

# TABLED

**CHEROKEE COUNCIL HOUSE  
CHEROKEE, QUALLA BOUNDARY**

**JUL 11 2019**

Date

**ORDINANCE NO. 657 (2019)**

WHEREAS, the Eastern Band of Cherokee Indians values protecting its elders and vulnerable adults from abuse, neglect, and exploitation; and

WHEREAS, tribal agencies that work with elders and vulnerable adults have identified ways to strengthen the Cherokee Code in order to better serve these populations; and

WHEREAS, Cherokee Code Chapter 35A provides the planning tools that can be used to promote and protect the well-being of persons in need of a guardianship; Chapter 14 provides criminal penalties for elder abuse, neglect, and exploitation; and Chapter 50E provides for a new restraining order for elders and vulnerable adults in need of protection from abusers; and

WHEREAS, changes and additions to these Chapters of the Cherokee Code have been proposed to better protect and provide for elders and vulnerable adults.

NOW THEREFORE BE IT ORDAINED by the Tribal Council of the Eastern Band of Cherokee Indians, in Council assembled, at which a quorum is present, that the following modifications to the Cherokee Code shall be made as follows:

**Amend Chapter 35A, Subchapter II, Article IV (Incompetency and Guardianship)**  
**as follows:**

~~Chapter 35A - INCOMPETENCY AND GUARDIANSHIP~~

~~SUBCHAPTER I. - PROCEEDINGS TO DETERMINE INCOMPETENCE~~ NEED FOR GUARDIANSHIP

Reserved for future codification.

~~SUBCHAPTER II - INCOMPETENCY AND GUARDIANSHIP~~

~~ARTICLE 4. - INCOMPETENCY AND GUARDIANSHIP~~

Sec. 35A-1100. - Policy.

It is the policy of the Eastern Band of Cherokee Indians to protect persons who lack the capacity to make decisions regarding their own life or property. The Tribe supports planning tools and measures that can be used to delay or avoid guardianship. Guardianship for an ~~incompetent~~ incompetent protected adult or ~~incompetent protected~~ child shall be used only as necessary to promote and to protect the well-being of the person. Guardianship shall be designed to encourage the development of maximum self-reliance and independence of the ~~incompetent protected~~ person and shall be ordered only to the extent necessitated by the person's actual functional mental and physical limitations. Any ~~incompetent~~ person for whom a guardian has been appointed retains all legal and civil rights, except those which have been expressly limited by Court order or have been specifically granted to the guardian by the Court.

(Ord. No. 447, 2-12-2017)

Sec. 35A-1101. - Definitions.

(a) *Accounting* means the financial or status reports filed by a guardian of the estate of ~~a~~ an incompetent protected adult.

(b) *Adult* means a person who is 18 years of age or older, married or legally emancipated.

(c) *Agency* means the Eastern Band of Cherokee Indians Public Health and Human Services Division as set out in Cherokee Code of Ordinances Section 130A-1.

(d) *Clerk* means the Clerk of the Cherokee Court of the Eastern Band of Cherokee Indians.

(e) *Competent* means any person who has not been legally declared to be ~~an incompetent~~ incompe protected adult or protected child.

(f) *Court* means the Clerk of the Cherokee Court or the Cherokee Court of the Eastern Band of Cherokee Indians.

(g) *Estate* means the real and personal property of the ~~incompetent protected~~ adult who is subject to this chapter.

(h) *Family* includes relationships based on bloodlines and marriage, such as parents, spouses, children, grandchildren, grandparents, in-laws, siblings, aunts, uncles, nieces, nephews, cousins and any others defined by Cherokee custom.

