

# Elder Abuse Issues Related to Guardianship, Powers of Attorney, and other Estate Planning Documents

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# Disclaimer

- The following slides and statements are solely those of the presenters and do not necessarily represent statements or opinions of their offices, supervisors, and other parties not speaking in this presentation.
- The information provided is intended as general information and is not case specific. All cases have highly individualized issues and facts and not all information shared may fit all cases.

# Power of Attorney



Statutory Short Form NC DPOA  
(including Limited DPOA)

Article 3.  
Statutory Forms.

§ 32C-3-301. Statutory form power of attorney.

As a nonexclusive method to grant a power of attorney, a document substantially in the following form may be used to create a statutory form power of attorney that has the meaning and effect prescribed by this Chapter:

"NORTH CAROLINA  
STATUTORY SHORT FORM POWER OF ATTORNEY  
NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32C OF THE NORTH CAROLINA GENERAL STATUTES, WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the North Carolina Uniform Power of Attorney Act.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Additional Provisions and Exclusions.

This form provides for designation of one agent, successor agent, and second successor agent. If you wish to name more than one agent, successor agent, and second successor agent, you may name a coagent, successor coagent, or second successor coagent in the Additional Provisions and Exclusions. Coagents, successor coagents, or second successor coagents are not required to act together unless you include that requirement in the Additional Provisions and Exclusions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I, \_\_\_\_\_, name the following person as my agent:  
Name of Agent:

\_\_\_\_\_  
(Name of Principal).

DESIGNATION OF SUCCESSOR AGENT(S)  
(OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of Successor Agent:

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of Second Successor Agent:

INITIAL below if you want to give an agent the power to name a successor agent.

( ) I give to my acting agent the full power to appoint another to act as my agent, and full power to revoke such appointment, if no agent named by me above is willing or able to act.

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the North Carolina Uniform Power of Attorney Act, Chapter 32C of the General Statutes:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

- ( ) Real Property
- ( ) Tangible Personal Property
- ( ) Stocks and Bonds
- ( ) Commodities and Options
- ( ) Banks and Other Financial Institutions
- ( ) Operation of Entity or Business
- ( ) Insurance and Annuities
- ( ) Estates, Trusts, and Other Beneficial Interests
- ( ) Claims and Litigation
- ( ) Personal and Family Maintenance
- ( ) Benefits from Governmental Programs or Civil or Military Service



- ☐ Retirement Plans  
☐ Taxes  
☐ All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY  
(OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- ☐ Make a gift, subject to the limitations provided in G.S. 32C-2-217  
☐ Create or change rights of survivorship  
☐ Create or change a beneficiary designation  
☐ Authorize another person to exercise the authority granted under this power of attorney  
☐ Waive my right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan  
☐ Exercise fiduciary powers that I have authority to delegate  
☐ Disclaim or refuse an interest in property, including a power of appointment  
☐ Access the content of electronic communications.

EXERCISE OF SPECIFIC AUTHORITY IN FAVOR OF AGENT  
(OPTIONAL)

☐ UNLESS INITIALED, an agent MAY NOT exercise any of the grants of specific authority initialed above in favor of the agent or an individual to whom the agent owes a legal obligation of support.

ADDITIONAL PROVISIONS AND EXCLUSIONS  
(OPTIONAL)

☐ \_\_\_\_\_  
\_\_\_\_\_

EFFECTIVE DATE

This power of attorney is effective immediately.

NOMINATION OF GUARDIAN  
(OPTIONAL)

INITIAL below ONLY if you WANT your acting agent to be your Guardian.

☐ If it becomes necessary for a court to appoint a guardian of my estate or a general guardian, I nominate my agent acting under this power of attorney to be the guardian to serve without bond or other security.

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

MEANING AND EFFECT

The meaning and effect of this power of attorney shall for all purposes be determined by the law of the State of North Carolina.

SIGNATURE AND ACKNOWLEDGMENT

\_\_\_\_\_  
Your Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Your Name Printed

State of \_\_\_\_\_, County of \_\_\_\_\_.

