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Cherokee Council House  
Cherokee, Qualla Boundary (NC)

Date: OCT 22 2015

ORDINANCE NO. 33 (2015)

WHEREAS, The Eastern Band of Cherokee Indians has inherent authority as a self-governing political body to make its own laws to protect the health and welfare of its membership and promote a safe community;

WHEREAS, In March 2012 the Tribal Council and Principal Chief authorized a working group to explore the feasibility of building and funding a tribal social services and child protection program that would allow the Eastern Band Cherokee Indians to exercise its own jurisdiction over adult protection, child protection, foster care, adoption and other services meant to promote public welfare on tribal trust lands;

WHEREAS, In preparation for the administration of a comprehensive public welfare system within an expanded and coordinated service system focused on community wellbeing, the Tribes Health and Medical Division re-organized and expanded to become a tribal Public Health and Human Services Division (PHHS);

WHEREAS, After many months of consultation, planning and preparation the tribal laws that will support and authorize the tribal vulnerable adult welfare system are complete and ready for passage and codification into tribal law.

**NOW THEREFORE, BE IT ORDAINED** by the Tribal Council of the Eastern Band of Cherokee Indians in annual council assembled, at which a quorum is present that the Cherokee Code shall be amended to incorporate the laws attached hereto entitled: LAWS NECESSARY TO AUTHORIZE AND SUPPORT TRIBAL PUBLIC HEALTH AND HUMAN SERVICES ADMINISTRATION OF COMPREHENSIVE VULNERABLE ADULT WELFARE SERVICES.

**BE IT FURTHER ORDAINED** that this ordinance shall be effective upon ratification by the Principal Chief and that all prior ordinances and resolutions that are inconsistent with this ordinance are rescinded.

*Submitted by Office of the Attorney General*

LAWS NECESSARY TO AUTHORIZE AND  
SUPPORT TRIBAL PUBLIC HEALTH AND HUMAN  
SERVICES ADMINISTRATION OF  
COMPREHENSIVE VULNERABLE ADULT  
WELFARE SERVICES

Chapter 108 Social Services.....	1
Article II .....	1
Protection of the Abused, Neglected, or Exploited Vulnerable Adult Act.....	1
108-6. Short title. ....	1
108-7. Legislative intent and purpose.....	1
108-8. Definitions. ....	1
108-8.1 Jurisdiction; venue. ....	3
108-9. Duty to report; content of report; immunity.....	4
108-10. Duty of director upon receiving report.....	4
108-11. Provision of protection services with the consent of the person; withdrawal of consent; caretaker refusal. ....	5
108-12. Provision of protective services to vulnerable adults who lack the capacity to consent; hearing, findings, etc. ....	6
108-13. Emergency intervention; findings by court; limitations; contents of petition; notice of petition; court authorized entry of premises; immunity of petitioner. ....	7
108-14. Motion in the cause. ....	8
108-15. Payment for essential services.....	8
108-16. Reporting abuse, neglect or exploitation of a vulnerable adult. ....	9
108-17. Elder abuse fatality review teams.....	9
108-18. Funding of protective services. ....	9
108-19. Adoption of standards. ....	9
Article III .....	9
Protection of Vulnerable and Elder Adults from Financial Exploitation .....	9
108-20. Legislative intent and purpose.....	9
108-21. Definitions. ....	9
108-22. Financial institutions encouraged to offer vulnerable adult customers the opportunity to submit a list of trusted persons to be contacted in case of financial exploitation. ....	10
108-23. Duty to report suspected fraud; content of report; immunity for reporting. ....	10
108-24. Production of customers' financial records in cases of suspected financial exploitation; immunity; records may not be used against account owner.....	11
108-25. Notice to customer; delayed notice.....	12
Chapter 35A.....	14
Incompetency and Guardianship.....	14

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.....	14
Article 1.....	14
Determination of Incompetence.....	14
35A-1101. Definitions.....	14
35A-1102. Scope of law; exclusive procedure.....	16
§ 35A-1103. Jurisdiction; venue.....	16
§ 35A-1104. Change of venue.....	16
§ 35A-1105. Petition before clerk.....	16
§ 35A-1106. Contents of petition.....	16
§ 35A-1107. Right to counsel or guardian ad litem.....	17
§ 35A-1108. Issuance of notice.....	17
§ 35A-1109. Service of notice and petition.....	18
§ 35A-1110. Right to jury.....	18
§ 35A-1111. Multidisciplinary evaluation.....	18
§ 35A-1112. Hearing on petition; adjudication order.....	19
§ 35A-1113. Hearing when incompetence determined in another jurisdiction.....	19
§ 35A-1114. Appointment of interim guardian.....	20
§ 35A-1115. Appeal from clerk's order.....	21
§ 35A-1116. Costs and fees.....	21
§§ 35A-1117 through 35A-1119: Reserved for future codification purposes.....	22
Article 2.....	22
Appointment of Guardian.....	22
§ 35A-1120. Appointment of guardian.....	22
§§ 35A-1121 through 35A-1129. Reserved for future codification purposes.....	22
Article 3.....	22
Restoration to Competency.....	22
§ 35A-1130. Proceedings before clerk.....	22
§§ 35A-1131 through 35A-1200: Reserved for future codification purposes.....	23
SUBCHAPTER II. GUARDIAN AND WARD.....	23
Article 4.....	23
Purpose and Scope; Jurisdiction; Venue.....	23
§ 35A-1201. Purpose.....	23
§ 35A-1202. Definitions.....	24

§ 35A-1203. Jurisdiction; authority of clerk. ....	25
§ 35A-1204. Venue. ....	26
§ 35A-1205. Reserved for future codification purposes. ....	26
§ 35A-1206. Letters of appointment. ....	26
§ 35A-1207. Motions in the cause. ....	26
§ 35A-1208. Authority for health care decisions. ....	27
§ 35A-1209: Reserved for future codification purposes. ....	27
Article 5. ....	27
Appointment of Guardian for Incompetent Person. ....	27
§ 35A-1210. Application before clerk. ....	27
§ 35A-1211. Service of application, motions, and notices. ....	27
§ 35A-1212. Hearing before clerk on appointment of guardian. ....	28
§ 35A-1212.1. Recommendation of appointment of guardian by will or other writing. ....	28
§ 35A-1213. Qualifications of guardians. ....	29
§ 35A-1214. Priorities for appointment. ....	30
§ 35A-1215. Clerk's order; issuance of letters of appointment. ....	30
§ 35A-1216. Rule-making power of Department of Human Services. ....	31
§ 35A-1217. Appointment of guardian ad litem for incompetent ward. ....	31
§ 35A-1218: Reserved for future codification purposes. ....	31
§ 35A-1219: Reserved for future codification purposes. ....	31
Article 6. ....	31
Appointment of Guardian for a Minor. ....	31
§ 35A-1220. Absence of natural guardian. ....	31
§ 35A-1221. Application before clerk. ....	31
§ 35A-1222. Service of application and notices. ....	32
§ 35A-1223. Hearing before clerk on appointment of guardian. ....	32
§ 35A-1224. Criteria for appointment of guardians. ....	33
§ 35A-1225. Testamentary recommendation; guardian for incompetent minor. ....	33
§ 35A-1226. Clerk's order; issuance of letters of appointment. ....	34
§ 35A-1227. Funds owed to minors. ....	34
§ 35A-1228. Guardians of children of servicemen; allotments and allowances. ....	34
§ 35A-1229: Reserved for future codification purposes. ....	35
Article 7. ....	35

Guardian's Bond.....	35
§ 35A-1230. Bond required before receiving property.....	35
§ 35A-1231. Terms and conditions of bond; increase on sale of realty or personal property. ....	35
§ 35A-1232. Exclusion of deposited money in computing amount of bond.....	36
§ 35A-1233. Clerk's authority to reduce penalty of bond.....	36
§ 35A-1234. Action on bond.....	37
§ 35A-1235. One bond sufficient when several wards have estate in common.....	37
§ 35A-1236. Renewal of bond.....	37
§ 35A-1237. Relief of endangered sureties.....	37
§ 35A-1238. Clerk's liability.....	37
§ 35A-1239. Health and Human Services bond.....	38
Article 8.....	38
Powers and Duties of Guardian of the Person.....	38
§ 35A-1240. Applicability of Article.....	38
§ 35A-1241. Powers and duties of guardian of the person.....	38
§ 35A-1242. Status reports for incompetent wards.....	39
§ 35A-1243. Duties of designated agency.....	40
§ 35A-1244. Procedure to compel status reports.....	41
§ 35A-1245. Procedure to permit the sterilization of a mentally ill or a mentally retarded ward in the case of medical necessity.....	42
§§ 35A-1246 through 35A-1249: Reserved for future codification purposes.....	43
Article 9.....	43
Powers and Duties of Guardian of the Estate.....	43
§ 35A-1250. Applicability of Article.....	43
§ 35A-1251. Guardian's powers in administering incompetent ward's estate.....	43
§ 35A-1252. Guardian's powers in administering minor ward's estate.....	46
§ 35A-1253. Specific duties of guardian of estate.....	48
§§ 35A-1254 through 35A-1259: Reserved for future codification purposes.....	49
Article 10.....	49
Returns and Accounting.....	49
§ 35A-1268. Guardian to exhibit investments and bank statements.....	51
Article 11.....	52
Public Guardians.....	52

§ 35A-1270. Appointment; term; oath.....	52
§ 35A-1271. Bond of public guardian; increasing bond. ....	52
§ 35A-1272. Powers, duties, liabilities, compensation. ....	53
§ 35A-1273. When letters issue to public guardian. ....	53
§§ 35A-1274 through 35A-1279: Reserved for future codification purposes.....	53
Article 12. ....	53
Nonresident Ward Having Property in State.....	53
§ 35A-1280. Appointment of ancillary guardian. ....	53
§ 35A-1281. Removal of ward's personalty from State. ....	54
§§ 35A-1282 through 35A-1289: Reserved for future codification purposes.....	55
Article 13. ....	55
Removal or Resignation of Guardian; Successor Guardian; Estates without Guardians; Termination of Guardianship. ....	55
§ 35A-1290. Removal by Clerk.....	55
§ 35A-1291. Emergency removal; interlocutory orders on revocation.....	56
§ 35A-1292. Resignation.....	56
§ 35A-1293. Appointment of successor guardian. ....	57
§ 35A-1294. Estates without guardians. ....	57
§ 35A-1295. Termination of guardianship.....	57
§§ 35A-1296 through 35A-1300: Reserved for future codification purposes.....	58
SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE. ....	58
Article 14. ....	58
Sale, Mortgage, Exchange or Lease of Ward's Estate. ....	58
§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease. ....	58
§ 35A-1302. Procedure when real estate lies in jurisdiction in which guardian does not reside. .	59
§ 35A-1303. Fund from sale has character of estate sold and subject to same trusts. ....	59
§ 35A-1304: Reserved for future codification purposes. ....	60
§ 35A-1305. When timber may be sold.....	60
§ 35A-1306. Abandoned incompetent spouse.....	60
§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real property.....	60
§§ 35A-1308 through 35A-1309: Reserved for future codification purposes.....	61
Article 15. ....	61
Mortgage or Sale of Estates Held by the Entireties. ....	61

§ 35A-1310. Where one spouse or both incompetent; special proceeding before clerk. ....	61
§ 35A-1311. General law applicable; approved by judge.....	61
§ 35A-1312. Proceeding valid in passing title.....	61
§ 35A-1313. Clerk may direct application of funds; purchasers and mortgagees protected. ....	62
§§ 35A-1314 through 35A-1319: Reserved for future codification purposes.....	62
Article 16. ....	62
Surplus Income and Advancements. ....	62
§ 35A-1320: Reserved for future codification purposes. ....	62
§ 35A-1321. Advancement of surplus income to certain relatives. ....	62
§ 35A-1322. Advancement to adult child or grandchild. ....	62
§ 35A-1323. For what purpose and to whom advanced. ....	63
§ 35A-1324. Distributees to be parties to proceeding for advancements.....	63
§ 35A-1325. Advancements to be equal; accounted for on death. ....	63
§ 35A-1326. Advancements to those most in need. ....	63
§ 35A-1327. Advancements to be secured against waste. ....	63
§ 35A-1328. Appeal; removal to Cherokee court.....	64
§ 35A-1329. Advancements only when incompetence permanent.....	64
§ 35A-1330. Orders suspended upon restoration of competence. ....	64
§§ 35A-1331 through 35A-1334: Reserved for future codification purposes.....	64
Article 17. ....	64
Gifts from Income for Certain Purposes.....	64
§ 35A-1335. Gifts authorized with approval of judge of Cherokee court. ....	64
§ 35A-1336. Prerequisites to approval by judge of gifts for governmental or charitable purposes. .....	64
§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals. ....	65
§ 35A-1337. Fact that incompetent had not previously made similar gifts.....	66
§ 35A-1338. Validity of gift.....	66
§ 35A-1339: Reserved for future codification purposes. ....	66
Article 18. ....	66
Gifts from Principal for Certain Purposes.....	66
§ 35A-1340. Gifts authorized with approval of judge of Cherokee court. ....	66
§ 35A-1341. Prerequisites to approval by judge of gifts for governmental or charitable purposes. .....	66
§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals. ....	68



§ 35A-1342. Who deemed specific and residuary devisees of incompetent under § 35A-1341...	69
§ 35A-1343. Notice to minors and incompetents under § 35A-1341 and § 35A-1341.1.....	70
§ 35A-1344. Objections to proposed gift; fact that incompetent had previously made similar gifts.....	70
§ 35A-1345. Validity of gift.....	70
§§ 35A-1346 through 35A-1349: Reserved for future codification purposes.....	70
Article 19. ....	70
Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.....	70
§ 35A-1350. Declaration and gift for certain purposes authorized with approval of judge of Cherokee court.....	70
§ 35A-1351. Prerequisites to approval of gift. ....	71
§ 35A-1352. Who deemed specific and residuary devisees of incompetent under § 35A-1351...	72
§ 35A-1353. Notice to minors and incompetents under § 35A-1351. ....	72
§ 35A-1354. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.....	72
§ 35A-1355. Validity of declaration and gift.....	72
§§ 35A-1356 through 35A-1359: Reserved for future codification purposes.....	73
Article 20. ....	73
§§ 35A-1360 through 35A-1369. Reserved for future codification purposes.....	73
SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN.....	73
Article 21. ....	73
Standby Guardianship. ....	73
§ 35A-1370. Definitions.....	73
§ 35A-1371. Jurisdiction; limits. ....	74
§ 35A-1372. Standby guardianship; applicability.....	74
§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing, order.....	75
§ 35A-1374. Appointment by written designation; form.....	77
§ 35A-1375. Determination of incapacity or debilitation. ....	80
§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.....	80
§ 35A-1377. Authority concurrent to parental rights. ....	81
§ 35A-1378. Powers and duties.....	81
§ 35A-1379. Appointment of guardian ad litem. ....	81
§ 35A-1380. Bond.....	81
§ 35A-1381. Accounting. ....	82

§ 35A-1382. Termination.....82

## Chapter 108 Social Services

### Article II

#### Protection of the Abused, Neglected, or Exploited Vulnerable Adult Act.

##### 108-6. Short title.

This Article may be cited as the “Protection of the Abused, Neglected, or Exploited Vulnerable Adult Act.”

##### 108-7. Legislative intent and purpose.

To protect the increasing number of vulnerable adults on Tribal trust lands who are abused, neglected or exploited, this Article is enacted to provide protective services for such persons.

##### 108-8. Definitions.

As used in this Article, unless the context clearly requires otherwise, the following words have the listed meanings

- (a) Able Person. – one who is physically capable and has the necessary skills, means, and know how to provide or mobilize the protective services needed by the vulnerable adult.
- (b) Abuse. – the infliction of bodily injury, unreasonable confinement, intimidation, emotional abuse, or cruel punishment of an elder or vulnerable adult with resulting physical harm or pain or mental anguish by any person, including anyone who has a special relationship with the victim such as a spouse, child, or other relative recognized by tribal law and custom, a caretaker or anyone with a significant relationship with the adult.
- (c) Caretaker. – an individual who has the responsibility for the care of the vulnerable adult as a result of family relationship or who has assumed the responsibility for the care of the vulnerable adult voluntarily or by contract. This includes, but is not limited to, anyone who has a special relationship with the victim such as a spouse, child, or other relative recognized by tribal law and custom, or anyone with a significant relationship with the adult.
- (d) Director. – The Director of the tribe’s Department of Human Services or agents of the Department of Human Services authorized to carry out the duties established under this Chapter.
- (e) Emancipated Minor. – a juvenile 16 or older for whom a judicial decree of emancipation has been entered by a court of competent jurisdiction, or who is or has been married.
- (f) Emergency. – a situation (i) in which evidence suggests that a human life is in jeopardy; (ii) the individual is in the process of being harmed due to criminal activity, medical emergency, fire, or is a clear and present danger to self or others.

