GUARDIANSHIP 101

NC Guardianship Association
Annual Conference
May 2, 2018
Asheville, NC

Objectives

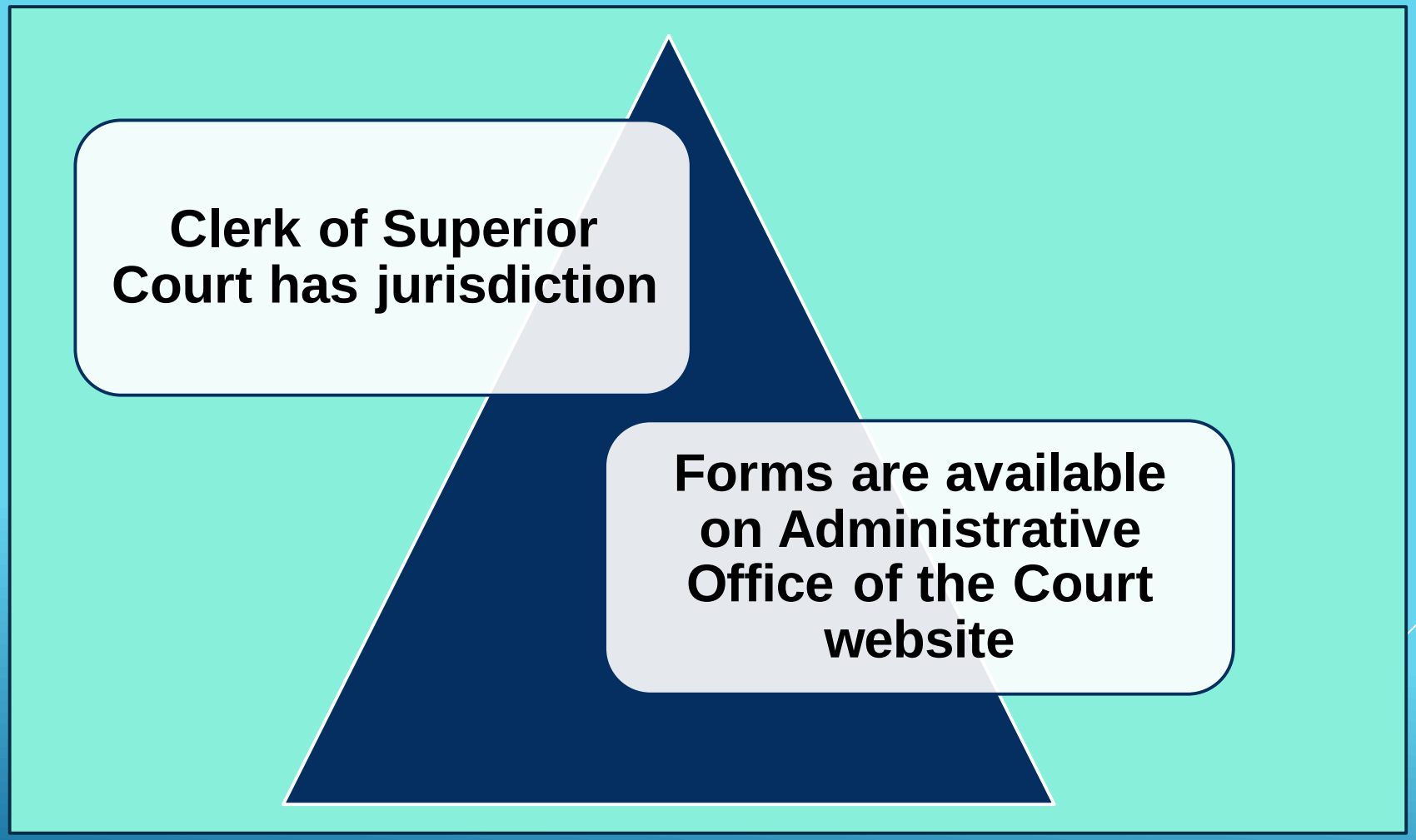
- Define guardianship
- Review types of guardianship
- Review Alternatives
- Review Decision -Making