I certify that the following person personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: \_\_\_\_\_.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Notary Public

(Official Seal)

\_\_\_\_\_, Notary Public  
Printed or typed name

My commission expires: \_\_\_\_\_

## "IMPORTANT INFORMATION FOR AGENT

### Agent's Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or your authority is terminated or the power of attorney is terminated or revoked. You must:

- (1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) Act in good faith;
- (3) Do nothing beyond the authority granted in this power of attorney; and
- (4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner: (Principal's Name) by (Your Signature) as Agent.

Unless the Additional Provisions and Exclusions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) Act with care, competence, and diligence;
- (4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects, or if you do not know the principal's expectations, to act in the principal's best interest;
- (6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest; and
- (7) Account to the principal (or a person designated by the principal (if any)) in the Additional Provisions and Exclusions.

### Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminated or revoked this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) Death of a principal;
- (2) The principal's revocation of the power of attorney or the termination of your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished; or

- (5) If you are married to the principal, your divorce from the principal, unless the Additional Provisions and Exclusions in this power of attorney state that your divorce from the principal will not terminate your authority.

### Liability of Agent

The meaning of the authority granted to you is defined in the North Carolina Uniform Power of Attorney Act. If you violate the North Carolina Uniform Power of Attorney Act or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice." (2017-153, s. 1.)

### § 32C-3-302. Agent's certification.

The following optional form may be used by an agent to certify facts concerning a power of attorney:

#### "AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY (G.S. 32C-3-302)

I, \_\_\_\_\_ (Name of Agent), do hereby state and affirm the following under penalty of perjury:

(1) \_\_\_\_\_ (Name of Principal) granted me authority as an agent or successor agent in a power of attorney dated \_\_\_\_\_.

(2) The powers and authority granted to me in the power of attorney are currently exercisable by me.

(3) I have no actual knowledge of any of the following:

- (a) The principal is deceased.
- (b) The power of attorney or my authority as agent under the power of attorney has been revoked or terminated, partially or otherwise.
- (c) The principal lacked the understanding and capacity to make and communicate decisions regarding his estate and person at the time the power of attorney was executed.
- (d) The power of attorney was not properly executed and is not a legal, valid power of attorney.
- (e) (Insert \_\_\_\_\_ other \_\_\_\_\_ relevant \_\_\_\_\_ statements) \_\_\_\_\_

(4) I agree not to exercise any powers granted under the power of attorney if I become aware that the principal is deceased, that the power of attorney has been revoked or terminated, or that my authority as agent under the power of attorney has been revoked or terminated.



## "IMPORTANT INFORMATION FOR AGENT"

### Agent's Duties

When you accept the authority granted under this power of attorney created between you and the principal. This relationship imposes a duty on you to act in the best interest of the principal. This relationship continues until you resign or your authority is terminated or the power is revoked. You must:

- (1) Do what you know the principal reasonably expects you to do with respect to the property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) Act in good faith;
- (3) Do nothing beyond the authority granted in this power of attorney;
- (4) Disclose your identity as an agent whenever you act on behalf of the principal and signing you in the following manner: (Principal's Name) by (Your Signature)

Unless the Additional Provisions and Exclusions in this power of attorney must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act on behalf of the principal;
- (3) Act with care, competence, and diligence;
- (4) Keep a record of all receipts, disbursements, and transactions on behalf of the principal;
- (5) Cooperate with any person that has authority to make decisions on behalf of the principal to do what you know the principal reasonably expects you to do, to act in the principal's best interest, to know the principal's expectations, to act in the principal's best interest;
- (6) Attempt to preserve the principal's estate plan if you know the plan is consistent with the principal's best interest;
- (7) Account to the principal (or a person designated by the principal) for the principal's property and the principal's transactions.

### Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. The following events terminate your authority to act under a power of attorney including:

- (1) Death of a principal;
- (2) The principal's revocation of the power of attorney or your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished.