- (i) *General guardian* means a guardian of both the estate and the person of the incompetent protected adult.
- (j) *Guardian* means an adult or agency authorized to make decisions on the care and control of a protected adult or protected child ~~incompetent person~~, his property or assets and insure the person is not abused or neglected. "Guardian" may include a limited, emergency, or substitute guardian but does not include a guardian ad litem.
- (k) "Guardian ad litem" means an attorney appointed to represent the best interests of an ~~allegedly incompetent person~~ respondent not represented by an attorney. The guardian ad litem personally visits the respondent, determines the respondent's wishes with respect to the guardianship proceeding, presents the respondent's express wishes to the Court and makes recommendations to the Court concerning the best interests of the ~~allegedly incompetent person~~ respondent.
- (l) *Guardian of the estate* means guardian of the property or assets of the ~~incompetent person~~ protected adult or protected child.
- (m) *Guardian of the person* means the guardian appointed solely to provide or arrange for the ~~incompetent person's~~ protected adult's or protected child's care, comfort and maintenance, rehabilitation or custodial care and has the ability to consent to medical, legal, psychological or other professional care.
- ~~(n) Incompetent adult means a person who the Court has determined is unable to understand, make, communicate or act on decisions about his person or property, as a result of mental illness, mental deficiency, physical illness or disability.~~
- ~~(o) Incompetent child means a minor who is at least 17 years, six months of age (17½ years), who other than by reason of minority, has been found by the Court to lack sufficient capacity to make or communicate important decisions concerning his/her person, family, or property as a result of mental illness, mental deficiency, physical illness or disability.~~
- ~~(np) Institution~~ means a non-profit or private organization that provides care for persons with disabilities or the elderly.
- ~~(o)~~ *Limited Guardian* means a guardian who exercises limited rights as to the person and/or estate that are specifically delineated in the Clerk's order of appointment.
- ~~(pq)~~ *Multidisciplinary evaluation* is an evaluation that may contains current medical, psychological, and social work evaluations as directed by the ~~Court~~ 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 present to or considered by the ~~Court~~ Clerk. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan or program.
- ~~(qr)~~ *Petitioner* means a person or agency who signs the guardianship petition ~~to determine incompetency and guardianship.~~

(r) Protected adult means a person who is 18 years of age or older, and who the Clerk has determined is unable to understand, make, communicate or act on decisions about his person or property, as a result of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause.

(s) Protected child means a minor who is at least 17 years, six months of age. (17½ years), who other than by reason of minority, has been found by the Clerk to lack sufficient capacity to make or communicate important decisions concerning his/her person, family, or property as a result of mental illness, mental deficiency, physical illness or disability.

(ts) Respondent means the person who is alleged to be incompetent in need of a guardian and against whom the petition is filed.

(Ord. No. 447, 2-12-2017)

Sec. 35A-1102. – Rights of Protected Adults and Protected Children.

(a) Policy. The dignity and self-reliance of protected adults and protected children shall be acknowledged and respected by family members, the tribal community and employees of the Tribe. The rights of protected adults or protected children shall be recognized and protected.

(b) Scope. This Section supplements and expands those protections afforded to all tribal members and other such persons under the jurisdiction of the Tribe as outlined in the Constitution of the Eastern Band of Cherokee Indians and the Cherokee Code. The rights described in this Section shall control in the event of conflicting or inconsistent law or policy.

(c) Rights of Protected Adult and Protected Child.

(1) A protected adult or protected child has the right to be treated with dignity and respect for the personal integrity of the individual. This means that the protected adult or protected child:

(i) has the right to communicate the individual's own choices regarding the individual's personal affairs, care, benefits, and services;

(ii) has the right to be free from abuse, neglect, and exploitation;

and

(iii) if protective measures are required, has the right to nominate a guardian or representative to ensure the right to quality stewardship of the individual's affairs.

(2) The protected adult or protected child shall receive notice and shall have the right to attend, either in person or by electronic means, any court

1 hearings to which he or she is a party, and shall be advised of his or her  
2 right to appeal any determination made at guardianship proceedings  
3 before the Court.  
4

5 Sec. 35A-11032. - Determination of incompetency and guardianship  
6 Petition and Hearing  
7 on Guardianship.

8 (a) The Cherokee Court Clerk shall have original jurisdiction over any case arising within  
9 its jurisdiction under this subchapter.

10 (b) Any person, including but not limited to a person selected by the respondent, or the  
11 agency through its personal representative, may file a verified petition for an  
12 adjudication of incompetency appointment of a guardian.

13 (c) A guardianship petition shall include:

14 (1) The petitioner's name, residence, current mailing address and physical location,  
15 relationship to the respondent, and petitioner's interest in the proceeding;

16 (2) The respondent's name, age, principal residence, current mailing address and  
17 physical location;

18 (3) The name and address of any other persons known to have an interest in the  
19 petition, including the spouse, caregiver, adult children, and if none, the  
20 respondent's parents and adult brothers and sisters, and if none, at least one  
21 adult nearest in kinship to the respondent who can be found with reasonably  
22 diligent efforts;

23 (4) Facts that show why guardianship is necessary and any relevant supporting  
24 evidence, including date of any examination and examples of behaviors;

25 (5) A description and estimate of the respondent's property, assets and liabilities,  
26 if guardianship over the estate or general guardianship is sought; and

27 (6) Who the petitioner recommends or seeks to have appointed as guardian.

28 (d) After a petition is filed, the petitioner shall serve a copy of the petition and summons  
29 on the respondent and any other persons known to have an interest in the petition,  
30 pursuant to Rule 4 of the North Carolina Rules of Civil Procedure, as adopted by  
31 Section 7-14 of the Cherokee Code ("Rule 4").

