

Attorneys & Guardianship

**Guardianship Training for Clerks and
Assistant Clerks of Superior Court
Judicial College
Institute of Government
The University of North Carolina at Chapel Hill
April 25, 2007**

Attorneys & Guardianship

- **Who appoints or selects attorney/GAL?**
- **What is the role of the attorney/GAL?**
- **Can the respondent retain counsel?**
- **Who pays cost of attorney/GAL?**

Who appoints or selects respondent's attorney/GAL?

- 1. CSC**
- 2. IDS**
- 3. It depends**

Appointment or Selection

GS 35A-1107

- Upon filing of petition**
- Attorney shall be appointed ...**
- In accordance with IDS rules**

Appointment or Selection

IDS Rules

- **If there is a Public Defender**
 - **Appointment per PD plan**
 - **PD representation in at least two districts**
 - **Appointment per IDS plan**
 - **Contract in at least one district**

Appointment or Selection

IDS Rules

- **If there is no Public Defender**
 - **Appointment per Bar plan or IDS plan**
 - **Appointment by CSC if no Bar or IDS plan**

What is the role of appointed lawyer?

- 1. GAL**
- 2. Attorney**
- 3. Both**
- 4. Not clear**

Role of Appointed Lawyer

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- Attorney appointed as guardian ad litem**

GS 35A-1101(6)

- GAL = appointed pursuant to Rule 17**

What is the role of a GAL?

1. Assist court
2. Best interest
3. Due process
4. All above

Role of GAL

Rule 17

- Investigate facts of case
- Employ counsel if necessary
- Secure necessary witnesses & evidence
- Protect party's rights & interests
 - Exercise due diligence & act in good faith
 - Determine & represent best interest?!?!?
 - *Not* act as investigator for court?!?!?

Role of GAL

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- **Personally visit respondent**
- **Determine respondent's wishes**
- **Present respondent's expressed wishes**
- **Recommend limited guardianship**
 - **If appropriate**

Role of GAL

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- **Recommend best interest**
 - **If different from expressed wishes**
- **Represent respondent**
 - **Request jury trial, MDE, closed hearing**
 - **Present evidence**
 - **Cross examine witnesses**
 - **Notice of appeal**

GAL or Attorney?

GS 35 (1977 & 1979)

- **Attorney *or* GAL**

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- **GAL must be attorney**
- **GAL discharged if counsel retained**
- **GAL represents respondent**

GAL or Attorney?

Role of appointed attorney

- **Unclear**
- **Either**
- **Both**

Alternative Models: UGPPA

Visitor

- **Appointed by court**
 - Experience & training regarding incapacity
- **Visit respondent**
 - Explain proceeding & determine wishes
- **Interview petitioner & proposed guardian**
- **Investigate & obtain information**
- **Report & recommendations**

Alternative Models: UGPPA

Lawyer (Option 1)

- **Appointed by court**
 - Unless respondent represented by attorney

Lawyer (Option 2)

- **Appointed by court**
 - If requested by respondent
 - If recommended by visitor
 - If determined necessary by court

Alternative Models: UGPPA

Guardian ad litem

- Appointed by court
 - If representation inadequate
 - Optional
 - Infrequent
- Duties specified by court

Alternative Models: Wingspan

Appointed attorney

- Act as “zealous advocate”
 - *Not* as guardian ad litem

Court visitor or investigator

- Separate from & in addition to attorney
- Identify needs, wants, & values
- *Not* guardian ad litem

Alternative Models: H 813

Appointed attorney

- **Unless respondent retains counsel**
- **Personally visit respondent**
- **Reasonable investigation**
- **Represent respondent**
 - **Comply with NC State Bar Rules**
 - **Rule 1.14 (client with diminished capacity)**
 - **Not purely “advocate” or “best interest”**

Alternative Models: H 813

Guardian ad litem

- **Only if requested by respondent’s lawyer**
- **Only if appropriate under Rule 17**
 - **No presumption of incompetency**
 - **Avoids potential due process problems**

Can respondent retain counsel?

1. Yes
2. Yes, if competent
3. No

Retained Counsel

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- Entitled to counsel of “own choice”
- Appointed lawyer *may* be discharged

NC State Bar 98 FEO 16

- Lawyer may represent respondent
 - If client has capacity to consent
 - Resisting guardianship is not frivolous
 - Comply with Rule 1.14

Retained Counsel

NC State Bar 98 FEO 16

- **May be paid by third party**
 - If client consents
 - And lawyer exercises independent judgment
- **No conflict of interest**
 - If lawyer previously represented others
 - And respondent's interests not adverse
- **Represents respondent**
 - Not guardian ad litem

Who pays cost of respondent's lawyer?

1. **Petitioner**
2. **Respondent**
3. **State**
4. **It depends**

Who Pays?

GS 35A-1116

- Retained counsel
 - Respondent
 - Petitioner (Rule 11)

Who Pays?

GS 35A-1116

- Appointed attorney/GAL
 - Petitioner
 - If no reasonable grounds for proceeding
 - Respondent's estate
 - If found incompetent & not indigent
 - AOC (IDS)
 - In all other cases

Who Pays?

GS 35A-1116

- **Petitioner's attorney**
 - **Petitioner**
 - If no reasonable grounds for proceeding
 - If respondent incompetent & indigent
 - **Petitioner or respondent**
 - In all other cases

Attorneys & Guardianship: Case Problem (Part II)