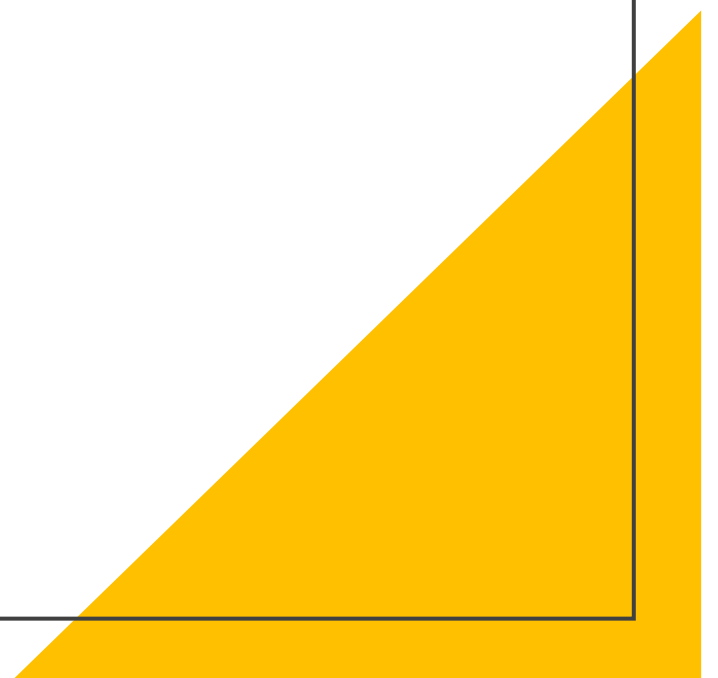


Incompetency and Adult Guardianship S.L. 2023-124 Legislative Changes

Meredith Smith

UNC School of Government

February 2023





Session Law 2023-124



1. Status reports/Notice of address
2. Motions in the cause
3. Priority for appointment
4. Notice of rights
5. Consideration of less restrictive alternatives
6. Costs and fees
7. Election of fiscal year (annual accounts)

Effective Date

Changes effective and apply to petitions and annual accounts filed on or after January 1, 2024.





Status Reports /
Notice of Address

Status Reports, G.S. 35A-1242

Current law:

Any corporation or disinterested public agent that is guardian of the person for an incompetent person is required to file status reports (six months then annually thereafter).

The clerk *may* order any other guardian of the person to file status reports.

G.S. 35A-1242(a)


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Purpose of Guardianship , S.L. 2023-124

Adds to G.S. 35A-1201(a) a new subsection (8):

“The filing of **regular status reports** by the guardian of the person or general guardian concerning the conditions and welfare of an incompetent person is **encouraged** and **should be required whenever appropriate.**”

What is the point?

1. Is the guardian doing their job and working themselves out of a job?
 2. Is the ward progressing, regressing?
 3. Have the needs of the ward changed?
- 
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Purpose of Guardianship , S.L. 2023-124

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“The filing of **regular status reports** by the guardian of the person or general guardian concerning the conditions and welfare of an incompetent person is **encouraged** and **should be required whenever appropriate.**”

Change of Address, S.L. 2023-124

Adds to G.S. 35A-1242 the requirement that **every guardian of the person**, upon knowledge of the ward's change of address, file a notice of change of the ward's address with the court within 30 days.

The notice must include:

1. Ward's previous address
2. Ward's new address
3. The date the ward moved to the new address

* This is separate from what is required in regular status reports and occurs when the change happens, not just in the status report.

Effective Date

Changes effective and apply to **petitions** and annual accounts **filed on or after January 1, 2024.**





Motions in the Cause

Motions in the Cause

G.S. 35A-1207

Current law:

Any interested person may file a motion in the cause with the clerk to modify the guardianship or consider any matter pertaining to the guardianship.

G.S. 35A-1242(a)

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Motion in the Cause, S.L. 2023-124

Amends G.S. 35A-1207 to expressly allow motions in the cause on the clerk's own motion.

"§ 35A-1207. Motions in the cause.

(a) Any interested person or the clerk, on the clerk's own motion, may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship.

(b) The clerk shall treat all such requests, however labeled, as motions in the cause.

(c) A movant under this section shall obtain from the clerk a time, date, and place for a hearing on the motion, and shall serve the motion and notice of hearing on all other parties and such other persons as the clerk directs as provided by G.S. 1A-1, Rule 5 of the Rules of Civil Procedure, unless the clerk orders otherwise.

(d) If the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate, the clerk may enter an appropriate ex parte order to address the emergency pending disposition of the matter at the hearing."



Priority for Appointment

Priority for Appointment

The clerk must consider appointing a guardian in the following order of priority:

1. an individual recommended by parent in a will for an unmarried child
2. an individual
3. a corporation
4. a disinterested public agent

G.S. 35A-1214.

A large yellow triangle is positioned in the bottom right corner of the slide, pointing towards the top right.

Priority for Appointment, S.L. 2023-124

The clerk **must consider** appointing a guardian in the following order of priority:

1. **an individual or entity nominated under a POA or health care POA**
2. an individual recommended by parent in a will for an unmarried child
3. an individual
4. a corporation
5. a disinterested public agent

Amends G.S. 35A-1214 to add (1) above.



Notice of Rights for Respondents and Wards

Notice of Rights

Form: AOC-SP-197



Notice of Rights: Respondents

The laws governing incompetency and guardianship are complex. This is a summary of rights for informational purposes only. It is not intended to be a complete discussion of all rights. The rights listed may not apply in all cases and should not be cited as law in a court proceeding. You should consult with an attorney of your choosing if you have any questions about your rights.

