



CHICAGO TITLE INSURANCE COMPANY

<u>TOPIC:</u>	<u>Conveyance of Real Property by Minors and Incompetents</u>
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There are significant challenges associated with the transfer of real property held by either minors or incompetents. In order to effectively convey title to real property one will have to abide by the statutes which prescribe the procedure for such a conveyance. The purpose of this manuscript is to discuss these procedures.

INCOMPETENTS

An incompetent is defined in the North Carolina General Statutes (NCGS) as “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” (NCGS 35A-1101(7)).

An incompetency determination is made by the clerk of court in a special proceeding brought to have a person declared incompetent. The proceeding is conducted according to Chapter 35A of the NCGS. Once a person has been declared to be incompetent, no reliance should be placed upon an instrument signed by that person until such time as competency has been restored. NCGS 35A-1130(d) provides that the clerk can entertain a motion in the cause to reconsider the competency of the ward and can enter an order restoring the ward to competency.

It is incumbent upon the title searcher to review the special proceedings index to see that no such determination has been made or initiated in regard to the owner of real property.

Important point: Because a person has not been adjudicated an incompetent does not mean that that person is competent to convey real property. Certainly, a lawyer preparing a deed on behalf of a client has at least some responsibility to ascertain that the client has “the ability to understand, deliberate upon and reach conclusions about matters affecting the client’s own well being” (*see* Rule 1.14 of the Rules of Professional Conduct and related ethics opinions). Where there is some question as to the competence of the client, the lawyer should “consider whether appointment of a guardian ad litem or guardian is necessary to protect the client’s interests” (Id).

Arguably, a closing attorney has an obligation as well to consider the competency of the seller. In this case, the attorney’s duty is to her buyer client to be certain that a deed executed by a seller conveys good title. It is true that frequently the closing attorney will not meet or speak to the seller. The obligation of the buyer’s attorney would exist only where the buyer’s attorney

has facts and information pertaining to the competency of the seller. Claims of relatives of the seller, reputation of the seller in the community, prior attempts (whether or not successful) to have the seller declared incompetent and information gathered in any face to face meeting may raise questions as to the seller's ability to convey clear title and should be disclosed to the insurer and the buyer client.

It is also noteworthy that the Notary Act, NCGS 10B-40(a2)(2) specifically provides that

(a2) In addition to the certifications under subsection (a1) of this section, by making or giving a notarial certificate, whether or not stated in the certificate, a notary certifies to all of the following:

. . .

(2) If the notarial certificate is for an acknowledgment or the administration of an oath or affirmation, the person whose signature was notarized did not appear in the judgment of the notary to be incompetent, lacking in understanding of the nature and consequences of the transaction requiring the notarial act, or acting involuntarily, under duress, or undue influence.

Certainly, if a transaction is challenged because of questions of competency, the notary taking the acknowledgment may be questioned exhaustively as to the apparent state of mind of the principal at the time of execution.

Incompetents can receive property as a grantee and can continue to own said property during the period of incompetence. However, transfers of real property by an incompetent are voidable and not void (*see Weeks v. Wilkins*, 139 N.C. 215 (1905)). Thus, any conveyance by an incompetent is subject to an action to set aside the conveyance.

MINORS

A "Minor" is defined in NCGS 48A-2 as "any person who has not reached the age of 18 years." A minor has the legal capacity to acquire ownership of property, but the conveyance of property held by a minor presents many challenges.

Any deed from a minor is voidable (and not void) for a period of three years after the minor reaches majority (the age of 18). Thus the minor may after obtaining majority, disaffirm any deed or conveyance made prior to the age of 18 (*see Ward v. Anderson*, 111 N.C. 115 (1892)). Conversely, a minor may also affirm any conveyance by some act or deed committed after reaching age 18. (Id)

One exception to the rule above is that the minor spouse of a person over 18 years of age may waive, release and renounce any interest that the minor spouse has in real or personal property (NCGS 39-13.2). The minor spouse may also execute contracts, deeds and deeds of trust with respect to real or personal property held with such other spouse as tenants by the entireties, joint tenants or tenants in common (NCGS 39-13.2(a)(2)).

GUARDIANS

Types of Guardians

Guardian of the Person: a guardian appointed solely for the purpose of performing duties relating to the care, custody and control of a ward. Unless limited by the clerk, the powers and duties of the Guardian of the Person (and General Guardians exercising the powers of a Guardian of the person) are outlined in NCGS 35A-1240.

General Powers:

- Provide for ward's care, comfort and maintenance
- Arrange for ward's training, education, employment, rehabilitation and habilitation; and
- Take reasonable care of the ward's *personal* property
- Holds custody of the person
- Establish the ward's place of abode
- Approve or consent to the ward's receipt of medical, legal, psychological, or other professional care, counseling, treatment or service
- MAY NOT commence or defend any action in court

A Guardian of the person only does not have the authority to convey real property.

Guardian of the Estate: A guardian appointed solely for the purpose of managing the property, estate and business affairs of a ward. Unless limited by the clerk, the powers and duties of the Guardian of the Estate (and General Guardians exercising the powers of the Guardian of the Estate) are outlined in NCGS 35A-1251 and 1252.

