UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 48 | Number 1 Article 13

12-1-1969

Civil Procedure -- Requirement of Notice for Appointment of Guardians Ad Litem and Next Friends

Odes L. Stroupe Jr.

NOTES

Civil Procedure—Requirement of Notice for Appointment of Guardians Ad Litem and Next Friends

The Supreme Court of North Carolina in *Hagins v. Redevelopment Commission*[1] recently set forth procedural requirements that substantially affect the process of appointing guardians ad litem and next friends. Under the rules laid down in this case, any person for whom a guardian ad litem or next friend is proposed must be notified of such proposal and be given an opportunity to be heard if there is objection to the appointment.

The case arose from the Greensboro Redevelopment Commission's premature destruction of plaintiff Hagins' buildings pursuant to attempts to condemn her land.[2] Subsequent to the condemnation proceeding, Mrs. Hagins instituted an action in the superior court against the commission to recover 407,460 dollars as damages for the loss of her buildings. On the day set for trial Mrs. Hagins was unable to proceed with the cause because she had fired her two attorneys after a dispute over the litigation. The trial judge nonsuited her and informed her that she had one year to re-institute the action. The two discharged attorneys then filed affidavits alleging that Mrs. Hagins had a "fixation" about the loss of her property and that she was incompetent to manage this particular case. Acting in his discretion,[3] the trial judge thereafter va-

[1] 275 N.C. 90, 165 S.E.2d 490 (1969).

[2] On August 7, 1961, the commission instituted condemnation proceedings against Mrs. Hagins' land in the Guilford Superior Court under section 160-454 of the North Carolina General Statutes. Mrs. Hagins filed a self-prepared answer alleging her buildings were not dilapidated and the commission had no power to condemn her land. The superior court upheld the commission's right of eminent domain and adjudged title be transferred to the commission. Mrs. Hagins appealed and the North Carolina Supreme Court in Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962), reversed, holding that the commission's petitions were fatally defective. While that appeal was pending, on or about May 24, 1962, the commission demolished the buildings. On January 14, 1963, the commission brought a second condemnation proceeding to acquire title to Mrs. Hagins' lots. She was awarded 3,000 dollars as just compensation by the jury in superior court and title was adjudged to have vested in the commission. The supreme court, in Redevelopment Comm'n v. Hagins, 267 N.C. 622, 148 S.E.2d 585 (1966), affirmed the superior court decree and noted the pendency of Mrs. Hagins' action for damages for the premature destruction of her buildings.

[3] During a term of court all judgments and orders are *in fieri* and, except for those entered by consent, may be opened, modified, or vacated by the court upon

cated the nonsuit, continued the case for the term, and appointed a next friend to manage the litigation for Mrs. Hagins pursuant to section 1-64 of the North Carolina General Statutes.[4] All of this action was taken without notice to the plaintiff. Mrs. Hagins first learned of the judge's orders after the term had expired by reading about them in a newspaper.

The next friend notified Mrs. Hagins of his appointment and of his intention to ask the court to approve a forty-thousand-dollars settlement and a one-thousand-dollars fee for his services. The superior court subsequently approved both of the next friend's recommendations and granted judgment releasing the redevelopment commission from all liability. Several months later, Mrs. Hagins filed a motion to vacate the appointment of the next friend and all judgments entered thereafter. She contended that her constitutional rights had been violated because she was sui juris and her property had been taken without notice and a hearing. The superior court denied the motion and the court of appeals affirmed.[5] On appeal to the Supreme Court of North Carolina the judgment was reversed with the court acceding to Mrs. Hagins' contentions.[6]

A next friend or *prochien ami* is appointed to bring or prosecute some proceeding in behalf of a party under a disability while a guardian ad litem is appointed only to defend,[7] but there is no substantial difference in the law between the two.[8] The most common disabilities for which guardians ad litem and next friends are appointed are infancy and incompetency.[9] At common law, the king was the general protector

its own motion. Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E.2d 407 (1947).