## SIGNATURE AND ACKNOWLEDGMENT

_____ Your Signature	_____ Date
_____ Your Name Printed	
State of _____, County of _____	
I certify that the following person personally appeared before me this day, acknowledging to me that he or she signed the foregoing document: _____	
Date: _____	_____ Signature of Notary Public
(Official Seal)	_____, Notary Public
(2017-153, s. 1.)	Printed or typed name"

principal, your divorce from the principal, unless the exclusions in this power of attorney state that your authority will not terminate your authority.

is defined in the North Carolina Uniform Power of Attorney Act or act outside the boundaries caused by your violation.

your duties that you do not understand, you should seek

by an agent to certify facts concerning a power of

ION AS TO THE VALIDITY OF  
AND AGENT'S AUTHORITY  
(32C-3-302)

f Agent), do hereby state and affirm the following

\_\_\_\_ (Name of Principal) granted me authority as an agent  
by dated \_\_\_\_\_  
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of the following:

my authority as agent under the power of attorney has been  
i, partially or otherwise.  
understanding and capacity to make and communicate  
ate and person at the time the power of attorney was

not properly executed and is not a legal, valid power

r \_\_\_\_\_ relevant \_\_\_\_\_ statements)

s granted under the power of attorney if I become  
ower of attorney has been revoked or terminated, or  
attorney has been revoked or terminated.

# Power of Attorney

- POA does **NOT** have to be filed.
- POA can be ended by:
  - Destroying the document (tearing it up)
  - **Death**
  - Purpose accomplished
  - Document itself provides for termination
  - Revoked by Guardian of Estate or General Guardian

# Power of Attorney

- No accounting required—**victim can ask for one.**
- Trumped by appointment of Guardianship (if the Guardian revokes it).
- New POA doesn't necessarily revoke old POA.
- Can't be incompetent at time of assigning.
- Super easy to get: available on the internet.



# Types of POA

- Health Care/Assets
- Specific Power of Attorney
  - Expires at the completion of the event or transaction
- General Power of Attorney
  - Expires when the principal becomes incompetent or incapacitated
- Durable Power of Attorney
  - Does not expire if principal becomes incompetent or incapacitated

# Duties of Agent:

- Act loyally for the principal's benefit.
- Don't create a conflict of interest.
- Act with care, competence, and diligence.
- Keep a record of all receipts, disbursements, and transactions made.



# Duties of Agent:

- Attempt to preserve the principal's estate plan based on:
  - value and nature of the property
  - foreseeable obligations and need for maintenance,
  - Minimization of taxes
  - Eligibility for a benefit, a program, or assistance

# Duties of Agent:

- Account to the Principal
- Act in good faith
- Act only w/n scope of authority granted



# Judicial (civil) Relief for bad Agent

- Action must be brought by principal, guardian, any INTERESTED Person (get a witness to file)
- Court may: enjoin, compel redress (pay money, restore property, etc.), order accounting, suspend or remove agent, any other appropriate relief



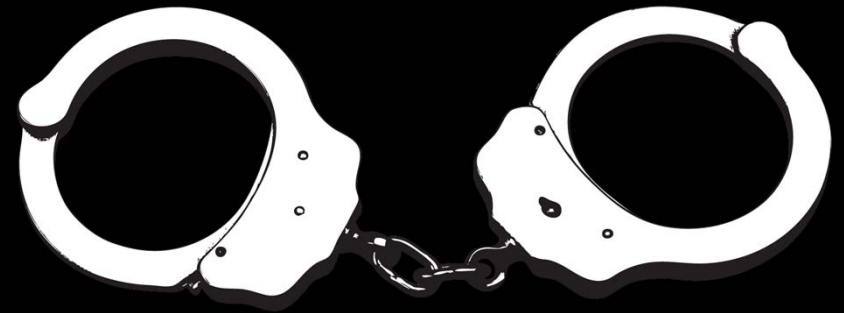


# Fiduciary

- The agent is a **fiduciary**
  - The POA has a **duty** to act in the Principal's **best interests**.
- “A violation by an agent of this Chapter is a breach of fiduciary duty.” **32C-1-117**
- POA ends with death of Principal and the WILL would control disposition of assets.

# It Might Be A Crime

- Embezzlement of property received by virtue of office or employment
- This section applies to any person... “who is a **guardian**, administrator, executor, trustee, or any receiver, or **any other fiduciary**...”



# Slippery slope for POA:

## Gifts



# Gifts

- The ability to make gifts MUST be **specifically authorized** in the POA document.
- AND the gifts must conform to the Principal's **past history** of making gifts, BUT a customized DPOA may exempt this requirement. Read the document carefully to see what the document allows.