RIGHTS OF RESPONDENTS BEFORE ADJUDICATION OF INCOMPETENCE

- 1. Right to Notice** – You have a right to receive a copy of the petition, the initial notice of hearing, and this notice of rights before the hearing. You also have the right at any time to request a copy of this notice of rights from your court-appointed guardian ad litem or the court.
- 2. Right to an Attorney** – You have the right to hire an attorney of your choice to represent you in the proceeding. If you do not hire your own attorney, you will be represented by an attorney called a guardian ad litem. If you do hire an attorney, the court may require the guardian ad litem to continue to be involved in your case. The guardian ad litem will present your express wishes to the court and consider the possibility of a limited guardianship, making recommendations to the court regarding the rights that you should keep if the guardianship is limited. The guardian ad litem may also make recommendations to the court that the guardian ad litem feels are in your best interest, even if those recommendations differ from your express wishes.
- 3. Right to Gather Evidence** – You have a right to require witnesses to appear and to gather documents concerning your ability to make decisions. You have a right to request an evaluation (called a multidisciplinary evaluation) to assist the court in determining the extent of your ability to make decisions and to assist in making an appropriate guardianship plan. You or your attorney must request a multidisciplinary evaluation in writing no later than 10 days after you are served with the petition.
- 4. Right to a Hearing** – A hearing must be held before you can be adjudicated to be incompetent. The hearing will be held between 10 and 30 days after you receive a copy of the petition, notice of hearing, and this notice of rights unless the court delays the hearing for a good reason. You have the right to ask the court to change the date of the hearing for a good reason, and the court will decide whether or not to change the hearing date. You have a right to attend the hearing if you choose to do so. You can give up your right to attend the hearing. You have a right to have your express wishes communicated to the court by the court-appointed guardian ad litem at all relevant stages of the proceedings.
- 5. Right to a Jury** – You have the right to request that a jury hear your case. You lose that right to a jury if you wait too long to ask.
- 6. Right to a Closed Hearing** – The hearing is open to the public unless you or your attorney ask for it to be private. You or your attorney have the right to ask the court to close the hearing and exclude anyone who is not directly involved or testifying at the hearing.
- 7. Right to Present Evidence and Testimony** – You have a right to present evidence at the hearing. You have a right to testify at the hearing.
- 8. Right to Call Witnesses and Right to Question Witnesses** – You have the right to call and question witnesses at the hearing, including family members and medical providers. You have the right to question witnesses anyone else calls at the hearing.
- 9. Right to Express Wishes Regarding Your Rights** – If you are adjudicated to be incompetent, you will lose the right to direct your healthcare, employment, interpersonal relationships, and religious, social, and community activities unless the court specifically agrees to allow you to keep those rights. You have the right to tell the court what rights you would like to keep. The court will consider your wishes, but the court is not required to follow your wishes.
- 10. Right to Express Wishes as to Who Serves as Your Guardian** – If the court decides that you need a guardian, you have the right to tell the court who you want to be your guardian. The court will consider your wishes, but the court is not required to follow your wishes.
- 11. Right to Appeal** – If you have a good reason to believe that your case was wrongly decided, (i) you have the right to appeal the decision adjudicating you to be incompetent by filing a written notice of appeal with the clerk within 10 days of the clerk entering the order and (ii) you have the right to appeal the clerk's decision about who is appointed as your guardian by filing a written notice of appeal with the clerk within 10 days of the order being served on you. You lose your rights to appeal any decision made by the clerk if you do not file a written notice of appeal in time.

(See Side Two for Rights Of Wards After Adjudication Of Incompetence)

Notice of Rights: Wards

RIGHTS OF WARDS AFTER ADJUDICATION OF INCOMPETENCE

1. **Right to a Qualified, Responsible Guardian** – You have the right to a qualified, responsible guardian.
2. **Right to Request Transfer to Another County** – If you have a good reason to believe that your guardianship should be administered in a different county, you have the right to request that your guardianship be transferred to another county.
3. **Right to Request Restoration of Competency** – If there has been a change in your circumstances and you believe that you can show to the court that you have regained your competency, you have the right to request that the court restore your competency and end your guardianship.
4. **Right to Request a Review or Modification of Your Guardianship** – If there has been a change in your circumstances and you believe that your guardianship should be modified or reviewed, you have the right to file a motion to request that the court review or modify your guardianship.
5. **Right to Vote** – You have a right to register to vote and vote in elections if you are otherwise qualified.
6. **Right to Request a Hearing in a Petition for Procedure to Permit Sterilization** – If your guardian asks the court for an order to sterilize you, you have the right to know about it, to participate in the hearing, to have an attorney at the hearing, and to appeal the court's decision by filing a written notice of appeal with the clerk within 10 days of the clerk entering the order.
7. **Ability to Drive** – You may lose your ability to drive a car or other vehicle. The clerk must notify the Department of Motor Vehicles (DMV) that you have been adjudicated incompetent, and the clerk will make a recommendation on whether you should keep your driver's license. The DMV will contact you and you may get a letter from the DMV revoking your license. You have the right to make a written request to the DMV to review a decision to revoke your license.
8. **Additional Rights** – *Some rights depend on whether you have the capacity to exercise the right. Different rights have different tests for capacity. Examples of rights where you need to demonstrate you have the required capacity are the right to marry, make a last will and testament, and testify as a witness. You should consult with an attorney of your choosing to discuss whether you have the capacity to exercise these rights.*

Chapter 35A: Two Step Process

**Step #1:
Incompetency
1100s**

- **Special Proceeding**
- **Clear, Cogent and Convincing**
- **Petition, SP 200**

**Step #2:
Guardianship
1200s + 1300s**

- **Estate Proceeding**
- **Best Interests of the Ward**
- **Application, SP 200**

Changes for DSS at Both Steps, S.L. 2023-124

1. Role as **Petitioner**: service of the notice of rights
2. Role as **Guardian**: explain the notice of rights to the ward and carry out purpose of 35A

Petitioner: Manner of Service

Stays the same – what is different is what must be served on each of the following:

1. Respondent must be personally served
2. GAL/respondent's counsel served by Rule 4 service
3. Next of kin and other persons designated by the clerk served by first-class mail

G.S. 35A-1109(a)

Petitioner Service of the Notice of Rights

Petitioner must serve copies of the following:

1. Petition,
2. Initial Notice of Hearing, and
3. **Notice of Rights.**



S.L. 2023-124, sec. 7.5, amending G.S. 35A-1109(a).

STATE OF NORTH CAROLINA

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

County

IN THE MATTER OF

Name And Address Where Respondent Is Located

County

Name And Address Of Attorney Guardian Ad Litem

NOTICE OF HEARING ON
INCOMPETENCE AND ORDER APPOINTING
GUARDIAN AD LITEM

G.S. 35A-1107, -1108, -1109, -1112

State Bar No.

PM

Clerk Of Superior Court



INSTRUCTIONS TO PETITIONER:

This Notice, a copy of the Petition, and, for petitions filed on or after January 1, 2024, the Notice Of Rights Of Respondents And Wards (AOC-SP-197) must be personally served on the respondent and must be served on the guardian ad litem by any method that complies with Rule 4 of the Rules of Civil Procedure. In addition, within five (5) days after filing the petition, you must mail this Notice, a copy of the Petition, and, for petitions filed on or after January 1, 2024, a copy of the Notice Of Rights Of Respondents And Wards (AOC-SP-197) by first-class mail, to the respondent's next of kin named on the petition and any other person(s) the clerk may designate (except those person(s) who have accepted notice) and file with the Clerk an affidavit of that mailing or a certificate of acceptance of notice.