32 (e) A summons shall accompany the petition, contain the date of the hearing and the  
33 pre-adjudication hearing and notify the respondent and other interested parties of the  
34 time in which to file a response to the petition.

35 (f) When any petition is filed, the Court Clerk shall set an initial hearing, not more than  
36 30 days from the date the petition was filed.

37 (g) The Clerk shall also set a pre-adjudication hearing for not more than 10 days from  
38 the date the petition was filed. At the pre-adjudication hearing, the Clerk shall:

39 (1) Assess the need for and scope of any necessary fact gathering, including a  
40 multidisciplinary evaluation, a prospective guardian report, a guardian ad litem

1 report, and any other information the Clerk deems relevant to disposition of the  
2 petition;

3 (2) Make a preliminary determination of what professionals should be involved in  
4 assessment of the respondent and any prospective guardian, and develop a plan  
5 for coordination with those professionals;

6 (3) Assess the circumstances surrounding the petition and make other preliminary  
7 determinations as may be necessary to obtain information bearing on disposition  
8 of the petition.

9 (hg) The Court Clerk shall appoint an attorney who shall serve as a guardian ad litem  
10 to assist the Court.

11 (ih) When appointed, the guardian ad litem shall:

12 (1) Interview in person the respondent prior to the hearing, visit the respondent's  
13 current residence and any proposed residence;

14 (2) Present the respondent's position regarding the proposed guardianship to the  
15 Court Clerk;

16 (3) Interview health care and other professionals involved with the respondent,  
17 other interested persons and the proposed guardian;

18 (4) Review both the medical report submitted by the licensed physician, and the  
19 multidisciplinary evaluation if either or both are required by the Clerk, or other  
20 records as necessary, and obtain independent medical and psychological  
21 assessments, if necessary;

22 (5) Participate in any mediation that occurs in conjunction with the proceeding;

23 (6) Unless otherwise ordered by the Court Clerk, the duties of the guardian ad litem  
24 end and the guardian ad litem is discharged from his duties when the guardian  
25 accepts the appointment and an order appointing the guardian is entered by the  
26 Court Clerk or the Court Clerk otherwise finds the respondent competent and  
27 dismisses the petition.

28 (ji) Before a determination of incompetency hearing on the petition, or at any time during  
29 the pendency of the action, a multidisciplinary evaluation may be ordered by the  
30 Court Clerk if the Clerk finds that: (1) the case involves or may involve complicated  
31 mental illness, mental deficiency, or physical illness or disability, or (2) evidence is  
32 conflicting or otherwise deficient regarding a person's guardianship needs.

33 (1) If ordered, the multidisciplinary evaluation shall be completed by an entity to  
34 be named by the Clerk within 30 days after the order is entered.

35 (2) The Clerk Court may order that the respondent attend a multidisciplinary  
36 evaluation in order to be evaluated.

37 (3) The petitioner shall assemble the information needed for a current  
38 multidisciplinary evaluation for the Court Clerk.

- (4) The entity completing the evaluation~~petitioner~~ shall file the completed multidisciplinary evaluation with the Court Clerk and the Clerk shall send copies of the evaluation to the petitioner, respondent, and the guardian ad litem.
- (5) When signed by the authoring medical professional, the multidisciplinary evaluation shall be self-authenticating in proceedings under this subchapter without the need for extrinsic evidence of authentication.
- (kj) At any time after the service of the summons upon the respondent, the Court Clerk may refer the case to mediation. Participation in mediation is voluntary, and the Court Clerk may not require that a settlement be reached through mediation.
- (1) A Court-hearing may be continued to allow mediation to be used. The Clerk shall send Nnotice of mediation and any continuance of Court-hearings shall be ~~sent to~~ all parties notified of the original hearing date.
- (2) Any information received by the mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential. No part of the proceeding shall be considered a matter of public record. Each mediation session shall be informal.
- (3) Any agreement reached through the mediation process shall be reviewed by the Court Clerk and may be made an order of the Court Clerk.
- (lk) ~~Incompetency hearing~~Hearing on petition.
- (1) The petitioner and the respondent are entitled to be present at the hearing, to present evidence and to examine and cross-examine witnesses.
- (2) The proceeding may be closed at the discretion of the Court Clerk.
- (3) The Court Clerk upon request, or on its own motion, may conduct hearings at the location of a respondent who is unable to be present ~~in Court~~. Any hearing under this Article shall be to the Court Clerk without a jury. There shall be a record of the hearing.
- (4) The Court Clerk shall dismiss the proceeding if the Finder of Fact does not find the respondent to be ~~incompetent~~in need of a guardian.
- (ml) Proof of incompetency~~need for guardian~~.
- (1) ~~Incompetency~~The need for a guardian must be proved by clear and convincing evidence. The rules of evidence shall apply and no hearsay evidence, not otherwise admissible in a Court, shall be admitted into evidence, except as otherwise provided in this Article.
- (2) There is a legal presumption of capacity and the burden of proof shall be on the petitioner to prove the allegations set forth in the petition.
- (3) ~~(3)~~Evidence supporting the need for a guardianship may include medical records, incident reports, and affidavits from family, friends, medical professionals, social workers, or mental health workers. The Clerk may, but is not required to, demand proof at the hearing shall include certification by a licensed physician showing that the respondent is incompetent~~in need of protection in~~