- (g) Emergency Services. – services necessary to maintain the person's vital functions where there is reasonable belief that the person would suffer irreparable harm or death. This may include taking physical custody of the vulnerable adult.
- (h) Essential Services. – those social, medical, psychiatric, psychological or legal services necessary to safeguard the vulnerable adult's rights and resources and to maintain the physical or mental well-being of the individual. These services shall include, but not be limited to, the provision of medical care for physical and mental health protection from health and safety hazards, protection from physical mistreatment, and protection from exploitation. The words "essential services" shall not include taking the person into physical custody without her consent except as provided for in C.C. 108-106.
- (i) Exploitation. – the unauthorized or improper use of funds, property, or other resources of a vulnerable adult; or the unauthorized or improper use of the person of the vulnerable adult by a caretaker or by any other person for personal gain or profit; or the failure to use the funds, property or other resources to the vulnerable adult's benefit or according to the vulnerable adult's desires.
- (j) Home Office. – the tribal or county social services office receiving the APS report. The location where the vulnerable adult lives or is found determines the home office.
- (k) Indigent. – a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding.
- (l) Lacks the Capacity to Consent. – lacks sufficient understanding or capacity to make or communicate responsible decisions concerning her person, including but not limited to provisions for health or mental health care, food, clothing or shelter, because of physical or mental incapacity. The director or FSP worker may reasonably determine a person's capacity or lack of capacity to consent. However, if they are unable to make the determination, they shall seek the assistance of the physician, psychologist or behavioral health.
- (m) Neglect. – the failure of a caretaker to provide for the basic needs of a vulnerable adult by not supplying resources, services, or supervision necessary to maintain a vulnerable adult's (minimum) physical and mental health and includes the inability of a vulnerable adult to supply such basic needs for himself or herself. Neglect is also interfering within delivery of necessary services and resources; failing to report abuse, neglect or exploitation of a vulnerable adult by any person; failing to provide services or resources essential to the elder or vulnerable adult's practice of her customs, traditions, or religion.
- (n) Protective Services. – services provided by EBCI Public Health and Human Services (PHHS) or other government or private organizations or individuals which are necessary to protect the vulnerable adult from abuse, neglect, or exploitation. They shall consist of evaluation of the need for service and mobilization of essential services on behalf of the vulnerable adult.

- (o) Responsible Person. – one who appears emotionally mature; has a history of being trustworthy, reliable, and dependable; and has demonstrated use of good judgment and sound thinking.
- (p) Reciprocal Office. – the tribal or county social services office requested by a home office to conduct the APS evaluation for a home office when the policy or administrative rules state the home office cannot conduct the evaluation. Where there is a conflict of interest that makes it inappropriate for the home office to conduct the evaluation, a reciprocal office may also include an agency or company contracted to perform investigations in cases of conflict.
- (q) Relative. – means: (i) a person who has reached the age of eighteen who is related by blood or marriage to another person, including but not limited to children, grandchildren, grandparent, aunt or uncle, brother or sister, in-laws, niece or nephew, first or second cousins or stepparents; or (ii) a person who provides care to another person in the traditional Cherokee way; or (iii) an individual with a substantial relationship to another person.
- (r) Tribal trust lands. – the entire Cherokee Indian Reservation located in North Carolina, including lands in Graham and Cherokee counties, and lands owned by the tribe in fee simple and specific areas of tribal trust land maintained, reserved, or operated by or for the benefit of the tribal government.
- (s) Vulnerable Adult.—(i) an elder who is 60 years of age or older or; (ii) an adult 18 years of age or over or any lawfully emancipated minor who is present in the EBCI PHHS service area and who is functionally disabled which means a person who because of a recognized chronic physical or mental condition or disease, or developmental disability, including chemical dependency, is impaired to the extent of being dependent upon others for direct care, support, supervision, or monitoring to perform activities of daily living.
- (t) Willing Person. – one who voluntarily commits to and is in agreement to providing or mobilizing the protective services needed by the vulnerable adult.

108-8.1 Jurisdiction; venue.

- (a) The clerk of Cherokee court shall have original jurisdiction over proceedings under this Article.
- (b) Venue for proceedings under this Article shall be Cherokee court when the respondent is domiciled on tribal trust lands.
- (c) If the clerk of Cherokee court in which a proceeding under this Article is brought has an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested in any Cherokee court judge residing or presiding, and the jurisdiction of the Cherokee court judge shall extend to all things which the clerk might have done.

108-9. Duty to report; content of report; immunity.

- (a) Any person, institution, Tribal agency or tribal entity with cause to suspect that any vulnerable adult is a victim of abuse, neglect or exploitation, shall report the case of that abuse, neglect or exploitation to the director of human services.
- (b) The report may be made orally, by telephone, or in writing and disclosure of any otherwise confidential information does not constitute a violation of tribal or federal laws or regulations.
- (c) The report shall include the name and address of the vulnerable adult; the name and address of the vulnerable adult's caretaker; the age of the vulnerable adult; the nature and extent of the vulnerable adult's injury or condition from abuse, neglect, or exploitation; and any other pertinent information.
- (d) Any person who knowingly or wantonly fails to report a suspicion that any vulnerable adult is a victim of abuse, neglect, or exploitation or who knowingly or wantonly prevents another person from making a report as required by subsection (a) of this section shall have charges filed against them in Cherokee court and shall be fined and/or imprisoned for not more than six (6) months.
- (e) Any institution, Tribal agency or tribal entity that knowingly or wantonly fails to report a suspicion that any vulnerable adult is a victim of abuse, neglect, or exploitation or prevents another person from making a report as required by subsection (a) of this section, shall be fined in an amount not less than \$500
- (f) Anyone who makes a report pursuant to this Chapter, cooperates with the department of human services in a protective services investigative assessment, testifies in any judicial proceeding resulting from a protective services report, investigative assessment, or otherwise participates in a program authorized by this Chapter, is immune from any civil or criminal liability that might otherwise be incurred or imposed for that action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed.
- (g) Upon receipt of any report under this Chapter, the reporter shall be asked whether they wish to be identified. If the reporter wishes to be identified, the reporter shall be informed that if they wish, they may contact the agency and after all investigations and assessments are completed pursuant to this Article, the reporter may be informed about whether the report was screened in, screened out, or if an evaluation was completed. The reporter may waive the right to notification, and no notification is required if the person making the report does not wish to be identified.

108-10. Duty of director upon receiving report.

- (a) Any director receiving a report that a vulnerable adult is in need of protective services shall make a prompt and thorough evaluation to determine whether the vulnerable adult is in need of protective services and what services are needed. The evaluation shall include a visit to the person and consultation with others having knowledge of the facts of the

particular case. When necessary for a complete evaluation of the report, the director shall have the authority to review and copy any and all records, or any part of such records, related to the care and treatment of the vulnerable adult that have been maintained by any individual, facility or agency acting as a caretaker for the vulnerable adult. The director shall have the authority to conduct an interview with the vulnerable adult with no other persons present. After completing the evaluation the director shall make a written report of the case indicating whether he believes protective services are needed and shall notify the individual making the report of her determination as to whether the vulnerable adult needs protective services.

- (b) The staff and physicians of local health departments, area mental health, developmental disabilities, and substance abuse authorities, and other public or private agencies shall cooperate fully with the director in the performance of her duties. These duties include immediate accessible evaluations and in-home evaluations where the director deems this necessary.
- (c) The director may contract with an agency or private physician for the purpose of providing immediate accessible medical evaluations in the location that the director deems most appropriate.
- (d) The director shall initiate the evaluation described in subsection (a) of this section as follows:
  - a. Immediately: contact 911 or local law enforcement when an emergency situation exists. An emergency is a situation in which evidence suggests that a human life is in jeopardy. The individual is in the process of being harmed due to criminal activity, medical emergency, fire, or is a clear and present danger to self or others.
  - b. Within two hours of receipt of complaint: Initiate investigation within two hours when the reported victim is identified as being in imminent danger.
  - c. Within 24 hours: Initiate investigation within 24 hours of report when the individual is identified as being in a hazardous situation that is one that may lead to increased harm or risk.
  - d. Within 48 hours: When screening determines the situation is problematic, one that is chronic or ongoing, or is a general complaint that an immediate response is unlikely to change the reported victim's risk level, an investigation must be initiated within 48 hours.
- (e) The evaluation shall be completed within 30 days for allegations of abuse or neglect and within 45 days for allegations of exploitation.

108-11. Provision of protection services with the consent of the person; withdrawal of consent; caretaker refusal.

- (a) If the director determines that a vulnerable adult is in need of protective services, he shall immediately provide or arrange for the provision of protective services, provided that the vulnerable adult consents.

(1) Regardless of the vulnerable adult's capacity to consent to protective services where the director reasonably determines that a vulnerable adult is being abused,

neglected, or exploited the information gathered in the evaluation is to be referred to CIPD and the tribal prosecutor to pursue criminal charges.

- (b) When a caretaker of a vulnerable adult who consents to the receipt of protective services refuses to allow the provision of such services to the vulnerable adult, the director may petition the court for an order enjoining the caretaker from interfering with the provision of protective services to the vulnerable adult. The petition must allege specific facts sufficient to show that the vulnerable adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services. If the judge finds by clear, cogent, and convincing evidence that the vulnerable adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services, he may issue an order enjoining the caretaker from interfering with the provision of protective services to the vulnerable adult.
- (c) If a vulnerable adult with the capacity to consent does not consent to the receipt of protective services, or if he withdraws her consent, the services shall not be provided.

108-12. Provision of protective services to vulnerable adults who lack the capacity to consent; hearing, findings, etc.

- (a) If the director reasonably determines that a vulnerable adult is being abused, neglected, or exploited and lacks capacity to consent to protective services, then the director shall petition the court for an order authorizing the provision of protective services. The petition must allege specific facts sufficient to show that the vulnerable adult is in need of protective services and lacks capacity to consent to them.
- (1) Regardless of the vulnerable adult's capacity to consent to protective services where the director reasonably determines that a vulnerable adult is being abused, neglected, or exploited the information gathered in the evaluation is to be referred to CIPD and the tribal prosecutor to pursue criminal charges.
- (b) The court shall set the case for hearing regarding the provision of protective services within 14 days after the filing of the petition. The vulnerable adult must receive at least five days' notice of the hearing. He has the right to be present and represented by counsel at the hearing. If the vulnerable adult, in the determination of the judge, lacks the capacity to waive the right to counsel, then a guardian ad litem shall be appointed. If the vulnerable adult is indigent, the cost of representation shall be borne by the Tribe.
- (c) If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the vulnerable adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the vulnerable adult or otherwise consenting to protective services on her behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with Chapter 35A; for



good cause shown, the court may extend the 60 day period for an additional 60 days, at the end of which it shall conduct a review to determine if a petition should be initiated in accordance with Chapter 35A. No vulnerable adult may be committed to a mental health facility under this Article.

- (d) A determination by the court that a person lacks the capacity to consent to protective services under the provisions of this Chapter shall in no way affect incompetency proceedings as set forth in Chapter 35A or any other proceedings, and incompetency proceedings as set forth in Chapter 35A shall have no conclusive effect upon the question of capacity to consent to protective services as set forth in this Chapter.

108-13. Emergency intervention; findings by court; limitations; contents of petition; notice of petition; court authorized entry of premises; immunity of petitioner.

- (a) Upon petition by the director, a court may order the provision of emergency services to a vulnerable adult after finding that there is reasonable cause to believe that:
- (1) A vulnerable adult lacks capacity to consent and that he is in need of protective service;
  - (2) An emergency exists; and
  - (3) No other person authorized by law or order to give consent for the person is available and willing to arrange for emergency services.
- (b) The court shall order only such emergency services as are necessary to remove the conditions creating the emergency. In the event that such services will be needed for more than 14 days, the director shall petition the court in accordance with C.C. 108-12.
- (c) The petition for emergency services shall set forth the name, address, and authority of the petitioner; the name, age and residence of the vulnerable adult; the nature of the emergency; the nature of the disability if determinable; the proposed emergency services; the petitioner's reasonable belief as to the existence of the conditions set forth in subsection (a) above; and facts showing petitioner's attempts to obtain the vulnerable adult's consent to the services.
- (d) Notice of the filing of such petition and other relevant information, including the factual basis of the belief that emergency services are needed and a description of the exact services to be rendered shall be given to the person, to her spouse, or if none, to her adult children or next of kin, to her guardian, if any. Such notice shall be given at least 24 hours prior to the hearing of the petition for emergency intervention; provided, however, that the court may issue immediate emergency order ex parte upon finding as fact (i) that the conditions specified in C.C. 108-13(a) exist; (ii) that there is likelihood that the vulnerable adult may suffer irreparable injury or death if such order be delayed; and (iii) that reasonable attempts have been made to locate interested parties and secure from them such services or their consent to petitioner's provision of such service; and such order shall contain a show-cause notice to each person upon whom served directing such person to appear immediately or at any time up to and including the time for the hearing

of the petition for emergency services and show cause, if any exists, for the dissolution or modification of the said order. Copies of the said order together with such other appropriate notices as the court may direct shall be issued and served upon all of the interested parties designated in the first sentence of this subsection. Unless dissolved by the court for good cause shown, the emergency order ex parte shall be in effect until the hearing is held on the petition for emergency services. At such hearing, if the court determines that the emergency continues to exist, the court may order the provision of emergency services in accordance with subsections (a) and (b) of this section.

(e) Where it is necessary to enter a premises without the vulnerable adult's consent after obtaining a court order in compliance with subsection (a) above, the representative of the petitioner shall do so and may be accompanied by a law enforcement officer.

(f) (1) Upon petition by the director, a court may order that:

(A) The vulnerable adult's financial records be made available at a certain day and time for inspection by the director or her designated agent; and

(B) The vulnerable adult's financial assets be frozen and not withdrawn, spent or transferred without prior order of the court.

(2) Such an order shall not issue unless the court first finds that there is reasonable cause to believe that:

(A) A vulnerable adult lacks the capacity to consent and that he is in need of protective services;

(B) The vulnerable adult is being financially exploited by her caretaker; and

(C) No other person is able or willing to arrange for protective services.

(3) Provided, before any such inspection is done, the caretaker and every financial institution involved shall be given notice and a reasonable opportunity to appear and show good cause why this inspection should not be done. And, provided further, that any order freezing assets shall expire ten days after such inspection is completed, unless the court for good cause shown, extends it.

(g) No petitioner shall be held liable in any action brought by the vulnerable adult if the petitioner acted in good faith.

108-14. Motion in the cause.

Notwithstanding any finding by the court of lack of capacity of the vulnerable adult to consent, the vulnerable adult or the individual or organization designated to be responsible for the vulnerable adult shall have the right to bring a motion in the cause for review of any order issued pursuant to this Article.

108-15. Payment for essential services.

If a caretaker is found guilty of abusing, neglecting, or exploiting a vulnerable adult as described under C.C. 14.40-16, as part of sentencing the court may order the convicted caretaker to

reimburse or provide payment for essential services caused as a result of the criminal act for which they were convicted.

108-16. Reporting abuse, neglect or exploitation of a vulnerable adult.

Upon finding evidence indicating that a person has abused, neglected, or exploited a vulnerable adult, the director shall notify the tribal prosecutor and CIPD.

108-17. Elder abuse fatality review teams.

- (a) Upon the death of an elder where suspicion exists that abuse, neglect, or exploitation may have played a role in the death, an Elder Abuse Fatality Review Team (EAFRT) shall be convened.
- (b) EAFRT may be convened by the Tribal Prosecutor, local law enforcement, the Director of Human Services, or at the order of the Principal Chief of the Eastern Band of Cherokee Indians. Team membership may be determined by the entity convening the EAFRT. Team membership typically consists of public agencies involved in the investigation of elder abuse cases, and may also include geriatricians, psychologists, and forensic experts.

108-18. Funding of protective services.

PHHS is authorized to use available tribal, federal, or other funding sources for the provision of the protection of abused, neglected, or exploited vulnerable adults within its service area as defined in C.C. 130A-2.1.

108-19. Adoption of standards.

PHHS shall adopt standards including but not limited to administrative rules, policies, and other procedures and guidelines with forms to insure the effective implementation of the provisions of this Article.

### Article III

#### Protection of Vulnerable and Elder Adults from Financial Exploitation

108-20. Legislative intent and purpose.

It is the policy of the tribe to protect and fight against the growing problem of financial exploitation of vulnerable and elder adults who reside on Tribal trust lands.

108-21. Definitions.

Unless the context or subject matter otherwise requires, the definitions found at C.C. 108-8 are incorporated into this article and terms phrases used in this Article shall be defined as follows:

- (a) Customer. - A person who is a present or former holder of an account with a financial institution.
- (b) Financial exploitation. - The illegal or improper use of a vulnerable adult's or elder adult's financial resources for another's profit or pecuniary advantage.

- (c) Financial institution. - A banking corporation, trust company, savings and loan association, credit union, or other entity principally engaged in lending money or receiving or soliciting money on deposit.
- (d) Financial record. - An original of, a copy of, or information derived from a record held by a financial institution pertaining to a customer's relationship with the financial institution and identified with or identifiable with the customer.
- (e) Investigating entity. - A law enforcement agency investigating alleged financial exploitation of a vulnerable adult or an elder adult, or a social services agency investigating alleged financial exploitation of a vulnerable adult.
- (f) Law enforcement agency. – any tribal, federal, state or local agency, force, department, or unit responsible for enforcing criminal laws, including the Bureau of Indian Affairs law enforcement, the police department of another tribe or any local police department or sheriff's department. This section in no way reduces the jurisdiction or authority of the Cherokee Indian Police Department or its officers.
- (g) Promptly. - As soon as practicable, with reasonable allowance to be made for the time required to retrieve older data or records that are not readily or immediately retrievable due to their current storage media.