Side Two, AOC-SP-201

RETURN OF SERVICE			
I certify that this Notice, a copy of the Petition, and, <u>for petitions filed on or after January 1, 2024, the Notice Of Rights Of Respondents And Wards</u> were received and served as follows:			
RESPONDENT			
<i>Date Served</i>	<i>Time Served</i>	<input type="checkbox"/> AM <input type="checkbox"/> PM	<i>Name Of Respondent</i>
<input type="checkbox"/> By delivering to the respondent named above a copy of the Notice, a copy of the Petition, and, for petitions filed on or after January 1, 2024, a copy of the Notice Of Rights Of Respondents And Wards.			
<i>Address Where Respondent Served</i>			
<input type="checkbox"/> Respondent WAS NOT served for the following reason:			
GUARDIAN AD LITEM			
<i>Date Served</i>	<i>Time Served</i>	<input type="checkbox"/> AM <input type="checkbox"/> PM	<i>Name Of Guardian Ad Litem</i>
<input type="checkbox"/> Service accepted by guardian ad litem.			
<i>Date Accepted</i>	<i>Signature Of Guardian Ad Litem</i>		
<input type="checkbox"/> By delivering to the guardian ad litem named above personally a copy of the Notice, a copy of the Petition, and, for petitions filed on or after January 1, 2024, a copy of the Notice Of Rights Of Respondents And Wards.			
<input type="checkbox"/> By leaving a copy of the Notice, a copy of the Petition, and, for petitions filed on or after January 1, 2024, a copy of the Notice Of Rights Of Respondents And Wards at the guardian ad litem's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.			
<i>Name Of Person With Whom Copies Left</i>		<i>Address Where Copies Delivered Or Left</i>	



STATE OF NORTH CAROLINA

File No.

County

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF

Name Of Respondent

**CERTIFICATE OF SERVICE
(INCOMPETENT PROCEEDING)**

G.S. 35A-1109

I, the undersigned, certify that I mailed by first class mail a copy of the Notice Of Hearing On Incompetence And Order Appointing Guardian Ad Litem (AOC-SP-201), a copy of the Petition For Adjudication Of Incompetence And Application For Appointment Of Guardian (AOC-SP-200), and for petitions filed on or after January 1, 2024, the Notice Of Rights Of Respondents And Wards (AOC-SP-197), to the respondent's next of kin named in the Petition and to other persons designated by the Clerk, at the addresses listed below. This Notice was mailed within five (5) days after the Petition was filed as required by law. The address given below is the last known address of the person listed.



Name And Address Of Person 1

Name And Address Of Person 2

Name And Address Of Person 3

Name And Address Of Person 4

Word of Caution

Notice of Rights exists separate from the Petition for Adjudication and Application for Appointment of Guardian (SP-200).

Petitioner files the petition (SP-200) and court issues NOH (SP-201).

Make sure Notice of Rights is added to your service packet (especially in Odyssey counties or if use File and Serve).





"§ 35A-1108. Issuance of notice.

(a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice of rights required under G.S. 35A-1117 and the petition and initial notice of hearing on the respondent, unless the clerk extends the time for good cause, for preparation of a multidisciplinary evaluation as provided in G.S. 35A-1111, or for the completion of a mediation.

Changes for DSS at Both Steps, S.L. 2023-124

1. Role as **Petitioner**: service of the notice of rights
2. Role as **Guardian**: explain the notice of rights to the ward and carry out purpose of 35A

Notice of Rights: Wards

RIGHTS OF WARDS AFTER ADJUDICATION OF INCOMPETENCE

1. **Right to a Qualified, Responsible Guardian** – You have the right to a qualified, responsible guardian.
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3. **Right to Request Restoration of Competency** – If there has been a change in your circumstances and you believe that you can show to the court that you have regained your competency, you have the right to request that the court restore your competency and end your guardianship.
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5. **Right to Vote** – You have a right to register to vote and vote in elections if you are otherwise qualified.
6. **Right to Request a Hearing in a Petition for Procedure to Permit Sterilization** – If your guardian asks the court for an order to sterilize you, you have the right to know about it, to participate in the hearing, to have an attorney at the hearing, and to appeal the court's decision by filing a written notice of appeal with the clerk within 10 days of the clerk entering the order.
7. **Ability to Drive** – You may lose your ability to drive a car or other vehicle. The clerk must notify the Department of Motor Vehicles (DMV) that you have been adjudicated incompetent, and the clerk will make a recommendation on whether you should keep your driver's license. The DMV will contact you and you may get a letter from the DMV revoking your license. You have the right to make a written request to the DMV to review a decision to revoke your license.
8. **Additional Rights** – *Some rights depend on whether you have the capacity to exercise the right. Different rights have different tests for capacity. Examples of rights where you need to demonstrate you have the required capacity are the right to marry, make a last will and testament, and testify as a witness. You should consult with an attorney of your choosing to discuss whether you have the capacity to exercise these rights.*

SECTION 7.11. G.S. 35A-1217 reads as rewritten:

"§ 35A-1217. Appointment of guardian ad litem for incompetent ward.


The clerk shall appoint a guardian ad litem to represent a ward in a proceeding under this Subchapter if the ward has been adjudicated incompetent under Subchapter I and the clerk determines that the ward's interests are not adequately represented. Appointment and discharge of the guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services. The guardian ad litem shall explain the notice of rights under G.S. 35A-1117 as part of the guardian ad litem's representation of the ward in connection with all proceedings under this Subchapter. Nothing herein shall affect the ward's right to retain counsel of his or her own choice."

Guardian's Role

No mandate imposed on guardian to deliver or explain the notice of rights or to take other action as guardian. HOWEVER, good practice for the guardian to:

- Engage with the ward about the notice of rights
- Effectuate the notice of rights
 - Request a hearing to consider matters related to the guardianship
 - Modify to limited guardianship
 - Petition for restoration
 - Transfer to another county
 - Assist with right to vote, drive, etc. if otherwise able

§ 35A-1201. Purpose.

- (a) The General Assembly of North Carolina recognizes that:
- (1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.
 - (2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.
 - (3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.
 - (4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.
 -  (5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.
 - (6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

Empower vs. Unpower

Protective Services for the Elderly: A Working Paper, Regan & Springer,
1977



Guardianship is a Last Resort, S.L. 2023-124

- (1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.
- (2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.
- (3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.
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- (5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.
- (6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.
- (7) For adults, guardianship should always be a last resort and should only be imposed after less restrictive alternatives have been considered and found to be insufficient to meet the adult's needs.





