

Incompetency and Guardianship
NC Supreme Court and NC Court of Appeals Published Case Summaries
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Removal of the Guardian of the Estate

[In re Estate of Skinner, N.C. , 804 S.E.2d 449 \(2017\) \(with dissent\)](#)

The NC Supreme Court held that the NC Court of Appeals erred in reversing the trial court's order removing a guardian of the estate (GOE) and trustee under a special needs trust (SNT) for breach of fiduciary duty. Respondent was adjudicated incompetent in 2010, and after her subsequent marriage, her husband was appointed guardian. After Respondent's mother died in 2012, one of her siblings petitioned to be GOE, as Respondent was entitled to an inheritance. After hearing, the clerk appointed Respondent's husband as GOE, and directed him to post a bond and to establish an SNT, which he did. A few months after assets were distributed and placed in the trust, Respondent's siblings petitioned the court to remove Respondent's husband as trustee, on the basis he had not complied with reporting and accounting obligations. After a hearing, the clerk entered an order removing the husband as trustee and as GOE, after determining that he had mismanaged assets, converted assets to his own use, and breached his fiduciary duty.

The trial court affirmed the clerk's order on appeal, and the matter was appealed to the court of appeals, which reversed in a divided opinion. The court of appeals majority concluded that the clerk's order of removal contained findings not supported by evidence and conclusions of law that were legally erroneous, and therefore the clerk abused his discretion in removing the husband as trustee. The dissenting judge argued that the majority essentially re-weighed the evidence and disregarded the deferential standard of review on appeal. The dissenting judge stated that the clerk's findings of fact were supported by competent evidence, save one, and that the findings supported the conclusions of law.

The NC Supreme Court reversed the court of appeals decision. The court noted that the superior court has derivative jurisdiction when reviewing an order from the clerk, and that such review is limited. Statutes govern how clerks make a determination regarding removal of a trustee or guardian. Clerks are authorized, but not required, to remove a trustee or guardian if a statutory ground for removal exists. The clerk must determine what the relevant facts are, whether the facts establish one or more grounds for removal, and if so, make a discretionary determination whether removal is justified. Findings of fact supported by competent evidence are conclusive on appeal, even if the evidence could be viewed as supporting a different finding. Facts not supported by competent evidence or that are found under a misapprehension of law are not conclusive and not binding on appeal. Even if some findings have been made in error, others properly made may be sufficient to support the clerk's conclusions. Conclusions of law are reviewed de novo, and decisions made by exercising discretion granted by statute are not reviewable except for abuse of discretion; that is, a

determination of whether the decision is manifestly unsupported by reason and so arbitrary that it could not have been made with a reasoned decision.

In the instant case, the NC Supreme Court recited the relevant statutory provisions enumerating grounds for removal of a guardian or trustee (G.S. 35A-1290(b), (c) and 36C-7-706), the duties and standard of care of a trustee (G.S. 32-71, 36C-1-105, and 36C-9-902) and the duties and standard of care of a guardian (G.S. 35A-1251). The trustee/GOE was obligated to act reasonably and prudently and in a manner that would serve the ward's best interests. The Court concluded that the unchallenged findings of fact supported the clerk's conclusions that the trustee/GOE used trust assets for his own personal benefit, that such use constituted self-dealing and a breach of fiduciary duty, that his actions demonstrated a lack of appropriate judgment and prudence, and that he wasted the trust's assets, mismanaged those assets, and converted them to his own use. The clerk had "ample justification" for determining that grounds exist for removal, and did not abuse his discretion when deciding that removal was the appropriate remedy. Even though the clerk erroneously construed a number of provisions of the SNT, the clerk did not rest his decision solely on whether the trustee/GOE's conduct violated the SNT. As the Court explained, "the extent to which a guardian or trustee violated his or her fiduciary duty is a separate, and broader, question than the issue of whether he or she violated a specific provision of a written trust instrument." Thus, the clerk appropriately focused on the actions of the trustee/GOE, without regard to their consistency with the terms of the SNT.