108-22. Financial institutions encouraged to offer vulnerable adult customers the opportunity to submit a list of trusted persons to be contacted in case of financial exploitation.

All financial institutions are encouraged, but not required, to offer to vulnerable adult and elder adult customers the opportunity to submit, and periodically update, a list of persons that the vulnerable adult or elder adult customer would like the financial institution to contact in case of suspected financial exploitation of the vulnerable adult or elder adult customer. No financial institution, or officer or employee thereof, who acts in good faith in offering to its customer the opportunity to submit and update a list of such contact persons may be held liable in any action in Cherokee Court for doing so.

108-23. Duty to report suspected fraud; content of report; immunity for reporting.

- (a) Any financial institution, or officer or employee thereof, having reasonable cause to believe that a vulnerable adult is the victim or target of financial exploitation shall report such information to the following:
  - a. Persons on the list provided by the customer under C.C. 108-114, if such a list has been provided by the customer. The financial institution may choose not to contact persons on the provided list if the financial institution suspects that those persons are financially exploiting the vulnerable adult.
  - b. The appropriate local law enforcement agency
  - c. The appropriate social services agency, if the customer is a vulnerable adult.

- (b) The report may be made orally or in writing. The report shall include the name and address of the vulnerable adult, the nature of the suspected financial exploitation, and any other pertinent information.
- (c) No financial institution, or officer or employee thereof, who acts in good faith in making a report under this section may be held liable in any action for doing so.

108-24. Production of customers' financial records in cases of suspected financial exploitation; immunity; records may not be used against account owner.

(a) An investigating entity may, under the conditions specified in this section, petition the Cherokee court to issue a subpoena directing a financial institution to provide to the investigating entity the financial records of a vulnerable adult customer. The court shall hear the case within two business days after the filing of the petition. The court shall issue the subpoena upon finding that all of the following conditions are met:

- a. The investigating entity is investigating, pursuant to the investigating entity's statutory authority, a credible report that the vulnerable adult or elder adult is being or has been financially exploited.
- b. The vulnerable adult's or elder adult's financial records are needed in order to substantiate or evaluate the report.
- c. Time is of the essence in order to prevent further exploitation of that vulnerable adult or elder adult.

(b) Delivery of the subpoena may be effected by hand, via certified mail, return receipt requested, or through a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) and may be addressed to the financial institution's local branch or office vice president, its local branch or office manager or assistant branch or office manager, or the agent for service of process listed by the financial institution with the North Carolina Secretary of State or, if there is none, with the agent for service of process listed by the financial institution in any state in which it is domiciled.

(b1) A financial institution may challenge the subpoena in Cherokee court by filing a motion to quash or modify the subpoena within ten days after receipt of delivery of the subpoena pursuant to subsection (b) of this section. The subpoena may be challenged only for the following reasons:

- a. There is a procedural defect with the subpoena.
- b. The subpoena contains insufficient information to identify the records subject to the subpoena.
- c. The financial institution is otherwise prevented from promptly complying with the subpoena.
- d. The petition was filed or subpoena requested for an improper purpose or based upon insufficient grounds.

- e. The subpoena subjects the financial institution to an undue burden or is otherwise unreasonable or oppressive.

Within two business days after the motion is filed, the court shall hear the motion and issue an order upholding, modifying, or quashing the subpoena.

- (c) Upon receipt of a subpoena delivered pursuant to subsection (b) of this section identifying the vulnerable adult customer or, if the subpoena is challenged pursuant to subsection (b1) of this section, entry of a court order upholding or modifying a subpoena, a financial institution shall promptly provide to the head of an investigating entity, or her or her designated agent, the financial records of a vulnerable adult or elder adult customer.
- (d) All produced copies of the vulnerable adult's financial records, as well as any information obtained pursuant to the duty to report found in C.C. 108-23, shall be kept confidential by the investigating entity unless otherwise required by law or as required by court order to be disclosed to a party to a court proceeding or introduced and admitted into evidence in an open court proceeding.
- (e) No financial institution or investigating entity, or officer or employee thereof, who acts in good faith in providing, seeking, or obtaining financial records or any other information in accordance with this section, or in providing testimony in any judicial proceeding based upon the contents thereof, may be held liable in any action for doing so.
- (f) No customer may be subject to indictment, criminal prosecution, criminal punishment, or criminal penalty by reason of or on account of anything disclosed by a financial institution pursuant to this section, nor may any information obtained through such disclosure be used as evidence against the customer in any criminal or civil proceeding. Notwithstanding the foregoing, information obtained may be used against a person who is a joint account owner accused of financial exploitation of a vulnerable adult or elder adult joint account holder, but solely for criminal or civil proceedings directly related to the alleged financial exploitation of the vulnerable adult or elder adult joint account holder.
- (g) The petition and the court's entire record of the proceedings under this section is not a matter of public record. Records qualifying under this subsection shall be maintained separately from other records, shall be withheld from public inspection, and may be examined only by order of the court.

108-25. Notice to customer; delayed notice.

- (a) Upon the issuance of a subpoena pursuant to C.C. 108-24, the investigating entity shall immediately provide the customer with written notice of its action by first-class mail to the customer's last known address, unless an order for delayed notice is obtained pursuant to subsection (b) of this section. The notice shall be sufficient to inform the customer of the name of the investigating entity that has obtained the subpoena, the financial records subject to production pursuant to the subpoena, and the purpose of the investigation.

- (b) An investigating entity may include in its application for a subpoena pursuant to C.C. 108-24 a request for an order delaying the customer notice required pursuant to subsection (a) of this section. The court issuing the subpoena may order a delayed notice in accordance with subsection (c) of this section if it finds, based on affidavit or oral testimony under oath or affirmation before the issuing court, that all of the following conditions are met:
- a. The investigating entity is investigating a credible report that the adult is being or has been financially exploited.
  - b. There is reason to believe that the notice will result in at least one of the following:
    - i. Endangering the life or physical safety of any person.
    - ii. Flight from prosecution.
    - iii. Destruction of or tampering with evidence.
    - iv. Intimidation of potential witnesses.
    - v. Serious jeopardy to an investigation or official proceeding.
    - vi. Undue delay of a trial or official proceeding.
- (c) Upon making the findings required in subsection (b) of this section, the court shall enter an ex parte order granting the requested delay for a period not to exceed 30 days. If the court finds there is reason to believe that the notice may endanger the life or physical safety of any person, the court may order that the delay be for a period not to exceed 180 days. An order delaying notice shall direct that:
- a. The financial institution not disclose to any person the existence of the investigation, of the subpoena, or of the fact that the customer's financial records have been provided to the investigating entity for the duration of the period of delay authorized in the order;
  - b. The investigating entity deliver a copy of the order to the financial institution along with the subpoena that is delivered pursuant to C.C. 108-24(b); and
  - c. The order be sealed until otherwise ordered by the court.
- (d) Upon application by the investigating entity, further extensions of the delay of notice may be granted by order of a court in the county of residence of the vulnerable adult or elder adult customer whose financial records are being subpoenaed, upon a finding of the continued existence of the conditions set forth in subdivisions (1) and (2) of subsection (b) of this section, and subject to the requirements of subsection (c) of this section. If the initial delay was granted for a period not to exceed 30 days, the delay may be extended by additional periods of up to 30 days each and the total delay in notice granted under this section shall not exceed 90 days. If the initial delay was granted for a period not to

exceed 180 days, the delay may be extended by additional periods of up to 180 days each and may continue to be extended until the court finds the notice would no longer endanger the life or physical safety of any person.

- (e) Upon the expiration of the period of delay of notice granted under this section, including any extensions thereof, the customer shall be served with a copy of the notice required by subsection (a) of this section.

## Chapter 35A.

### Incompetency and Guardianship.

#### SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

##### Article 1.

##### Determination of Incompetence.

###### 35A-1101. Definitions.

###### When used in this Subchapter:

- (a) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain-functioning disorders.
- (b) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.
- (c) "Clerk" means the clerk of Cherokee court.
- (d) "Designated agency" means the local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.
- (e) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.
- (f) "Guardian ad litem" means a guardian appointed pursuant to N.C.G.S. 1A-1, Rule 17, Rules of Civil Procedure.



- (g) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.
- (h) "Indigent" means unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.
- (i) "Inebriety" means the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family.
- (j) "Intellectual Disability" means impairment of general mental abilities that impact adaptive functioning in three domains:
- a. The conceptual domain includes skills in language, reading, writing, math, reasoning, knowledge, and memory.
  - b. The social domain refers to empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, and similar capacities.
  - c. The practical domain centers on self-management in areas such as persona care, job responsibilities, money management, recreation, and organizing school and work tasks.
- (k) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate.
- (l) "Mental illness" means an illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "lunacy", "unsoundness of mind", and "insanity".
- (m) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.
- (n) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court.

The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

- (o) "Respondent" means a person who is alleged to be incompetent in a proceeding under this Subchapter.
- (p) "Treatment facility" any person at one location whose primary purpose is to provide services for the care, treatment, habilitation, or rehabilitation of the mentally ill, the developmentally disabled, or substance abusers and includes group homes, halfway houses, and other community-based residential facilities.
- (q) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction.

35A-1102. Scope of law; exclusive procedure.

This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem pursuant to C.C. 35A-1389, C.C. 7B-601 or N.C.G.S. 1A-1, Rule 17.

§ 35A-1103. Jurisdiction; venue.

- (a) The clerk of Cherokee court shall have original jurisdiction over proceedings under this Subchapter.
- (b) Venue for proceedings under this Subchapter shall be Cherokee court when the respondent is domiciled on tribal trust lands.
- (c) If the clerk of Cherokee court in which a proceeding under this Subchapter is brought has an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested in any Cherokee court judge residing or presiding, and the jurisdiction of the Cherokee court judge shall extend to all things which the clerk might have done.

§ 35A-1104. Change of venue.

The clerk, on motion of a party or the clerk's own motion, may order a change of venue upon finding that no hardship or prejudice to the respondent will result from a change of venue.

§ 35A-1105. Petition before clerk.

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any human or social services agency through its authorized representative.

§ 35A-1106. Contents of petition.

The petition shall set forth, to the extent known:

- a. The name, age, address, and county of residence of the respondent;
- b. The name, address, and county of residence of the petitioner, and her interest in the proceeding;

- c. A general statement of the respondent's assets and liabilities with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;
- d. A statement of the facts tending to show that the respondent is incompetent and the reason or reasons why the adjudication of incompetence is sought;
- e. The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;
- f. Facts regarding the adjudication of respondent's incompetence by a court of another state, if an adjudication is sought on that basis pursuant to C.C. 35A-1113(1).

§ 35A-1107. Right to counsel or guardian ad litem.

- (a) The respondent is entitled to be represented by counsel of her own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains her own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Cherokee Court.
- (b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of this Chapter. After being appointed, the guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship.

§ 35A-1108. Issuance of notice.

- (a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the clerk extends the time for good cause, for preparation of a multidisciplinary evaluation as provided in C.C. 35A-1111, or for the completion of a mediation.
- (b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a notice to the parties that the hearing has been continued, the reason therefor, and the date, time, and place of the new

hearing, which shall not be less than 10 days nor more than 30 days after service of such notice on the respondent.

- (c) Subsequent notices to the parties shall be served as provided by N.C.G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise.

§ 35A-1109. Service of notice and petition.

Copies of the petition and initial notice of hearing shall be personally served on the respondent. Respondent's counsel or guardian ad litem shall be served pursuant to N.C.G.S. 1A-1, Rule 4, Rules of Civil Procedure. A law enforcement officer who serves the notice and petition shall do so without demanding his fees in advance. The petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate.

§ 35A-1110. Right to jury.

The respondent has a right, upon request by her, her counsel, or her guardian ad litem, to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with N.C.G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on her own motion.

§ 35A-1111. Multidisciplinary evaluation.

- (a) To assist in determining the nature and extent of a respondent's disability, or to assist in developing an appropriate guardianship plan and program, a multidisciplinary evaluation of the respondent shall be performed. The multidisciplinary evaluation shall be completed within 10 days after service of the petition on the respondent.
- (b) The Family Safety Program Adult Services unit shall be responsible for prepare, cause to be prepared, or assemble a current multidisciplinary evaluation of the respondent. The Family Safety Program shall file the evaluation with the clerk not later than 5 days after completion of the evaluation. The multidisciplinary evaluation shall be filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of a guardian under Subchapter II of this Chapter, or both. The agency shall send copies of the evaluation to the petitioner and the counsel or guardian ad litem for the respondent not later than 10 days after completion of the evaluation. The evaluation shall not be a public record and shall not be released except by order of the clerk.
- (c) If a multidisciplinary evaluation shall contain medical, psychological, or social work evaluations,
- (d) The clerk may order that the respondent attend a multidisciplinary evaluation for the purpose of being evaluated.

- (e) The multidisciplinary evaluation may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian under Subchapter II of this Chapter, or both.

§ 35A-1112. Hearing on petition; adjudication order.

- (a) The hearing on the petition shall be at the date, time, and place set forth in the final notice of hearing and shall be open to the public unless the respondent or her counsel or guardian ad litem requests otherwise, in which event the clerk shall exclude all persons other than those directly involved in or testifying at the hearing.
- (b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses.
- (c) The clerk shall dismiss the proceeding if the finder of fact, whether the clerk or a jury, does not find the respondent to be incompetent.
- (d) If the finder of fact, whether the clerk or the jury, finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk shall enter an order adjudicating the respondent incompetent. The clerk may include in the order findings on the nature and extent of the ward's incompetence.
- (e) Following an adjudication of incompetence, the clerk shall appoint a guardian pursuant to Subchapter II of this Chapter.
- (f) Except as provided in C.C. 35A-1114(f), a proceeding filed under this Article may be voluntarily dismissed as provided in N.C.G.S. 1A-1, Rule 41, Rules of Civil Procedure.

§ 35A-1113. Hearing when incompetence determined in another jurisdiction.

When the petition alleges that the respondent is incompetent on the basis of an adjudication that occurred in another jurisdiction, the clerk in her discretion may:

- (a) Adjudicate incompetence on the basis of the prior adjudication, if the clerk first finds by clear, cogent, and convincing evidence that:
  - (1) The respondent is represented by an attorney or guardian ad litem; and
  - (2) A certified copy of an order adjudicating the respondent incompetent has been filed in the proceeding; and
  - (3) The prior adjudication was made by a court of competent jurisdiction on grounds comparable to a ground for adjudication of incompetence under this Article; and
  - (4) The respondent, subsequent to the adjudication of incompetence in another jurisdiction, assumed residence within tribal trust land and needs a guardian; or
- (b) Decline to adjudicate incompetence on the basis of the other jurisdiction's adjudication, and proceed with an adjudicatory hearing as in any other case pursuant to this Article.

§ 35A-1114. Appointment of interim guardian.

- (a) At the time of or subsequent to the filing of a petition under this Article, the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian.
- (b) The motion shall set forth facts tending to show:
  - (1) That there is reasonable cause to believe that the respondent is incompetent, and
  - (2) One or both of the following:
    - A. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to her physical well-being and that requires immediate intervention;
    - B. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest, and
- (c) That the respondent needs an interim guardian to be appointed immediately to intervene on her behalf prior to the adjudication hearing.
- (d) Upon filing of the motion for appointment of an interim guardian, the clerk shall immediately set a date, time, and place for a hearing on the motion. The motion and a notice setting the date, time, and place for the hearing shall be served promptly on the respondent and on her counsel or guardian ad litem and other persons the clerk may designate. The hearing shall be held as soon as possible but no later than 15 days after the motion has been served on the respondent.
- (e) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:
  - (1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to her physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or
  - (2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest, the clerk shall immediately enter an order appointing an interim guardian.
- (f) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk,

for good cause shown, extends that period for up to 45 additional days; when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

- (g) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to the hearing on the motion for appointment of an interim guardian.

§ 35A-1115. Appeal from clerk's order.

Appeal from an order adjudicating incompetence shall be to the Cherokee court for hearing de novo. An appeal does not stay the appointment of a guardian unless so ordered by the Cherokee court.

§ 35A-1116. Costs and fees.

- (a) Costs. - Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner which the clerk, in her discretion, may allow, may be taxed against either party in the discretion of the court unless:
- (1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or
- (2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above in subsection (a)(1).
- (b) Multidisciplinary Evaluation. - The cost of a multidisciplinary evaluation order pursuant to C.C. 35A-1111 shall be borne by the Department of Human Services.
- (c) Witness. - Witness fees shall be paid by:
- (1) The petitioner, if the respondent is not adjudicated incompetent;
- (2) The petitioner for any of the petitioner's witnesses, when the clerk finds there were reasonable grounds to bring the proceeding and the respondent was adjudicated incompetent.
- (3) The Department of Human Services for witness fees for the respondent, if the respondent is indigent and is adjudicated as incompetent.
- (c1) Mediator. - Mediator fees and other costs associated with mediation shall be assessed in accordance with rules created by Cherokee court.
- (c2) Guardian Ad Litem. - The fees of an appointed guardian ad litem shall be paid by:

(1) The respondent, if:

a. The respondent is adjudicated incompetent; and

b. The respondent is not indigent.