GRANT OF SPECIFIC AUTHORITY  
(OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

☒ **Make a gift**, subject to the limitations provided in G.S. 32C-2-217

☐ Create or change rights of survivorship

☐ Create or change a beneficiary designation

☐ Authorize another person to exercise the authority granted under this power of attorney

☐ Waive my right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

☐ Exercise fiduciary powers that I have authority to delegate

☐ Disclaim or refuse an interest in property, including a power of appointment

☐ Access the content of electronic communications.

# Gifts

- Gifts **to Attorney-In-fact** must be specifically authorized in the document.
- AND must conform to past history of making gifts to that person.





# Gifts

- Gifts **of real property** (house or land) MUST be expressly conferred by the Principal.
- Designate what property, and to whom it is to be given.
- General POA document is NOT ENOUGH. Whitford v. Gaskill 119 N.C. App. 790 (1995)



# Slippery slope for Agent:

- Gifts must consider:

- Value and nature of property
- Foreseeable obligations and need for maintenance
- Personal history of making gifts
- Estate plan
- Minimization of taxes
- Eligibility for a benefit, etc.



# Undue Influence

- [N.C. G.S. 14-112.2](#) Exploitation of an Older Adult or Disabled Adult
- 65 years of age or older
- By **deception or intimidation**, obtain or use, or endeavor to obtain or use... funds, assets, or property with intent to temporarily or permanently deprive... of the use, benefit, or possession... or to benefit someone other than the older adult
- There is no Undue Influence Criminal Pattern Jury Instruction in NC



# Guardianship



# Types of Guardianship

- Guardian of the Person
- Guardian of the Estate
- General Guardian



# STATE OF NORTH CAROLINA

In The General Court Of Justice  
Superior Court Division  
Before the Clerk

File No. \_\_\_\_\_

IN THE MATTER OF THE ESTATE OF:

Plaintiff \_\_\_\_\_ County

Defendant \_\_\_\_\_

## LETTERS OF APPOINTMENT GENERAL GUARDIAN

G.S. 35A-1203, -1206

☒ Incompetent Person ☐ Minor

The Court in the exercise of its jurisdiction for the appointment of guardians of incompetent persons and minors upon proper application, has appointed the person(s) named below as General Guardian(s) of the ward named above and ordered that these Letters Of Appointment be issued.

The General Guardian is fully authorized and entitled under the laws of North Carolina to receive, manage and control the property, estate and business affairs of the ward and to have the custody, care and control of the ward.

These Letters are issued to attest to that authority and to certify that it is now in full force and effect.

Witness my hand and the Seal of the Superior Court.

Witness my hand and the Seal of the Superior Court.

Witness my hand and the Seal of the Superior Court.

Name And Address Of General Guardian 1

Robert \_\_\_\_\_  
Charlotte, NC 27211

Name And Address Of General Guardian 2

\_\_\_\_\_

SEAL

NOTE: This letter is not valid without the official seal of the Clerk of Superior Court.

AOC-E-413, Rev. 4/11  
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# STATE OF NORTH CAROLINA

File No. 14E 00703

In The General Court Of Justice  
Superior Court Division  
Before the Clerk

Plaintiff \_\_\_\_\_ County

IN THE MATTER OF THE ESTATE OF:

Defendant \_\_\_\_\_

## LETTERS OF APPOINTMENT GUARDIAN OF THE PERSON

G.S. 35A-1203, 35A-1206, 35A-1251

☒ Incompetent Person ☐ Minor

The Court in the exercise of its jurisdiction for the appointment of guardians of incompetent persons and minors, and upon proper application, has appointed the person(s) named below as Guardian(s) of the Person of the ward named above and has ordered that these Letters Of Appointment be issued.

The guardian of the person is fully authorized and entitled under the laws of North Carolina to have the custody, care and control of the ward, but has no authority to receive, manage or administer the property, estate or business affairs of the ward.

These Letters are issued to attest to that authority and to certify that it is now in full force and effect.

Witness my hand and the Seal of the Superior Court.

Name And Address Of Guardian 1 Of The Person

Pitt County Department of Social Services  
1717 West 30th Street  
Greenville, NC 27834

Date Of Qualification

09/17/2014

Clerk Of Superior Court

Sara Beth Fulford Rhodes

EX OFFICIO JUDGE OF PROBATE

Name And Address Of Guardian 2 Of The Person

Date Of Issuance

Signature

☐ Deputy CDO ☐ Assistant CDO ☐ Clerk Of Superior Court

SEAL

NOTE: This letter is not valid without the official seal of the Clerk of Superior Court.