Less Restrictive Alternatives

Everyone Has a Role in Ensuring Autonomy for the Respondent....



Petitioner

Must include statement in petition identifying what alternatives considered and why they are insufficient



GAL

Representation of the respondent in a way that advocates for less restrictive alternatives and allows for guardianship only when alternatives found to be insufficient



Court

Legal definition of incompetency requires consideration of alternatives
Guardianship is a last resort and only imposed if less restrictive insufficient

Less Restrictive Alternatives: Definition

Session Law 2023-124 amends G.S. 35A-1101 to add a new definition

(11a) Less restrictive alternative. – An arrangement enabling a respondent to manage his or her affairs or to make or communicate important decisions concerning his or her person, property, and family that restricts fewer rights of the respondent than would the adjudication of incompetency and appointment of a guardian. The term includes supported decision making, appropriate and available technological assistance, appointment of a representative payee, and appointment of an agent by the respondent, including appointment under a power of attorney for health care or power of attorney for finances.

Less Restrictive Alternatives

- **General, open-ended definition:** “an arrangement” enabling the respondent to manage affairs or make and communicate decisions **that restricts fewer rights** than an adjudication of incompetency
- **Non-exclusive** list of examples
 - Supported decision making
 - Appropriate and available technological assistance
 - Representative payee
 - Financial power of attorney
 - Health care power of attorney

Petitioner's Role

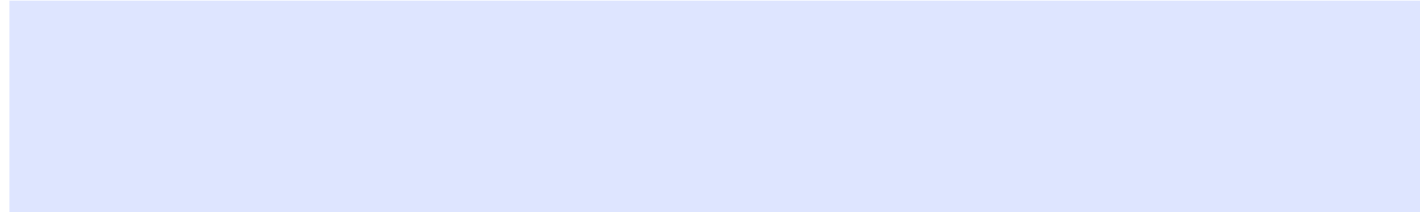
The petition shall set forth **to the extent known** a statement identifying

1. **what** less restrictive alternatives (LRAs) have been considered prior to seeking adjudication and
2. **why** those LRAs are insufficient to meet the respondent's needs.

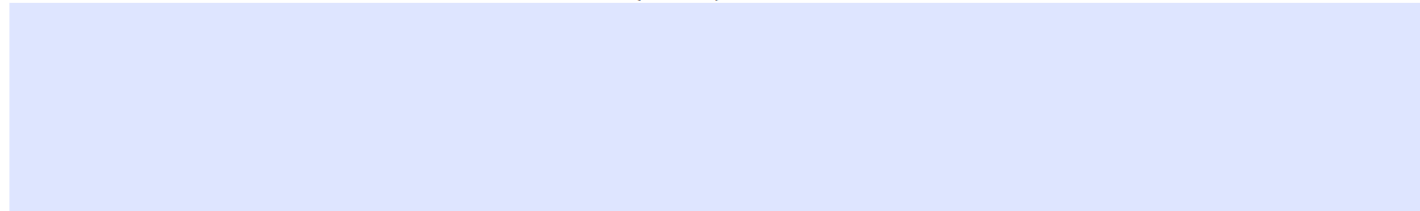
Session Law 2023-124, sec. 7.2 amending G.S. 35A-1106(4a)

Petition for Adjudication (SP-200, Side Two)

6. I considered the following less restrictive alternatives prior to seeking an adjudication of incompetence: *(see Notes To Petitioner below and list the less restrictive alternatives that were considered)*

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7. The less restrictive alternatives listed above are insufficient to meet the needs of the respondent because: *(explain why these less restrictive alternatives are insufficient to meet the needs of the respondent)*

A large rectangular area that has been redacted with a light blue background, covering the response to question 7.

NOTES TO PETITIONER: *A less restrictive alternative is defined as an arrangement enabling a respondent to manage his or her affairs or to make or communicate important decisions concerning his or her person, property, and family that restricts fewer rights of the respondent than would the adjudication of incompetency and appointment of a guardian. This term includes supported decision making, appropriate and available technological assistance, appointment of a representative payee, and appointment of an agent by the respondent, including appointment under a power of attorney for health care or power of attorney for finances. G.S. 35A-1101(11a).*

An adult, emancipated minor, or incompetent child does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property. G.S. 35A-1101(7) and (8).

For adults, guardianship should always be a last resort and should only be imposed after less restrictive alternatives have been considered and found to be insufficient to meet the adult's needs. G.S. 35A-1201(7).

What (Q6)
Considered and
Why (Q7)
Insufficient

More than just a bare assertion or checking a box.