(2) The petitioner, if:

a. The respondent is not adjudicated incompetent; and

(3) The Cherokee court in all other cases.

§§ 35A-1117 through 35A-1119: Reserved for future codification purposes.

#### Article 2.

#### Appointment of Guardian.

§ 35A-1120. Appointment of guardian.

If the respondent is adjudicated incompetent, a guardian or guardians shall be appointed in the manner provided for in Subchapter II of this Chapter.

§§ 35A-1121 through 35A-1129. Reserved for future codification purposes.

#### Article 3.

#### Restoration to Competency.

§ 35A-1130. Proceedings before clerk.

- (a) The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion in the cause of the incompetency proceeding with the clerk who is exercising jurisdiction therein. The motion shall be verified and shall set forth facts tending to show that the ward is competent.
- (b) Upon receipt of the motion, the clerk shall set a date, time, and place for a hearing, which shall be not less than 10 days or more than 30 days from service of the motion and notice of hearing on the ward and the guardian, or on the one of them who is not the petitioner, unless the clerk for good cause directs otherwise. The petitioner shall cause notice and a copy of the motion to be served on the guardian and ward (but not on one who is the petitioner) and any other parties to the incompetency proceeding. Service shall be in accordance with provisions of N.C.G.S. 1A-1, Rule 4, Rules of Civil Procedure.
- (c) At the hearing on the motion, the ward shall be entitled to be represented by counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules adopted by the Cherokee court if the ward is indigent and not represented by counsel. Upon motion of any party or the clerk's own motion, the clerk may order a multidisciplinary evaluation. The ward has a right, upon request by him, her counsel, or her guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with



N.C.G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on her own motion.

- (d) If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk shall enter an order adjudicating that the ward is restored to competency. Upon such adjudication, the ward is authorized to manage her affairs, make contracts, control and sell her property, both real and personal, and exercise all rights as if he had never been adjudicated incompetent.
- (e) The filing and approval of final accounts from the guardian and the discharge of the guardian shall be as provided in Subchapter II of this Chapter.
- (f) If the clerk or jury fails to find that the ward should be restored to competency, the clerk shall enter an order denying the petition. The ward may appeal from the clerk's order to the Cherokee court for trial de novo.

§§ 35A-1131 through 35A-1200: Reserved for future codification purposes.

## SUBCHAPTER II. GUARDIAN AND WARD.

### Article 4.

#### Purpose and Scope; Jurisdiction; Venue.

§ 35A-1201. Purpose.

(a) The Eastern Band of Cherokee Indians recognizes that:

(1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.

(3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.

(4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising her rights.

(5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within her comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of her capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

(6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

(b) The purposes of this Subchapter are:

(1) To establish standards and procedures for the appointment of guardians of the person, guardians of the estate, and general guardians for incompetent persons and for minors who need guardians;

(2) To specify the powers and duties of such guardians;

(3) To provide for the protection of the person and conservation of the estate of the ward through periodic accountings and reports; and

(4) To provide for the termination of guardianships.

§ 35A-1202. Definitions.

When used in this Subchapter, unless a contrary intent is indicated or the context requires otherwise:

(a) "Accounting" means the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.

(b) "Clerk" means the clerk of Cherokee court.

(c) "Designated agency" means the local human services agency designated by the clerk in an order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(d) "Disinterested public agent" means the director of human services or her designated agent. The fact that a disinterested public agent provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian.

(e) "Estate" means any interest in real property, choses in action, intangible personal property, and tangible personal property, and includes any interest in joint accounts or jointly held property.

- (f) "Financial report" means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of the ward's money, sale of the ward's property, or other transactions involving the ward's property.
- (g) "General guardian" means a guardian of both the estate and the person.
- (h) "Guardian ad litem" means a guardian appointed pursuant to N.C.G.S. 1A-1, Rule 17, Rules of Civil Procedure.
- (i) "Guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.
- (j) "Guardian of the person" means a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.
- (k) "Incompetent person" means a person who has been adjudicated to be an "incompetent adult" or "incompetent child" as defined in C.C. 35A-1101(7) or (8).
- (l) "Minor" means a person who is under the age of 18, is not married, and has not been legally emancipated.
- (m) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.
- (n) "Status report" means the report required by C.C. 35A-1242 to be filed by the general guardian or guardian of the person.
- (o) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction.

§ 35A-1203. Jurisdiction; authority of clerk.

- (a) Clerks of Cherokee court have original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings brought or filed under this Subchapter. Clerks of Cherokee court have original jurisdiction for the appointment of guardians of the estate for minors, for the appointment of guardians of the person or general guardians for minors who have no natural guardian, and of related proceedings brought or filed under this Subchapter.
- (b) The clerk shall retain jurisdiction following appointment of a guardian in order to assure compliance with the clerk's orders and those of the Cherokee court. The clerk shall have authority to remove a guardian for cause and shall appoint a successor guardian.

following the criteria set forth in C.C. 35A-1213 or C.C. 35A-1224, after removal, death, or resignation of a guardian.

- (c) The clerk shall have authority to determine disputes between guardians and to adjust the amount of the guardian's bond.
- (d) Any party or any other interested person may petition the clerk to exercise the authority conferred on the clerk by this section.
- (e) Where a guardian or trustee has been appointed for a ward, the clerk, upon her own motion or the motion of that guardian or trustee or any other interested person, may designate that guardian or trustee or appoint another qualified person as guardian of the person, guardian of the estate, or general guardian of the ward under this Chapter.

§ 35A-1204. Venue.

- (a) Venue for proceedings under this Article shall be Cherokee court when the respondent is domiciled on tribal trust lands.
- (b) If the clerk of Cherokee court in which a proceeding under this Article is brought has an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested in any Cherokee court judge residing or presiding, and the jurisdiction of the Cherokee court judge shall extend to all things which the clerk might have done.

§ 35A-1205. Reserved for future codification purposes.

§ 35A-1206. Letters of appointment.

Whenever a guardian has been duly appointed and qualified under this Subchapter, the clerk shall issue to the guardian letters of appointment signed by the clerk and sealed with the clerk's seal of office. In all cases, the clerk shall specify in the order and letters of appointment whether the guardian is a guardian of the estate, a guardian of the person, or a general guardian.

§ 35A-1207. Motions in the cause.

- (a) Any interested person may file a motion in the cause with the clerk of Cherokee court where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship.
- (b) The clerk shall treat all such requests, however labeled, as motions in the cause.
- (c) A movant under this section shall obtain from the clerk a time, date, and place for a hearing on the motion, and shall serve the motion and notice of hearing on all other parties and such other persons as the clerk directs as provided by N.C.G.S. 1A-1, Rule 5 of the Rules of Civil Procedure, unless the clerk orders otherwise.
- (d) If the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate, the clerk may enter an appropriate ex parte order to address the emergency pending disposition of the matter at the hearing.

§ 35A-1208. Authority for health care decisions.

- (a) A guardian of the person or general guardian of an incompetent adult may petition the Clerk, in accordance with N.C.G.S. 32A-22(a), for an order suspending the authority of a health care agent, as that term is defined in N.C.G.S. 32A-16(2).
- (b) A guardian of the person or general guardian of an incompetent adult may not revoke a Declaration, as that term is defined in N.C.G.S. 90-321.

§ 35A-1209: Reserved for future codification purposes.

Article 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1210. Application before clerk.

Any individual, corporation, or disinterested public agent may file an application for the appointment of a guardian for an incompetent person by filing the same with the clerk. The application may be joined with or filed subsequent to a petition for the adjudication of incompetence under Subchapter I of this Chapter. The application shall set forth, to the extent known and to the extent such information is not already a matter of record in the case:

- (1) The name, age, address, and county of residence of the ward or respondent;
- (2) The name, address, and county of residence of the applicant, her relationship if any to the respondent or ward, and her interest in the proceeding;
- (3) The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;
- (4) A general statement of the ward's or respondent's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled; and
- (5) Whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian, and whom the applicant recommends or seeks to have appointed as such guardian or guardians.

§ 35A-1211. Service of application, motions, and notices.

- (a) Application for appointment of a guardian and related motions and notices shall be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk shall direct.
- (b) When the application for appointment of a guardian is joined with a petition for adjudication of incompetence, the application shall be served with and in the same manner as the petition for adjudication of incompetence. When the application is filed subsequent to the petition for adjudication of incompetence, the applicant shall serve the

application as provided by N.C.G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk directs otherwise.

§ 35A-1212. Hearing before clerk on appointment of guardian.

(a) The clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

(1) The nature and extent of the needed guardianship;

(2) The assets, liabilities, and needs of the ward; and

(3) Who, in the clerk's discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so.

(b) If a current multidisciplinary evaluation is not available and the clerk determines that one is necessary, the clerk, on her own motion or the motion of any party, may order that such an evaluation be performed pursuant to C.C. 35A-1111. The provisions of that section shall apply to such an order for a multidisciplinary evaluation following an adjudication of incompetence.

(c) The clerk may require a report prepared by a designated agency to evaluate the suitability of a prospective guardian, to include a recommendation as to an appropriate party or parties to serve as guardian, or both, based on the nature and extent of the needed guardianship and the ward's assets, liabilities, and needs.

(d) If a designated agency has not been named pursuant to C.C. 35A-1111, the clerk may, at any time he finds that the best interest of the ward would be served thereby, name a designated agency.

§ 35A-1212.1. Recommendation of appointment of guardian by will or other writing.

Any parent may by will recommend appointment of a guardian for an unmarried child who has been adjudicated an incompetent person and specify desired limitations on the powers to be given to the guardian. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. Such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the incompetent adult's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the incompetent adult would be best served by requiring the guardian to give bond.

§ 35A-1213. Qualifications of guardians.

- (a) The clerk may appoint as guardian an adult individual, a corporation, or a disinterested public agent. The applicant may submit to the clerk the name or names of potential guardians, and the clerk may consider the recommendations of the next of kin or other persons.
- (b) A nonresident of Cherokee, to be appointed as general guardian, guardian of the person, or guardian of the estate of a person residing or domiciled on tribal trust land, must indicate in writing her willingness to submit to the jurisdiction of the Cherokee courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointment must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence. The clerk shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties.
- (c) A corporation may be appointed as guardian only if it is authorized by its charter to serve as a guardian or in similar fiduciary capacities. A corporation shall meet the requirements outlined in Chapters 55 and 55D of the North Carolina General Statutes. A corporation will provide a written copy of its charter to the clerk of Cherokee court. A corporation contracting with a public agency to serve as guardian is required to attend guardianship training and provide verification of attendance to the contracting agency. A corporation shall not be appointed as guardian for any individual to whom it provides mental health, developmental disabilities, or substance abuse services for compensation as part of a contractual or other arrangement with a local management entity (LME), including an LME that has been approved to operate the 1915(b)/(c) Medicaid Waiver.
- (d) A disinterested public agent who is appointed by the clerk to serve as guardian is authorized and required to do so; provided, if at the time of the appointment or any time subsequent thereto the disinterested public agent believes that her role or the role of her agency in relation to the ward is such that her service as guardian would constitute a conflict of interest, or if he knows of any other reason that her service as guardian may not be in the ward's best interest, he shall bring such matter to the attention of the clerk and seek the appointment of a different guardian. A disinterested public agent who is appointed as guardian shall serve in that capacity by virtue of her office or employment, which shall be identified in the clerk's order and in the letters of appointment. When the disinterested public agent's office or employment terminates, her successor in office or employment, or her immediate supervisor if there is no successor, shall succeed him as guardian without further proceedings unless the clerk orders otherwise.

- (e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in C.C. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works.
- (f) An individual who contracts with or is employed by an entity that contracts with a local management entity (LME) for the delivery of mental health, developmental disabilities, and substance abuse services may not serve as a guardian for a ward for whom the individual or entity is providing these services, unless the individual is one of the following:
- (1) A parent of that ward.
  - (2) A member of the ward's immediate family, a licensed family foster care provider, or a licensed therapeutic foster care provider who is under contract with a local management entity (LME) for the delivery of mental health, developmental disabilities, and substance abuse services. For the purposes of this subsection, the term "immediate family" is defined as a spouse, child, sibling, parent, grandparent, or grandchild. The term also includes stepparents, stepchildren, stepsiblings, and adoptive relationships.
  - (3) A biologically unrelated individual who was serving, as a guardian without compensation for guardianship services.

§ 35A-1214. Priorities for appointment.

The clerk shall consider appointing a guardian according to the following order of priority: an individual recommended under C.C. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward.

§ 35A-1215. Clerk's order; issuance of letters of appointment.

- (a) When appointing a guardian, the clerk shall enter an order setting forth:
- (1) The nature of the guardianship or guardianships to be created and the name of the person or entity appointed to fill each guardianship; and
  - (2) The powers and duties of the guardian or guardians, which shall include, unless the clerk orders otherwise, (i) with respect to a guardian of the person and general guardian, the powers and duties provided under C.C. 35A, Article 8, and (ii) with respect to a guardian of the estate and general guardian, the powers, and duties provided under C.C. 35A, Article 9 and Subchapter III; and
  - (3) The identity of the designated agency if there is one.
- (b) If the clerk orders a limited guardianship as authorized by C.C. 35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which the ward was



entitled before the ward was adjudged incompetent. Any order of limited guardianship shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians.

(c) The clerk shall issue the guardian or guardians letters of appointment as provided in C.C. 35A-1206.

§ 35A-1216. Rule-making power of Department of Human Services.

The Department of Human Services shall adopt rules concerning the guardianship responsibilities of disinterested public agents. The rules shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians.

§ 35A-1217. Appointment of guardian ad litem for incompetent ward.

The clerk shall appoint a guardian ad litem to represent a ward in a proceeding under this Subchapter if the ward has been adjudicated incompetent under Subchapter I and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the guardian ad litem shall be in accordance with rules adopted by the Cherokee court. Nothing herein shall affect the ward's right to retain counsel of his or her own choice.

§ 35A-1218: Reserved for future codification purposes.

§ 35A-1219: Reserved for future codification purposes.

## Article 6.

### Appointment of Guardian for a Minor.

§ 35A-1220. Absence of natural guardian.

When a minor either has no natural guardian or has been abandoned, and the minor requires services from the department of social services, the director of human services, when the minor resides or is domiciled on tribal land, shall be the guardian of the person of the minor until the appointment of a general guardian or guardian of the person for the minor under this Subchapter or the entry of an order by a court of competent jurisdiction awarding custody of the minor or appointing a general guardian or guardian of the person for the minor.

§ 35A-1221. Application before clerk.

Any person or corporation, including any local human services agency through its authorized representative, may make application for the appointment of a guardian of the estate for any minor or for the appointment of a guardian of the person or general guardian for any minor who has no natural guardian by filing an application with the clerk. The application shall set forth, to the extent known:

(1) The minor's name, date of birth, address, and county of residence;

(2) The names and address of the minor's parents, if living, and of other persons known to have an interest in the application for appointment of a guardian; the name of and date of death of the minor's deceased parent or parents;

(3) The applicant's name, address, county relationship if any to the minor, and interest in the proceeding;

(4) If a guardian has been appointed for the minor or custody of the minor has been awarded, a statement of the facts relating thereto and a copy of any guardianship or custody order, if available;

(5) A general statement of the minor's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled;

(6) A statement of the reason or reasons that the appointment of a guardian is sought; whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian; and whom the applicant recommends or seeks to have appointed as such guardian or guardians; and

(7) Any other information that will assist the clerk in determining the need for a guardian or in appointing a guardian.

§ 35A-1222. Service of application and notices.

A copy of the application and written notice of the time, date, and place set for a hearing shall be served on each parent, guardian, and legal custodian of the minor who is not an applicant, and on any other person the clerk may direct, including the minor. Service shall be provided by N.C.G.S. 1A-1, Rule 4, Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by a law enforcement officer, the law enforcement officer shall make such service without demanding her fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered.

§ 35A-1223. Hearing before clerk on appointment of guardian.

The clerk shall receive evidence necessary to determine whether a guardian of the person, a guardian of the estate, or a general guardian is required. If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest.

§ 35A-1224. Criteria for appointment of guardians.

(a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.

(b) The clerk may appoint as guardian of the person or general guardian only an adult individual.

(c) The clerk may appoint as guardian of the estate an adult individual or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) If the minor's parent or parents have made a testamentary recommendation pursuant to C.C. 35A-1225 for the appointment of a guardian, the clerk shall give substantial weight to such recommendation; provided, such recommendation may not affect the rights of a surviving parent who has not willfully abandoned the minor, and the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in C.C. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works.

§ 35A-1225. Testamentary recommendation; guardian for incompetent minor.

(a) Parents are presumed to know the best interest of their children. Any parent may by last will and testament recommend a guardian for any of her or her minor children, whether born at the parent's death or en ventre sa mere, for such time as the child remains under 18 years of age, unmarried, and unemancipated, or for any less time. Such will may be made without regard to whether the testator is an adult or a minor. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. In the absence of a surviving parent, such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the minor's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the minor would be best served by requiring the guardian to give bond.