1 whole or in part, what functions are effected, the anticipated duration of the  
2 incompeteneyneed for protection, and that the best interests of the respondent  
3 will be served by the appointment of a guardian, as a condition of appointment.  
4

- 5 (4) The Clerk may consider hearsay evidence as defined in N.C.G.S. 8C-1, rule 801,  
6 or testimony or evidence from any person that is not a party that the Clerk finds  
7 to be relevant, reliable, and necessary to determine whether the respondent is in  
8 need of a guardian.

9 Sec. 35A-1104. Due Process Requirements.

- 10 (a) The respondent has the right to be represented by counsel at respondent's own  
11 expense.

- 12  
13 (b) The respondent, guardian ad litem, and respondent's counsel, if any, shall receive  
14 notice of all proceedings under this Article. The notice must include a statement  
15 that the respondent may attend, either in person or by electronic means, any court  
16 hearings to which the respondent is a party. All notices shall be personally served  
17 pursuant to Rule 4 of the North Carolina Rules of Civil Procedure, as adopted by  
18 Section 7-14 of the Cherokee Code, within a reasonable time prior to the hearing.

- 19  
20 (c) If a guardian is appointed, the protected adult or protected child retains all rights  
21 not restricted by the Court order, and these rights must be enforced by the Court.  
22 These rights include the right to:

23  
24 (1) Treatment with dignity and respect;

25  
26 (2) Due consideration of current and previously stated personal desires,  
27 medical treatment preferences, religious and spiritual beliefs, and other  
28 preferences and opinions in decisions made by the guardian;

29  
30 (3) Receive timely and appropriate healthcare and medical treatment that does  
31 not violate known conscientious, religious, spiritual, or moral beliefs of the  
32 or protected person;

33  
34 (4) Exercise control of all aspects of life not delegated specifically by order to  
35 the guardian;

36  
37 (5) Guardianship services individually suited to the protected person's  
38 conditions and needs;

39  
40 (6) Petition the Clerk to prevent or initiate a change in abode;

41  
42 (7) Care, comfort, social and recreational needs, training, education,  
43 habilitation, and rehabilitation care and services, as available resources  
44 permit;  
45



(8) Be consulted concerning, and to decide to the extent possible, the reasonable care and disposition of the protected person's clothing, furniture, vehicles, and other personal effects, to object to the disposition of personal property and effects, and to petition the Clerk for a review of the guardian's proposed disposition;

(9) Personal privacy;

(10) Communication and visitation with persons of the protected person's choice, provided that if the guardian or a court by lawful order has found that certain communication or visitation may result in harm to the protected person's health, safety, or wellbeing, that communication or visitation may be restricted but only to the extent necessary to prevent the harm;

(11) Petition the Clerk for termination or modification of the guardianship or for other appropriate relief; and

(12) Execute a health care directive, including both health care instructions and the appointment of a health care agent, if appropriate.

(Ord. No. 447, 2-12-2017)

Sec. 35A-1105~~3~~. - Who may serve as guardian.

(a) The following are entitled to consideration for appointment:

(1) A person appointed by the ~~Court~~Clerk; or

\_\_\_\_(2) The Agency.

(b) ~~The Court~~Clerk shall consider whether a prospective guardian has ever been convicted of a felony or other crime and whether a prospective guardian owns or is employed at an institution where an ~~incompetent~~protected person resides.

(c) To assess suitability of a prospective guardian, the Clerk may undertake or cause to be undertaken a ~~Any person seeking appointment as guardian under this article shall provide to the Court a criminal background check on the prospective guardian.~~  
The Clerk may also order the prospective guardian to provide a ~~and~~ credit history.

(d) 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 protected person's assets, liabilities, and needs.

(Ord. No. 447, 2-12-2017)

Sec. 35A-1106~~4~~. - Appointment of guardian.