[4] N.C. GEN. STAT. § 1-64 (1967):

> In actions and special proceedings when any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this state, they must appear by their general or testamentary guardian, if they have any within the State; but if the action or proceeding is against such guardian, or if there is no such guardian, then said person may appear by their next friend.

[5] 1 N.C. App. 40, 159 S.E.2d 584 (1968). The court based its affirmance on the fact that both the vacation of the nonsuit and the appointment of the next friend were ordered during the same term in which Mrs. Hagins brought the action, thus "fixing" her with notice. The court also held that Mrs. Hagins had actual notice of the actions from a phone conversation with the next friend. The court said that an inquisition was not necessary to have a next friend appointed; rather, the matter was within the discretion of the trial judge.

[6] Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

[7] Johnson County v. Ellis, 226 N.C. 268, 38 S.E.2d 31 (1948).

[8] 44 C.J.S. *Insane Persons* § 140 (1945).

[9] However, statutes in many states provide for appointment of guardians ad litem in other cases of disability. *See e.g.* ARK. STAT. ANN. § 27-883 (1947)

of persons with disabilities.[10] Consequently, when a person under a disability needed assistance in court, the king issued a letter patent appointing a guardian.[11] The chancery court later acquired jurisdiction over infants and incompetents by a delegation of duty by the crown and a grant of authority from the crown respectively.[12] American courts were quick to adopt the English policy of protecting persons with disabilities,[13] but unlike the delegation of the power in England, the courts of America recognized an inherent power to appoint guardians ad litem and next friends to protect infants and incompetents.[14]

Guardians ad litem are special guardians[15] whose powers are coterminous with the beginning and ending of the particular litigation for which they are appointed.[16] Due to the limited nature of the guardian ad litem's duties, rules governing them cannot be said to be a part of the general law of guardianship;[17] however, the general rationale that moves the courts to protect persons under disability by appointment of guardians of the person or of the estate is also operative in the appointment of guardians ad litem and next friends.[18] Still, the appointment of guardians ad litem and next friends is more practically a matter of procedure since state and federal rules of procedure normally control their appointment.[19]

Under the North Carolina General Statutes, there are various situations in which next friends or guardians ad litem can be appointed. Judges of superior courts can appoint next friends or guardians ad litem for idiots, infants, lunatics, or persons non compos mentis when they have no general guardian,[20] as occurred in *Hagins*. A guardian ad litem may also be appointed by the court in actions where unborn persons would have an interest if living;[21] for non-existent corporations, trusts,

(guardian ad litem appointment for persons in prison); N.C. GEN. STAT. § 28A-2(c) (1966) (guardian ad litem appointment for missing persons in action to have receiver appointed for the estate).

[10] 2 J. FONTBLANQUE, A TREATISE ON EQUITY 225 (2d Am. ed. 1820).

[11] 2 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 441 n.6 (2d ed. 1911).

[12] 2 J. FONTBLANQUE, *supra* note 10, at 232.

[13] *See, e.g.*, Kesler v. Penninger, 59 Ill. 134 (1871); Fisher v. Stilson, 9 Abb. Pr. 33 (N.Y. Sup. Ct. 1859).

[14] Insurance Co. v. Bangs, 103 U.S. 435, 438 (1880) (dictum); Zaro v. Strauss, 167 F.2d 218, 220 (5th Cir. 1948).

[15] Till v. Hartford Accident & Indem. Co., 124 F.2d 405, 408 (10th Cir. 1941).

[16] Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

[17] 5 J. HENDERSON, PROBATE PRACTICE § 1366 (2d ed. 1950).

[18] Note, *Guardians Ad Litem*, 45 IOWA L. REV. 376 n.5 (1960).

[19] *E.g.*, FED. R. CIV. P. 17(c); N.C. SUPER. CT. R. 16, 17.

[20] N.C. GEN. STAT. §§ 1-64, 1-65.1 (1967).