(b) Any person authorized by law to recommend a guardian for a minor by her last will and testament or other writing may direct that the guardian appointed for her incompetent child shall petition the clerk during the six months before the child reaches majority for an adjudication of incompetence and appointment of a guardian under the provisions of this Chapter. If so directed, the guardian shall timely file such a petition unless the minor is no longer incompetent. Notwithstanding the absence of such provision in a will or other writing, the guardian of an incompetent child, or any other person, may file such petition during the six months before the minor reaches majority or thereafter.

§ 35A-1226. Clerk's order; issuance of letters of appointment.

After considering the evidence, the clerk shall enter an appropriate order. If the clerk determines that a guardian or guardians should be appointed, the order may set forth:

- (1) Findings as to the minor's circumstances, assets, and liabilities as they relate to her need for a guardian or guardians; and
- (2) Whether there shall be one or more guardians, her or their identity, and if more than one, who shall be guardian of the person and who shall be guardian of the estate. The clerk shall issue the guardian or guardians letters of appointment as provided in C.C. 35A-1206.

§ 35A-1227. Funds owed to minors.

(a) Certain insurance proceeds or other funds to which a minor is entitled may be paid to and administered by the public guardian or the clerk.

(b) A devise of personal property to a minor may be distributed to the minor's parent or guardian with the approval of the clerk.

(c) A personal representative or collector who holds property due a minor without a guardian may deliver the property to the clerk.

(d) Inter vivos or testamentary transfers to minors may be made and administered according to the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the North Carolina General Statutes.

§ 35A-1228. Guardians of children of servicemen; allotments and allowances.

In all cases where a person serving in the Armed Forces of the United States has made an allotment or allowance to a person residing on tribal trust land who is her child or other minor dependent as provided by the Wartime Allowances to Service Men's Dependents Act or any other act of Congress, the clerk in the county of the minor's residence may act as temporary guardian, or appoint some suitable person to act as temporary guardian, of the person's minor dependent for purposes of receiving and disbursing allotments and allowance funds for the benefit of the minor dependent, when:

- (1) The other parent of the child or other minor dependent, or other person designated in the allowance or allotment to receive and disburse such moneys for the benefit of the minor dependent, dies or becomes mentally incompetent; and
- (2) The person serving in the Armed Forces of the United States is reported as missing in action or as a prisoner of war and is unable to designate another person to receive and disburse the allotment or allowance to the minor dependent.

§ 35A-1229: Reserved for future codification purposes.

## Article 7.

### Guardian's Bond.

§ 35A-1230. Bond required before receiving property.

Except as otherwise provided by C.C. 35A-1212.1 and C.C. 35A-1225(a), no general guardian or guardian of the estate shall be permitted to receive the ward's property until he has given sufficient surety, approved by the clerk, to account for and apply the same under the direction of the court, provided that if the guardian is a nonresident of this State and the value of the property received exceeds one thousand dollars (\$1,000) the surety shall be a bond under C.C. 35A-1231(a) executed by a duly authorized surety company, or secured by cash in an amount equal to the amount of the bond, or by a voluntary assignment of per capita, or by a mortgage of real estate located within this state, the value of which, excluding all prior liens and encumbrances, shall be at least one and one-fourth times the amount of the bond; and further provided that the nonresident shall appoint a resident agent to accept service of process in all actions and proceedings with respect to the guardianship. The clerk may waive this bond requirement.

§ 35A-1231. Terms and conditions of bond; increase on sale of realty or personal property.

(a) Before issuing letters of appointment to a general guardian or guardian of the estate the clerk shall require the guardian to give a bond payable to the Tribe. The clerk shall determine the value of all the ward's personal property and the rents and profits of the ward's real estate by examining, under oath, the applicant for guardianship or any other person or persons. The penalty in the bond shall be set as follows:

(1) Where the bond is executed by personal sureties, the penalty must be at least double the value so determined by the clerk;

(2) Where the bond is executed by a duly authorized surety company, the penalty may be fixed at not less than one and one-fourth times the value so determined by the clerk;

(3) Provided, however, the clerk may accept bond in estates where the value determined by the clerk exceeds the sum of one hundred thousand dollars (\$100,000), in a sum equal to one hundred and ten percent (110%) of the determined value.

The bond must be secured with two or more sufficient sureties, jointly and severally bound, and must be acknowledged before and approved by the clerk. The bond must be conditioned on the guardian's faithfully executing the trust reposed in him as such and obeying all lawful orders of the clerk or judge relating to the guardianship of the estate committed to him. The bond must be recorded in the office of the clerk appointing the guardian, except, if the guardianship is transferred to a different county, it must be recorded in the office of the clerk in the county where the guardianship is docketed.

(b) If the court orders a sale of the ward's real property, or if the guardian expects or offers to sell personal property that he knows or has reason to know has a value greater than the value used in determining the amount of the bond posted, the guardian shall, before receiving the proceeds of the sale, furnish bond or increase her existing bond to cover the proceeds if real estate is sold, or to cover the increased value if personal property is sold. The bond, or the increase in the existing bond, shall be twice the amount of the proceeds of any real property sold, or of the increased value of any personal property sold, except where the bond is executed by a duly authorized surety company, in which case the penalty of the bond need not exceed one and one-fourth times the amount of the real property sold or the increased value of the personal property sold.

*§ 35A-1232. Exclusion of deposited money in computing amount of bond.*

(a) When it appears that the ward's estate includes money that has been or will be deposited in an account with a financial institution upon condition that the money will not be withdrawn except on authorization of the court, the court may, in its discretion, order that the money be so deposited or invested and exclude such deposited money from the computation of the amount of the bond or reduce the amount of the bond in respect of such money to such an amount as it may deem reasonable.

(b) The applicant for letters of guardianship, or a general guardian or guardian of the estate, may deliver to any such financial institution any such money in the applicant's or the guardian's possession or may allow such financial institution to retain any such money already deposited or invested with it; in either event, the applicant or guardian shall secure and file with the court a written receipt including the agreement of the financial institution, duly acknowledged by an authorized officer of the financial institution, that the money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money from an applicant for letters of guardianship, the financial institution shall be protected to the same extent as though it had received the same from a general guardian or a guardian of the estate.

(c) The term "account with a financial institution" as used in this section means any account in a bank, savings and loan association, credit union, trust company, or registered securities broker or dealer.

(d) The term "money" as used in this section means the principal of the ward's estate and does not include the income earned by the principal, which may be withdrawn without any authorization of the court.

*§ 35A-1233. Clerk's authority to reduce penalty of bond.*

When a guardian has disbursed either income or income and principal of the estate according to law, for the purchase of real estate or the support and maintenance of the ward or the ward and her dependents or any lawful cause, and when the personal assets and income of the estate from all sources in the hands of the guardian have been diminished, the penalty of the guardian's bond

may be reduced in the discretion of the clerk to an amount not less than the amount that would be required if the guardian were first qualifying to administer the personal assets and income.

§ 35A-1234. Action on bond.

Any person injured by a breach of the condition of the guardian's bond may prosecute a suit thereon, as in other actions.

§ 35A-1235. One bond sufficient when several wards have estate in common.

When the same person is appointed guardian for two or more minors or incompetent persons possessed of one estate in common, the clerk may take one bond only in such case, upon which each of the wards or their heirs or personal representatives may have a separate action.

§ 35A-1236. Renewal of bond.

Every guardian who is required to post a bond and who does so other than through a duly authorized surety company shall renew her bond before the clerk every three years during the continuance of the guardianship. The clerk shall issue a citation against every such guardian failing to renew her bond, requiring the guardian to renew the bond within 20 days after service of the citation. On return of the citation duly served and failure of the guardian to comply, the clerk shall remove the guardian and appoint a successor. This section shall not apply to a guardian whose bond is executed by a duly authorized surety company.

§ 35A-1237. Relief of endangered sureties.

Any surety of a guardian, who is in danger of sustaining loss by her suretyship, may file a motion in the cause before the clerk where the guardianship is docketed, setting forth the circumstances of her case and demanding relief. The guardian shall have 10 days after service of the motion to answer the motion. If, upon the hearing, the clerk deems the surety entitled to relief, the clerk may order the guardian to give a new bond or to indemnify the surety against apprehended loss, or may remove the guardian from her trust. If the guardian fails to give a new bond or security to indemnify within a reasonable time when required to do so, the clerk must enter a peremptory order for her removal, and her authority as guardian shall cease.

§ 35A-1238. Clerk's liability.

(a) If any clerk commits the estate of a ward to the guardianship of any person without taking good and sufficient bond for the same as required by law, the clerk shall be liable on her official bond, at the suit of the aggrieved party, for all loss and damages sustained for want of sufficient bond being taken; but if the sureties were good at the time of their being accepted, the clerk shall not be liable.

(b) If any clerk willfully or negligently does, or omits to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, the clerk shall be liable on her official bond, at the suit of the aggrieved party, for all loss and damages sustained from such act or omission.

§ 35A-1239. Health and Human Services bond.

The Director of the Department of Human Services shall require or purchase individual or blanket bonds for all disinterested public agents appointed to be guardians, whether they serve as guardians of the estate, guardians of the person, or general guardians, or one blanket bond covering all agents, the bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the Tribe. The premiums shall be paid by the Tribe.

Article 8.

Powers and Duties of Guardian of the Person.

§ 35A-1240. Applicability of Article.

This Article applies only to guardians of the person, including general guardians exercising authority as guardian of the person.

§ 35A-1241. Powers and duties of guardian of the person.

(a) To the extent that it is not inconsistent with the terms of any order of the clerk or any other court of competent jurisdiction, a guardian of the person has the following powers and duties:

(1) The guardian of the person is entitled to custody of the person of the guardian's ward and shall make provision for the ward's care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for the ward's training, education, employment, rehabilitation or habilitation. The guardian of the person shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects that are with the ward.

(2) The guardian of the person may establish the ward's place of abode within or without this State. In arranging for a place of abode, the guardian of the person shall give preference to places within this State over places not in this State if in-State and out-of-State places are substantially equivalent. The guardian also shall give preference to places that are not treatment facilities. If the only available and appropriate places of domicile are treatment facilities, the guardian shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based.

(3) The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other



professional care, counsel, treatment, or service; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority granted in the health care power of attorney unless the Clerk has suspended the authority of that health care agent in accordance with C.C. 35A-1208. The guardian shall not, however, consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk in accordance with C.C. 35A-1245. The guardian of the person may give any other consent or approval on the ward's behalf that may be required or in the ward's best interest. The guardian may petition the clerk for the clerk's concurrence in the consent or approval.

(b) A guardian of the person is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in the performance of her duties as guardian of the ward's person.

(c) A guardian of the person, if he has acted within the limits imposed on him by this Article or the order of appointment or both, shall not be liable for damages to the ward or the ward's estate, merely by reason of the guardian's:

(1) Authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service, in a situation where the damages result from the negligence or other acts of a third person; or

(2) Authorizing medical treatment or surgery for her ward, if the guardian acted in good faith and was not negligent.

§ 35A-1242. Status reports for incompetent wards.

(a) Any corporation or disinterested public agent that is guardian of the person for an incompetent person, within six months after being appointed, shall file an initial status report with the clerk and submit a copy of the initial status report to the designated agency, if there is one. Such guardian shall file a second status report with the clerk one year after being appointed, and subsequent reports annually thereafter. The clerk may order any other guardian of the person to file status reports. If a guardian required by this section to file a status report is employed by the designated agency, the guardian shall file any required status report with the clerk and submit a copy of the status report to the designated agency.

(a1) Each status report shall include all of the following:

(1) A report or summary of recent medical and dental examinations of the ward by one or more physicians and dentists. In instances when the guardian has made diligent but unsuccessful attempts to secure this information, the guardian shall include in the status report an explanation and documentation of all actions taken to attempt to secure this information.

(2) A report on the guardian's performance of the duties set forth in this Chapter and in the clerk's order appointing the guardian.

(3) A report on the ward's residence, education, employment, and rehabilitation or habilitation.

(4) A report of the guardian's efforts to restore competency.

(5) A report of the guardian's efforts to seek alternatives to guardianship.

(6) If the guardian is a disinterested public agent or corporation, a report of the efforts to identify alternative guardians.

(7) The guardian's recommendations for implementing a more limited guardianship, preserving for the ward the opportunity to exercise rights that are within the ward's comprehension and judgment.

(8) Any additional reports or information required by the clerk.

(a2) The guardian may include in each status report additional information pertaining to the ward's best interests.

(b) Each status report shall be filed (i) under the guardian's oath or affirmation that the report is complete and accurate so far as the guardian is informed and can determine or (ii) with the signature of a disinterested, competent witness to a statement by the guardian that the report is complete and accurate so far as the guardian is informed and can determine. Status reports filed with the signature of a disinterested, competent witness shall include the full name, address, and telephone number of the witness.

(b1) The clerk shall make status reports submitted by corporations or disinterested public agents available to the Director, or the Director's designee, of the Department of Human Services. The Director, or the Director's designee, shall review the status reports in connection with the Department's regular program of oversight for these categories of guardians.

(c) A clerk or designated agency that receives a status report shall not make the status report available to anyone other than the guardian, the ward, the court, or State or local human services agencies providing services to the ward.

(d) The clerk, on the clerk's own motion, or any interested party, may file a motion in the cause pursuant to C.C. 35A-1207 with the clerk where the guardianship is filed to request modification of the order appointing the guardian or guardians or for consideration of any matters contained in the status report.

§ 35A-1243. Duties of designated agency.

(a) Within 30 days after it receives a status report, the designated agency shall certify to the clerk that it has reviewed the report and shall mail a copy of its certification to the guardian.

(b) At the same time, the designated agency may:

- (1) Send its written comments on the report to the clerk, the guardian, or any other person who may have an interest in the ward's welfare;
- (2) Notify the guardian that it is able to help the guardian in the performance of her duties;
- (3) Petition the clerk for an order requiring the guardian to perform the duties imposed on him by the clerk or this Article if it appears that the guardian is not performing those duties;
- (4) Petition the clerk for an order modifying the terms of the guardianship or the guardianship program or plan if it appears that such should be modified;
- (5) Petition the clerk for an order removing the guardian from her duties and appointing a successor guardian if it appears that the guardian should be removed for cause;
- (6) Petition the clerk for an adjudication of restoration to competency; or
- (7) Petition the clerk for any other appropriate orders.

(c) If the designated agency files such a petition, it shall cause the petition to be signed and acknowledged by the officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition, and it shall set forth all facts known to it that tend to support the relief sought by the petition.

(d) The clerk shall take appropriate action upon the petition in accordance with other provisions or requirements of this Chapter.

§ 35A-1244. Procedure to compel status reports.

If a guardian of the person fails to file a status report as required, or renders an unsatisfactory report, the clerk shall, on her own motion or the request of an interested party, promptly order the guardian to render a full and satisfactory report within 20 days after service of the order. If, after due service of the order, the guardian does not file such report, or obtain further time in which to file it, on or before the return day of the order, the clerk may remove him from office or may issue an order or notice to show cause for civil or criminal contempt as provided in Cherokee Code. In such proceedings, the defaulting guardian may be held personally liable for the costs of the proceeding, including the costs of service of all notices or motions incidental thereto, or the amount of the costs of the proceeding may be deducted from any commissions due to the guardian of the person. Where a corporation or disinterested public agent is guardian of the person, the president or director or person or persons having charge of the guardianship for the corporation or agency, or the person to whom the duty of making status reports has been assigned by the corporation or agency, may be proceeded against as herein provided as if he or they were the guardian personally, provided, the corporation or agency itself may also be fined and/or removed as guardian for such failure or omission.

§ 35A-1245. Procedure to permit the sterilization of a mentally ill or a mentally retarded ward in the case of medical necessity.

(a) A guardian of the person shall not consent to the sterilization of a mentally ill or mentally retarded ward unless an order from the clerk has been obtained in accordance with this section.

(b) If a mentally ill or mentally retarded ward needs to undergo a medical procedure that would result in sterilization, the ward's guardian shall petition the clerk for an order to permit the guardian to consent to the procedure. The petition shall contain the following:

(1) A sworn statement from a physician licensed in this State who has examined the ward that the proposed procedure is medically necessary and not for the sole purpose of sterilization or for the purpose of hygiene or convenience.

(2) The name and address of the physician who will perform the procedure.

(3) A sworn statement from a psychiatrist or psychologist licensed in this State who has examined the ward as to whether the mentally ill or mentally retarded ward is able to comprehend the nature of the proposed procedure and its consequences and provide an informed consent to the procedure.

(4) If the ward is able to comprehend the nature of the proposed procedure and its consequences, the sworn consent of the ward to the procedure.

(c) A copy of the petition shall be served on the ward personally. If the ward is unable to comprehend the nature of the proposed procedure and its consequences and is unable to provide an informed consent, the clerk shall appoint an attorney to represent the ward in accordance with rules adopted by the Cherokee court.

(d) Should the ward or the ward's attorney request a hearing, a hearing shall be held. Otherwise, the clerk may enter an order without the appearance of witnesses. If a hearing is held, the guardian and the ward may present evidence.