(a) The Clerk at any time may hold a hearing 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 protected person; and

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

(b) The Court Clerk may appoint a guardian if it finds by clear and convincing evidence that the respondent is incompetent and that the respondent is a protected adult or protected child, and that appointment is necessary to provide care and supervision of the respondent and/or the respondent's estate. The Clerk Court, at the time of appointment, or later upon an appropriate motion of the incompetent protected adult, protected child, or other interested person, or sua sponte, may limit the powers of a guardian or create a limited guardianship.

(cb) The Clerk Court will grant only those powers to the guardian necessary due to the respondent's limitations and demonstrated needs and will make appointive or other orders that will encourage the development of the petitioner's maximum self-reliance and independence. The person subject to the guardianship shall retain all legal rights and abilities other than those expressly limited or curtailed by the Clerk Court as delineated by the order appointing the guardian.

(de) After making the requisite findings set forth in subsection (a), tThe Clerk Court may appoint a guardian of the person, who shall be entitled to custody of the person. The guardian of the person shall make provision for the protected incompetent person's care, comfort and maintenance and shall, as appropriate to the incompetent protected person's needs, arrange for the protected incompetent person's training, education, employment, rehabilitation or custodial care. The guardian of the person shall take reasonable care of the incompetent protected person's clothing, furniture, vehicles and other personal effects. The guardian of the person shall have authority to consent to any medical, legal, psychological or other professional care, counsel, treatment, and give other consent that may be required or in the protected incompetent person's best interest.

(ed) After making the requisite findings set forth in subsection (a), tThe Clerk Court may appoint a guardian of the estate solely for the purpose of managing the property, estate and business affairs of the person subject to the guardianship.

(fe) After making the requisite findings set forth in subsection (a), tThe Clerk Court may appoint a general guardian to act as a guardian of both the person and the estate.

(gf) After making the requisite findings set forth in subsection (a), tThe Clerk Court may appoint a limited guardian or a temporary guardian of the person, estate or as a general guardian. If the Clerk appoints a limited guardian in any of those respects, the Clerk shall specifically state in the order of appointment the limited powers that the guardian shall have as to the person and/or the estate.

(Ord. No. 447, 2-12-2017)

1 Sec. 35A-11075. - Duties of the guardian.

2 (a) A guardian shall have the following duties:

- 3 (1) Maintain a relationship of ethics and trust with the person subject to the  
4 guardianship:
- 5 (2) Exercise a high degree of fiduciary responsibility and care in managing the  
6 estate of the protected person: and
- 7 (3) Derive no personal benefit of any kind from his management of the estate of  
8 the protected person: and
- 9 (4) Consider the expressed desires and personal values of the person subject to  
10 the guardianship to the extent known and may consult with other family members  
11 and caregivers to the extent appropriate and possible to gain such information.
- 12 (5) Within 14 days of his appointment, any guardian, who is an individual, shall  
13 participate in a training relating to the ethics, standards, powers and limitations  
14 of guardianship. The ~~Court~~ Clerk may coordinate with the Adult Protective  
15 Services unit for this training.
- 16 (6) The guardian shall submit a current background check and credit report with  
17 the annual accounting required pursuant to Article 10.

18 (b) In addition to any other duties imposed by law or by order of the Clerk, a guardian  
19 of the estate shall have the following specific duties:

- 20 (1) To take possession, for the protected adult's use, of all his estate.
- 21 (2) To diligently endeavor to collect, by all lawful means, all bonds, notes, obligations,  
22 or moneys due to the protected adult.
- 23 (3) To pay income taxes, property taxes, or other taxes or assessments owed by the  
24 protected adult, out of the protected adult's estate, as required by law. If any  
25 guardian allows his protected adult's lands to be sold for nonpayment of taxes or  
26 assessments, he shall be liable to the protected adult for the full value thereof.
- 27 (4) To observe the standard of judgment and care under the circumstances then  
28 prevailing that an ordinarily prudent person of discretion and intelligence, who is  
29 a fiduciary of the property of others, would observe as such fiduciary in acquiring,  
30 investing, reinvesting, exchanging, retaining, selling, and managing the protected  
31 adult's property. If the guardian has special skills or is named as guardian on the  
32 basis of representations of special skills or expertise, to use those skills.
- 33 (5) To obey all lawful orders of the court pertaining to the guardianship and to comply  
34 with the accounting requirements of Article 10.

35 (cb) The Clerk Court may shall require any guardian, before taking and receiving into  
36 custody the money or funds personal property of a protected person with a value equal  
37 to or greater than \$50,000, to provide security in the form of a bond, in such amount  
38 as the Clerk Court may order. In lieu of a required bond, the Clerk Court may accept  
39 a voluntary garnishment to the Court of the guardian's per capita to be invoked by the  
40 Clerk Court should it be required. If the value of the personal property of a protected

1 person to be taken into custody by the guardian is less than \$50,000, the Clerk may  
2 require the guardian to provide security in the form of a bond. In lieu of a required  
3 bond, the Clerk may accept a voluntary garnishment to the Court of the guardian's  
4 per capita to be invoked by the Clerk should it be required.

