent the respondent. [G.S. 35A-1107\(a\)](#). The respondent may hire his or her own counsel and, if the respondent chooses to do so, the court then may discharge the GAL (although in practice this rarely happens). [G.S. 35A-1107\(a\)](#). It is always important for the GAL, as part of the representation of the respondent, to confirm service was completed on the respondent and the respondent had adequate notice of and time to prepare for the hearing, including the opportunity to hire an attorney. If the GAL sees that service was completed on the respondent by leaving copies with a person at the facility where the respondent resides under the new G.S. 35A-1109(b), the GAL’s role becomes even more important in ensuring that the respondent actually received copies of the petition and notice. The GAL may consider requesting a continuance if there are concerns about service to allow time for service to be completed on the respondent. If the GAL has problems communicating with or visiting the respondent in the facility, my colleague, Timothy Heinle, has a great [blog post](#) here on how to address those concerns.
6. **Role of the court.** The respondent has a right to attend the hearing, but the respondent’s presence is not required. If the respondent is not at the hearing, before proceeding the court should examine the proof of service (often, the SP-201 form) to confirm proper service on the respondent. The court may want to ask questions of the GAL to find out more information related to the details surrounding service and if there are concerns related to proper service on the respondent, the court may continue the hearing to allow time for proper service.

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What are your thoughts about this new provision in G.S. 35A-1109? Feel free to reach out to me with them at meredith.smith@sog.unc.edu.