(e) If the clerk finds the following, the clerk shall enter an order permitting the guardian to consent to the proposed procedure:

(1) The ward is capable of comprehending the procedure and its consequences and has consented to the procedure, or the ward is unable to comprehend the procedure and its consequences.

(2) The procedure is medically necessary and is not solely for the purpose of sterilization or for hygiene or convenience.

(f) The guardian or the ward, the ward's attorney, or any other interested party may appeal the clerk's order to the Cherokee court.

§§ 35A-1246 through 35A-1249: Reserved for future codification purposes.

## Article 9.

### Powers and Duties of Guardian of the Estate.

§ 35A-1250. Applicability of Article.

(a) This Article applies only to guardians of the estate, including general guardians exercising authority as guardian of the estate. A guardian of the estate or general guardian shall have all the powers and duties under this Article unless those are inconsistent with the clerk's order appointing a guardian, in which case the clerk's order shall prevail.

(b) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any court order creating or limiting the guardian's powers and duties.

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in C.C. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or her estate, or to refuse to complete the contracts, as the guardian determines to be in the ward's best interests, taking into account any cause of action that might be maintained against the ward for failure to complete the contract.

(5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in a condition that it is of no benefit or value to the ward or her estate.

(5a) To renounce any interest in property as provided in Chapter 31B of the North Carolina General Statutes, or as otherwise allowed by law.

- (6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.
- (7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.
- (8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living expenses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or her estate.
- (9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.
- (10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.
- (11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.
- (12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.
- (13) To pay from the ward's estate necessary expenses of administering the ward's estate.
- (14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of her duties as guardian.
- (15) To continue any business or venture or farming operation in which the ward was engaged, where that continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in the business.
- (16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.
- (17) a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order shall not exceed five thousand dollars (\$5,000) per accounting period. When any item of the ward's tangible personal property has a value

which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed five thousand dollars (\$5,000) in the current accounting period, a guardian may sell the item only as provided in subdivision (17)b.

b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in N.C.G.S 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon any other persons the clerk may direct, and the court may issue the order after conducting a hearing and upon any conditions that the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the North Carolina General Statutes unless the order so requires; and

2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.

(18) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed or trust, or other lien securing the bond, note or other obligation, and to bid in the property at a foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(19) To borrow money for any periods of time and upon the terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber that portion of the ward's estate as may be required to secure the loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

(21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to her minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents; and the

ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons.

(22) To transfer to the spouse of the ward those amounts authorized for transfer to the spouse pursuant to 42 United States Code § 1396r-5.

(23) To create a trust for the benefit of the ward pursuant to 42 United States Code § 1396p(d)(4), provided that all amounts remaining in the trust upon the death of the ward, other than those amounts which must be paid to a state government and those amounts retained by a nonprofit association as set forth in 42 United States Code § 1396p(d)(4)(C), are to be paid to the estate of the ward.

(24) To petition the court for approval of the exercise of any of the following powers with respect to a revocable trust that the ward, if competent, could exercise as settlor of the revocable trust:

- a. Revocation of the trust.
- b. Amendment of the trust.
- c. Additions to the trust.
- d. Direction to dispose of property of the trust.
- e. The creation of the trust.

The exercise of the powers described in this subdivision (i) shall not alter the designation of beneficiaries to receive property on the ward's death under that ward's existing estate plan but may incorporate tax planning or public benefits planning into the ward's existing estate plan, which may include leaving beneficial interests in trust rather than outright, and (ii) shall be subject to the provisions of Articles 17, 18, and 19 of this Chapter concerning gifts.

§ 35A-1252. Guardian's powers in administering a minor ward's estate.

In the case of a minor ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in C.C. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise,



adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or her estate.

(4a) To renounce any interest in property as provided in Chapter 31B of the North Carolina General Statutes, or as otherwise allowed by law.

(5) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(6) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(7) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(8) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(9) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal; provided, neither the existence of the estate nor the guardian's authority to make expenditures therefrom shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward.

(10) To pay from the ward's estate necessary expenses of administering the ward's estate.

(11) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of her duties as guardian.

(12) To continue any business or venture or farming operation in which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business.

(13) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(14) a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order shall not exceed five thousand dollars (\$5,000) per accounting period. When any item of the ward's tangible personal property has a value

which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed five thousand dollars (\$5,000) in the current accounting period, a guardian may sell the item only as provided in subdivision (14)b.

b. A guardian who is required by subdivision (14)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in N.C.G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (9) of this section.

(15) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(16) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(17) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

§ 35A-1253. Specific duties of guardian of estate.

In addition to any other duties imposed by law or by order of the clerk, a general guardian or guardian of the estate shall have the following specific duties:

- (1) To take possession, for the ward's use, of all her estate.
- (2) To diligently endeavor to collect, by all lawful means, all bonds, notes, obligations, or moneys due her ward.

(3) To pay income taxes, property taxes, or other taxes or assessments owed by the ward, out of the ward's estate, as required by law. If any guardian allows her ward's lands to be sold for nonpayment of taxes or assessments, he shall be liable to her ward for the full value thereof.

(4) To observe the standard of judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property. If the guardian has special skills or is named as guardian on the basis of representations of special skills or expertise, to use those skills.

(5) To obey all lawful orders of the court pertaining to the guardianship and to comply with the accounting requirements of this Subchapter.

Nothing in this section shall be construed as broadening the powers granted in C.C. 35A-1251 or C.C. 35A-1252.

§§ 35A-1254 through 35A-1259: Reserved for future codification purposes.

## Article 10.

### Returns and Accounting.

#### **§ 35A-1260. Applicability.**

This Article applies only to general guardians and guardians of the estate.

#### **§ 35A-1261. Inventory or account within three months.**

Every guardian, within three months after her appointment, shall file with the clerk an inventory or account, upon oath, of the estate of her ward; but the clerk may extend such time not exceeding six months, for good cause shown.

#### **§ 35A-1262. Procedure to compel inventory or account.**

(a) In cases of default to file the inventory or account required by C.C. 35A-1261, the clerk must issue an order requiring the guardian to file the inventory or account within the time specified in the order, or to show cause why he should not be removed from office or held in civil contempt, or both. If after due service of the order, the guardian does not, within the time specified in the order, file such inventory or account, or obtain further time to file the same, the clerk may remove him from office, hold him in civil contempt as provided in Cherokee Code.

(b) The guardian shall be personally liable for the costs of any proceeding incident to her failure to file the inventory or account required by C.C. 35A-1261. Such costs shall be taxed against him by the clerk and may be collected by deduction from any commissions that may be found due the guardian upon final settlement of the estate.

**§ 35A-1263. Repealed by Session Laws 1989, c. 473, s. 28.**

**§ 35A-1263.1. Supplemental inventory.**

Whenever any property not included in the original inventory report becomes known to the guardian or whenever the guardian learns that the valuation or description of any property or interest therein indicated in the original inventory is erroneous or misleading, he shall prepare and file with the clerk a supplementary inventory in the same manner as prescribed for the original inventory. The clerk shall record the supplementary inventory with the original inventory. A guardian who fails to file a supplementary inventory as required by this section shall be subject to the enforcement provisions of C.C. 35A-1262.

**§ 35A-1264. Annual accounts.**

Every guardian shall, within 30 days after the expiration of one year from the date of her qualification or appointment, and annually, so long as any of the estate remains in her control, file in the office of the clerk an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and her receipts and disbursements for the past year in the form of debit and credit. The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must endorse her approval thereon, which shall be deemed prima facie evidence of correctness.

**§ 35A-1265. Procedure to compel accounting.**

(a) If any guardian omits to account, as directed in C.C. 35A-1264, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such guardian to render a full and satisfactory account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if the guardian fails to appear or refuses to exhibit such account, the clerk may issue an attachment against him for contempt and commit him until he exhibits such account, and may likewise remove him from office. In all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceedings, including the costs of service of all notices or writs incidental to, or thereby acquiring, and also including reasonable

attorney fees and expenses incurred by a successor guardian or other person in bringing any such proceeding, or other proceedings deemed reasonable and necessary to discover or obtain possession of assets of the ward in the possession of the defaulting guardian or which the defaulting guardian should have discovered or which the defaulting guardian should have turned over to the successor guardian. The amount of the costs and attorney fees and expenses of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate.

(b) Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for the corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of the corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may be fined and/or removed as such guardian for such failure or omission.

**§ 35A-1266. Final account and discharge of guardian.**

Within 60 days after a guardianship is terminated under C.C. 35A-1295, the guardian shall file a final account for the period from the end of the period of her most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability.

**§ 35A-1267. Expenses and disbursements credited to guardian.**

Every guardian may charge in her annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for her education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward.

*§ 35A-1268. Guardian to exhibit investments and bank statements.*

At the time the accounts required by this Article and other provisions of law are filed, the clerk shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account: Provided, such examination may be made by the clerk in the county in which such guardian resides or the county in which such securities are located and, when the guardian is a duly authorized bank or trust company, unless the guardian resides on tribal trust land such examination may be made by the clerk in the county in which such bank or trust company has its

principal office or in which such securities are located; the certificate of the clerk of such county shall be accepted by the clerk of any county in which such guardian is required to file an account; provided that banks organized under the laws of North Carolina or the acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian or in other fiduciary capacity, shall be exempt from the requirements of this section, when a certificate executed by a trust examiner employed by a governmental unit, by a bank's internal auditors who are responsible only to the bank's board of directors or by an independent certified public accountant who is responsible only to the bank's board of directors is exhibited to the clerk and when said certificate shows that the securities have been examined within one year and that the securities were held at the time of the examination by the fiduciary or by a clearing corporation for the fiduciary and that the person making such certification has no reason to believe said securities are not still so held. Nothing herein contained shall be construed to abridge the inherent right of the clerk to require the production of securities, should he desire to do so.

#### **§ 35A-1269. Commissions.**

The clerk shall allow commissions to the guardian for her time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors under the provisions of N.C.G.S. 28A-23-3 and N.C.G.S. 28A-23-4.

#### Article 11.

#### Public Guardians.

##### § 35A-1270. Appointment; term; oath.

There may be in every county a public guardian, to be appointed by the clerk for a term of eight years. The public guardian shall take and subscribe an oath or affirmation faithfully and honestly to discharge the duties imposed upon him; the oath or affirmation so taken and subscribed shall be filed in the office of the clerk.

##### § 35A-1271. Bond of public guardian; increasing bond.

The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars (\$6,000), payable to the Eastern Band of Cherokee Indians, conditioned faithfully to perform the duties of her office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into her hands. Whenever the aggregate value of the real and personal estate belonging to her several wards exceeds one-half the bond herein required the clerk shall require him to enlarge her bond in amount so as to cover at least double the aggregate amount under her control as guardian.

§ 35A-1272. Powers, duties, liabilities, compensation.

The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians.

§ 35A-1273. When letters issue to public guardian.

The public guardian shall apply for and obtain letters of guardianship in the following cases:

- (1) When a period of six months has elapsed from the discovery of any property belonging to any minor or incompetent person without guardian.
- (2) When any person entitled to letters of guardianship shall request in writing the clerk to issue letters to the public guardian; but it is lawful and the duty of the clerk to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation.

§§ 35A-1274 through 35A-1279: Reserved for future codification purposes.

## Article 12.

### Nonresident Ward Having Property in State.

§ 35A-1280. Appointment of ancillary guardian.

(a) A clerk may appoint an ancillary guardian whenever it appears by petition or application and due proof to the satisfaction of the clerk that:

- (1) There is in the clerk's jurisdiction real or personal property in which a nonresident has an ownership or other interest; and
- (2) The nonresident is incompetent or is a minor and a guardian of the estate or general guardian, or a comparable fiduciary, has been appointed and is still serving for the nonresident in the state of her or her residence; and
- (3) That the nonresident ward has no guardian in the jurisdiction of the Cherokee court.

(b) Except as otherwise ordered by the clerk or provided herein, an ancillary guardian shall have all the powers, duties, and responsibilities with respect to the nonresident ward's estate as guardians otherwise appointed have. An ancillary guardian shall annually make an accounting to the Cherokee court and remit to the guardian in the state of the ward's residence any net rents of the real estate or any proceeds of sale.

(c) A certified or exemplified copy of letters of appointment or other official record of a court of record appointing a guardian for a nonresident in the state of her residence shall be

conclusive proof of the fact of the ward's minority or incompetence and of the appointment of the guardian in the state of the ward's residence; provided, that the letters of appointment or other record shall show that the guardianship is still in effect in the state of the ward's residence and that the ward's incompetence or minority still exists.

(d) Upon the appointment of an ancillary guardian under this Article, the clerk shall notify the appropriate court in the county of the ward's residence and the guardian in the state of the ward's residence.

§ 35A-1281. Removal of ward's personalty from State.

(a) For purposes of this section, the term "personal estate" means:

(1) Personal property;

(2) Personal property substituted for realty by decree of court;

(3) Any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this jurisdiction; or in the hands of any executor, administrator, or other person holding for the ward; or, if not being adversely held and claimed, not in the lawful possession or control of any person.

(b) Where any ward residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this jurisdiction, the ward's guardian or trustee duly appointed at the place where such ward resides, or, in the event no guardian or trustee has been appointed, the court or officer of the court authorized by the laws of such place to receive moneys belonging to any ward when no guardian or trustee has been appointed, may apply to have such estate removed to the residence of the ward by petition filed before the clerk in the jurisdiction in which the property or some portion thereof is situated. Such petition shall be proceeded with as in other cases of special proceedings.

(c) The petitioner must show to the court a copy of her appointment as a guardian or trustee and bond duly authenticated, and must prove to the court that the bond is sufficient, in the ability of the sureties as well as in amount, to secure all the estate of the ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian or trustee of any person and is not required to execute a bond to qualify as guardian or trustee under the laws of the state in which such guardian or trustee qualified and was appointed, and no sureties are or were required by the state in which said banking institution qualified as guardian or trustee, and this fact affirmatively appears to the court, then the personal estate of the ward may be removed from this State without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the ward is filed may order the transfer and removal of the property of the ward and the payment and delivery of the same to the nonresident guardian or trustee without regard to whether a nonresident guardian or trustee has filed a bond with sureties; and the finding of the court that the said guardian or trustee is a banking institution and has duly qualified and been appointed guardian or trustee under the laws of the state where the ward is resident shall be sufficient. Any



person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of Chapter 1A of the North Carolina General Statutes.

§§ 35A-1282 through 35A-1289: Reserved for future codification purposes.

### Article 13.

#### Removal or Resignation of Guardian; Successor Guardian; Estates without Guardians; Termination of Guardianship.

§ 35A-1290. Removal by Clerk.

(a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.

(b) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests in the following cases:

(1) The guardian wastes the ward's money or estate or converts it to her own use.

(2) The guardian in any manner mismanages the ward's estate.

(3) The guardian neglects to care for or maintain the ward or her dependents in a suitable manner.

(4) The guardian or her sureties are likely to become insolvent or to become nonresidents of this jurisdiction.

(5) The original appointment was made on the basis of a false representation or a mistake.

(6) The guardian has violated a fiduciary duty through default or misconduct.

(7) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out her duties as guardian.

(c) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests in the following cases:

(1) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competence.

(2) The guardian has been convicted of a felony under the laws of the United States or of any state or territory of the United States or of the District of Columbia and her citizenship has not been restored.

- (3) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment as guardian due to a change in residence, a change in the charter of a corporate guardian, or any other reason.
- (4) The guardian is the ward's spouse and has lost her rights as provided by Chapter 31A of the North Carolina General Statutes.
- (5) The guardian fails to post, renew, or increase a bond as required by law or by order of the court.
- (6) The guardian refuses or fails without justification to obey any citation, notice, or process served on him in regard to the guardianship.
- (7) The guardian fails to file required accountings with the clerk.
- (8) The clerk finds the guardian unsuitable to continue serving as guardian for any reason.
- (9) The guardian is a nonresident of the jurisdiction and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent.

§ 35A-1291. Emergency removal; interlocutory orders on revocation.

The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate. In all cases where the letters of a guardian are revoked, the clerk may, pending the resolution of any controversy in respect to such removal, make such interlocutory orders and decrees as the clerk finds necessary for the protection of the ward or the ward's estate or the other party seeking relief by such revocation.

§ 35A-1292. Resignation.

(a) Any guardian who wishes to resign shall file a motion with the clerk setting forth the circumstances of the case. If a general guardian or guardian of the estate, at the time of making the application, also exhibits her final account for settlement, and if the clerk is satisfied that the guardian has fully accounted, the clerk may accept the resignation of the guardian and discharge him and appoint a successor guardian. The guardian so discharged and her sureties are still liable in relation to all matters connected with the guardianship before the discharge and shall continue to ensure that the ward's needs are met until the clerk officially appoints a successor. The guardian shall attend the hearing to modify the guardianship, if physically able.

(b) A general guardian who wishes to resign as guardian of the estate of the ward but continue as guardian of the person of the ward may apply for the partial resignation by petition as provided in subsection (a) of this section. If the general guardian also exhibits her final account as guardian of the estate for settlement, and if the clerk is satisfied that the general guardian has fully accounted as guardian of the estate, the clerk may accept the resignation of the

general guardian as guardian of the estate, discharge him as guardian of the estate, and issue to him letters of appointment as guardian of the person, but the general guardian so discharged as guardian of the estate and her sureties are still liable in relation to all matters connected with the guardianship of the estate before the discharge.