5 (de) By accepting appointment, a guardian submits personally to the jurisdiction of the  
6 Court in any proceeding relating to the guardianship. Notice shall be delivered or  
7 mailed to the guardian at the address listed in the Court records, pursuant to Rule 5  
8 of the North Carolina Rules of Civil Procedure, as adopted by Section 7-14 of the  
9 Cherokee Code.

10 (Ord. No. 447, 2-12-2017)

11 Sec. 35A-11086. - Guardianship oversight.

12 Article 10 of this subchapter shall apply to guardians of the estate, and general guardians,  
13 and limited guardians who have rights with respect to the protected person's estate.  
14 Instruction on completing these accountings shall be provided by the ClerkCourt.

15 (Ord. No. 447, 2-12-2017)

16 Sec. 35A-11097. - Termination of guardianship.

17 A. (a) The authority and responsibility of a guardian terminates upon the death of the  
18 guardian or the protected person, the ~~determination of incompetency of the~~  
19 ~~guardian~~dismissal or denial of the petition, or upon removal or resignation.

20 B. (b) The ClerkCourt, after hearing, may remove a guardian if in the best interest of  
21 the protected person. The Clerk Court may refer the matter to mediation.

22 C. (c) Upon removal, resignation or death of the guardian, or if the guardian is  
23 ~~determined to be incompetent~~in need of protection, the ClerkCourt may appoint a  
24 successor guardian and make any other appropriate order. Before appointing a  
25 successor guardian, or ordering that a person's ~~incompetency~~need for a guardian  
26 has ended, the ClerkCourt shall follow the same procedure to safeguard the rights of  
27 the protected person that apply to a petition for appointment of a guardian.

28 (Ord. No. 447, 2-12-2017)

29 Sec. 35A-111008. – Appointment of Interim Guardian.

30 (a) The Clerk or any person, including but not limited to a person selected by the  
31 respondent, or the Agency, or the Clerk, sua sponte, may file a motion for appointment  
32 of an interim guardian along with, or subsequent to, the filing of a Petition for Guardian  
33 under Sec. 35A-1103.

34 (b) Upon filing of the motion for appointment of an interim guardian by the petitioner or  
35 the guardian ad litem, the Clerk shall immediately set a date, time, and place for a hearing  
36 on the petition for interim guardian not later than five (5) days after the petition is filed.  
37 The petition and notice setting the date, time, and place for the hearing shall be served  
38 promptly on the petitioner, the respondent, respondent's counsel (if any), the guardian ad

1 litem if one has been appointed, and other persons the Clerk may designate.

2 (c) The Clerk's order appointing an interim guardian shall include specific findings of fact  
3 to support the Clerk's conclusions, and shall set forth the interim guardian's powers and  
4 duties. Such powers and duties shall be limited and shall extend only so far and so long  
5 as necessary to meet the conditions necessitating the appointment of an interim guardian.  
6 In any event, the interim guardianship shall terminate on the earliest of the following: the  
7 date specified in the Clerk's order; 45 days after entry of the Clerk's order unless the  
8 Clerk, for good cause shown, extends that period for up to 45 additional days; when any  
9 guardians are appointed for respondent following a hearing on a petition submitted under  
10 Sec. 35A-1103; or when a petition submitted under Sec. 35A-1103 as to respondent is  
11 dismissed by the Clerk. An interim guardian whose authority relates only to the person of  
12 the respondent shall not be required to post a bond. If the interim guardian has authority  
13 over to the respondent's estate in any respect, the interim guardian may be required to  
14 post a bond in an amount determined by the Clerk, with any conditions the Clerk may  
15 impose, and shall render an account as directed by the Clerk.

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17  
18  
19 Sec.- 35A-1109. – Restoration to Competency.

20  
21 (a) The guardian, protected adult, agency, or any other interested person may  
22 petition for restoration of the protected adult to competency by filing a motion with the  
23 Clerk. The motion shall be verified and shall set forth facts tending to show that the  
24 protected adult is competent.

25  
26 (b) Upon receipt of the motion, the Clerk shall set a date, time, and place for a  
27 hearing, which shall be not less than 10 days or more than 30 days from service of the  
28 motion and notice of hearing on the protected adult and the guardian, or on the one of  
29 them who is not the petitioner, unless the Clerk for good cause directs otherwise. The  
30 Clerk shall also appoint a guardian ad litem to represent the best interests of the  
31 protected adult. The petitioner shall cause notice and a copy of the motion to be served  
32 on the guardian and protected adult (but not on one who is the petitioner) and any other  
33 parties to the proceeding in accordance with Rule 4.

