

You Have a Right to Appeal My Incompetency?

**** UPDATE: On October 4, 2016, the N.C. Court of Appeals published a decision, [In re Dippel](#), in which the court applied G.S. 35A-1115 and G.S. 1-301.2 to hold that an aggrieved party has the right to appeal from the clerk's order dismissing an incompetency proceeding. In that case, the court determined that the petitioner was an aggrieved party and could appeal from the clerk's order. However, the court did not provide any analysis as to how the petitioner is aggrieved by the clerk's order dismissing the incompetency proceeding pertaining to the respondent's competency. The opinion therefore provides limited guidance going forward as to whether a person that is entitled to notice and is not the petitioner has a right to appeal the clerk's order dismissing the incompetency proceeding as an aggrieved party. ****

Bob and Mary have been married for 60 years. They live at home together but recently Mary's health has started to decline significantly. Due to a concern over Mary's ability to care for herself, a friend of Mary's makes a report to the county department of social services (DSS). After an investigation, DSS decides to file a petition to adjudicate Mary incompetent and an application to have a guardian appointed on her behalf. DSS sends notice of the proceeding to both Bob and Jane, their daughter, as Mary's next of kin. After a hearing, the clerk of superior court finds that Mary is [incompetent](#) and appoints Jane as her general guardian.

Bob comes to you as his attorney and states that he wants to appeal the clerk's decision. Does he have standing to appeal?

Two Orders - Two Separate Proceedings

It is important to first identify which order Bob wants to appeal. This is because the adjudication of incompetency and appointment of a guardian are two separate proceedings resulting in two different orders.

The incompetency proceeding is initiated by a petition filed by a petitioner against a respondent, who is the alleged incompetent person. [G.S. 35A-1105](#). The proceeding is treated as a special proceeding. [In re Winstead, 189 N.C. App. 145, 146 \(2008\)](#). At the hearing, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that the respondent is incompetent. [G.S. 35A-1112](#).

In contrast, the guardianship proceeding is initiated by an application and is in the nature of an estate matter. [Winstead](#), 189 N.C. App. at 151. During the guardianship proceeding, the court's role shifts to a more protective/oversight posture that considers the respondent's best interests. The court has the duty to inquire and receive evidence necessary to determine the needs and best

interests of the respondent. [G.S. 35A-1212\(a\)](#). This shift in the court's role from adjudicating incompetency to determining best interests is similar to the two stage process of adjudication and disposition that is required in an abuse, neglect, dependency or termination of parental rights case.

Given the overlap in testimony and other evidence, some clerks will often hear the two matters simultaneously. However, because the clerk's duty changes between the two proceedings and an determination of incompetency must occur before a guardian may be appointed, some clerks prefer to hear the incompetency matter first before proceeding to the question of guardianship.

Regardless of whether the clerk hears the matters simultaneously or sequentially, if the clerk finds that a respondent is incompetent or incompetent to a limited extent, as was the case with Mary, the clerk enters two orders: an order adjudicating incompetence and a second order appointing a guardian. Whether someone has a right to appeal depends, in part, on what order the person is challenging.

Appeal of the Incompetency Order

After hearing the evidence on incompetency, the clerk may enter an order that:

- The respondent is incompetent or incompetent to limited extent, or
- The petitioner failed to meet the requisite burden of proof and the proceeding is dismissed.

[G.S. 35A-1112](#). Typically, the clerk uses AOC form [SP-202](#), which is the Order on Petition for Adjudication of Incompetence. The appeal of the order on incompetency is to superior court for a trial de novo. [G.S. 35A-1115](#). The appellant has 10 days from the entry of the clerk's order on incompetency to file a notice of appeal. [G.S. 1-301.2\(e\)](#).

1. Order Respondent is Incompetent or Incompetent to a Limited Extent.

If the clerk orders that the respondent is incompetent or incompetent to a limited extent, the **respondent** has the right to appeal. In addition, **any person entitled to notice of the proceeding also has standing to appeal as an interested party**. See In re Ward, 337 N.C. 443 (1994); In re Winstead, 189 N.C. App. 145 (2008) (holding the more specific G.S. 35A-1115 is the controlling statute regarding the appeal of an order adjudicating incompetency over the more general G.S. 1-301.2). This includes (a) next of kin, (b) any person designated by the clerk to receive notice, and (c) a party to a lawsuit where the determination of incompetence may effect the tolling of an otherwise expired statute of limitations. Ward, 337 N.C. at 447; [G.S. 35A-1109](#).