§ 35A-1293. Appointment of successor guardian.

Upon the removal, death, or resignation of a guardian, the clerk shall appoint a successor guardian following the same criteria that would apply to the initial appointment of a guardian.

§ 35A-1294. Estates without guardians.

(a) Whenever a general guardian or guardian of the estate is removed, resigns, or stops serving without making a full and proper accounting, the successor guardian, or the clerk if there is no successor guardian, shall initiate a proceeding to compel an accounting. The surety or sureties on the previous guardian's bond shall be served with notice of the proceeding.

(b) If no successor guardian has been appointed, the clerk may act as receiver or appoint some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due the ward, and to secure, lend, invest, or apply the same for the benefit and advantage of the ward, under the direction of the clerk until a successor guardian is appointed. The accounts of the receiver shall be returned, audited, and settled as the clerk may direct. The receiver shall be allowed such amounts for her time, trouble, and responsibility as seem to the clerk reasonable and proper. Such receivership may continue until a suitable guardian can be appointed.

(c) When another guardian is appointed, he may apply by motion, on notice, to the clerk for an order directing the receiver to pay over all the money, estate, and effects of the ward. If no such guardian is appointed, the ward shall have the same remedy against the receiver on becoming age 18 or otherwise emancipated if the ward is a minor or on being restored to competence if the ward is an incompetent person. In the event of the ward's death, her executor, administrator, or collector, and the heir or personal representative of the ward shall have the same remedy against the receiver.

§ 35A-1295. Termination of guardianship.

(a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward:

(1) Ceases to be a minor as defined in C.C. 35A-1202(12),

(2) Is adjudicated to be restored to competency pursuant to the provisions of C.C. 35A-1130, or

(3) Dies.

(b) Notwithstanding subsection (a), a guardian of the estate or a general guardian is responsible for all accountings required by Article 10 of this Chapter until the guardian is discharged by the clerk.

*§§ 35A-1296 through 35A-1300: Reserved for future codification purposes.*

### SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

#### Article 14.

##### Sale, Mortgage, Exchange or Lease of Ward's Estate.

*§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease.*

(a) Whenever used herein, the word "guardian" shall be construed to include general guardian, guardian of the estate, ancillary guardian, next friend, guardian ad litem, or commissioner of the court acting pursuant to this Article, but not a guardian who is guardian of the person only; and the word "mortgage" shall be construed to include deeds of trust.

(b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of her ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in her discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:

(1) The ward's interest would be materially promoted by such sale, mortgage, exchange, or lease, or

(2) The ward's personal estate has been exhausted or is insufficient for her support and the ward is likely to become chargeable on the county, or

(3) A sale, mortgage, exchange, or lease of any part of the ward's real estate is necessary for her maintenance or for the discharge of debts unavoidably incurred for her maintenance, or

(4) Any part of the ward's real estate is required for public purposes, or

(5) There is a valid debt or demand against the estate of the ward; provided, when an order is entered under this subdivision, (i) it shall authorize the sale of only so much of the real estate as may be sufficient to discharge such debt or demand, and (ii) the proceeds of sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

The order shall specify particularly the property thus to be disposed of, with the terms of leasing or sale or exchange or mortgage, and shall be entered at length on the records of the court. The guardian may not mortgage the property of her ward for a term of years in excess of the term fixed by the court in its order.

(c) In the case of a ward who is a minor, no sale, mortgage, exchange, or lease under this Article shall be made until approved by the Cherokee court judge, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale, mortgage, exchange, or lease shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

(d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

(e) The procedure for a sale pursuant to this section shall be as provided by Article 29A of Chapter 1 of the General Statutes.

(f) Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases.

§ 35A-1302. Procedure when real estate lies in jurisdiction in which guardian does not reside.

In all cases where a guardian is appointed under the authority of Chapter 35A and such guardian applies to the court for an order to sell, mortgage, or exchange all or part of her ward's real estate, and such real estate is situated in a jurisdiction other than the jurisdiction in which the guardian is appointed and qualified, the guardian shall first apply to the clerk of the jurisdiction in which he was appointed and qualified for an order showing that the sale, mortgage, or exchange of her ward's real estate is necessary or that the ward's interest would be materially promoted thereby. The clerk to whom such application is made shall hear and pass upon the same and enter her findings and order as to whether said sale, mortgage, or exchange is necessary or would materially promote the ward's interest, and said order and findings shall be certified to the clerk of the jurisdiction in which the ward's land, or some part of it, is located and before whom any petition or application is filed for the sale, mortgage, or exchange of said land. Such findings and orders so certified shall be considered by the court along with all other evidence and circumstances in passing upon the petition in which an order is sought for the sale, mortgage, or exchange of said land. In the case of a ward who is a minor, before such findings and orders shall become effective the same shall be approved by the Cherokee court.

§ 35A-1303. Fund from sale has character of estate sold and subject to same trusts.

Whenever, in consequence of any sale under C.C. 35A-1301, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians

whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, or devised and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper.

§ 35A-1304. Reserved for future codification purposes.

§ 35A-1305. When timber may be sold.

In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. In addition, the guardian, with the consent of the clerk, may annually dispose of, use, or sell so much of the timber as is necessary to maintain good forestry practices.

§ 35A-1306. Abandoned incompetent spouse.

(a) A guardian of a married person found incompetent who has been abandoned, whether the guardian was appointed before or after the abandonment, may initiate a special proceeding before the clerk having jurisdiction over the ward requesting the issuance of an order authorizing the sale of the ward's separate real property without the joinder of the abandoning spouse.

(b) The ward's spouse shall be served with notice of the special proceeding in accordance with N.C.G.S. 1A-1, Rule 4.

(c) If the clerk finds:

(1) That the spouse of the ward has willfully and without just cause abandoned the ward for a period of more than one year; and

(2) That the spouse of the ward has knowledge of the guardianship, or that the guardian has made a reasonable attempt to notify the spouse of the guardianship; and

(3) That an order authorizing the sale of the separate real property of the ward is in the best interest of the ward; the clerk may issue such an order thereby barring the abandoning spouse from all right, title and interest in any of the ward's separate real property sold pursuant to such an order.

§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real property.

Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution, and who was living with the incompetent spouse at the time

of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk to sell the real property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the Cherokee court where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser.

§§ 35A-1308 through 35A-1309: Reserved for future codification purposes.

#### Article 15.

##### Mortgage or Sale of Estates Held by the Entireties.

§ 35A-1310. Where one spouse or both incompetent; special proceeding before clerk.

In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the Cherokee court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. All petitions filed under the authority of this section shall be filed in the office of the clerk of the Cherokee court of the county where the real estate or any part of same is situated.

§ 35A-1311. General law applicable; approved by judge.

The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by a Cherokee court judge wherein the property or any part of same is located within the jurisdiction of the Cherokee court.

§ 35A-1312. Proceeding valid in passing title.

Any mortgage, deed, or deed of trust executed under authority of this Article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said

property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance.

§ 35A-1313. Clerk may direct application of funds; purchasers and mortgagees protected.

In all cases conducted under this Article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section.

§§ 35A-1314 through 35A-1319: Reserved for future codification purposes.

#### Article 16.

#### Surplus Income and Advancements.

§ 35A-1320: Reserved for future codification purposes.

§ 35A-1321. Advancement of surplus income to certain relatives.

When any incompetent person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of her family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the Cherokee court for the county in which such person has her residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of her family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any incompetent person of full age, not being married and not having issue, be possessed, or her guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the Cherokee court for the county in which such person resided prior to incompetency to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to her or her parents, brothers and sisters, or grandparents to whose support, prior to her incompetency, he contributed in whole or in part.

§ 35A-1322. Advancement to adult child or grandchild.

When such incompetent person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and



suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of her estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval.

§ 35A-1323. For what purpose and to whom advanced.

Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of 21 years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement.

§ 35A-1324. Distributees to be parties to proceeding for advancements.

In every application for such advancements, the guardian of the incompetent person and all such other persons shall be parties as would at that time be entitled to a distributive share of her estate if he were then dead

§ 35A-1325. Advancements to be equal; accounted for on death.

The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the incompetent person, her estate shall be distributed among her distributees in the same equal manner as if the advancements had been made by the person himself; and on her death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received.

§ 35A-1326. Advancements to those most in need.

When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper.

§ 35A-1327. Advancements to be secured against waste.

It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons.

§ 35A-1328. Appeal; removal to Cherokee court.

Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the Cherokee court.

§ 35A-1329. Advancements only when incompetence permanent.

No such application shall be allowed under this Article but in cases of such permanent and continued incompetence as that the incompetent person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion.

§ 35A-1330. Orders suspended upon restoration of competence.

Upon such incompetent person's being restored to competence, every order made for advancements shall cease to be further executed, and her estate shall be discharged of the same.

§§ 35A-1331 through 35A-1334: Reserved for future codification purposes.

## Article 17.

### Gifts from Income for Certain Purposes.

§ 35A-1335. Gifts authorized with approval of judge of Cherokee court.

With the approval of the resident judge of the Cherokee court in which the guardian was appointed, upon a duly verified petition the guardian of a person judicially declared to be incompetent may, from the income of the incompetent, make gifts to the Eastern Band of Cherokee Indians, the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes, or to individuals including the guardian. References in this Article to the "guardian" include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate.

§ 35A-1336. Prerequisites to approval by judge of gifts for governmental or charitable purposes.

The judge shall not approve gifts from income for governmental or charitable purposes unless it appears to the judge's satisfaction that all of the following apply:

(1) After making the gifts and the payment of federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability.

(3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(4) The aggregate of the gifts does not exceed the percentage of income fixed by federal law as the maximum deduction allowable for the gifts in computing federal income tax liability.

§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from income to individuals unless it appears to the judge's satisfaction that both the following requirements are met:

(1) After making the gifts and paying federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort, and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life;

(2) The judge determines that either:

a. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required Cherokee Code for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent, and each donee is entitled to one or more specific devises, or distributions of specific amounts of money, income, or property under the paper-writing or the revocable trust or both or is a residuary devisee or beneficiary designated in the paper-writing or revocable trust or both; or

b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of the approval of the gifts; or

c. The donee is the spouse, parent, descendent of the incompetent, or descendant of the incompetent's parent, and the gift qualifies either for the federal annual gift tax exclusion under section 2503(b) of the Internal Revenue Code or is a qualified transfer for tuition or medical expenses under section 2503(e) of the Internal Revenue Code.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death.

§ 35A-1337. Fact that incompetent had not previously made similar gifts.

The judge shall not withhold her approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type.

§ 35A-1338. Validity of gift.

A gift made with the approval of the judge under the provisions of this Article shall be deemed a gift by the incompetent and shall be as valid in all respects as if made by a competent person.

§ 35A-1339: Reserved for future codification purposes.

#### Article 18.

##### Gifts from Principal for Certain Purposes.

§ 35A-1340. Gifts authorized with approval of judge of Cherokee court.

With the approval of the resident judge of the Cherokee court of the district in which the guardian was appointed upon a duly verified petition, the guardian of a person judicially declared to be incompetent may, from the principal of the incompetent's estate, make gifts to the Eastern Band of Cherokee Indians, the State of North Carolina, its agencies, counties or municipalities, or the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes, or to individuals including the guardian. The incompetent's estate shall consist of all assets owned by the incompetent, including nonprobate assets. For purposes of this Article, nonprobate assets are those which would not be distributable in accordance with the incompetent's valid probated will or the provisions of N.C.G.S. Chapter 29 at the incompetent's death. The incompetent's nonprobate estate would include nonprobate assets only. References in this Article to the "guardian" include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate.

§ 35A-1341. Prerequisites to approval by judge of gifts for governmental or charitable purposes.

The judge shall not approve any gifts from principal for governmental or charitable purposes unless it appears to the judge's satisfaction all of the following requirements are met:

(1) The making of the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and these dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability.

(3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(4) The making of the gifts will not jeopardize the rights of any creditor of the incompetent.

(5) It is improbable that the incompetent will recover competency during her or her lifetime.

(5a) Sufficient credible evidence is presented to the court that the proposed gift is of a nature which the incompetent would have approved prior to being declared incompetent.

(6) Either a. or b. applies:

a. All of the following apply:

1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by Cherokee Code for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.

2. Specific devise, or nondiscretionary distributions of specific amounts of money, income or property included in the paper-writing or revocable trust or both, will not be jeopardized by making the gifts.

3. All residuary devisees and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both, if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will and the spouse, if any, of the incompetent have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of Cherokee court of the county in which the guardian was appointed, within the 10-day period.

b. Both of the following apply:

1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and

2. All persons who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the Cherokee court, of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the

order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of Cherokee court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in C.C. 35A-1341(6)a.3. and (6)b.2.

§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from principal to individuals unless it appears to the judge's satisfaction that all of the following requirements have been met:

(1) Making the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort, and welfare of the incompetent in order to maintain the incompetent and any dependents legally entitled to support from the incompetent in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) The making of the gifts will not jeopardize the rights of any existing creditor of the incompetent.

(3) It is improbable that the incompetent will recover competency during her or her lifetime.

(4) The judge determines that either a., b., c., or d. applies.

a. All of the following apply:

1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.

2. Each donee is entitled to one or more specific devises, or distributions of specific amounts of money, income, or property under either the paper-writing or revocable trust or both or is a residuary devisee or beneficiary designated in the paper-writing or revocable trust or both.

3. The making of the gifts will not jeopardize any specific devise, or distribution of specific amounts of money, income, or property.

b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval of the gifts.

c. The donee is a person who would share in the incompetent's nonprobate estate, if the incompetent died contemporaneously with the signing of the order of approval.

d. The donee is the spouse, parent, descendant of the incompetent, or descendant of the incompetent's parent, and the gift qualifies either for the federal annual gift tax exclusion under section 2503(b) of the Internal Revenue Code or is a qualified transfer for tuition or medical expenses under section 2503(e) of the Internal Revenue Code.

(5) If the incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by Cherokee Code for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent; then all residuary devisees and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will, the spouse, if any, of the incompetent and all persons identified in C.C. 35A-1341.1(7) have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of Cherokee court of the county in which the guardian was appointed, within the 10-day period.

(6) If so far as is known, the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the Cherokee court of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the Cherokee court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in C.C. 35A-1341.1(5) and (6) above.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death.

§ 35A-1342. Who deemed specific and residuary devisees of incompetent under § 35A-1341.

For purposes of C.C. 35A-1341(6)a and C.C. 35A-1341.1(4) and (5), if the paper-writing provides for the residuary estate to be placed in trust for a term of years, or if the paper-writing names as beneficiary a revocable trust created by the incompetent, and the trust or trusts include dispositive provisions which provide that assets continue in trust for a term of years with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust or trusts, the designated beneficiaries shall be deemed to be specific devisees and beneficiaries and those taking the

remaining income of the trust or trusts and, at the end of the term, the remaining principal shall be deemed to be residuary devisees and beneficiaries who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary devisee or beneficiary on the sole basis of prospective service as executor or trustee.

§ 35A-1343. Notice to minors and incompetents under § 35A-1341 and § 35A-1341.1.

If any person, to whom notice must be given under the provisions of C.C. 35A-1341 and C.C. 35A-1341.1 is a minor or is incompetent, or is an unborn or unascertained beneficiary, then the notice shall be given to her duly appointed guardian or other duly appointed representative: Provided, that if a minor, incompetent, unborn, or unascertained beneficiary has no guardian or representative, then a guardian ad litem shall be appointed by the judge and the guardian ad litem shall be given the notice herein required.

§ 35A-1344. Objections to proposed gift; fact that incompetent had previously made similar gifts.

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make her order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold her approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type.

§ 35A-1345. Validity of gift.

A gift made with the approval of the judge under the provisions of this Article shall be deemed to be a gift made by the incompetent, and shall be as valid in all respects as if made by a competent person.

§§ 35A-1346 through 35A-1349: Reserved for future codification purposes.

#### Article 19.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§ 35A-1350. Declaration and gift for certain purposes authorized with approval of judge of Cherokee court.

When a person has created a revocable trust, reserving the income for life, and thereafter has been judicially declared to be incompetent, the guardian or trustee of such incompetent, with the approval of the resident judge of the Cherokee court in which he was appointed, upon a duly verified petition may declare the trust to be irrevocable and make a gift of the life interest of the



incompetent to the Eastern Band of Cherokee Indians, the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes.

§ 35A-1351. Prerequisites to approval of gift.

The judge shall not approve the gift unless it appears to the judge's satisfaction that:

- (1) It is improbable that the incompetent will recover competency during her or her lifetime;
- (2) The estate of the incompetent, after making the gift and after payment of any gift taxes which may be incurred by reason of the declaration of irrevocability, will be sufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gift, of expenditures for the incompetent's support, maintenance, comfort and welfare);
- (3) Each donee of any part of the life interest is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (4) Each donee of any part of the life interest is a donee qualified to receive tax deductible gifts under federal and State income tax laws.
- (5) Either:
  - a. 1. The incompetent, prior to being declared incompetent, executed a paper-writing, with the formalities required by the laws of North Carolina for the execution of a valid will;
  2. Specific devises of specific amounts of money, income or property included in such paper-writing, will not be jeopardized by making such gifts;
  3. All residuary devisees designated in such paper-writing, who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts, and such paper-writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of Cherokee court, of the county in which the guardian or trustee was appointed, within the 10-day period;  
or
- b. 1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and

2. All persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the Cherokee court, of the county in which the guardian or trustee was appointed, within the 10-day period.