The dissent argued that the clerk's legal errors were too "fundamental" to salvage his order, including misunderstanding the essential purpose of the SNT. The dissent would adopt the opinion of the court of appeals, and remand to that court to remand to the trial court to apply the appropriate legal standard.

Rule 11

[In re Cranor \(COA15-541; May 17, 2016\) \(with dissent\)](#)

In this interesting but very fact-specific case, the trial court disciplined an attorney (the appellant) in its inherent authority and under Rule 11 and ordered her to pay substantial attorney fees to the opposing party and his attorney. The issues relate to the appellant's conduct in representing the respondent in an incompetency proceeding. The Court of Appeals reversed, with the majority holding that the record did not support the trial court's findings of fact regarding the bases for Rule 11 sanctions or sanctions imposed in its inherent authority. The dissenting judge opined in detail that, under the proper review standards for Rule 11 and disciplinary orders, the Court of Appeals should have affirmed the trial court's orders imposing discipline and awarding fees. (I will await a disposition by the Supreme Court, if there is one, to provide a more detailed summary of this case.) (*Summary by Ann Anderson*).

Action Abates at Death; Nunc Pro Tunc

[In re Thompson \(COA15-1380; Dec. 20, 2016\)](#)

The NC Court of Appeals vacated all orders entered after the death of a ward in an incompetency proceeding, noting that the matter abated upon the ward's death, rendering the matter moot. Since the trial court lacked subject matter jurisdiction once the matter abated, any orders entered after that point were invalid and of no effect. This was so even though the hearing was held while the ward was still alive, since the trial court's order was not actually entered until after the ward died.

This case involved a prior appeal in In re Thompson, 232 N.C. App. 224 (2014) (summarized below), in which the NC Court of Appeals held an order incompetency order was invalid because it was improperly entered. The court remanded the case to the trial court for further proceedings. On remand, the clerk entered an order correcting its prior order *nunc pro tunc*. In this appeal, the court held that the clerk's failure to properly enter its prior order was a clerical error which the clerk had the authority to correct. Therefore, the clerk did not act improperly in entering its order *nunc pro tunc*, and because that order was the last one entered prior to the ward's death, it is the controlling order in the case.

(Summary by Aly Chen.)

Civ. Pro. Rule 58: Entry of Orders/Judgments

In re Thompson, N.C. App. (Feb. 4, 2014)

Respondent adjudicated incompetent and guardian appointed. Clerk orally announced the ruling in court on both matters and signed and dated the order as well as letters appointing guardian. Interested party filed motions challenging the incompetency and guardianship orders. Clerk denied the orders and entered sanctions against interested party. Interested party appealed. Trial court upheld the decision of the clerk. Interested party appealed to the NC Court of Appeals. NC Court of Appeals held:

- Regarding the Incompetency Order:
 - NC Rules of Civil Procedure apply to special proceedings. Under Rule 58, a judgment or order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.
 - The incompetency order failed to comply with Rule 58 because it lacked a stamp-file or other marking necessary to indicate a filing date and therefore was not entered. A signed and dated order is insufficient to be considered filed. An oral ruling announced in open court is not enforceable until it is entered.
 - Because the order was not entered, the appeal period did not run and therefore had not expired.
- Regarding the Guardianship Order:
 - Because the incompetency order was not entered, the clerk did not have the subject matter jurisdiction to appoint the guardian.
 - The appointment of the guardian and entry of sanctions against the appellant were without legal authority.

Appeal of Dismissal of Incompetency Proceeding

In re Dippel (COA16-54; Sept. 20, 2016)

Petitioner filed incompetency proceeding against his father, the respondent. The assistant clerk of court found there was not clear, cogent, and convincing evidence of the respondent's incompetency and entered an order dismissing the proceeding. The petitioner appealed the clerk's order. The superior court held that the petitioner lacked standing to appeal the order of the clerk as GS 35A-1115 did not provide a right of appeal from an order dismissing an incompetency proceeding. The NC Court of Appeals, applying GS 35A-1115 and GS 1-301.2, reversed the order of the superior court and held that an aggrieved party has the right to appeal from the clerk's order dismissing an incompetency proceeding. In this 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 against the respondent.