[21] N.C. GEN. STAT. § 1-65.2 (1967).

or other entities;[22] for missing persons when a receiver is sought to be appointed;[23] and for insane or incompetent non-residents having property within the state.[24] The clerk of superior court may appoint a guardian ad litem for a person who is committed to a state-supervised hospital if its superintendent provides a certificate declaring the person to be insane or mentally retarded.[25]

Although North Carolina statutes specify the situations in which guardians ad litem may be appointed, they do not contain any procedure for appointing them or next friends. Instead, the procedure is controlled by rules 16 and 17 of the superior courts,[26] which do not contain any provision about the two issues raised in *Hagins*[27]—(1) whether the plaintiff was entitled to actual notice of the proposed appointment of a next friend and (2) whether she was entitled to an opportunity to be heard upon the competency issue before the trial judge could properly appoint a next friend.[28]

There is case law in North Carolina indicating that notice and an opportunity to be heard are constitutional requirements in all cases; however, no case specifically mentions notice to allegedly incompetent persons.[29] One case has held that an alleged incompetent was entitled to be

[22] N.C. GEN. STAT. § 1-65.3 (1967).

[23] N.C. GEN. STAT. § 28A-2(c) (1966).

[24] N.C. GEN. STAT. § 35-3.1 (1966).

[25] N.C. GEN. STAT. § 35-3 (1966). For a discussion of North Carolina commitment procedures and due process see Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274 (1958).

[26] N.C. SUPER. CT. R. 16:

> In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

This rule also governs the appointment of guardians ad litem for persons other than infants. Abbott v. Hancock, 123 N.C. 99, 31 S.E. 268 (1898).
N.C. SUPER. CT. R. 17. "All motions for a guardian ad litem shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case."

[27] Possibly because infancy and incompetency are the two major disabilities to which these rules of practice are applicable. Infancy is seldom disputed, and an incompetent who owns property normally has a general guardian to represent him.

[28] Hagins v. Redevelopment Comm'n, 275 N.C. 90, 98, 165 S.E.2d 490, 495 (1969).

[29] See Collins v. Highway Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953) (condemnation proceeding); National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950) (notice to creditors in insolvency proceeding); *In re* State v. Gordon, 225 N.C. 241, 34 S.E.2d 414 (1945) (notice to owners of liquor confiscated under state laws).

heard upon timely objection,[30] but an inquisition to determine competency was not a condition precedent to the appointment of a guardian ad litem or next friend.[31] The right to a hearing is of little value if there is no requirement that the alleged incompetent must receive notice. In fact, under the practice followed by the North Carolina superior courts, notice almost never reaches the ward.[32]

It was in this context that the Supreme Court of North Carolina decided *Hagins*. The court first looked at the jurisdictional facts that allow appointment of guardians ad litem and next friends and determined that Mrs. Hagins should have been non compos mentis if a next friend was appointed. The court also noted, as pointed out above, that neither section 1-64 of the North Carolina General Statutes nor North Carolina Superior Court Rule 16 contains any provision for notice or for an adjudication of incompetency where there is a dispute. Relying upon the history of legislative and judicial protections of the right of one accused of incompetency to traverse the allegations, the court concluded that such person was entitled to notice as in the case of an inquisition under section 35-2 of the North Carolina General Statutes. The supreme court held that if the person upon notice asserts his competency, in the absence of an emergency situation the trial court must then proceed under the lunacy statute[33] and hold an inquisition.[34] Since Mrs. Hagins had neither notice nor an opportunity to be heard, the court deemed void the appointment of the next friend and the subsequent judgments.

Requirements of notice and hearing set forth in *Hagins* will apparently govern the procedure for appointing guardians ad litem after the new North Carolina Rules of Civil Procedure become effective in January, 1970. The case will be of continuing validity since the new rules, while repealing superior court rules 16 and 17, fail to provide for

[30] Moore v. Lewis, 250 N.C. 77, 108 S.E.2d 26 (1959).