GUARDIANSHIP

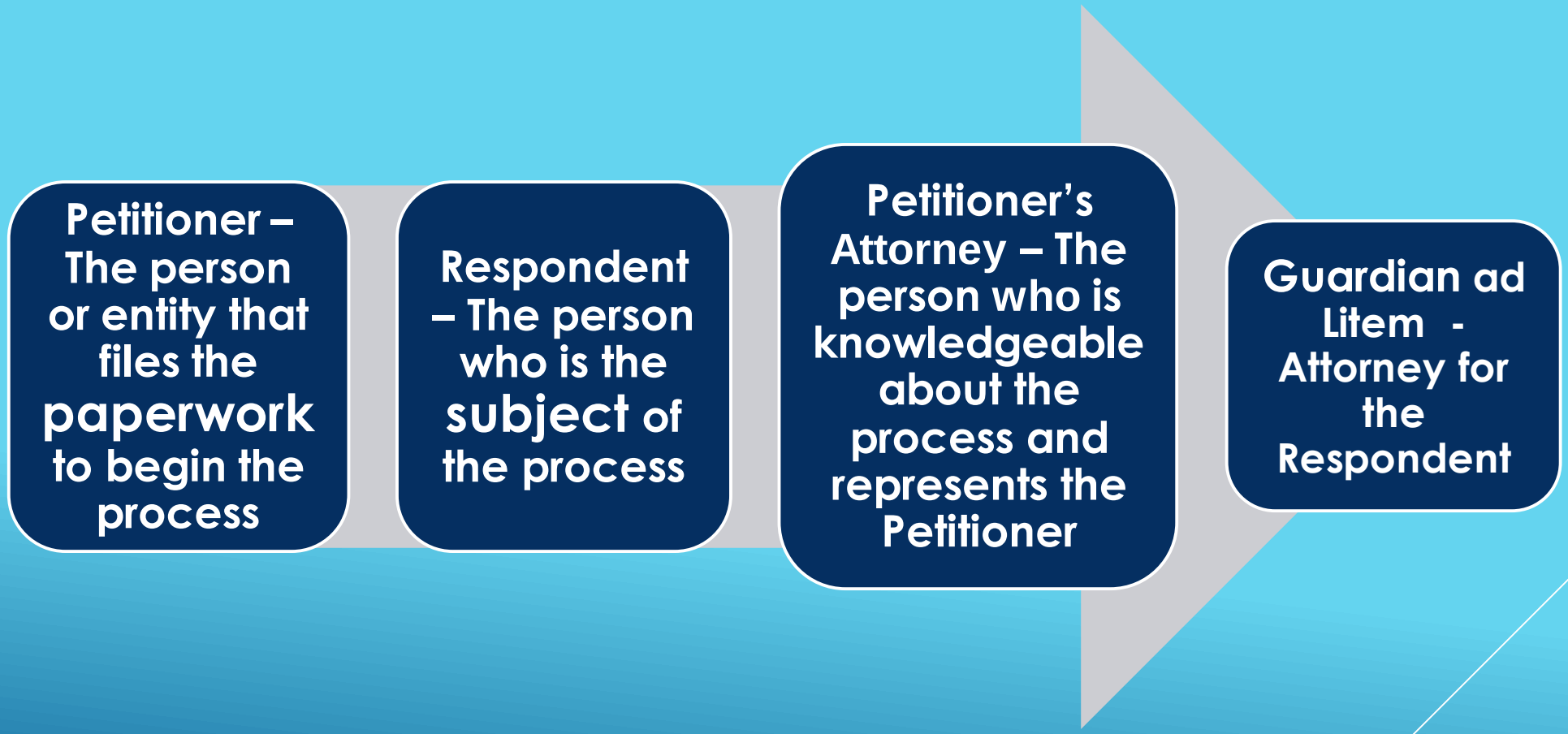
A legal relationship between an individual (the guardian) who has been given the legal authority and duty to make decisions on behalf of another individual (the ward) who lacks sufficient capacity to manage his or her own affairs or make and communicate important decisions.

N.C. General Statute 35A

LEGAL PROCEEDINGS



LEGAL PROCEEDINGS – WHO IS INVOLVED?



LEGAL PROCEEDINGS
WHO IS INVOLVED?

- **Clerk of Superior Court – The judge of the proceeding, in charge of the hearing on the petition, the decision-maker concerning the type and degree of the Guardianship (or an Assistant Clerk if designated by the Clerk to officiate)**
- **Witnesses – an array of people who perform the function of informing the Clerk about the circumstances of the Respondent; may include:**

LEGAL PROCEEDINGS
WHO IS INVOLVED?

