

Rule 17 GALs for Respondent Parents: A Final Lesson from *In re A.K.*

This entry was contributed by [Timothy Heinle](#) on October 18, 2024.

Recently, the North Carolina Court of Appeals rendered a decision in *In re A.K.*, __ N.C. App. __ (August 6, 2024), which touches on multiple issues relevant to juvenile abuse, neglect, dependency (AND) practitioners. (I blogged about one of those issues – a parent’s right to be represented by a retained attorney of their choosing, regardless of the attorney’s AND experience – [here](#). My colleague Sara DePasquale published [a blog](#) about another issue: considering a family’s culture, including religion and language, in an AND proceeding.) This post will explore a third issue raised in the opinion: the appointment of a Rule 17 guardian ad litem (GAL) to an incompetent respondent parent.

What a Rule 17 GAL is (and is not). The term “GAL” has many meanings in North Carolina, so let’s first clarify what a Rule 17 GAL is *not*. A Rule 17 GAL is different from a juvenile’s GAL appointed pursuant to G.S. 7B-601 and is different from an attorney representing a parent.* In juvenile court, Rule 17 GALs are appointed to incompetent respondent parents pursuant to G.S. 7B-602, G.S. 7B-1101.1, and Rule 17 of the N.C. Rules of Civil Procedure. If a parent in an AND or termination of parental rights proceeding is incompetent by virtue of being an unmarried and unemancipated minor, the trial court must appoint a Rule 17 GAL. G.S. 7B-602(b), -1101.1(b). If the parent is an incompetent adult, appointment of a Rule 17 GAL is in the court’s discretion. G.S. 7B-602(c), -1101.1(c).

Neither Rule 17 nor the Juvenile Code specify the exact duties of a Rule 17 GAL, but the appellate courts have provided some guidance. A Rule 17 GAL should meet with the parent and seek to protect that parent’s rights and understanding of the proceedings, acting to promote that parent’s interests and chances of obtaining a positive outcome, when possible. See *In re W.K.*, 376 N.C. 269 (2020); *In re J.E.B.*, 376 N.C. 629 (2021). A hearing cannot be held without the presence of the Rule 17 GAL once one is appointed. *In re D.L.P.*, 242 N.C. App. 597 (2015). Although the parent is represented by a separate attorney, a Rule 17 GAL can actively participate in proceedings, including by questioning witnesses, presenting evidence, and making arguments. See *Id.* (citations omitted); *J.E.B.*, 376 N.C. 629; *Narron v. Musgrave*, 236 N.C. 388 (1952).

The appointment of a Rule 17 GAL has significant consequences. See, e.g., *In re J.A.A.*, 175 N.C. App. 66, 71 (2005) (holding a Rule 17 GAL appointment “divest[s] the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination.”). Rule 17 GALs are often said to be serving in a role of substitution – though it is critical that the parent is still consulted and remains involved to the extent the parent is

capable. A Rule 17 GAL should seek clarification from the court about the nature of their appointment and their duties, if there is confusion.

Determining incompetency. To determine whether a parent is incompetent for purposes of a juvenile proceeding, our courts have adopted the language used to determine an adult's incompetency in Ch. 35A proceedings. See *In re N.K.*, 375 N.C. 805 (2020); see also *D.L.P.*, 242 N.C. App. 597. That is, an adult who cannot manage their affairs or make or communicate important decisions regarding their person, family, or property, because of one or more of the listed causes. G.S. 35A-1101(7). Also relevant is "whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case." *In re Q.B.*, 375 N.C. 826, 836 (2020).

Multiple factors may indicate whether a parent is incompetent but no one factor is dispositive. For example, it may be relevant whether a parent has a mental health diagnosis and whether the parent is receiving treatment – but these factors do not, on their own, require a determination that a parent is or is not incompetent. Similarly, if an adult is adjudicated incompetent in a Ch. 35A proceeding, that adjudication may be relevant to a juvenile court considering whether to appoint a Rule 17 GAL, but it is not controlling. See *Q.B.*, 375 N.C. 826; see also G.S. 35A-1102 (clarifying that although Ch. 35A is the exclusive procedure for adjudicating a person incompetent, a judge still has the authority to appoint a GAL under Rule 17, where proper). The juvenile court may consider its own observations of the parent, their ability to express themselves, whether the parent understands their situation and the roles of different actors in the case, and if the parent can assist counsel. *In re M.S.E.*, 378 N.C. 40 (2021); *Q.B.*, 375 N.C. 826; *In re T.L.H.*, 368 N.C. 101 (2015).