***Jurisdiction between Ch. 50 Custody and Ch. 35A Guardianship of Minor
[Corbett v. Lynch \(COA16-221; Dec. 20, 2016\).](#)***

Facts: Brother and Sister were orphans as a result of Mother's death in 2006 and Father's death in 2015. Father was married to Stepmother at time of his death. Father's will named Aunt and Aunt's husband as testamentary guardians for the minor children.

Procedural History:

- August 4, Stepmother filed a petition for guardianship and a petition for a stepparent adoption in superior court
- August 5, 2015, Stepmother initiated a custody action under G.S. Ch. 50 in district court. An ex parte temporary emergency custody order was entered based on the allegation that Aunt was coming to take children to Ireland.
- August 7, 2015, Aunt filed an application for guardianship in superior court and filed an answer, motion to dismiss, and counterclaim for custody in the district court custody action.
- August 17, 2015, clerk of superior court ordered guardianship to Aunt and her husband.
- District court dismissed the custody action as a result of the guardianship order. Stepmother appealed.

Holding: The NC Court of Appeals affirmed the district court's dismissal of the custody action. The court held that the clerk of superior court had jurisdiction over the guardianship proceeding as the children had no "natural guardian" (no biological or adoptive parent). G.S. 35A-1221. The custody order did not divest the clerk of jurisdiction as G.S. 35A-1221(4) requires the application for guardianship to include a copy of any order awarding custody. **Guardianship of the person includes custody.** G.S. 35A-1241(a)(1) and -1202(10). NC statutes "provide for an override of a Chapter 50 custody determination by the appointment of a general guardian or guardian of the person." The clerk retains jurisdiction over the guardianship proceeding, including modifications. G.S. 35A-1203(b), (c). **The appointment of a general guardian in a Ch. 35A guardianship proceeding renders a Ch. 50 custody action moot.** The holding "does not affect any jurisdiction the district court may have to issue ex parte orders under Chapter 50 for temporary custody arrangements where the conditions of G.S. 50-13.5(d)(2)-(3) are met. (Summary by Sara DePasquale.)

Power of Attorney Executed After Adjudication of Incompetence

[O'Neal v. O'Neal \(COA16-1299; July 5, 2017\)](#)

The clerk adjudicated a ward incompetent upon a petition filed by the ward's granddaughter and appointed the granddaughter as general guardian. After the adjudication and appointment of a guardian, the ward executed a durable power of attorney (POA) in favor of the guardian/granddaughter. The clerk subsequently removed the granddaughter as general guardian and appointed a new guardian of the estate. The new guardian of the estate revoked the POA and filed suit to declare the POA and three deeds conveyed by the granddaughter as agent under the POA void. The trial court entered an order declaring the POA and three deeds void *ab initio*. The NC Court of Appeals affirmed the trial court. The court held the subsequently executed POA was void as a matter of law. The ward's incompetency to execute the POA was conclusively established, and not a rebuttable presumption, as to the granddaughter who was the petitioner in the incompetency proceeding and appointed guardian for the ward. The court noted that the holding poses no threat to subsequent good faith purchasers for value of real property as potential purchasers are on constructive notice of all information recorded in the land and court records, which includes an adjudication of incompetence in the special proceedings index.

Authority of Interim Guardian to Admit a Ward to a Mental Health Facility

[In re Matter of Winebarger \(COA15-1357; Oct. 4, 2016\)](#) (unpublished)

The NC Court of Appeals held that an interim guardian powers include the power to apply for voluntary admission of a ward to a mental health facility where the clerk's order appointing the interim guardian gives the interim guardian all powers and duties of a general guardian.