Consider the Role of Chapter 32C POA Proceedings to Address Bad Agents

Less Restrictive Alternatives

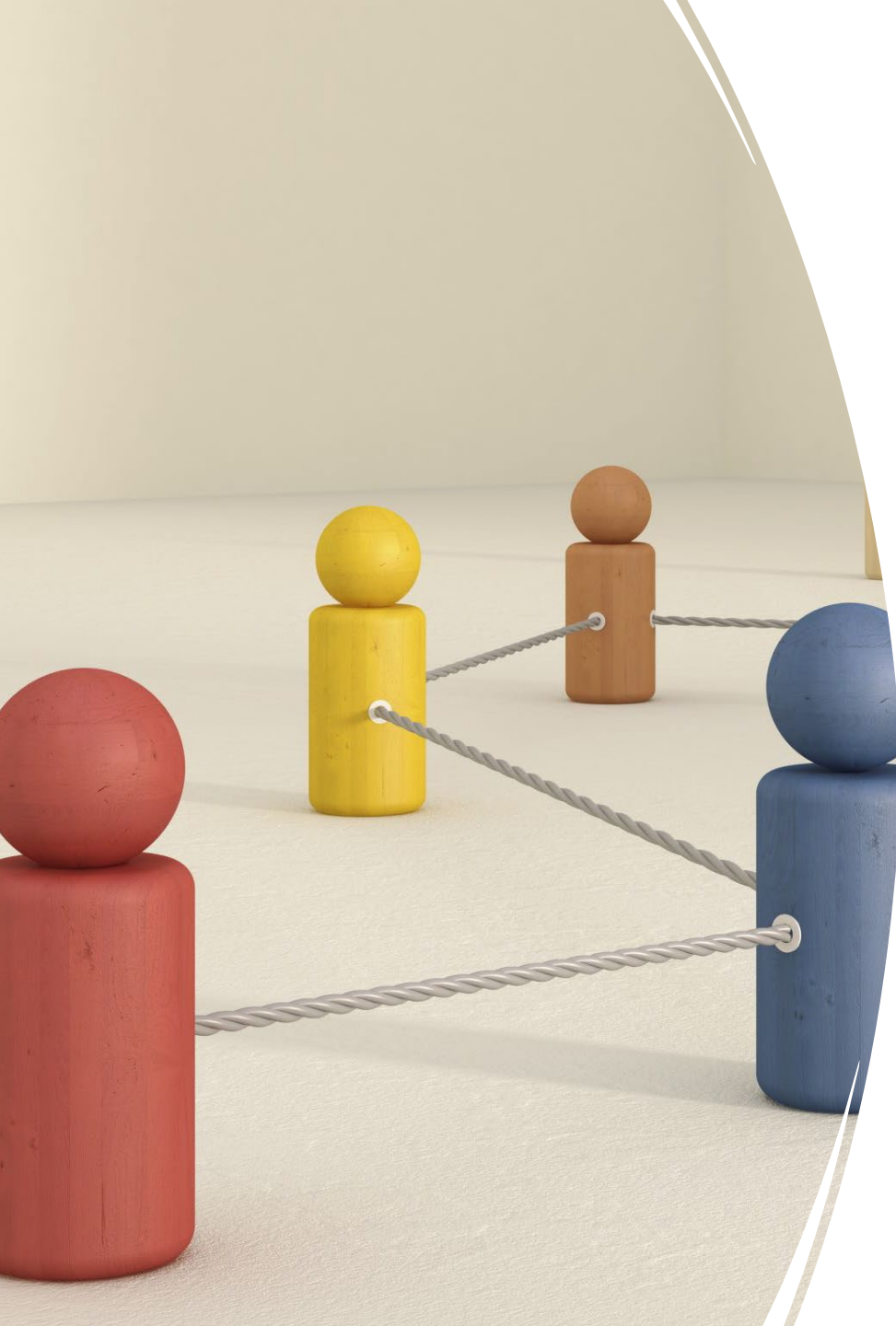
- **General, open-ended definition:** “an arrangement” enabling the respondent to manage affairs or make and communicate decisions **that restricts fewer rights** than an adjudication of incompetency
- **Non-exclusive** list of examples
 - Supported decision making
 - Appropriate and available technological assistance
 - Representative payee
 - Financial power of attorney
 - Health care power of attorney

Supported Decision Making

The process by which most individuals make decisions - by consulting with friends, family, social services, community organizations, and and/or other sources of support to weigh the pros and cons of a decision, review potential outcomes, and finally make a choice.

Practice takes many forms - from recognition of organic decision-making networks to formal, written supported decision-making agreements.

Less Restrictive Alternatives,
Am. Bar Ass'n (November 21, 2023).



SUPPORTED DECISION MAKING PRINCIPLES

- I can change my mind
- Assume I can
- One decision at a time
- It's up to me
- Understand me and my preferences
- Are the right people involved?
- Explore all options
- The right assistance for me
- Experience to explore

www.waindividualisedservices.org.uk 799 x 1,136

sdmny
Supported Decision-Making New York

HOME ABOUT US ▾ ABOUT SDM ▾ LEGISLATION ▾ STORIES ▾

Presentation last saved: Just now

RESOURCES ▾ EASY READ RESOURCES NEWS

EVENTS CONTACT



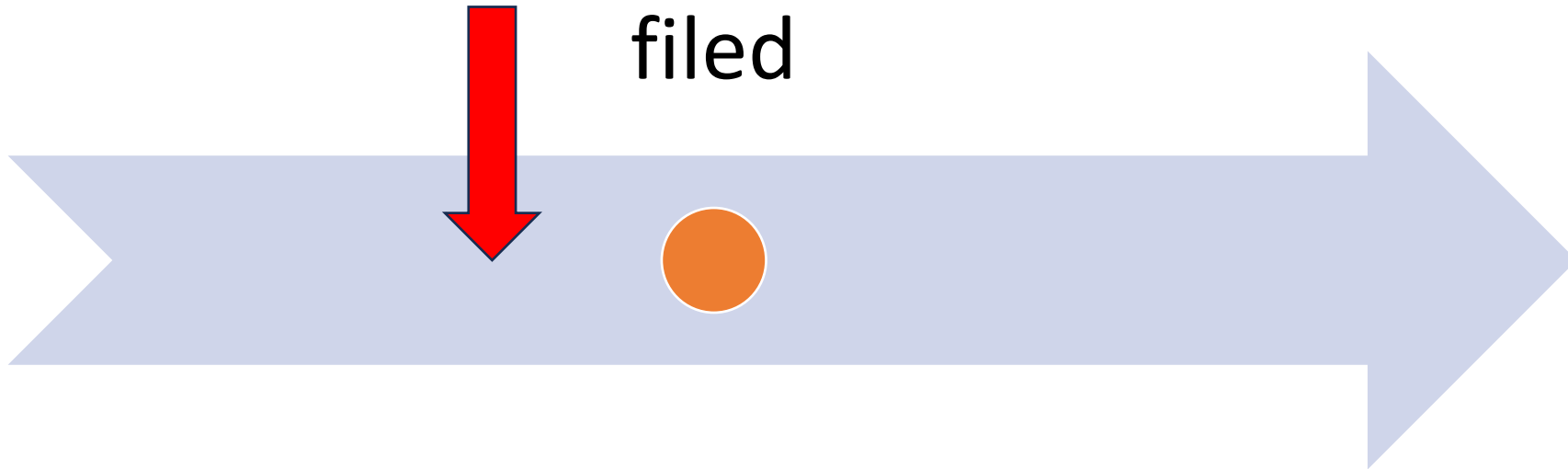
Supported Decision-Making (SDM) allows people with intellectual and developmental disabilities to make their own decisions with the support of trusted persons in their lives

Guardianship vs. Supported Decision Making

What Other
LRAs Can
You Name?