AOC-E-408, Rev. 4/11  
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# STATE OF NORTH CAROLINA

In The General Court Of Justice  
Superior Court Division  
Before the Clerk

File No. 14E 00703

IN THE MATTER OF THE ESTATE OF:

Plaintiff \_\_\_\_\_ County

Defendant \_\_\_\_\_

## LETTERS OF APPOINTMENT GUARDIAN OF THE ESTATE

G.S. 35A-1302, -1306, -1307, 34-2.1

☒ Incompetent Person ☐ Minor

The Court in the exercise of its jurisdiction for the appointment of guardians of incompetent persons and minors, and upon proper application, has appointed the person(s) named below as Guardian(s) of the Estate of the ward named above and ordered that these Letters Of Appointment be issued.

The guardian of the estate is fully authorized and entitled under the laws of North Carolina to receive, manage and control the property, estate and business affairs of the ward.

These Letters are issued to attest to that authority and to certify that it is now in full force and effect.

Witness my hand and the Seal of the Superior Court.

Name And Address Of Guardian 1 Of The Estate

W & Porter, LLP

Charlotte, NC

Date Of Qualification

April 27, 2014

Clerk Of Superior Court

SARA BETH FULFORD RHODES

EX OFFICIO JUDGE OF PROBATE

Date Of Issuance

April 27, 2014

Signature

☐ Deputy CDO ☒ Assistant CDO ☐ Clerk Of Superior Court

SEAL

NOTE: This letter is not valid without the official seal of the Clerk of Superior Court.



# Who Needs A Guardian?

## Incompetent Adult

- “lacks sufficient capacity to manage the adult’s own affairs or make or communicate important decisions concerning the adult’s person, family, or property...”

# Test

- Test for establishing an adult incompetent:
- Mental competence to manage one's own affairs



# Filing For Guardianship

- Petition filed with Clerk of Superior Court (Special Proceedings).
- Fee for filing and service by the sheriff.
- **ANY PERSON** may file incompetency proceedings.
- Guardian ad litem shall be appointed, or respondent may also hire their own attorney.
- Hearing date set.

# Attendees

- At the hearing the petitioner is there, respondent doesn't have to be there.
- Anyone who can support the petition are there to testify:
  - Medical, friends, anyone who knows the individual
- Guardian Ad Litem, private attorneys



# The Hearing

- Heard by the Clerk, or the respondent may request a jury trial.
- Hearings may be **recorded** and have **sworn testimony**.
- The petitioner speaks first, presenting their case.
- Guardian ad litem, or attorney for the respondent, follows.

# The Hearing

- Hearing is in two parts:
- 1<sup>st</sup>--Determine whether or not the individual is incompetent.
- 2<sup>nd</sup>--Appointment of a guardian
  - Who would best serve as guardian?
  - Family, anyone else proper, then DSS.





# Legal Standard

- Standard for appointing a guardian is “Clear, cogent, and convincing evidence.”
- Guardian will have “Letters of Appointment”—proof of guardianship.
- The Clerk can remove a Guardian.



# Guardian of the Estate

- Public Guardian can be appointed.
- DSS usually declines to serve as Guardian of the Estate (check local practice).
- Guardian **can pay from the ward's estate** necessary expenses of administering the ward's estate.
- Must file inventory or accounting annually.
  - Can be compelled to file by the Clerk



# Guardian of the Person

- DSS is the public entity usually appointed
- Guardian **can be reimbursed** out of the ward's estate for **reasonable and proper expenditures** incurred in the performance of their duties
- Guardians **allowed commissions** from the ward's estate
- Guardians must file status reports
  - Can be compelled by the Clerk



# Interim Guardian

- Can be done very fast.
- Incompetency hearing is done within a month so this can be a faster option in emergency situations.
- Consider this an option during the investigation of criminal cases.



# Take Home Lesson:

- Make friends with the Clerk of Court and APS.
- The Clerk can freeze joint bank accounts.
- Can do Interim Guardianship to protect the estate, and the person in emergency.
- Get recordings of Guardianship proceedings.

# Other Documents



# Other Documents

- Wills
- Living Wills
- Deeds
- Etc.



- MUST BE COMPETENT AT THE TIME OF CREATION



# Questions?