[31] *Id.*; Smith v. Smith, 106 N.C. 498, 11 S.E. 188 (1890). *But see In re* Wilson, 257 N.C. 593, 597, 126 S.E.2d 489, 492 (1962) (dissenting opinion).

[32] In an interview with the writer, several superior court judges indicated that proceedings to appoint a next friend or guardian ad litem were pro forma in that the clerk of court or judge would grant such appointment on affidavits, without notice to the proposed ward, and would rely on the guardian ad litem's verified answer to set forth the details of the ward's incompetency. The judges stated that they had no problem in this respect and that if at some point in the litigation the alleged non compos mentis objected to such appointment, he would be given an opportunity to be heard. Interview with four superior court judges in Chapel Hill, N. C., on Sept. 5, 1969. See also Groves v. Ware, 182 N.C. 553, 556, 109 S.E. 568, 570 (1921).

[33] N.C. GEN. STAT. § 35-2 (1966).

[34] *Accord,* Borough of East Paterson v. Karkus, 136 N.J. Eq. 286, 41 A.2d 332 (Ct. Ch. 1945); Graham v. Graham, 40 Wash. 2d 64, 240 P.2d 564 (1952).

notice and an opportunity to be heard or contest an issue for infants, incompetents, and others in proceedings to appoint a guardian ad litem.[35]

Hagins is particularly significant for the future for its treatment of notice. The court indicated that not only are alleged incompetents (as in *Hagins*) entitled to notice before appointment of a guardian ad litem, but also *any person* for whom a guardian ad litem is proposed is entitled to such notice in the absence of an emergency.[36] The court stated:

> [A] person for whom a next friend or guardian ad litem is proposed is entitled to notice as in case of a [*sic*] inquisition of lunacy under G.S. Section 35-2. This statute does not specify the time, but by analogy to G.S. Section 1-581, ten days notice would be appropriate unless the court, for good cause should prescribe a shorter period.[37]

Any interpretation that this rule applies only to persons allegedly non compos mentis is illogical because the court before laying it down already had discussed notice to them.[38] Thus the requirements of *Hagins* would seem to apply to *all* cases in which a guardian ad litem can be appointed under any North Carolina statute.[39]

If this interpretation is correct, infants would have a right to notice if they are old enough to comprehend it. Moreover, when a guardian ad litem is proposed for a person who already has a general guardian,[40] the potential ward still would be entitled to notice. *Hagins* may even require that when a guardian ad litem is to be appointed for non-existent trusts, corporations, or other entities under Rule 17(b) of the North Carolina Rules of Civil Procedure, some or all persons who will be a part of or have an interest in the nonexistent entity be given notice.

Hagins would also affect section 28A-2(c) of the North Carolina General Statutes, which provides for appointment of a guardian ad litem

---

[35] N.C.R. Civ. P. 17 (N.C. Gen. Stat. § 1A-4 (Advance Legis. Pamp. No. 7 1969)). The separate terminology of next friend and guardian ad litem is dropped; guardian ad litem is used for both plaintiff and defendant. N.C. Gen. Stat. §§ 1-64, 1-65.1 to -65.3 are incorporated into Rule 17 without significant change.

[36] "In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as next friend." 275 N.C. at 103, 165 S.E.2d at 499.

[37] *Id.* at 102, 165 S.E.2d at 498.

[38] *Id.*

[39] See note 20 and p. 94 *supra.*

[40] N.C.R. Civ. P. 17(b)(3) (N.C. Gen. Stat. § 1A-4 (Advance Legis. Pamp. No. 7 1969)). ". . . a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant or insane or incompetent person so represented notwithstanding such person may have a general or testamentary guardian."

to represent a missing person in an action to appoint a receiver. While section 28A-5 provides for notice by publication to the missing person, it fails to require notice of the appointment of the guardian ad litem.[41] Assuredly, it is most difficult to conceive of one being able to notify a missing person, but under *Hagins* he must be notified; and constitutionally notice must be given in a manner reasonably calculated to inform him of the proceedings.[42]