§ 35A-1352. Who deemed specific and residuary devisees of incompetent under § 35A-1351.

For purposes of C.C. 35A-1351(5)a. of this Article, if such paper-writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary devisees who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary devisee.

§ 35A-1353. Notice to minors and incompetents under § 35A-1351.

If any person, to whom notice must be given under the provisions of C.C. 35A-1351(5) of this Article, is a minor or is incompetent, then the notice shall be given to her duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative, then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required.

§ 35A-1354. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make her order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold her approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type.

§ 35A-1355. Validity of declaration and gift.

Such declaration and gift, when made with the approval of the judge and under the provisions of this Article, shall be deemed to be the declaration and gift of the incompetent and shall be as valid in all respects as if made by a competent person.

§§ 35A-1356 through 35A-1359: Reserved for future codification purposes.

Article 20.

§§ 35A-1360 through 35A-1369. Reserved for future codification purposes.

SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN.

Article 21.

Standby Guardianship.

§ 35A-1370. Definitions.

For purposes of this Article:

(1) "Alternate standby guardian" means a person identified in either a petition or designation to become the guardian of the person or, when appropriate, the general guardian of a minor child, pursuant to C.C. 35A-1373 or to C.C. 35A-1374, when the person identified as the standby guardian and the designator or petitioner has identified an alternate standby guardian.

(2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the parent or legal guardian. When more than one physician shares this responsibility, or when a physician is acting on the primary physician's behalf, any such physician may act as the attending physician pursuant to this section. When no physician has this responsibility, a physician who is familiar with the petitioner's medical condition may act as the attending physician pursuant to this Article.

(3) "Debilitation" means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child.

(4) "Designation" means a written document voluntarily executed by the designator pursuant to this Article.

(5) "Designator" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological or adoptive parent, the guardian of the person, or the general guardian of a minor child. A designation under this Article may be made on behalf of a designator by the guardian of the person or the general guardian of the designator.

(6) "Determination of debilitation" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the debilitation of the petitioner or designator.

(7) "Determination of incapacity" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the incapacity of the petitioner or designator.

(8) "Incapacity" means a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of one's minor child, and a consequent inability to make these decisions.

(9) "Minor child" means an unemancipated child or children under the age of 18 years.

(10) "Petitioner" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological parent, the adoptive parent, the guardian of the person, or the general guardian of a minor child. A proceeding under this Article may be initiated and pursued on behalf of a petitioner by the guardian of the person, the general guardian of the petitioner, or by a person appointed by the clerk of Cherokee court pursuant to Rule 17 of the North Carolina Rules of Civil Procedure as guardian ad litem for the purpose of initiating and pursuing a proceeding under this Article on behalf of a petitioner.

(11) "Standby guardian" means a person appointed pursuant to C.C. 35A-1373 or designated pursuant to C.C. 35A-1374 to become the guardian of the person or, when appropriate, the general guardian of a minor child upon the death of a petitioner or designator, upon a determination of debilitation or incapacity of a petitioner or designator, or with the consent of a petitioner or designator.

(12) "Triggering event" means an event stated in the designation executed or order entered under this Article which empowers the standby guardian, or the alternate standby guardian, if one is identified and the standby guardian is unwilling or unable to serve, to assume the duties of the office, which event may be the death of a petitioner or designator, incapacity of a petitioner or designator, debilitation of a petitioner or designator with the petitioner's or designator's consent, or the consent of the petitioner or designator, whichever occurs first.

§ 35A-1371. Jurisdiction; limits.

Notwithstanding the provisions of Subchapter II of this Chapter, the clerk of Cherokee court shall have original jurisdiction for the appointment of a standby guardian for a minor child under this Article. Provided that the clerk shall have no jurisdiction, no standby guardian may be appointed under this Article, and no designation may become effective under this Article when the Cherokee court has assumed jurisdiction over the minor child in an action under Chapter 50 of the Cherokee Code or in a maltreatment proceeding under Chapter 7B of the Cherokee Code.

§ 35A-1372. Standby guardianship; applicability.

This Article provides two methods for appointing a standby guardian: by petition pursuant to C.C. 35A-1373 or by designation pursuant to C.C. 35A-1374. If a standby guardian is unwilling or unable to serve as a standby guardian and the designator or petitioner has identified an alternate standby guardian, then the alternate standby guardian shall become the standby guardian, upon the same conditions as set forth in this Article.

§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing, order.

(a) A petitioner shall commence a proceeding under this Article for the appointment of a standby guardian of a minor child by filing a petition with the clerk of Cherokee court when the child resides or is domiciled on tribal trust land at the time of filing. A petition filed by a guardian of the person or a general guardian of the minor child who was appointed under this Chapter shall be treated as a motion in the cause in the original guardianship, but the provisions of this section shall otherwise apply.

(b) A petition for the judicial appointment of a standby guardian of a minor child shall:

(1) Identify the petitioner, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any;

(2) State that the authority of the standby guardian is to become effective upon the death of the petitioner, upon the incapacity of the petitioner, upon the debilitation of the petitioner with the consent of the petitioner, or upon the petitioner's signing of a written consent stating that the standby guardian's authority is in effect, whichever occurs first;

(3) State that the petitioner suffers from a progressively chronic illness or an irreversible fatal illness, and the basis for such a statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question;

(4) State whether there are any lawsuits, in this or any other jurisdiction, involving the minor child and, if so, identify the parties, the case numbers, and the states and counties where filed; and

(5) Be verified by the petitioner in front of a notary public or another person authorized to administer oaths.

(c) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a petitioner, and on any other person the clerk may direct, including the minor child. Service shall be made pursuant to Rule 4 of the North Carolina Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding her fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(d) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the Cherokee Code and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(e) The petitioner's appearance at the hearing shall not be required if the petitioner is medically unable to appear, unless the clerk determines that the petitioner is able with reasonable

accommodation to appear and that the interests of justice require that the petitioner be present at the hearing.

(f) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this Article for the appointment of a standby guardian have been satisfied. If the clerk finds that the petitioner suffers from a progressive chronic illness or an irreversible fatal illness, that the best interests of the minor child will be promoted by the appointment of a standby guardian of the person or general guardian, and that the standby guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or general guardian of the minor child, the clerk shall enter an order appointing the standby guardian named in the petition as standby guardian of the person or standby general guardian of the minor child and shall issue letters of appointment to the standby guardian. The order may also appoint the alternate standby guardian named in the petition as the alternate standby guardian of the person or alternate general guardian of the minor child in the event that the person named as standby guardian is unwilling or unable to serve as standby guardian and shall provide that, upon a showing of that unwillingness or inability, letters of appointment will be issued to the alternate standby guardian.

(g) Letters of appointment issued pursuant to this section shall state that the authority of the standby guardian or alternate standby guardian of the person or the standby guardian or alternate standby general guardian is effective upon the receipt by the guardian of a determination of the death of the petitioner, upon receipt of a determination of the incapacity of the petitioner, upon receipt of a determination of the debilitation of the petitioner and the petitioner's consent, whichever occurs first, and shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the petitioner pursuant to subsection (l) of this section.

(h) If at any time prior to the commencement of the authority of the standby guardian the clerk, upon motion of the petitioner or any person entitled to notice under subsection (c) of this section and after hearing, finds that the requirements of subsection (f) of this section are no longer satisfied, the clerk shall rescind the order.

(i) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the death of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of proof of death of the petitioner such as a copy of a death certificate or a funeral home receipt. The standby guardian shall file the proof of death in the office of the clerk who entered the order within 90 days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the clerk.

(j) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the incapacity of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of incapacity made pursuant to C.C. 35A-1375. The standby guardian shall file a copy of the determination of incapacity in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(k) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the debilitation of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of debilitation made pursuant to C.C. 35A-1375, as well as a written consent signed by the petitioner. The standby guardian shall file a copy of the determination of debilitation and the written consent in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(l) Notwithstanding subsections (i), (j), and (k) of this section, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to such commencement, signed by the petitioner in the presence of two witnesses who are at least 18 years of age, other than the standby guardian or the alternate standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the two witnesses. The standby guardian shall file the written consent in the office of the clerk who entered the order within 90 days of the date of such written consent, or the standby guardian's authority may be rescinded by the clerk.

(m) The petitioner may revoke a standby guardianship created under this section by executing a written revocation, filing it in the office of the clerk who entered the order, and promptly providing the standby guardian with a copy of the revocation.

(n) A person appointed standby guardian pursuant to this section may at any time before the commencement of the person's authority renounce the appointment by executing a written renunciation and filing it with the clerk who entered the order and promptly providing the petitioner with a copy of the renunciation. Upon the filing of a renunciation, the clerk shall issue letters of appointment to the alternate standby guardian, if any.

§ 35A-1374. Appointment by written designation; form.

(a) A designator may designate a standby guardian by means of a written designation, signed by the designator in the presence of two witnesses at least 18 years of age, other than the standby guardian or alternate standby guardian, who shall also sign the writing. Another person may sign the written designation on the behalf of and at the direction of the designator if the designator is physically unable to do so, provided that the designation is signed in the presence of the designator and the two witnesses.

(b) A designation of a standby guardian shall identify the designator, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any, and shall indicate that the designator intends for the standby guardian or the alternate standby guardian to become the minor child's guardian in the event that the designator either:

(1) Becomes incapacitated:

- (2) Becomes debilitated and consents to the commencement of the standby guardian's authority;
- (3) Dies prior to the commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or
- (4) Consents to the commencement of the standby guardian's authority.
- (c) The authority of the standby guardian under a designation shall commence upon the same conditions as set forth in C.C. 35A-1373(i) through (l).
- (d) The standby guardian or, if the standby guardian is unable or unwilling to serve, the alternate standby guardian shall commence a proceeding under this Article to be appointed guardian of the person or general guardian of the minor child by filing a petition with the clerk of Cherokee court of the county in which the minor child resides or is domiciled at the time of filing. The petition shall be filed after receipt of either:
- (1) A copy of a determination of incapacity made pursuant to C.C. 35A-1375;
- (2) A copy of a determination of debilitation made pursuant to C.C. 35A-1375 and a copy of the designator's written consent to such commencement;
- (3) A copy of the designator's written consent to such commencement, made pursuant to C.C. 35A-1373(l); or
- (4) Proof of death of the designator, such as a copy of a death certificate or a funeral home receipt.
- (e) The standby guardian shall file a petition pursuant to subsection (d) of this section within 90 days of the date of the commencement of the standby guardian's authority under this section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to recommence only upon filing of the petition.
- (f) A petition filed pursuant to subsection (d) of this section shall:
- (1) Append the written designation of such person as standby guardian; and
- (2) Append a copy of either (i) the determination of incapacity of the designator; (ii) the determination of debilitation of the designator and the written consent of the designator; (iii) the designator's consent; or (iv) proof of death of the designator, such as a copy of a death certificate or a funeral home receipt; and
- (3) If the petition is by a person designated as an alternate standby guardian, state that the person designated as the standby guardian is unwilling or unable to act as standby guardian, and the basis for that statement; and
- (4) State whether there are any lawsuits, in this jurisdiction or any other jurisdiction, involving the minor child and, if so, identify the parties, the case numbers, and the jurisdictions where filed; and



(5) Be verified by the standby guardian or alternate standby guardian in front of a notary public or another person authorized to administer oaths.

(g) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a designator, and on any other person the clerk may direct, including the minor child. Service shall be made pursuant to Rule 4 of the North Carolina Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding her fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(h) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the Cherokee Code and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(i) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this section have been satisfied. The clerk shall enter an order appointing the standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child if the clerk finds that:

(1) The person was duly designated as a standby guardian or alternate standby guardian;

(2) That (i) there has been a determination of incapacity; (ii) there has been a determination of debilitation and the designator has consented to the commencement of the standby guardian's authority; (iii) the designator has consented to that commencement; or (iv) the designator has died, such information coming from a document, such as a copy of a death certificate or a funeral home receipt;

(3) That the best interests of the minor child will be promoted by the appointment of the person designated as standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child;

(4) That the standby guardian or alternate standby guardian is fit to serve as guardian of the person or general guardian of the minor child; and

(5) That, if the petition is by a person designated as an alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve as standby guardian.

(j) The designator may revoke a standby guardianship created under this section by:

(1) Notifying the standby guardian in writing of the intent to revoke the standby guardianship prior to the filing of the petition under this section; or

(2) Where the petition has already been filed, by executing a written revocation, filing it in the office of the clerk with whom the petition was filed, and promptly providing the standby guardian with a copy of the written revocation.

§ 35A-1375. Determination of incapacity or debilitation.

(a) If requested by the petitioner, designator, or standby guardian, an attending physician shall make a determination regarding the incapacity or debilitation of the petitioner or designator for purposes of this Article.

(b) A determination of incapacity or debilitation shall:

(1) Be made by the attending physician to a reasonable degree of medical certainty;

(2) Be in writing; and

(3) Contain the attending physician's opinion regarding the cause and nature of the incapacity or debilitation, as well as its extent and probable duration.

(c) The attending physician shall provide a copy of the determination of incapacity or debilitation to the standby guardian, if the standby guardian's identity is known to the physician.

(d) The standby guardian shall ensure that the petitioner or designator is informed of the commencement of the standby guardian's authority as a result of a determination of incapacity or debilitation and of the possibility of a future suspension of the standby guardian's authority pursuant to C.C. 35A-1376.

§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.

In the event that the authority of the standby guardian becomes effective upon the receipt of a determination of incapacity or debilitation and the petitioner or designator is subsequently restored to capacity or ability to care for the child, the authority of the standby guardian based on that incapacity or debilitation shall be suspended. The attending physician shall provide a copy of the determination of restored capacity or ability to the standby guardian, if the identity of the standby guardian is known to the attending physician. If an order appointing the standby guardian as guardian of the person or general guardian of the minor child has been entered, the standby guardian shall, and the petitioner or designator may, file a copy of the determination of restored capacity or ability in the office of the clerk who entered the order. A determination of restored capacity or ability shall:

(1) Be made by the attending physician to a reasonable degree of medical certainty;

(2) Be in writing; and

(3) Contain the attending physician's opinion regarding the cause and nature of the parent's or legal guardian's restoration to capacity or ability.

Any order appointing the standby guardian as guardian of the person or general guardian of the minor child shall remain in full force and effect, and the authority of the standby guardian shall recommence upon the standby guardian's receipt of a subsequent determination of the petitioner's or designator's incapacity, pursuant to C.C. 35A-1373(j), or upon the standby guardian's receipt of a subsequent determination of debilitation pursuant to C.C. 35A-1373(k), or upon the receipt of proof of death of the petitioner or designator, or upon the written consent of the petitioner or designator, pursuant to C.C. 35A-1373(l).

§ 35A-1377. Authority concurrent to parental rights.

The commencement of the standby guardian's authority pursuant to a determination of incapacity, determination of debilitation, or written consent shall not itself divest the petitioner or designator of any parental or guardianship rights, but shall confer upon the standby guardian concurrent authority with respect to the minor child.

§ 35A-1378. Powers and duties.

A standby guardian designated pursuant to C.C. 35A-1374 and a guardian of the person or general guardian appointed pursuant to this Article have all of the powers, authority, duties, and responsibilities of a guardian appointed pursuant to Subchapter II of this Chapter.

§ 35A-1379. Appointment of guardian ad litem.

(a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child.

(b) The duties of the guardian ad litem, when appointed, shall be to make an investigation to determine the facts, the needs of the minor child and the available resources within the family to meet those needs, and to protect and promote the best interests of the minor child until formally relieved of the responsibility by the clerk.

(c) The court may order the guardian ad litem to conduct an investigation to determine the fitness of the intended standby guardian and alternate standby guardian, if any, to perform the duties of standby guardian.

§ 35A-1380. Bond.

The bond requirements of Article 7 of this Chapter shall apply to a guardian of the person or general guardian appointed pursuant to C.C. 35A-1373 or C.C. 35A-1374, provided that: (i) the clerk need not require a bond if the bond requirement is waived in writing by the petitioner or designator; and (ii) a general guardian appointed pursuant to C.C. 35A-1373 shall not be required to furnish a bond until a triggering event has occurred.

§ 35A-1381. Accounting.

The accounting requirements of Article 10 of this Chapter apply to a general guardian appointed pursuant to this Article.

§ 35A-1382. Termination.

Any standby guardianship created under this Article shall continue until the child reaches 18 years of age unless sooner terminated by order of the clerk who entered the order appointing the standby guardian, by revocation pursuant to this Article, or by renunciation pursuant to this Article. A standby guardianship shall terminate, and the authority of the standby guardian designated pursuant to C.C. 35A-1374 or of a guardian of the person or general guardian appointed pursuant to this Article shall cease, upon the entry of an order of the district court granting custody of the minor child to any other person.