- **A medical or psychological/psychiatric provider** - who can provide the Clerk with the basis for finding the incompetency of the Respondent
- **DSS social worker** - who has investigated the circumstances surrounding the Repondent in response to an Adult Protective Services report
- **Family, friends, acquaintances** - who are familiar with the Respondent and the situation
- **Facility staff, in-home care providers, case managers, community support workers** - familiar with the Respondent's level of functioning
- **Any other individual with pertinent information**

Type of Guardianships

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

Legal Proceedings
Hearing on Incompetency

- The Clerk of Superior Court in each county is the judicial official presiding over the hearing
- The burden of proof by clear, cogent and convincing evidence must be met by the Petitioner or the matter must be dismissed by the Clerk
- The N.C. Rules of Evidence (N.C.G.S. Chapter 8C) apply

Legal Proceedings
Hearing on Incompetency

An expedited hearing on the appointment of an Interim Guardian may be held prior to the actual hearing on incompetency

- **Must be requested in the Petition, hearing to be held as soon as possible, no later than 15 days after service on the Respondent**
- **There is reasonable cause to believe that the Respondent is incapacitated**
- **Emergency situation must be present**
- **Immediate appointment of an interim guardian is required**
- **Powers and duties limited to address the emergency situation(s)**

LEGAL PROCEEDINGS
HEARING ON INCOMPETENCY

- Appointment Hearing separate from adjudication
- Order of Appointment
  - Adult family member and friend
  - Corporation
  - Disinterested public agent
  - Person nominated in POA, POA
  - Public Guardian

DUTIES OF THE GUARDIAN OF THE PERSON

- Responsible for the care, comfort and maintenance of the Ward's person
- Arranges for the Ward's training, education, employment, rehabilitation or habilitation
- Establishes where the ward will reside (in the least restrictive environment)
- Gives consent or approval for legal, medical, psychological or other professional care, counsel or treatment for the Ward in their best interest

DUTIES OF THE GUARDIAN OF THE PERSON

- Allows the Ward to exercise rights that are within their comprehension
- Support the Ward's right to participate in all decision affecting them
- Petitions for restoration of competency if necessary
- Cannot consent to sterilization unless by order of the clerk in cases of medical necessity

DUTIES OF THE GUARDIAN OF THE ESTATE

- Appointed for purposes of managing the Ward's property, estate and business affairs
- Must post a bond payable to the State before receiving the Ward's estate
- Takes control of the ward's estate (both real & personal property) for the Ward's use
- Administers the estate in a prudent manner in the Ward's best interest
- Pays the Ward's debts, income taxes, property taxes and other taxes owed by the Ward from the ward's estate
- Many more specific duties are listed in N.C.C.G.S. Chapter 35A-1251

GUARDIAN OF THE ESTATE IN PERFORMING THESE DUTIES MUST:

- Obey all lawful orders of the court pertaining to the guardianship
- Keep the Ward's finances separate from their own finances
- Act in a reasonable and prudent manner in administering the Ward's estate
- Comply with the accounting requirements of the court

DUTIES OF THE GENERAL GUARDIAN

Combines the Duties of Both the Guardian of the Person and the Guardian of the Estate into One Guardianship

LIMITED GUARDIANSHIP

- Clerk determines what rights and privileges the Ward has the capacity to perform and can continue to exercise
- Specifically listed in the Order on Application and in the Letters
- Use Capacity Questionnaire

Misconceptions of Guardian's role

- CANNOT FORCE PEOPLE TO TAKE MEDICATIONS
- CANNOT FORCE PEOPLE TO LIVE IN A FACILITY
- DOES NOT SPEED UP HOSPITAL DISCHARGE
- DOES NOT SPEED UP ACCESS TO SERVICES

SUBSEQUENT PROCEEDINGS

- Successor Guardianship
- Modify rights – add or limit
- Seek Guardian of the Estate
- Restoration of Rights
- Right to a natural death
- Permission for a medical procedure that might sterilize an individual

TERMINATION OF GUARDIANSHIP

- Upon the death of the Ward
- Upon the entry of an order restoring the Ward's competency
- Guardian of the Estate or General Guardian must file a final account within 60 days of the termination of the Guardianship, then can be discharged.

ALTERNATIVES TO GUARDIANSHIP

Power of Attorney

- Health
- Financial
- Durable

Representative Payee

Advanced Directives

- Health
- Mental Health

Crisis Plan

WRAP

Supported Decision Making

APPROACHES TO DECISION MAKING

- How will you make decisions? Substitute or Surrogate?
- Protections vs Recovery
- Choose you battles careful – you can only control so much
- Family is family – is it fair to restrict visitation?
- Are you an island? Recognize when help is needed
- Perception is key…how others perceive you make a difference (an activity)

RESOURCES

QUESTIONS? COMMENTS?

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