Because Bob is entitled to notice as a next of kin under [G.S. 35A-1109](#), he has the right to appeal the order adjudicating Mary incompetent under [G.S. 35A-1115](#). Winstead, 189 N.C. at 150. This is despite the fact that Bob was neither the petitioner nor the respondent in the incompetency proceeding and may not have the right to present evidence on the issue of incompetency without authorization from the court. [G.S. 35A-1112\(b\)](#) states that "[t]he petitioner and the respondent are

entitled to present testimony and documentary evidence...and to examine and cross-examine witnesses at the hearing on the [incompetency] petition.” In holding that an interested party entitled to notice has a right to appeal, the court in Ward and Winstead did not squarely address the right of such a party to present evidence in the original incompetency proceeding in light of G.S. 35A-1112(b). The court in Ward stated in dicta that an interested party after a motion and order for relief from judgment under Rule 60(b)(6) of the NC Rules of Civil Procedure has the right to offer evidence and contest the incompetency proceeding. 337 N.C. at 448.

2. Order Dismissing the Proceeding.

It is less clear who has the right to appeal if the clerk enters an order dismissing an incompetency proceeding. The facts in both Ward and Winstead dealt with the appeal of an order adjudicating incompetence and neither court directly addressed whether the petitioner or an interested party would have standing to appeal the clerk’s order of dismissal. Both cases discussed [G.S. 35A-1115](#), which addresses an appeal from the clerk’s “order adjudicating incompetence.” Both G.S. 35A-1115 and Article 1 of G.S. Chapter 35A are silent regarding a dismissal of the proceeding.

Although G.S. 35A-1102 provides that Article 1 of Chapter 35A sets forth the exclusive procedure for adjudicating a person to be an incompetent adult, NC appellate courts have looked to G.S. 1-301.2 to provide guidance where Article 1 is silent. Winstead, 189 N.C. App. at 147. [G.S. 1-301.2](#) applies to special proceedings and provides that “a party aggrieved by an order or judgment of a clerk” may appeal for a hearing de novo. “A ‘party aggrieved’ is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court.” Selective Ins. Co. v. Mid-Carolina Insulation Co., Inc., 126 N.C. App. 217, 219 (1997).

It is open to interpretation whether Bob, as an interested party entitled to notice, or even DSS as the petitioner would qualify as an aggrieved party with a right to appeal a dismissal of the proceeding related to Mary’s competency. Notwithstanding a dismissal by the court, Bob, DSS, or any other person could file a new petition at a later date based on new facts and circumstances on the issue of Mary’s incompetency. [G.S. 35A-1105](#).

Appeal of the Guardianship Order

1. Order Appointing a Guardian

After hearing the evidence on guardianship, the clerk shall enter an order that, in part, sets forth the name of the person or entity appointed to fill the guardianship. [G.S. 35A-1215](#). Typically, the clerk uses AOC form [E-406](#), which is the Order on Application for Appointment of Guardian. The appeal of the order on guardianship is on the record to superior court. [G.S. 1-301.3](#). The appellant has 10 days from the entry of the clerk’s order on guardianship to file a notice of appeal. *Id.*

2. Right to Appeal Guardianship Order

The right to appeal a guardianship order depends on whether the person is (i) a party to the guardianship proceeding, and (ii) an aggrieved party. Winstead, 189 N.C. App. at 151.

The **parties** to the guardianship proceeding include the petitioner, the respondent, as well as any person or entity that filed an application to be the respondent's guardian. *Id.*

An **aggrieved party** has the right to appeal the guardianship order pursuant to G.S. 1-301.3(c), which applies to appeals from estate matters determined by the clerk. In applying G.S. 1-301.3(c) the court in Winstead held that a husband, who files an application to be his wife's guardian, does have standing to appeal the appointment of another person as her guardian. In that case, the husband and wife, like Bob and Mary, had been married and lived together for 60 years. In addition, the petitioner conceded that the husband was possibly aggrieved by the appointment of someone other than him as his wife's guardian. Based on the application of Winstead, Bob would have standing to appeal the appointment of Jane as Mary's guardian, provided that he filed an application to be Mary's guardian.

It is important to note that the clerk should always accept for filing a notice of appeal presented by any person absent a gatekeeper order restricting the authority of that person to file an appeal with the court. The discretion to determine whether a party has the right to appeal either order of the clerk lies with the superior court judge in the first instance and the appellate courts after that.