BEFORE petition for incompetency
and appointment of a guardian is
filed



- Consider what LRAs in place and whether those are sufficient to meet the respondent's needs





2. Alternatives to Guardianship

a. Statutory Requirement

None

b. State Policy

None

c. Social Work Practice Guidelines

Before initiating a petition for adjudication of incompetence for a person who meets criteria in the applicable statutory definition of incompetency, careful consideration should be given as to whether the person's need for assistance can be met through other means. Proceedings for adjudication of incompetence and appointment of a guardian should be initiated only when other less restrictive forms of intervention for an incompetent person are determined to be inappropriate or inadequate. The appropriate use of alternatives to guardianship depends on the nature of the incompetent person's abilities and limitations, income and resources. Some alternatives to guardianship and examples of circumstances in which each may be appropriate include:

Consequences....

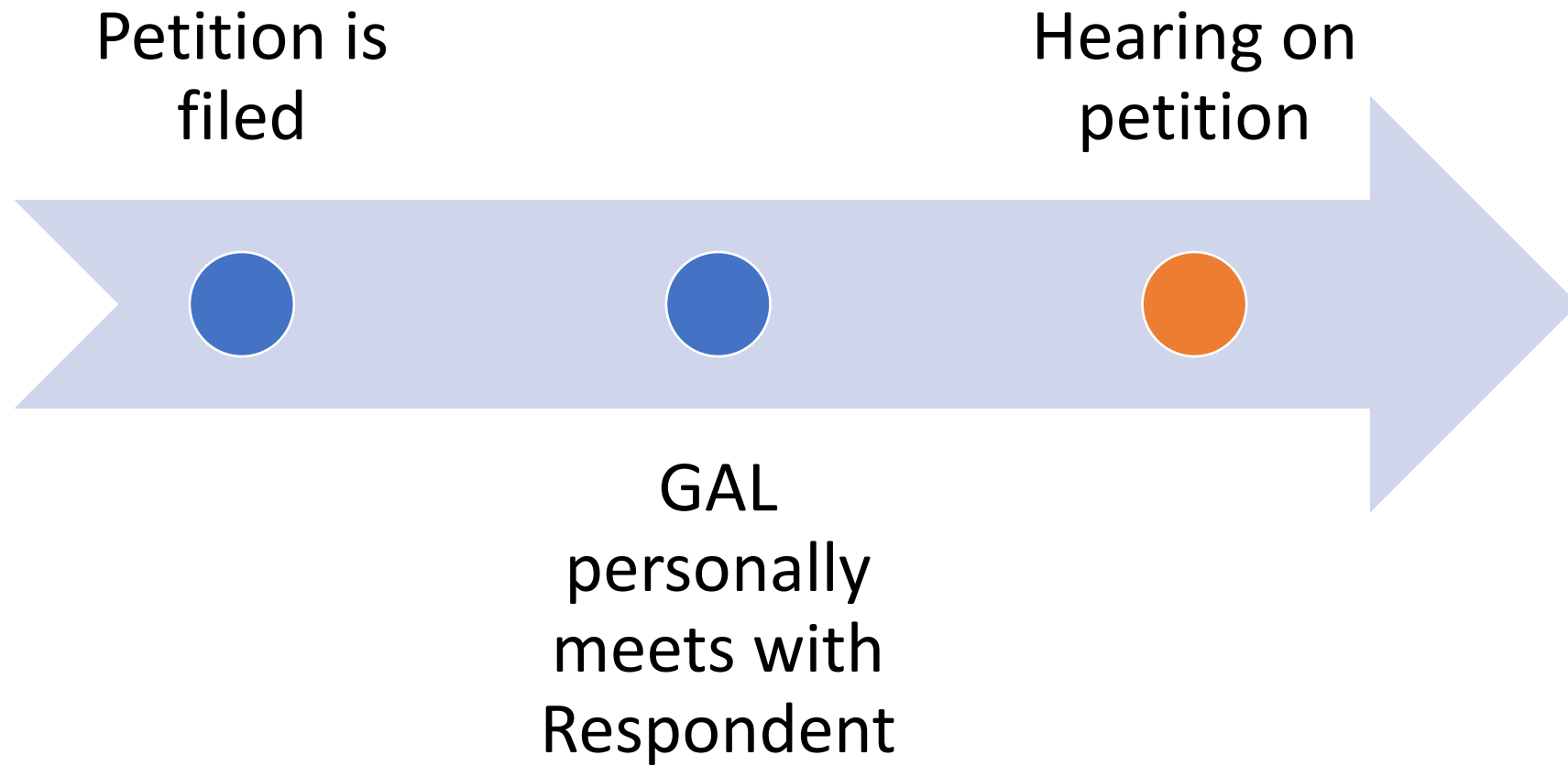
If a petitioner **knows** the respondent has **sufficient** LRAs in place at the time of filing and still proceeds to file the petition, a court may, after a hearing, find that

1. the respondent is not incompetent, and
2. the petitioner did not have reasonable grounds to bring the petition.

If there were no reasonable grounds to bring the petition, the court is required to tax costs of the proceeding to the petitioner.

S.L. 2023-124, sec. 7.6, amending G.S. 35A-1116(a).





Chapter 35A: Two Step Process

**Step #1:
Incompetency
1100s**

- **Special Proceeding**
- **Clear, Cogent and Convincing**
- **Petition, SP 200**

**Step #2:
Guardianship
1200s + 1300s**

- **Estate Proceeding**
- **Best Interests of the Ward**
- **Application, SP 200**

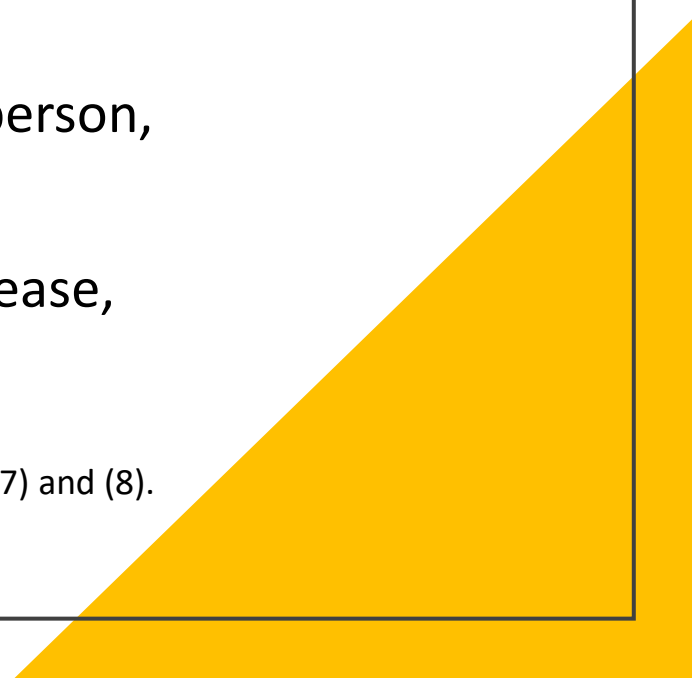
Step #1: Incompetency

Lacks sufficient capacity

1. to manage their own affairs, or
2. to make or communicate important decisions concerning person, family, or property

whether lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

G.S. 35A-1101(7) and (8).