General Duties:

- Take possession of the ward's estate for the use of the ward
- Collect, try to collect all bonds, notes, obligations or monies due the ward
- Pay out of the ward's estate income taxes, property taxes or other taxes or assessments owed by the ward
- Act as a fiduciary for the purpose of acquiring, investing reinvesting, exchanging, selling and managing the ward's property

General Powers (inter alia):

- To complete performance of contracts entered into by the ward
- to insure the ward's assets against damage or loss
- to pay taxes, assessments and other expenses incident to the collection, care administrations and protection of the ward's estate
- to continue any business or venture or farming operation in which the ward was engaged
- to acquire and retain every kind of property including real property and mortgages
- to borrow money for the purpose of paying taxes and other claims against the ward

- to lease the real property of the ward for a period of less than three (3) years
- to execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian

Actions of a Guardian of the Estate requiring prior court approval:

- sale, mortgage, exchange or lease of ward's real property (discussed with particularity below)
- giving of certain gifts
- expenditures for the support, maintenance and education of the ward's minor children, spouse and dependents
- Sale, lease or exchange of ward's personal property having a value of \$1,500 or more

General Guardian: a guardian of both the estate and the person. Unless limited by the clerk, a General Guardian shall have the powers and duties of both a guardian of the person *and* a guardian of the estate.

Guardian ad litem: a Guardian appointed pursuant to NCGS 1A-1, Rule 17, Rules of Civil Procedure.

Ancillary Guardian: a North Carolina resident appointed guardian through the authority of a guardian of the estate or general guardian in the state in which the ward resides.

Natural Guardian: parents are the natural guardians of their minor children.

Qualification of a Guardian

If the ward is an incompetent, a general guardian or a guardian of the estate must be a North Carolina resident. A non-resident may be appointed as a guardian of the person only subject to the requirements of NCGS 35A-1213(b).

If the ward is a minor, a non-resident may be appointed as a guardian of the estate, guardian of the person or general guardian (*see* NCGS 35A-1224(c)).

Guardian for a Minor

A guardian of the estate may be appointed for any minor. A guardian of the person or a general guardian may only be appointed for a minor who has no natural guardian.

Ancillary Guardianship

Where the ward is a resident of another state but has property in North Carolina, neither the ward nor her guardian in her state of residency has authority to act in North Carolina. The out

of state guardian may petition the clerk to have an ancillary guardian appointed in North Carolina. The ancillary guardian must be a resident of North Carolina to serve in this capacity. The ancillary guardian should be appointed in a county in which the ward owns real or personal property. Proof of the ward's minority or incompetence and of the guardian's appointment in the ward's state of residence may be conclusively shown by a certified or exemplified copy of letters of guardianship or official court record appointing the guardian in the ward's state. An ancillary guardian shall have all powers of a with respect to the ward's North Carolina property as a guardian otherwise appointed in this state.

Guardian's Bond

A guardian of the estate or general guardian may not receive the ward's property until such time as a surety or bond, approved by the clerk, has been provided. The surety must be in an amount approved by the clerk in accordance with NCGS 35A-1231. Notwithstanding the amount of the bond determined by the clerk, if the guardian intends to sell real property, the amount of the bond shall be twice the amount of the proceeds of any real property sold unless the bond is executed by a duly authorized surety company in which case the amount of the bond shall be 125% of the value of the real property sold.

Sale, Mortgage, Exchange or Transfer of Ward's Estate

Chapter 35A, Article 14 outlines the procedure for the sale, mortgage, exchange or lease of a ward's estate by a guardian. While the procedure for the transfer of an incompetent's real property and a minor's real property are substantially similar, there are minor procedural differences. These differences will be noted in a general discussion of the procedure for both.

A guardian of the estate or a general guardian (and not a guardian of the person) may initiate a special proceeding to sell, mortgage, exchange or lease for a term of more than three years (hereinafter "sell" or "sale") any part of the ward's real estate.

If the guardian is appointed in the county in which the ward's property is located, then such county is the proper venue for the proceeding. However, if the guardian was not appointed in the county in which the property is located, the action requires two filings. First, the guardian must file in the county in which she was appointed. There, she must obtain an order of the clerk indicating that the sale will materially promote the ward's interests. The clerk must then certify the order together with its findings to the clerk in the county in which the property is located. In the second proceeding, the clerk in the county where the property is located will make a determination, considering the first clerk's findings and all other evidence, and then may order the sale (but is not obligated to do so solely because of the earlier clerk's order).

Whenever the ward is a minor, a superior court judge must approve in advance the decision to order the sale (NCGS 35A-1301). This is not the case when the ward is an adult incompetent. In either case, the sale is not consummated until a superior court judge confirms the sale.

Other Proceedings

- **Sale of Abandoned Incompetent Spouse's Separate Real Property**

Where the incompetent is a married person and his spouse has abandoned him, a guardian may apply to the clerk to authorize the sale of the ward's separate real property without the joinder of the spouse. Such an order, once given, will bar the abandoning spouse from all right, title and interest in any of the ward's separate real property sold pursuant to the order.

- **Sale or Mortgage of Entirety Property When One or Both Spouses Are Incompetent**

Where spouses hold title to real property as tenants by the entireties and either one or both are deemed incompetent, a special proceeding may be brought by the guardian of one or both or by the competent spouse (*see generally* Article 15 of NCGS Chapter 35A). The clerk should find that such sale or mortgage is in the best interest of the parties and not prejudicial to the interests of the incompetent spouse. Approval of the transaction by a superior court judge is required prior to the sale. Any sale or mortgage executed under such an order shall have the force and effect of a sale or mortgage executed by husband and wife.