34  
35 (c) At the hearing on the motion, the protected adult shall be entitled to be  
36 represented by the appointed guardian ad litem or by private counsel at the protected  
37 adult's expense. Upon motion of any party or the Clerk's own motion, the Clerk may  
38 order a multidisciplinary evaluation.

39 (d) If the Clerk finds by a preponderance of the evidence that the protected adult is  
40 competent, the Clerk shall enter an order adjudicating that the protected adult is  
41 restored to competency. Upon such adjudication, the protected adult is authorized to  
42 manage his or her affairs and exercise all legal rights not otherwise restricted or limited  
43 by law.

1 (e) If the Clerk fails to find that the protected adult should be restored to  
2 competency, the Clerk shall enter an order denying the petition. The protected adult  
3 may appeal from the Clerk's order to the Cherokee Court of the Eastern Band of  
4 Cherokee Indians.

5  
6 Sec. 35A-11110. – Motions in the Cause.  
7

8 (a) Any interested person may file a motion in the cause with the Clerk to request  
9 modification of the order appointing a guardian or guardians or consideration of any  
10 matter pertaining to the guardianship.

11  
12 (b) A movant under this section shall obtain from the Clerk a time, date, and place  
13 for a hearing on the motion, and shall serve the motion and notice of hearing on all  
14 other parties, the Guardian ad Litem, and such other persons as the Clerk directs as  
15 provided by Rule 4, unless the Clerk orders otherwise.

16  
17 (c) If the Clerk finds reasonable cause to believe that an emergency exists that  
18 threatens the physical well-being of the protected adult or constitutes a risk of  
19 substantial injury to the protected adult's estate, the Clerk may enter an appropriate ex  
20 parte order to address the emergency pending disposition of the matter at the hearing.  
21

22  
23 Sec. 35A-11120. – Costs and Fees.  
24

25 (a) Costs. Except as otherwise provided herein, costs, including any reasonable  
26 fees and expenses of counsel for the petitioner which the Clerk, in his discretion, may  
27 allow, may be assessed against either party in the discretion of the Clerk unless:  
28

29 (1) The Clerk finds that the petitioner did not have reasonable grounds to bring the  
30 proceeding, in which case costs shall be taxed to the petitioner; or

31 (2) The respondent is indigent, in which case the costs shall be waived by the Clerk  
32 if not taxed against the petitioner as provided above or otherwise paid as provided  
33 herein.

34  
35 (b) Multidisciplinary Evaluation. The cost of a multidisciplinary evaluation required  
36 as under this subchapter shall be assessed as follows:  
37

38 (1) If the respondent is adjudicated as a protected adult and is not indigent, the cost  
39 shall be assessed against the respondent.

40 (2) If the respondent is adjudicated as a protected adult and is indigent, the cost shall  
41 be borne by the entity conducting the MDE, or as otherwise ordered by the Court.

42 (3) If the respondent is not adjudicated as a protected adult, the cost may be taxed  
43 against either party, apportioned among the parties, borne by the Court, or borne  
44 by the entity conducting the MDE, in the discretion of the court.

1 (c) Witness. Witness fees shall be paid by:

2  
3 (1) The respondent, if the respondent is adjudicated as a protected adult and is not  
4 indigent.

5 (2) The petitioner, if the respondent is not adjudicated as a protected adult and the  
6 Clerk finds that there were not reasonable grounds to bring the proceeding.

7 (2a) The petitioner for any of the petitioner's witnesses, and the respondent for any  
8 of the respondent's witnesses, when the Clerk finds all of the following:

9 (i) There were reasonable grounds to bring the proceeding.

10 (ii) The respondent was not adjudicated in need of a guardian.

11 (iii) The respondent is not indigent.

12 (3) The Court for witness fees for the respondent, if the respondent is indigent.

13 (d) Mediator. Mediator fees and other costs associated with mediation shall be paid  
14 by the Court.

15  
16 (e) Guardian Ad Litem. The fees of an appointed guardian ad litem shall be paid by:

17  
18 (1) The respondent, if:

19 (i) The respondent is adjudicated in need of a guardian; and

20 (ii) The respondent is not indigent.

21 (2) The respondent, if:

22 (i) The respondent is not adjudicated in need of a guardian;

23 (ii) The Clerk finds that there were reasonable grounds to bring the  
24 proceeding; and

25 (iii) The respondent is not indigent.