A large yellow right-angled triangle is positioned in the bottom right corner of the slide, extending from the bottom edge towards the right edge.

Definition of Incompetent Adult + Child

Session Law 2023-124 amends G.S. 35A-1101(7) and (8) to provide that an adult, emancipated minor, or minor at least 17.5 **does not lack capacity if by means of an LRA they are able to sufficiently**

1. Manage affairs, and
2. Communicate important decisions concerning person, family, and property.

"§ 35A-1101. Definitions.

The following definitions apply in this Subchapter:

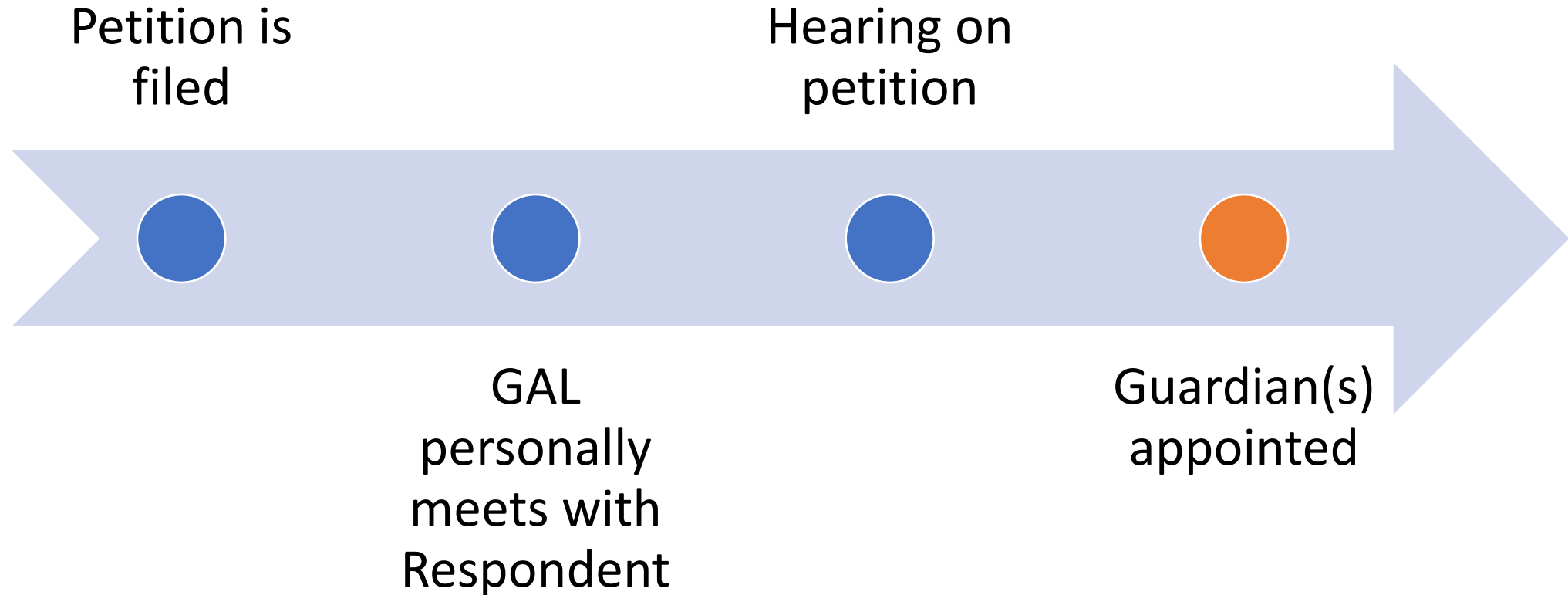
- ...
- (7) Incompetent adult. – An adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition. An adult or emancipated minor does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property.
- (8) Incompetent child. – A minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition. An incompetent child does not lack capacity if, by means of a less restrictive alternative, he or she is able to sufficiently (i) manage his or her affairs and (ii) communicate important decisions concerning his or her person, family, and property.

At the Hearing....

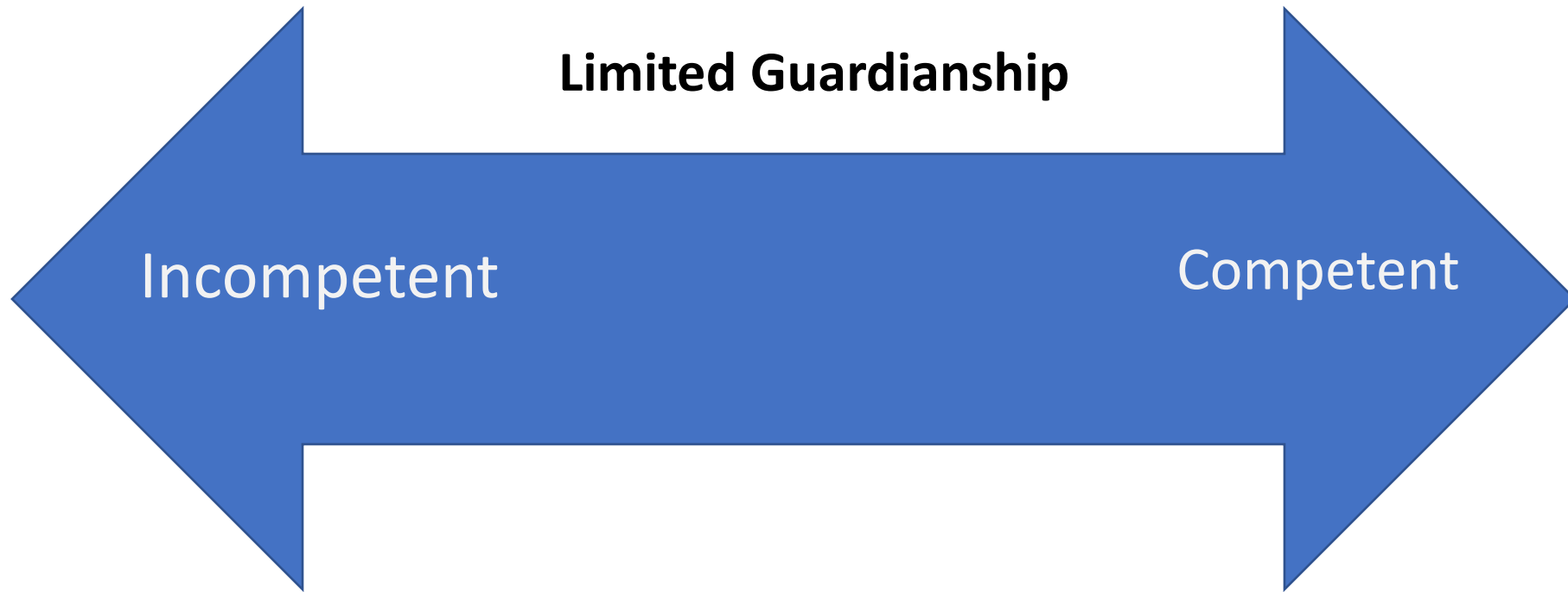
1. Evidence of incompetency
2. Evidence of LRAs
 - What considered
 - Why they are insufficient



