



SENATE BILL 308: Guardianship Rights.

2023-2024 General Assembly

Committee:	Senate Rules and Operations of the Senate	Date:	April 4, 2023
Introduced by:	Sens. Galey, Daniel, Overcash	Prepared by:	Bill Patterson
Analysis of:	Second Edition		Staff Attorney

OVERVIEW: *Senate Bill 308 would amend the laws governing guardianships and powers of attorney to:*

- *Require a general guardian or guardian of the estate to elect a fiscal year-end date upon the filing of the initial annual account, or if made in a subsequent year, with the clerk's permission, and to file each annual account within 30 days after the elected fiscal year-end unless the time for filing has been extended by the clerk.*
- *Provide that a petition for judicial relief challenging the authority of an agent holding a power of attorney or the manner in which that authority has been exercised can be dismissed only upon motion filed by the principal acting individually, and not through the agent.*
- *Require respondents in guardianship proceedings to be informed of their rights before and after an adjudication of incompetency.*
- *Provide that a respondent is not incompetent who is able, by means of a less restrictive alternative, to sufficiently manage the respondent's affairs and communicate important decisions concerning the respondent's person, family, and property.*
- *Provide that examples of less restrictive alternatives include supported decision making, appropriate and available technological assistance, appointment of a representative payee, and appointment of an agent by the respondent, including appointment of a health care or financial power of attorney.*
- *Require a petition to state what less-restrictive alternatives were considered before seeking adjudication and why those alternatives are insufficient to meet the respondent's needs.*
- *Strengthen the clerks' oversight of guardians of the person.*

CURRENT LAW AND BILL ANALYSIS:

Section 1 – Guardianship Annual Accounting Changes

Article 10 (Returns and Accounting) of Chapter 35A of the General Statutes (Incompetency and Guardianship) requires general guardians and guardians of the estate to file annual accounts of the ward's estate with the clerk of superior court. The initial account must be filed within 30 days after the expiration of one year from the date of the guardian's appointment or qualification, and annually thereafter for as long as any of the ward's estate remains within the guardian's control.

Section 1 of the bill would:

Jeffrey Hudson
Director



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- Require the guardian, upon filing the first annual account, to elect the date of the fiscal year-end for all accounts, which must not be fewer than eleven months nor more than twelve months from the date of the guardian's qualification or appointment.
- Require each annual account to be filed within 30 days after the elected fiscal year-end unless the time for filing has been extended by the clerk.

Section 2 – Prevent Abuse of Authority in Powers of Attorney

Under the North Carolina Uniform Power of Attorney Act, Chapter 32C of the General Statutes, clerks of superior court are authorized, upon motion by the principal under a power of attorney, to dismiss a petition seeking to compel an accounting by the agent holding the power of attorney, to suspend or terminate the agent's authority, to determine the agent's compensation and expenses, or to determine the agent's authority and powers.

Section 2 would provide that the clerk can dismiss such a petition only upon motion of the principal *acting individually* and not through the agent.

Section 3 – Changes to Guardianship Statutes

In a proceeding to adjudicate competency, a respondent is deemed to be incompetent if the respondent lacks sufficient capacity to manage the respondent's own affairs or to make or communicate important decisions concerning the respondent's person, family, or property, whether this is the result of mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. For minors, the incapacity must be by reason of something other than minority.

Section 3.1 would provide that a respondent is not incompetent if, by means of a "less restrictive alternative," the respondent can manage respondent's own affairs and communicate important decisions concerning the respondent's person, family, and property. For this purpose, "less restrictive alternative" would mean an arrangement that enables the respondent to do these things with a restriction of fewer rights of the respondent than would occur with the adjudication of incompetency and appointment of a guardian. Such less restrictive alternatives would include supported decision making, appropriate and available technological assistance, appointment of a representative payee, and appointment of an agent, including appointment under a health care or financial power of attorney.

Section 3.2 would require a petition to include a statement identifying what less restrictive alternatives were considered before seeking adjudication and the reasons why those alternatives are insufficient to meet the respondent's needs.

Sections 3.3 and 3.11 would require the respondent's appointed guardian ad litem to explain the rights set forth in the notice of rights (required by Section 3.7 of the bill) at the time of the guardian ad litem's first personal visit with the respondent, and at any time thereafter upon the respondent's request.

Sections 3.4 and 3.5 would make conforming changes to include references to the notice of rights that would be required by Section 3.7 of the bill.

Section 3.6 would provide that the court shall tax costs, including attorneys' fees, incurred by any party against the respondent if the court the costs were incurred for the respondent's benefit, unless doing so would be inequitable. Costs would be taxed against the petitioner upon a finding that the petitioner lacked reasonable grounds to bring the proceeding.

Section 3.7 would require every respondent to be given a notice of his or her rights, substantially similar to the language set forth in the provided model notice, to include an explanation of the following rights:

- Rights of a respondent before an adjudication of incompetence:

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- Right to notice
 - Right to an attorney
 - Right to gather evidence
 - Right to a hearing
 - Right to a jury
 - Right to a closed hearing
 - Right to present evidence and testimony
 - Right to call and question witnesses
 - Right to express wishes regarding the respondents's rights
 - Right to appeal
- Rights of a ward after an adjudication of incompetence:
 - Right to a qualified, competent guardian
 - Right to request transfer to another county
 - Right to request restoration of the ward's competency
 - Right to request a a review of modification of the ward's guardianship
 - Right to vote
 - Right to request a hearing in a petition for procedure to permit sterilization
 - Right to request the DMV to review a decision to revoke the ward's license
 - Additional rights depending on whether the ward has the capacity to exercise the right

Section 3.8 would state the following public policy governing the appointment of guardians:

- For adults, guardianship is a last resort only to be imposed if less restrictive alternatives have been considered and found to be insufficient to meet the adult's needs.
- The regular filing of status reports by general guardians and guardians of the person concerning the ward's conditions and welfare is encouraged and should be required whenever appropriate.

Section 3.9 would authorize a clerk, on the clerk's own motion, to request modification of the order appointing a guardian or consideration of any other matter pertaining to the guardianship.

Section 3.10 would require that when exercising the clerk's discretion in appointing a guardian, highest priority must be given to an individual or entity nominated as guardian in a power of attorney or health care power of attorney executed by the respondent prior to the commencement of the guardianship proceeding.

Section 3.12 would require a guardian of the person to notify the clerk of a change in the ward's address within 30 days.

EFFECTIVE DATE: Part 1 becomes effective January 1, 2024, and applies to annual account filings made on or after that date. Part 2 is effective when it becomes law, and applies to guardianship proceedings filed on or after that date. Part 3 becomes effective January 1, 2024, and applies to petitions filed on or after that date. The remainder of the act is effective when it becomes law.