26 (3) The petitioner, if:

27 (i) The respondent is not adjudicated in need of a guardian; and

28 (ii) The Clerk finds that there were not reasonable grounds to bring the  
29 proceedings.

30 (4) The Court in all other cases.

31  
32 (f) Prospective Guardian Background Checks. The cost of undertaking a  
33 background check to assess the suitability of a prospective guardian shall be paid by  
34 the Court.

35  
36 Sec. 35A-111308. - Appeals and contempt of court.

37 A-(a) Any order entered pursuant to this article may be appealed under the appellate  
38 rules of the Cherokee Court. The Cherokee Court shall adhere to the appellate  
39 rules in adjudicating any appeal under this article.

B.(b) Any willful violation of an order entered pursuant to this article, willful failure to file accountings or attend trainings shall constitute contempt of Court and may be punished civilly or criminally.

(Ord. No. 447, 2-12-2017)

### SUBCHAPTER III. - GUARDIAN AND ~~WARD~~PROTECTED PERSON<sup>[1]</sup>

Footnotes:

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**Editor's note**— Former Subchapter II. Ord. No. 447, adopted February 12, 2017, adopted a new Subchapter II, causing all subsequent subchapters to renumbered.

### ARTICLE 10. - RETURNS AND ACCOUNTING

Sec. 35A-1260. - Applicability.

This article applies only to general guardians and guardians of the estate or kinship guardians as ordered by the Court.

(Ord. No. 524, 7-17-2015)

Sec. 35A-1261. - Inventory or account within three months.

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

(Ord. No. 524, 7-17-2015)

Sec. 35A-1262. - Procedure to compel inventory or account.

(a) In cases of default to file the inventory or account required by C.C. section 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 C.C. section 1-27 through 1-29, or both.

(b) The guardian shall be personally liable for the costs of any proceeding incident to his failure to file the inventory or account required by C.C. section 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.

(Ord. No. 524, 7-17-2015)

Sec. 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 supplemental 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. section 35A-1262.

(Ord. No. 524, 7-17-2015)

Sec. 35A-1264. - Annual accounts.

Every guardian shall, within 30 days after the expiration of one year from the date of his qualification or appointment, and annually, so long as any of the estate remains in his 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 his 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 his approval thereon, which shall be deemed prima facie evidence of correctness.

(Ord. No. 524, 7-17-2015)

Sec. 35A-1265. - Procedure to compel accounting.

(a) If any guardian omits to account, as directed in C.C. section 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 protected person 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.

(Ord. No. 524, 7-17-2015)

Sec. 35A-1266. - Final account and discharge of guardian.

Within 60 days after a guardianship is terminated, the guardian shall file a final account for the period from the end of the period of his 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.

(Ord. No. 524, 7-17-2015)

Sec. 35A-1267. - Expenses and disbursements credited to guardian.

Every guardian may charge in his 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 protected person's estate, for his 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 protected person.

(Ord. No. 524, 7-17-2015)

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

At the time the accounts required by this subchapter 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 jurisdiction in which such guardian resides or the jurisdiction in which such securities are located and, when the guardian is a duly authorized bank or trust company, such examination may be made by the clerk in the jurisdiction 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 jurisdiction shall be accepted by the clerk of any jurisdiction 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 or Tribe, 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.

(Ord. No. 524, 7-17-2015)

Sec. 35A-1269. - Commissions.

The clerk shall allow commissions to the guardian for his time and trouble in the management of the protected personward'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.

(Ord. No. 524, 7-17-2015)

ARTICLE 12. - NONRESIDENT MEMBER ~~WARD~~ PROTECTED PERSON HAVING PROPERTY IN TRIBAL TRUST LANDS

Reserved for future codification

**Strike Chapter 14, Article IX, Section 14-40.13 (Domestic abuse, neglect, and exploitation of disabled or elder adults) in its entirety and replace it with the following:**

"Sec. 14-40.13 – Elder and Vulnerable Adult Protection Criminal Code.

(a) *Purpose.* The purpose of the Elder and Vulnerable Adult Protection Criminal Code is to protect elders and vulnerable adults to the greatest extent possible pursuant to the inherent authority of the Eastern Band of Cherokee Indians.

(b) *Definitions.* The following definitions shall apply in this Section:

(1) *Agency.* The word "Agency" means Eastern Band of Cherokee Indians Public Health and Human Services Division as set out in Cherokee Code of Ordinances Sec. 130A-1.

(2) *Caretaker.* The word "caretaker" means a person who has the care, custody, or control of, or who stands in a position of trust with, an elder or vulnerable adult.

(3) *CIPD.* The term "CIPD" means the Cherokee Indian Police Department.