When and how? Any party (or the court sua sponte) may raise the need for a Rule 17 GAL at any time. G.S. 7B-602(c); -1101.1(c); see *M.S.E.*, 378 N.C. 40. However, concerns about a parent's incompetency should be raised "as soon as possible [] to avoid prejudicing the party's rights." *J.A.A.*, 175 N.C. App. at 72. No specific procedures are required by the Juvenile Code or the Rules of Civil Procedure; however, a court must hold a hearing or otherwise inquire about a parent's competency if the court determines a substantial question exists. See *M.S.E.*, 378 N.C. 40; *N.K.*, 375 N.C. 805. It is in the court's discretion to determine whether a substantial question exists and whether the parent is incompetent. *Q.B.*, 375 N.C. 826; *In re Z.V.A.*, 373 N.C. 207 (2019).

After determining a substantial question exists, the court then conducts an inquiry or holds a hearing on the need for a Rule 17 GAL, which the parent and their attorney are entitled to notice of. *Hagins v. Redev. Comm'n of Greensboro*, 275 N.C. 90 (1969). The hearing can take different forms, but generally the respondent should be present, a voir dire

examination of the respondent should occur, and the court should make findings of fact to support its determination. *Rutledge v. Rutledge*, 10 N.C. App. 427 (1971).

For more on Rule 17 GALs, including privileged communications and factors indicating whether a substantial question exists about a parent's competency, see [Section 2.5.F](#) of the AND manual.

Lessons from *In re A.K.*

Facts related to the GAL appointment. In *In re A.K.*, __ N.C. App. __ (August 6, 2024), DSS alleged that the mother, who is Muslim and speaks Albanian, suffers from mental health issues (including delusions) and had confined her children in their rooms without adequate access to education and medical services, harming their language and social development. DSS alleged that the mother refused to speak with the social worker, except for yelling at the worker while “acting ‘paranoid’ and ‘confused.’” Sl. Op. at 3.

On the scheduled day of the pre-adjudication, adjudication, and disposition hearings, the court entered a continuance order indicating the court sua sponte appointed a Rule 17 GAL to assist the mother “based on the allegations in the petition and the mother’s inability to understand the proceedings and cultural barriers.” The order did not reflect that an evidentiary hearing was held, but rather that the court considered attorney arguments (which are not evidence) and the contents of the court file.

One week later, the court entered a separate order memorializing the Rule 17 GAL appointment, using form [AOC-J-206](#). This order indicated that the mother is incompetent, but again made no reference to an evidentiary hearing. The section for findings of fact was left blank, which could have explained the basis for appointing a Rule 17 GAL.

Is an order appointing a Rule 17 GAL appealable? DSS argued for dismissal of mother’s appeal, as an order appointing a Rule 17 GAL—which was separate from the adjudication and dispositional orders—is not one of the orders that may be appealed under G.S. 7B-1001. The Court of Appeals acknowledged the continuance orders were interlocutory, but that Rule 2 of the N.C. Rules of Appellate Procedure “allows an appellate court to suspend the Rules of Appellate Procedure and reach the merits of an unpreserved issue in a case” in “exceptional circumstances when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest.” (citations omitted). Note that prior published appellate cases have addressed the *lack* of an appointed Rule 17 GAL. See, e.g., *In re M.S.E.*, 378 N.C. 40 (no abuse of discretion where the court did not make inquiry into mother’s competency and did not appoint a Rule 17 GAL despite her intellectual disability, where the evidence showed the mother understood the proceedings,

gave clear and cogent testimony, and was observed by the trial court at multiple hearings without giving rise to concerns for incompetency).

Here, the Court of Appeals stated that it was inclined to invoke Rule 2 because of the impact on her rights as a parent; however, no transcript of the November 9 hearing was available to allow for appellate review. Still, the Court of Appeals had “serious concerns regarding the appointment of a GAL” without giving the mother prior notice or an opportunity to be heard. The Court raised additional concerns about the lack of findings as to why the mother was incompetent and the impact may have had on another issue in the case – her ability to choose her retained counsel.

While the orders were vacated on other grounds, the Court of Appeals required on remand that the trial court hold a hearing to consider if the mother is incompetent and in need of a Rule 17 GAL and, if so, to make findings of fact that support its conclusions of law.

A reminder for future proceedings. Before appointing a Rule 17 GAL to a respondent parent, a court should hold an evidentiary hearing where the parent has notice and opportunity to be heard. The basis for incompetency is found in G.S. 35A-1101(7), which does not contemplate an “inability to understand the proceedings” due to language differences “and cultural barriers.” Sl. Op. at 21, n. 4. A determination about a parent’s (in)competency and need for a Rule 17 GAL must be based upon evidence, and the order must contain relevant findings of fact and conclusions of law.

Reach out to me anytime at Heinle@sog.unc.edu if you have questions or want to discuss issues related to this post or your own cases.

*This is beyond the scope of this post; however, a GAL in a Ch. 35A incompetency and guardianship proceeding before the clerk is appointed pursuant to G.S. 1A-1, Rule 17. G.S. 35A-1101(6). GALs in the incompetency and guardianship context have additional duties imposed by G.S. 35A-1107 and must be an attorney, unless the respondent hires their own counsel.