A further problem created by *Hagins* is that the decision requires notice to be served upon the alleged incompetent. Even where a person is a known incompetent but has not yet been so adjudged, *Hagins* would require notice to him before a guardian can be appointed. In *Covey v. Town of Somers*,[43] the United States Supreme Court held that notice to a person known to be an incompetent and without the protection of a guardian does not measure up to constitutional standards.[44] The potential impasse created by the two cases yields to common sense, but it is difficult to solve mechanically. Perhaps *Covey* simply adds the further requirement of notifying someone other than the alleged incompetent, such as a close friend or relative, while sustaining the *Hagins* requirement of notice.

If, after receiving notice, the alleged incompetent objects to the appointment of a guardian ad litem, *Hagins* requires (in the absence of an emergency) an inquisition similar to that in section 35-2 of the North Carolina General Statutes, which provides for a jury of twelve men to inquire into the person's competency. Should the inquisition reveal that the party is not incompetent to manage his own affairs but is incompetent as to the particular subject matter of the litigation, then a guardian ad litem cannot be appointed.[45] Thus *Hagins*, while no doubt providing additional safeguards for alleged incompetents, fails to protect a person who is only mentally unable to comprehend his interests in the litigation even though he has retained counsel.

Where the inquisition finds the proposed ward incompetent, another

[41] See McCall, *Estates of Missing Persons in North Carolina*, 44 N.C.L. REV. 275 (1966).

[42] Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[43] 351 U.S. 141 (1956).

[44] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

[45] 275 N.C. at 104, 165 S.E.2d at 499. "[W]e understand the word affairs to encompass a person's entire property and business—not just one transaction or one piece of property to which he may have a unique attachment."

problem, which the court failed to examine, is raised: what is the effect of the determination of incompetency? This question was left unanswered because the court did not specify that the determination should be a binding judicial decree as in the case of the lunacy proceeding under section 35-2 of the North Carolina General Statutes. A person found incompetent under section 35-2 loses power over his estate, and a guardian is appointed for him. If incompetency is adjudged in an inquisition proceeding specified by the decision in *Hagins*, a guardian ad litem rather than a general guardian will be appointed, unless the determination is given the effect of a binding judicial decree under section 35-2. But a guardian ad litem has no power to administer an incompetent's estate.[46] The lack of a general guardian might well mean that the person adjudged incompetent will be unable to conduct his affairs or deal in business with others due to their fear of his transactions being deemed void.

Another, and perhaps the most significant, aspect of *Hagins* is the court's discussion of the effect of failure to comply with the prescribed requirements of notice. Prior to this decision, an irregularity in the appointment of a guardian ad litem or next friend was considered a procedural rather than a jurisdictional defect so that the judgment was voidable and could only be attacked directly by the parties to it.[47] The attacking party had to show that his rights had been prejudiced before the judgment could be set aside.[48] But in *Hagins* the court considered the lack of notice and an opportunity for a hearing as jurisdictional defects that left the lower court's judgment completely void rather than simply voidable:[49] "[T]he order appointing Franks as her next friend was void and his settlements of her actions, notwithstanding they were approved by the court, are not binding upon her." If void, a judgment rendered without notice or an opportunity to be heard can be collaterally attacked by persons other than the ward.

Although the result in *Hagins* is unquestionably just, the case leaves many questions unanswered. Until these problems are clarified, the careful lawyer should make certain in all cases where a guardian ad litem is to be appointed that all reasonable means are used to inform the person for whom the proposed appointment is to be made and that an opportunity for him to be heard is provided.

ODES L. STROUPE, JR.

[46] Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).
[47] *In re* Barker, 210 N.C. 617, 188 S.E. 205 (1936); Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).
[48] Moore v. Lewis, 250 N.C. 77, 108 S.E.2d 26 (1959).
[49] 275 N.C. at 102, 103, 165 S.E.2d at 498.