Step #2: Guardianship



DSS as Guardian: LRAs are a Vehicle to Move Along the Pathway from Incompetency to Competency



Restoration: Things to Work Towards

- The ward has a treatment/therapy plan in place
- The ward has adhered to a treatment/therapy plan over an extended number of months
- The ward acknowledges and understands the condition or cause that led to the order adjudicating the ward to be incompetent
- The ward acknowledges the risk of relapse and has an emergency plan in place in the event of a relapse along with a support network of people to contact in the event of relapse
- The ward is able to manage his or her daily affairs, such as making decisions about where to live, paying rent, maintaining employment, providing for food, and living safely without being a threat to himself or herself or others either directly or through supports



Costs and Fees

Costs and Fees

Current law: G.S. 35A-1116(a) provides that costs, including any reasonable **fees and expenses of counsel for the petitioner** which the clerk, in their discretion, may allow, may be taxed against either party in the discretion of the court unless:

1. The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or
2. The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in G.S. 35A-1116.

Costs and Fees, S.L. 2023-124

Modifies G.S. 35A-1116(a) to provide:

1. **Costs (including all counsel fees, not just petitioner's counsel) shall** be taxed against any party or apportioned among the parties, in the discretion of the court.
2. If the court finds that costs were incurred for the “**benefit of the respondent**” the court **shall tax costs incurred by any party against the respondent**, unless doing so would be **inequitable**.

Retains the following in G.S. 35A-1116:

1. If the court finds the petitioner did not have reasonable grounds to bring the petition, costs shall be taxed to the petitioner.
2. If the respondent is indigent, costs shall be waived if not taxed to a party other than the respondent or otherwise paid pursuant to G.S. 35A-1116.
3. These provisions also apply to post-adjudication proceedings.



Election of Fiscal Year

Annual Accountings, S.L. 2023-124

Modifies G.S. 35A-1264 to allow for election of fiscal year (similar to decedents' estates).

"§ 35A-1264. Annual accounts.

~~Every~~ Unless the time for filing the annual account has been extended by the clerk, every guardian shall, within 30 days after the expiration of one year from the date of his qualification or appointment, and annually, for so long as any of the estate remains in his the guardian's control, file annually in the office of the clerk an inventory and account, under oath, of the amount of property the guardian received by him, or invested by him, and invested, including the manner and nature of such investment, and his all receipts and disbursements for the past year in the form of debit and credit. All accounts shall be due within 30 days after the close of the fiscal year selected by the guardian, and annually thereafter. The election of a fiscal year shall be made by the guardian upon filing of the first annual account; or, if made in a subsequent year, with the permission of the clerk. In no event may a guardian select a fiscal year-end that is fewer than 11 months nor more than 12 months from the date of the guardian's qualification or appointment. 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 the accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having estate. The clerk shall carefully revised review and audited such audit the account, and, if he approve the same, he approved, must endorse his the approval thereon, on the account and cause the account to be recorded, which shall be deemed prima facie evidence of correctness."

Questions and Other Resources

Meredith Smith

Meredith.smith@sog.unc.edu

Timothy Heinle

heinle@sog.unc.edu

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S.L. 2023-124: Changes to Guardianship Statutes, Notice of Rights, and Details on Upcoming SOG Resources

This entry was contributed by Timothy Heinle on October 26, 2023 at 10:30 am and is filed under Guardianship, Incompetency.

On September 20, 2023, Senate Bill 615 became [Session Law 2023-124](#), enacting a significant number of changes to North Carolina's existing incompetency and guardianship laws. The changes modified the definitions in G.S. Chapter 35A of key terms, added a requirement of all parties and the court to consider less restrictive alternatives to guardianship, created a new notice of rights (and with it, new obligations for guardian ad litem attorneys (GALs) and others), changed the standards applicable to the assessment of costs and fees, and more. This post will explore one of these changes, the new notice of rights requirement, and will consider the practical implications for GALs. At the end of this post, you will find information about upcoming School of Government blog posts and webinars on the legislative changes resulting from S.L. 2023-124.

Notice of Rights

When? The new requirements related to the notice of rights are effective [January 1, 2024](#), and apply to incompetency petitions filed under G.S. Chapter 35A on or after that date.

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The New Notice of Rights for Respondents and Wards

What GALs, clerks, and petitioners need to know

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Meaningful Consideration of Less Restrictive Alternatives to Guardianship

Timothy Heinle + Meredith Smith
UNC School of Government
December 2023

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Change is Coming: The Consideration of Less Restrictive Alternatives in Adult Guardianship Proceedings Mandated by S.L. 2023-124

This entry was contributed by Meredith Smith on November 22, 2023 at 7:00 am and is filed under Guardianship.

Significant changes are on the way for individuals, legal practitioners, and public officials involved in North Carolina incompetency and adult guardianship proceedings. The recently enacted [Session Law 2023-124](#) mandates the consideration of less restrictive alternatives (LRAs) to guardianship prior to an adjudication of incompetency. There is a lot to cover on this topic; more than can fit in a single blog post. As a result, this post will focus on (i) introducing the statutory changes brought about by this new law and (ii) highlighting some key things the parties and the court will need to do differently with respect to petitions filed on or after January 1, 2024. S.L. 2023-124, sec. 7.13.

[Changes Applicable to Less Restrictive Alternatives](#)